MEMORANDUM

TO:     David                      DATE:  June 16, 1982
FROM:  Lewis F. Powell, Jr.  

_81-9 Seattle_

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

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

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

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

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

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

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

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

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

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

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L.F.P., Jr.
This is a "piecemeal" comment, addressed only to Part II.

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

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

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

As I indicated illegibly in the margin a couple of times, we are not talking simply about "mandatory pupil assignment" by the school board. This occurs every year as population shifts require changes in attendance areas. The issue here concerns mandatory busing to achieve racial balance beyond a defined limit. Rather than undertake to spell all of this out whenever we mention it, I suggest that we define - in a note - the term "mandatory busing" to be used interchangeably with "mandatory busing to achieve racial balance".
The second part of Part II, stating general principles should summarize the principles you already have stated. These two are important and necessary to our decision.

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L.F.P., Jr.
Justice Powell, dissenting.

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

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

I dissent from the Court's unprecedented intrusion into the structure of a state government. The School Districts in this case were under no Federal Constitutional obligation to adopt mandatory busing programs. The State of Washington, the governmental body ultimately responsible for the provision of public education, has determined that certain mandatory busing programs are detrimental to the education of its children.

"[T]he Fourteenth Amendment leaves the States free to distribute the powers of government as they will between their legislative and judicial branches." Hughes v.

Throughout this dissent, I use the term "mandatory busing" to refer to busing—or mandatory student reassignments—for the purpose of achieving racial balance.
Superior Court, 339 U.S. 460, 467 (1950). In my view, that Amendment leaves the States equally free to distribute the powers of government between State and local governmental bodies.

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

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

This suit was filed in United States District

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3In addition to this reservation of authority to school districts, the Initiative also reserves "the authority of any school district to close school facilities." 28A.26.030.

4Unlike the constitutional amendment at issue in *Crawford v. Los Angeles Bd. of Ed.*, __ U.S. __ (1982), Initiative 350 places no limits on the State courts in their interpretation of the State Constitution. Thus, if mandatory school assignments were required by the State Constitution—although not by the Fourteenth Amendment of the Federal Constitution—Initiative 350 would not hinder a State from enforcing the State constitution.
Court shortly after the Initiative was enacted. The Seattle School District, joined by the Tacoma and Pasco School Districts and certain individual plaintiffs, argued that the Initiative violated the Equal Protection Clause of the Fourteenth Amendment. The District Court agreed, and, in a split decision, the Court of Appeals affirmed. Relying on *Hunter v. Erickson*, 393 U.S. 385 (1969), the Court of Appeals concluded that Initiative 350 "both creates a constitutionally-suspect racial classification and radically restructures the political process of Washington by allowing a state-wide majority to usurp traditional local authority over local school board educational policies." 633 F. 2d, at 1344.

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

6. Judge Wright dissented. In his view Initiative 350 could not be said to embody a racial classification. The Initiative does not classify individuals on the basis of their race. It simply deals with a matter bearing on race relations. Moreover, no racial classification is created because the citizens of a State favor mandatory school reassignments for some purposes but not for reasons of race. The benefits and problems associated with busing for one reason are not the same as for another. Finally, Judge Wright could not understand how the exercise of
The principles that should guide us in reviewing the constitutionality of Initiative 350 are well established. To begin with, we have never held, or even intimated, that absent a federal constitutional violation, a State must choose to treat persons differently on the basis of race. In the absence of a federal constitutional violation requiring race-specific remedies, a policy of strict racial neutrality by a State would violate no federal constitutional principle. Cf. University of California Regents v. Bakke, 438 U.S. 265 (1978).

In particular, a neighborhood school policy and a decision not to assign students on the basis of their race, does not offend the Fourteenth Amendment. The authority by the State could create a racial classification. The State had not intervened by altering the legislative process in a way that burdened racial minorities. Charged by the State Constitution with the responsibility for the provision of public education, the State had simply exercised its authority to run its own school system.

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

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

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Desirable to assign pupils to schools nearest their homes.

Indeed, in the absence of a finding of segregation by the School District, mandatory busing on the basis of race raises constitutional difficulties of its own. Extensive pupil transportation may threaten liberty or privacy interests. See *University of California Board of Regents v. Bakke*, 438 U.S. 265, 300 n. 39 (opinion of Powell, J.); *Keyes v. School District No. 1*, 413 U.S. 189, 240-250 (1973) (Powell, J., concurring in part and dissenting in part). Moreover, when a State or school board assigns students on the basis of their race, it acts on the basis of a racial classification, and we have consistently held that "[a] racial classification, regardless of purported motivation is presumptively invalid and can be upheld only upon an extraordinary justification." *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979).
constitutional duty exists upon school boards or States to maintain integration. See Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976).

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

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

8. "[A]ccording to the institutions of this country, the sovereignty in every State resides in the people of the State, and ... they may alter and change their form of government at their own pleasure." Luther v. Borden, 7 How. 1, 47 (1849). See Community Communications Co. v. Boulder, 470 U.S. 52 (1982); Sailors v. Board of Education, 387 U.S. 105, 109 (1967) ("Save and unless the state, county, or municipal government runs afoul of a federally protected right, it has vast leeway in the management of its internal affairs"); United States v. Kagama, 118 U.S. 375, 379 (1886) (under the Constitution, sovereign authority resides either with the States or the Federal government, and "[t]here exist ... but these two").
at the State or local level. There is no constitutional requirement that the State establish or maintain local institutions of government or that it delegate particular powers to these bodies. The only relevant constitutional limitation on a State's freedom to order its political institutions is that it may not do so in a fashion designed to "[place] special burdens on racial minorities within the governmental process." *Hunter v. Erickson*, *supra*, at 391 (emphasis added).

In sum, in the absence of a prior constitutional violation, the States are under no constitutional duty to adopt integration programs in their schools, and certainly they are under no duty to establish a regime of mandatory busing. Nor does the Federal Constitution require that particular decisions concerning the schools or any other matter be made on the local as opposed to the State level. It does not require the States to establish local governmental bodies or to delegate unreviewable authority to them.
Application of these settled principles demonstrates the serious error of today's decision—an error that cuts deeply into the heretofore unquestioned right of a state to structure the decisionmaking authority of its government. In this case, by Initiative 350, the state has adopted a policy of racial neutrality in student assignments. The policy in no way interferes with the power of State or Federal Courts to remedy constitutional violations. And if such a policy had been adopted by any of the school districts in this litigation there could have been no question that the policy was constitutional. 9

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

9 The Court consistently has held "that the Equal Protection Clause is not violated by the mere repeal of race related legislation or policies that were not required by the Federal Constitution in the first place." Crawford v. Los Angeles Bd. of Ed., supra, at ___.
Court holds that neither the legislature or the people of
the State of Washington could alter what the School Board
had decided.

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

Under today's decision this heretofore undoubted
supreme authority of a State's electorate is to be
curtailed whenever a school board--or indeed any other
state board or local instrumentality--adopts a race
specific program that arguably benefits racial minorities.
Once such a program is adopted, only the local or subordinate entity that approved it will have authority to change it. The Court offers no authority or relevant explanation for this extraordinary subordination of the ultimate sovereign power of a state to action with respect to racial matters by subordinate bodies. It is a strange notion that local governmental bodies can forever preempt the ability of a State--the sovereign power--to address a matter of compelling concern to the State. The Constitution of the United States does not require such a bizarre result.

Even if one assumes that somehow the federal Constitution now imposes special conditions on the exercise of state sovereignty once a local school board has acted, this is certainly not a case where a State--in moving to change a locally adopted policy--has established a racially discriminatory requirement. Initiative 350 does not impede enforcement of the Fourteenth Amendment. If a Washington school district should be found to have established a segregated school system, Initiative 350 will place no barrier in the way of a remedial busing
order. Nor does Initiative 350 authorize or approve segregation in any form or degree. It is neutral on its face, and racially neutral as public policy. Children of all races benefit from neighborhood schooling, just as children of all races benefit from exposure to "ethnic and racial diversity in the classroom." Ante, at __, quoting Columbus Board of Education v. Penick, 443 U.S. 449, 486 (1979) (Powell, J., dissenting).10

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

10The policies in support of neighborhood schooling are various but all of them are racially neutral. The people of the State legitimately could decide that unlimited mandatory busing places too great a burden on the liberty and privacy interests of families and students of all races. It might decide that the reassignment of students to distant schools, on the basis of race, was too great a departure from the ideal of racial neutrality in State action. And, in light of the experience with mandatory busing in other cities, the State might conclude that such a program ultimately would lead to greater imbalance in the schools. See Estes v. Metropolitan Branches of the Dallas NAACP, 444 U.S. 437, 451 (1980) (Powell, J., dissenting).
that all matters dealing with race—or with integration in
the schools—must henceforth be submitted to a referendum
of the people. Cf. Hunter v. Erickson, supra. The State
has done no more than precisely what the Court has said
that it should do: It has "resolved through the
political process" the "desirability and efficacy of

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

("[O]f course a lawmaking procedure that 'disadvantages' a
Footnote continued on next page.
IV

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

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

The Court also relies at certain critical points in its discussion on the summary affirmance in Lee v. Nyquist, 318 F. Supp. 710 (WDNY 1970), summarily aff'd, 402 U.S. 935 (1971). As we have often noted, however, summary affirmances by this Court are of little precedential force. See Metromedia, Inc. v. San Diego, 453 U.S. 490, 500 (1981). A summary affirmance "is not to be read as an adoption of the reasoning supporting the judgment under review." Zobel v. Williams, ___ U.S. ___, ___ n. 13 (1982).
"[T]he reality is that the law's impact falls on the minority. The majority needs no protection against discrimination." Id., at 391. By making it more difficult to pass legislation in favor of racial minorities, the amendment placed "special burdens on racial minorities within the governmental process." Ibid.

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

\(^{13}\) It is far from clear that in the absence of a constitutional violation, mandatory busing necessarily benefits racial minorities or that it is even viewed with favor by racial minorities. See *Crawford v. Board of Education of the City of Los Angeles*, U.S. __, __ n. 32 (1982). As the Court indicates, the busing question is complex and is best resolved by the political process. Moreover, it is significant that Initiative 350 places no limits on voluntary programs or on court ordered reassignments. It permits school districts to order school closings for purposes of racial balance. And it permits school districts to order a student to attend the "next nearest"—rather than nearest—school to promote racial integration.
because the State decides to regulate within an area subject to its control. And racial minorities are not uniquely or comparatively burdened by the adoption by the State of a policy that lawfully could be adopted by any School District in the State.

Hunter is simply irrelevant. If anything, it is the Court that disrupts the normal course of State government. Under its holding, the people of the State of Washington are forever barred from developing a policy on mandatory busing because a School District got there first. Under the Court's peculiar theory of a "vested constitutional right to local decisionmaking," the State...

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14 The Court's decision intrudes deeply into normal State decisionmaking. Thus, if the admissions committee of a State law school developed an affirmative action plan that came under fire, the Court apparently would find it unconstitutional for any higher authority to intervene unless that authority traditionally dictates admissions policies. Thus, as a constitutional matter, the Dean of the Law School, the faculty of the University as a whole, the University President, the Chancellor of the University System, and the Board of Regents might be powerless to intervene despite their greater authority under state law. After today's decision it is unclear to me whether the State may set policy in any area of race relations where a local governmental body arguably has done "more" than the Fourteenth Amendment requires. If local employment or benefits are distributed on a racial basis to the benefit of racial minorities, the State apparently may not intervene. Indeed, under the Court's theory one must wonder whether the Federal Government may no longer assert its superior authority to regulate in these areas.
The pressing problem of how best to accommodate fairly and in the best interest of educating all children—wirh respect for a multi-racial society—is now forever barred from addressing a question of interest to its people.

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

15 Even accepting the dubious notion that a State must demonstrate some past interest in public schooling or race relations before intervening in these matters, the Court's attempt to demonstrate that Initiative 350 represents a unique thrust by the State into these areas is utterly unpersuasive. The Court's own discussion indicates the breadth of the State's activity. The Common School Provisions of the State's Code of Laws is nearly 200 pages long; governing a broad variety of school matters. The State has taken seriously its constitutional obligation to provide public education. See Art. IX, §2; Seattle School District v. State, 90 Wash. 2d 476, 518, 575 P. 2d 71, 95 (1978). In light of the wealth of regulation of the public schools by the State, it is unclear to me just what degree of prior State interference by the State would satisfy the Court's new doctrine.

In addition to public school affairs generally, the State has taken a direct interest in ending racial discrimination in the schools and elsewhere. See §49.60.010 et seq. Article IX, §1 of the State Constitution specifically prohibits discrimination in the provision of public schooling: "It is the paramount duty of the State to make ample provision for the education of all children residing within its borders without distinction or preference on account of race, color, caste, or sex." The State Supreme Court has not interpreted this section of the State Constitution to prohibit race conscious school assignments in the absence of a violation of the Fourteenth Amendment. Cf. Citizens Against Mandatory Bussing v. Palmason, 80 Wash. 2d 445, 495 P. 2d 657 (1972). But until today's decision one would have thought that the State Court could have rendered such a decision without violating the Federal Constitution.
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this case were under no federal constitutional obligation
to adopt mandatory busing. Having tried a system of
mandatory busing, they were free to return to a voluntary
program. The Court objects to the State setting policy in
this area. Indeed, it deprives the State of all
opportunity to address the questions presented by the
adoption of mandatory busing. The Constitution does not
dictate to the States at what level of government
decisions affecting the public schools must be taken. It
does not strip the States of their sovereignty. It does
not authorize today's intrusion into the State's internal
structure.
Application of these settled principles demonstrates the serious error of today's decision - an error that cuts deeply into heretofore unquestioned authority of a state to structure decision-making authority of its government. In Washington, as in many other states, use of an initiative - a popular referendum - to determine state policy is a valid and uniquely democratic legislative technique. See *James v. Valtierra*, at 137, 142 (1971). In this case, by initiative 350, the state adopted a statewide policy of racial neutrality in student assignments. As there had been no state segregated schools, the state was perfectly free to adopt this policy. The issue here arises only because the Seattle School Board - in the absence of a then established state policy and exercising its broad discretion - had chosen to adopt race specific school assignments with extensive busing. It is not questioned in this case that the school board itself, at any time thereafter, could have changed its mind and cancelled its
integration program without violating the federal Constitution. Yet this Court, by a process of reasoning that defies rational understanding, holds that neither the legislature or the people of the State of Washington could alter what the school board had decided.

The Court's reasoning is that the people of Washington by initiative 350 created a racial classification, although identical action by the Seattle school board would have created no such classification. This is not an easy argument to answer because it is wholly illogical. School boards are the creation of supreme state authority, whether in a state constitution or by legislative enactment. Until today's decision no one would have questioned that school boards could have been abolished altogether or the operation of public schools could be restructured in any neutral way approved by the legislature or the people. Under today's decision this heretofore undoubted supreme authority of a state's electorate is to be curtailed whenever a school board - or indeed any other state board or local instrumentality - adopts a race specific program that arguably benefits
racial minorities. Once such a program is adopted, only
the local or subordinate entity that approved it will have
authority to change it. The Court offers no explanation
for this extraordinary subordination of the ultimate
sovereign authority of a state to action with respect to
racial matters by subordinate bodies. The Constitution of
the United States does not require such a bizarre result.

This dissent well could conclude at this point.

Yet, even if one assumes that somehow the federal
Constitution imposes special conditions on the exercise of
state sovereign authority once a local school board has
acted, this is not a case where a state - in moving to
change a locally adopted policy - has established some
racially discriminatory requirement. It is fundamental to
bear in mind that no finding has been made in this or in
any other case of schools in Washington segregated by
state action. Nor does initiative 350 authorize or
approve segregation in any form or degree. It is neutral
on its face, and neutral as public policy. It merely
limits - to a specified extent - the discretionary
authority of school boards to seek racial balance by mandatory busing beyond certain limits. The rationale of the initiative is that children of all races benefit from neighborhood schooling, just as children of all races benefit from exposure to "ethnic and racial diversity in the classroom". *Columbus Board of Education v. Penick*, 443 U.S. 449, 486 (1979) (Powell, J., dissenting).

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

If we accept the substance of what I have dictated above, it would be a substitute for all of present III-B. In any event, it seems to me that most, if not all, of III-B commencing with the last sentence at the bottom of page 14, can be eliminated as a secondary type of argument.
Application of these settled principles demonstrates the serious error of today's decision - an error that cuts deeply into heretofore unquestioned right of a state to structure decision-making authority of its government. In Washington, as in many other states, use of an initiative - a popular referendum - to determine state policy is a valid and uniquely democratic legislative technique. See James v. Valtierra, at 137, 142 (1971). In this case, by Initiative 350, the state adopted a policy of racial neutrality in student assignments. As there had been no state segregated schools, Washington was perfectly free to adopt this policy.

The issue here arises only because the Seattle School Board - in the absence of a then established state policy and exercising its broad discretion - had chosen to adopt race specific school assignments with extensive busing. It is not questioned that the school board itself, at any time thereafter, could have changed its mind and cancelled its integration program without violating the federal Constitution. Yet this Court, by
a process of reasoning that defies rational understanding, holds that neither the legislature or the people of the State of Washington could alter what the school board had decided.

The Court holds that the people of Washington by Initiative 350 created a racial classification, and yet concedes that identical action by the Seattle school board itself would have created no such classification. This is not an easy argument to answer because it seems to make no sense. School boards are the creation of supreme state authority, whether in a state constitution or by legislative enactment. Until today's decision no one would have questioned the authority of a state to abolish school boards altogether, or to require that they conform to any lawful state policy. And in the State of Washington, a neighborhood school policy would have been lawful. Under today's decision this heretofore undoubted supreme authority of a state's electorate is to be curtailed whenever a school board - or indeed any other state board or local instrumentality - adopts a race specific program that arguably benefits racial minorities.
Once such a program is adopted, only the local or subordinate entity that approved it will have authority to change it. The Court offers no authority or relevant explanation for this extraordinary subordination of the ultimate sovereign power of a state to action with respect to racial matters by subordinate bodies. The Constitution of the United States does not require such a bizarre result.

This dissent well could conclude at this point. Yet, even if one assumes that somehow the federal Constitution now imposes special conditions on the exercise of state sovereignty once a local school board has acted, this is certainly not a case where a state— in moving to change a locally adopted policy— has established some racially discriminatory requirement. It is essential to bear in mind that no finding has been made in this or in any other case, that schools in Washington have been segregated by state action. Thus, there had been no constitutional violation to be remedied by the Seattle board or the state. Nor does initiative 350 authorize or approve segregation in any form or degree.
It is neutral on its face, and neutral as public policy. It merely limits the discretionary authority of school boards to seek racial balance by mandatory busing beyond certain limits. The rationale of the initiative is that children of all races benefit from neighborhood schooling, just as children of all races benefit from exposure to "ethnic and racial diversity in the classroom". *Columbus Board of Education v. Penick*, 443 U.S. 449, 486 (1979) (Powell, J., dissenting). (David: other authority for this?)

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

In any event, it seems to me that most, if not all, of III-B commencing with the last sentence at the
bottom of page 14, can be eliminated as a secondary type of argument.