AN EXAMINATION OF VOLUNTARY INTEGRATION STUDENT
ASSIGNMENT PLANS AS A VIABLE APPROACH TO CREATING DIVERSE AND
EQUITABLE SCHOOLS

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I. Introduction

Historically, schools have been a key testing ground for racial integration policies. As a result, student assignment plans that promote integration have been controversial and highly contested. While many districts found to have purposefully segregated student by race have been subject to court-ordered integration programs (consent decrees), many more districts have not experienced court orders or long-term judicial oversight. Yet due to housing patterns, white flight, and continuing racial tension, these districts still face significant segregation among and even within schools. Orfield, Kucsera, and Siegel-Hawley (2012) have demonstrated that since 1990 districts across the country have become increasingly segregated. They attribute this resegregation to failures of all three branches of government to oversee, meaningfully impact, and enforce civil rights in education, among other causes (p.3-5).

In response to increasing segregation, a few districts have voluntarily implemented student assignment plans aimed at increased integration. Wells and Frankenberg explain how student assignment plans that promote integration can be beneficial:

“Hundreds of school districts across the country have adopted some variation of these plans because such voluntary integration achieves two goals. First, it provides families with choice, and second, it ensures that schools remain fairly balanced in terms of race, resources, reputation, and political clout. This balance prevents instability and the white and middle-class flight that often follows” (Wells & Frankenberg, 2007, p. 178).

Two of these voluntary integration student assignment plans were challenged for discriminating against students on the basis of race in violation of the Equal Protection Clause of
the U.S. Constitution. The challenges made it all the way to the Supreme Court. In the 2007 case Parents Involved in Community Schools v. Seattle School District (Parents Involved), the Supreme Court’s ruling on these challenged districts added to the complex legal landscape of voluntary integration plans. In finding Seattle and Jefferson County’s student assignment plans unconstitutional, the Court highlighted key factors needed for a voluntary integration plan to comply with the Constitution.

Recent research from the University of Houston’s Kinder Institute shows drastically changing demographics in one of the country’s largest cities which are being writ large across the nation’s urban areas (Interesting Times). Approximately 1 in every 10 public schools students is classified as an English language learner (Thompson, 2009). In the past decade, the total number of immigrants has reached a level similar to that of the turn of the century (Population Reference Bureau, 2009). The Pew Research Center estimates that immigrants and their native-born children will account for 82% of U.S. population growth between 2005 and 2050 (Population Reference Bureau, 2009). Minorities, especially Latinos, are a rapidly growing population in the U.S. yet are significantly less likely to have access to quality K-12 education or to higher education in general.

This paper deals with the legal gray area with which school districts must contend that has been left open in the wake of four key cases: Parents Involved, Lower Merion, Spurlock, and Fisher v. UT. Specifically, it examines whether, given the current state of legal constraints, student assignment plans can offer a viable approach to creating diverse and equitable schools. To this end, Section II surveys current literature regarding the benefits of diversity and the harms of segregation, as well as current scholarship on diversity approaches in organizations. The second half of Section II gives an overview of the history of legal analysis at the nexus of
education, law, and race. Section III delves deeply into the key cases, amicus brief responses by key stakeholders, and executive branch responses. This section aims to give an in depth look at the recent and evolving legal landscape of pro-integration student assignment plans. Section IV offers brief discussions and recommendations of the future of these student assignment plans. In examining the legal landscape and potential viability of these plans, this paper aims to review and perhaps further the discussion of legal means of promoting diversity and equity in K-12 schools in an ever-evolving legal and social science research landscape.

II. Background

A. Literature Review

In evaluating race-conscious policies in education, courts require policy-makers to demonstrate that their policies serve a compelling government interest. In higher education, for example, affirmative action policies are justified under the theory that a diverse student body—where diversity is broadly construed as encompassing race and many other inherent and acquired characteristics—produces educational benefits such as “enhanced classroom dialogue and the lessening of racial isolation and stereotypes” (Fisher, 2013, p. 6). In K-12 cases, where a school or district is subject to a court-ordered desegregation decree as a result of past discrimination, “remedy[ing] the vestiges of intentional discrimination” is a compelling government interest (Green et al., 2011, p. 509). While the law remains unclear, two other possible interests are available for race-conscious policies in the K-12 context: 1) “to reduce racial concentration in…schools,” and 2) “to make sure that racially concentrated school patterns [do] not prevent nonwhite students from having access to the best schools” (Green et al., 2011, p. 510).
Because of the difficulty of establishing a compelling government interest in race-conscious plans at schools not subject to court oversight, the benefits of diversity in schools and other key contexts are important to identify. Wells and Frankenberg (2007) have identified short and long-term benefits of diversity in K-12 schools. Short-term benefits can be found in “academics and intergroup relations” while long-term benefits include “increased mobility for students of color, positive racial attitudes, and higher comfort levels in racially diverse settings” (p.179). Wells and Frankenberg call attention to the lack of emphasis on the harms of racial segregation after the landmark Brown v. Board of Education case in 1954. In that case, social science evidence of harms of segregation to children was used for the first time. These harms include unequal resources, evidenced by “concentrated poverty [in certain schools], poor teacher quality and high teacher turnover, inadequate curriculum and supplies, and limited aspirations and social networks,” as well as harmful effects such as “low academic achievement and graduation rates” and “instability and lack of public support” (Wells and Frankenberg, 2007, p.180). Goldring et al. (2006) echo the focus on unequal resources, noting that “evidence that spans several decades shows a persistent relationship between the percentage of minority students in a school and the financial resources allocated to it” (p.338) This team also confirms the influence of the community’s social networks and support, reminding us that “the resources available to a school are not limited to those within its walls” (p.338).

In the landmark Brown v. Board of Education (1954) decision, the Court recognized education as the “principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment” (p.493). The idea of diverse educational environments as key to a child’s professional and financial future
was recognized explicitly in Grutter v. Bollinger (2003) in which the Court approved an affirmative action policy used by the University of Michigan Law School:

“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.’… These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints” (p. 330).

In businesses and other contexts, as in the classroom, approaches to promoting diversity vary. Stevens et al. (2008) identify two basic approaches currently employed by organizations: the colorblind approach and the multicultural approach. The colorblind approach “focuses on ignoring cultural group identities or realigning them with an overarching identity” (Stevens et al. p.119). They describe this approach as “interwined with American cultural ideals of individualism, equality, meritocracy, assimilation, and ‘the melting pot’ (p.119). This viewpoint resonates with arguments against affirmative action policies, which are often seen as “contrary to our traditions” of individualism, meritocracy, and equal treatment for all (Fisher, 2013, p.8, citing opinion in Bolling v. Sharpe). Stevens et al. (2008) take issue with this approach because it is “associated with higher levels of racial bias… and a tendency to ignore processes that perpetuate differential outcomes for nonminority and minority groups” and is therefore perceived by minority groups as exclusionary even as majority groups are attracted to it for its adherence to traditional American values (p.120).
The multicultural approach, by contrast, is attractive to minorities but multicultural policies are “widely met by nonminorities with noncompliance and resistance” and “skepticism and resentment” (Stevens et al., 2008, p.120-121). This approach “emphasizes the benefits of a diverse workforce and explicitly recognizes employee differences as a source of strength” (p.120). Yet, as Stevens et al. (2008) note, majority-group support for the approach is crucial as nonminorities “represent overlooked, yet critical, stakeholders in diversity issues” (p.121, italics mine). Because of the inherent weaknesses in each approach, Stevens et al. recommend the All-Inclusive Multiculturalism Approach (AIM approach), which “emphasiz[es] that diversity includes all employees—that is, both minorities and nonminorities alike” (p.122, italics in original). The AIM approach aims to promote “high-quality relationships among dissimilar others—that is, relationships that engender positive affect, encourage ongoing learning, are resilient, have longevity, and create ‘the capacity of individuals to engage, challenge, and support one another with clarity and confidence’” (Stevens et al., 2013, p.124). The kind of positive relationships described by Stevens et al. correlate strongly with the expectation articulated in Grutter that diversity in higher education classrooms would lead to the interpersonal skills necessary for survival in the global marketplace and increasingly diverse workforce.

B. Review of the Law: 14th Amendment and Constitutional Analysis, History of Race and Education in Case Law

Under the Equal Protection Clause of the 14th Amendment of the U.S. Constitution, "no state shall...deny to any person within its jurisdiction the equal protection of the laws." The 14th Amendment also empowers Congress to enforce the Equal Protection Clause to remediate past discrimination, and historically the federal courts deferred to this power. However, in recent
years the Supreme Court has turned a more skeptical eye to federal policies that endorse race-conscious approaches for remediation (Adarand; Harvey, 2007; Mishkin 1996). This trend does not bode well for state and local policies that seek to promote integration, as the states are traditionally under greater scrutiny than the federal government when they consider race, regardless of the motives.

When the Equal Protection Clause is implicated in a state or local law or policy, courts review the law or policy using a standard known as strict scrutiny review. Under the current state of the law, government policies that classify individuals on the basis of race are subject to strict scrutiny. To satisfy strict scrutiny review, government acts must be narrowly tailored to further a compelling government interest. The state must also consider whether a race-neutral alternative could fulfill the same compelling interest. Traditionally, the strict scrutiny standard is nearly impossible to pass, and the challenge is due in part to the difficulty of demonstrating a compelling government interest. A compelling government interest that passes strict scrutiny might include, for example, national security, as in the Korematsu case involving Japanese internment camps. However, the Supreme Court “has not recognized a compelling interest in simple racial diversity,” (Amicus, Florida Governor, 2007, p. 10) and states’ discretionary use of race has not been approved (Asian American Legal Foundation, 2007, p.11), although the Court has recognized an interest in diversity generally, as in the affirmative action case Grutter v. Bollinger.

In the education context, affirmative action cases in higher education have received strict scrutiny review. Mandatory, or court-ordered, K-12 desegregation cases like Brown historically received a more abstract Equal Protection Clause review, asking whether a district had achieved “unitary” status. However, because of the previous trend toward deference, prior to 2007 the
Supreme Court had not applied strict scrutiny review to K-12 voluntary school integration cases. When school districts chose to implement policies such as student assignment plans that promoted greater diversity, these policies were not deemed invalid under the Constitution. In 2007, the Parents Involved decision clarified the level of scrutiny that should apply to K-12 pro-diversity student assignment plans, but ambiguity in the decision left school districts at a loss for how to constitutionally promote diversity. Two recent lower court decisions, Lower Merion and Spurlock, have further complicated districts’ understanding by applying rational basis review to pro-diversity student assignment plans that considered race to a lesser extent than in the Parents Involved decision. By declining to review the 3rd Circuit’s decision in Lower Merion, the Supreme Court tacitly approved this plan’s design. These two cases are reviewed below.

i. Race, Education, and the Application of Strict Scrutiny Review

The Court’s use of the Equal Protection Clause as a basis for suit in discrimination cases is well-established. After Brown v. Board of Education in 1954, in which the Court held that separate schools for whites and blacks are inherently unequal, many families and interested parties, such as the NAACP, brought suits in federal courts against their discriminatory school districts. These desegregation suits resulted in many districts being declared segregated by law (de jure segregation), and the courts required systemic changes in the districts to integrate the schools. When a level of satisfactory integration was achieved, often after years of policy changes and implementation of complex plans, the courts declared these districts “unitary” and no longer subject to court orders to integrate. Case law established three standard questions courts ask in evaluating whether a district has reached unitary status: 1) Has the district complied with the desegregation order for a reasonable period of time?, 2) Have the vestiges of segregation been eliminated to the extent practicable?, and 3) Is the district committed in good
faith to its constitutional obligations? (Goldring, 2006, p. 337). Goldring et al. (2006) note that “despite the widespread trend toward unitary status, there are virtually no empirical analyses of these [post-unitary declaration] plans” (p. 338). However, it stands to reason that districts previously under court supervision run the risk of following the trend of resegregation after the supervision is removed. As a result, districts may pursue student assignment plans that have as one of their goals promoting racial integration, as was the case in the two districts at issue in the Parents Involved case.

In the 2007 Parents Involved case, the Supreme Court established that not only mandatory desegregation but also voluntary integration plans in K-12 will be subject to strict scrutiny review. This case was the only instance in which the Supreme Court has reviewed these kinds of assignment plans, but the analysis closely resembles that of affirmative action plans discussed below. Recently, with the return to segregation detailed above (Orfield et al., 2012), purposeful approaches to K-12 integration are increasingly necessary to ensure the benefits of diversity and a quality education for historically underserved minority communities. As Goldring et al. (2006) explains, when consent decrees end, school districts are left to determine new student assignment plans with no supervision, and these plans “typically involve[] a retreat from closely controlled diversity targets and the reduction of crosstown busing intended to integrate” (p. 335-336). Voluntary integration student assignment plans like those at issue in Parents Involved, Lower Merion, and Spurlock are positively motivated to remedy segregation that was caused not by an explicit government policy but rather by housing patterns and other individual decisions. Yet when these policies are reviewed by courts under a strict scrutiny analysis, they are highly likely to fail to meet the court’s standard despite their non-discriminatory motive because of their race-conscious nature.
Similarly, in higher education affirmative action policies consider race yet are not motivated by discrimination but rather aim to produce a diverse student body. Despite important differences between the higher education and K-12 spheres, the legal analysis of affirmative cases—generally more high-profile and controversial—is instructive for K-12 student assignment plans. The use of strict scrutiny review of affirmative action policies is well-established. In 1978 in Regents of the University of California v. Bakke, the University of California used a quota system to promote the integration of underrepresented minorities into their medical school class. The Court found this system unconstitutional because the quota system was not the least restrictive means of achieving the University’s interests. The Court approved as a compelling interest the University’s pursuit of a diverse student body for purposes of a “robust exchange of ideas” (Bakke, 1978, p. 313). Bakke left the door open for policies that considered race as one of many factors rather than in a quota system. In 2003, the Supreme Court in Grutter v. Bollinger held that an admissions policy that aimed to create a “critical mass” of minority students was constitutional as long as the admissions policy used a holistic review of each applicant. The Court applied strict scrutiny review again and confirmed that student body diversity on college campuses is a compelling interest that satisfies strict scrutiny review. In Grutter, as in Bakke, the Court acknowledged the complexity of educational judgments and the tradition of deference to the university’s expertise in this area (Grutter, 2003). Together, Bakke, Grutter, and Grutter’s companion case Gratz in which a quota-style policy was invalidated, are generally thought to have created the bounds within which universities can use pro-diversity admissions policies.

In the Fisher v. University of Texas at Austin cases, argued in October of 2012 and opinion released June 2013, a rejected white UT applicant, Abigail Fisher, challenged UT’s use
of race in its affirmative action admissions policy. Records from the Fisher oral arguments reveal the Court’s concern with the difficulty of defining a “critical mass” of minority students. Generally liberal-leaning Justice Kagan recused herself from the Fisher case, and Justice O’Connor, who approved the limited use of affirmative action in Grutter, has been replaced by the less approving Justice Alito (SCOTUSblog).

In the Fisher opinion, the majority focused on the justification for the means used to achieve diversity; in other words, the Court emphasized the narrow tailoring, rather than compelling interest, prong of the strict scrutiny analysis. Treating as established the compelling government interest in a diverse student body, the Court remanded the case to determine whether the policy was necessary and narrowly tailored to meet its diversity goal. (Fisher p.10) The opinion pushed back hard against traditional court deference to a university’s special knowledge of its own needs “based on its experience and expertise” (Fisher, 2013, p.9). The 5th circuit is now tasked with determining whether UT “could achieve sufficient diversity without using racial classifications,” though UT need not have considered every possible alternative (p.10). In its previous decision, the 5th circuit deferred to UT’s “good faith consideration” of alternatives rather than carefully scrutinizing the policy (p. 11) Based in part on Texas’ long legal history regarding race in higher education (see Hopwood v. Texas, the Top Ten Percent law aka HB 588), the 5th circuit presumed that UT fulfilled the command from Grutter that a university give “serious, good faith consideration [to] workable race-neutral alternatives” (Fisher, 2013, p.12).
III. Key Cases & Responses

A. Parents Involved in Community Schools (PICS)

In 2007, the Supreme Court applied strict scrutiny review to voluntary student assignment plans that considered race in an effort to promote diversity in public schools. The Parents Involved case consolidated two cases against school districts in Seattle, Washington and Jefferson County, Kentucky. The districts differed in that the Jefferson County district had been under a court-ordered desegregation decree until 2000, while the Seattle district had never operated a segregated school system. In 2000, the district court determined that the Jefferson County school district had removed the vestiges of segregation, and one year later the district implemented the voluntary integration plan at issue in the case (Green et al., 2011, p. 508; Parents Involved, 2007).

The Seattle school district operated 10 public high schools and sought to use its student assignment plan sought to overcome racially segregated housing patterns. The plan in question was implemented in 1999 and allowed incoming ninth graders to select their preferences of high schools. Because some high schools were more popular than others, a set of tiebreakers determined which school students would attend from their preferences. The first tiebreaker asked whether the student had a sibling in that high school. The second tiebreaker, the one at issue in Parents Involved, assessed the racial makeup of the school to determine whether the school was sufficiently diverse. Students were classified as white or non-white, and their racial status was used to develop diverse student bodies in each high school. At the time, the district consisted of 41 percent white and 59 percent non-white students, and the plan sought to maintain each school
within a 10% range of the overall district’s racial makeup (Green et al., 2011; Parents Involved, 2007, p. 710-13).

From 1973-2000, the Jefferson County district operated under a court-mandated consent decree to ensure integration in public schools. In 2001, Jefferson County adopted the voluntary assignment plan at issue in Parents Involved case. The district consisted of about 34 percent black students and 66 percent white students. The plan called for maintaining between 15-50 percent black students at all non-magnet public schools. A student’s address was used to determine the cluster of schools from which the student could choose and rank two schools. If students failed to submit an application with their school preferences, students were assigned to a school within their geographic cluster. Assignment occurred when the students were either in kindergarten, first grade, or new students to the district and was based on availability of an opening at the school and the racial percentage guidelines. Transfers were possible but could be denied based on race if the school approached either end of the racial spectrum—too many or too few black students in a school (Green et al., 2011; Parents Involved, 2007, p. 715-17).

Both districts’ plans satisfied strict scrutiny review at the district and circuit court levels. However, at the circuit court level, 9th Circuit concurring Judge Kozinski argued for applying a “robust and realistic rational basis review” (Parents Involved 9th Cir., 2005, p. 1194). Recognizing that motive makes a difference, he reasoned that the voluntary integration plans at issue used race in a meaningfully different way than past laws “aimed at oppressing blacks” and affirmative action policies which “seek to give one racial group an edge over another” (Parents Involved 9th Cir., 2005, p. 1193). The 9th circuit majority and dissent, according to Judge Kozinski were applying the analysis of cases with very different factual circumstances in such a forced way that he could “hear the thud of square pegs being pounded into round holes” (Parents
Involved 9th Cir., 2005, p. 1193). Ultimately, the majority applied strict scrutiny because of the use of race-based tie breakers. The Court found that the plans did not support a compelling government interest and were not narrowly tailored to meet any of the purported interests. Therefore, the plans in both districts were found to be unconstitutional (Parents Involved, 2007, p. 511).

i. **Amicus Briefs in Parents Involved**

The amicus briefs filed by interested parties on behalf of both the district and the parents of Parents Involved in Community Schools demonstrate arguments for and against voluntary integration plans and the legal standards applied to them. To demonstrate that the voluntary integration plans ought to pass strict scrutiny, amicus parties sought to demonstrate that the voluntary integration plans at issue were narrowly tailored to further a compelling government interest. Other parties argued that the doctrine of local control dictates that the state and local governing bodies should have the authority to address local problems as they see fit. Because of the similarities between voluntary integration plans at the K-12 level and affirmative action plans at the higher education level, these arguments are informed by the Grutter and Gratz cases discussed above. This section will address each prong of the strict scrutiny test and the local control arguments, each in turn.
a. Compelling Government Interests

1. Arguments For Integration Plans: Educational & Social Benefits

Amicus parties documented a number of educational and social benefits achieved by integrating schools and the cases that have recognized these benefits. For example, the Association of the Bar of New York City cited the 1st circuit case Comfort v. Lynn School Committee which listed educational benefits such as the “‘preempt[ion of] racial stereotypes through intergroup contact,’ which ‘ameliorate[s] racial and ethnic tension and [fosters] interracial tolerance,’ as well as the ‘positive impact of racial diversity on student safety and attendance” (Amicus, Assoc. of Bar of NYC, 2007, p.11; Amicus, Massachusetts, 2007, p.7-8). Former chancellors of the University of California made similar arguments, stating that integrated schools “strengthen the fabric of our diverse democracy by promoting tolerance, cooperation, and mutual respect” (Amicus, 19 Former UC Chancellors, 2007, p. 15-16). The NAACP argued that one of the goals of elementary and secondary school is to inculcate important social values, such as ethnic harmony and appreciation for diverse experiences (Amicus, NAACP, 2007 p.5). In addition, based on their extensive experience in higher education in a diverse state, the former chancellors observed that integrated K-12 schools lead to greater minority access to higher education, which in turn grants minorities greater access to positions of leadership in society.

Several amicus parties noted the important distinction between the K-12 education and higher education contexts, and many argued that the educational benefits of diversity are not restricted to the college campus (Amicus, U.S., 2007, p.13; Black Women Lawyers’ Assoc., 2007, p.7). In Grutter, the Court established that enlightening classroom discussion is a positive
educational benefit of a diverse university classroom. Importantly, this diversity is not focused solely on racial diversity but rather a broader definition of diversity, adding life experiences and other background factors into the mix. In the pre-college years, especially at the earliest stages of education (Amicus, Rep. Jim McDermott), exposure to racial and ethnic diversity is crucial to promoting tolerance, and primary and secondary schools must teach tolerance by example. (Amicus, States of New York, et al., 2007). From a constitutional perspective, these parties argued that the strict scrutiny standard is highly context-specific, allowing for flexibility in what kind of educational benefits could be considered a compelling interest (Amicus, States of New York et al., 2007, p.19). 

Taking a very similar tack, other amicus parties argued that the educational benefits of racial integration—rather than diversity generally—in higher education were equally applicable in the K-12 context. These benefits include a robust exchange of ideas, better preparation for real-life racial diversity, and strengthening the fabric of society (Amicus, Professors Amy Stuart Wells et al., 2007). While amicus parties for the parents argued that the Grutter decision recognized only “viewpoint diversity” as an educational benefit, the Anti-Defamation League (ADL) countered that this limitation was not a part of the holding of Grutter. The ADL argued that Grutter established that the government may consider race standing alone as a factor in diversity, which they argue is exactly what the Districts in Parent’s Involved did (Amicus, Anti-Defamation League, 2007, p.24). 

Research and political history support diversity as a compelling government interest. The American Educational Research Association (AERA) and National Education Association (NEA) confirmed that educational research supports the compelling interests in racial diversity and integrated schools (Amicus, AERA, 2007). Exposure to racial diversity has been shown to
reduce prejudice and discrimination (Amicus, Asian American Justice Center et al., 2007, p.10; National Parent Teacher Assoc., 2007, p. 8; American Council on Education and 19 others, 2007, p.8-9; Brennan Center, 2007, p.8). Then-Senators Kennedy, Obama, and others argued that the compelling national interest in promoting integration has been implicitly recognized by all three branches of government (Amicus, Senators Edward M. Kennedy et al., 2007). The judiciary has recognized it in cases, and the legislative and executive branches have demonstrated this interest through legislation such as the Emergency School Aid Act (ESAA) of 1972 and the No Child Left Behind Act of 2001.

Two additional social benefits are the reduced crime rate and increased compliance with international standards that result from integrated schools. Current and former law enforcement officers argued in an amicus brief that desegregating schools decreases minority drop-out rates, which in turn reduces the overall crime rate in a community (Amicus, Joseph E. Brann et al., 2007). The National Lawyers Guild made the case that compliance with international human rights conventions is a compelling government interest, and these conventions require the elimination of discrimination in all forms (Amicus, National Lawyers Guild, 2007). Lastly, in the arena of sports, racial integration has positively impacted and magnified the popularity of college sports, and it has allowed minorities to become role models (Amicus, NCAA, 2007, p.11).

2. Arguments Against the Integration Plans

To review, the strict scrutiny standard is nearly impossible to pass, and the challenge is due in part to the difficulty of demonstrating a compelling government interest. A compelling government interest that passes strict scrutiny might include, for example, national security, as in
the Korematsu case involving Japanese internment camps. However, the Supreme Court “has not recognized a compelling interest in simple racial diversity,” (Amicus, Florida Governor, 2007, p. 10) and states’ discretionary use of race has not been approved (Amicus, Asian American Justice Center et al., 2007, p.11) Amicus parties opposing integration plans point to a number of prominent cases in which strong interests could not justify a racial classification (See Amicus, Drs. Murphy, Rossell, and Walburg, 2007 for cases). Furthermore, the Adarand case, which is beyond the scope of this paper’s discussion but remains important, proves for these parties that the only interest compelling enough to justify a racial classification is the remedying of past discrimination (Amicus, Florida Governor, 2007, p. 21). To bolster the argument that rarely if ever can racial classifications be acceptable, opposing parties stress a close textual reading of the Equal Protection Clause on which strict scrutiny is based. Under this interpretation, the clause’s language, structure, and history confirm that the clause’s prohibition on discrimination is absolute. Supporting parties, by contrast, argue that the clause was meant to be flexible in the face of vast social problems such as discrimination and racial isolation (Amicus, Merits of Mountain States, 2007).

Opposing parties also emphasize the distinction between K-12 and higher education in that K-12 school assignments are traditionally compulsory whereas choice of school in higher education, like housing, is driven by private decisions (Amicus, Drs. Murphy, Rossell, and Walburg, 2007). These parties have also argued that a cognizable difference exists between K-12 voluntary integration plans and higher education affirmative action plans. One main difference is that former students, by not being integrated, are not suffering any measurable harm. Moreover, the NAACP Legal Defense and Education Fund explained that unlike in higher education, K-12 race-conscious student assignment does not equate race with other merit-based factors that are
needed to determine which students obtain limited and unique spots in college classrooms. Therefore, the “kinds of Equal Protection concerns about the distribution of burdens and benefits… [of] traditional affirmative action cases, are not triggered where school districts sensitively manage the assignment of K-12 students to public schools that are alike in material respects to achieve racial integration” (Amicus, NAACP, 2007, p. 9, italics mine).

A key argument relied upon by those against finding a compelling interest in school integration is that social science research has failed to demonstrate the claimed benefits of integration (Amicus, Drs. Murphy, Rossell, and Walburg). Parties opposed to the plans observe that the data has not shown a “clear link between racial diversity and academic achievement” or any significant improvement in “race relations” in integrated K-12 schools (Amicus, Drs. Murphy, Rossell, and Walburg, 2007, p. 13). Similarly, opposing parties argue that the claimed interest in racial diversity is “too amorphous” and “too insubstantial” (Amicus, Merits of Mountain States, 2007, p. 23).

Furthermore, voluntary integration plans could work to the detriment of minority students. The Merits of Mountain States Legal Foundation of Colorado explains that racial classifications can have negative consequences for students and therefore cannot be compelling government interests. For example, racial classifications can demean the individual by assuming their beliefs are exactly the same as all others in that racial category. Additionally, racial classifications can “provoke resentment among those who believe that they have been wronged” by the classifications (Amicus, Merits of Mountain States, 2007, p. 26). Students who perform better in a homogenous learning environment may suffer as a result of forced integration. Finally, the use of racial classifications “undermines the very principles upon which the Nation was founded” (Amicus, Merits of Mountain States, 2007, p. 28). The Foundation does not
specify these principles beyond “liberty,” but presumably these principles include equality of treatment, freedom from certain government interference, and the meritorious reward.

b. **Narrow Tailoring**

1. **Arguments Demonstrating the Plans Are Narrowly Tailored**

   In the context of race-based classifications, a narrowly tailored policy is one which best addresses the government interest, does not impose an undue burden upon individuals involved, and which could not reasonably be replaced by a race-neutral alternative. In the Parents Involved voluntary integration plans, race was one of several factors and was used as a tie-breaker rather than a replacement for the consideration of merit (Amicus, Urban League, 2007; Leadership Conference, 2007, p.10-11; Religious Organizations, 2007, p.10). Amicus parties argued that the integration plans did not impose an undue burden on any students (Amicus, States of New York et al., 2007). This argument is key because it relies on the idea that all public schools within a district are essentially equal, and thus the assignment to one over another will not affect the quality of education a child receives.

   The Civil Rights Clinic at Howard urged the Court to rely on the Grutter/affirmative action idea of constitutionally using race as one of multiple factors to achieve the goal of diversity. Otherwise, they argued, schools will fall back into re-segregation (Amicus, Civil Rights Clinic at Howard, 2007, p.10). In addressing alternatives, the AERA demonstrated that plans that are race-neutral or sensitive to socio-economic status are not as effective at racial integration in school as are plans that are race-conscious. Further, the AERA cautioned that these
race-neutral alternatives could also lead ultimately to the resegregation of schools (Amicus, AERA, 2007).

2. **Arguments Demonstrating the Plans Are Not Narrowly Tailored**

   The Center for Individual Rights argued that the plans were not narrowly tailored because of the approximated, non-scientific race percentages used as guidelines and the lumping together of all minorities into one non-white category (Amicus, Center for Individual Rights, 2007). Additionally, the Center noted that only oversubscribed schools participated in the school assignment plan, effectively denying other schools any of the claimed benefits. Moreover, Grutter requires a sunset provision that would end the plan after a certain period of time or goal reached, and the plans have failed to provide this provision (Amicus, Center for Individual Rights, 2007).

   Other amicus parties contend that the plans are not narrowly tailored because of their use of “hard numerical quotas” rather than an individualized consideration of each student, as required by Grutter in the higher education context (Amicus, Asian American Legal Defense and Educational Fund et al., 2007, p.7). Many pointed to the failure to give serious consideration to race-neutral alternatives (Amicus, Drs. Murphy, Rossel, and Walburg, 2007), but this argument is a serious point of contention as supporting parties claim that race-neutral alternatives could not achieve the racial integration goal. Florida Governor Bush and the Florida Board of Education identify a number of programs in Florida that have raised achievement without using racial classifications. These include the Governor’s A+ Plan, gifted programs, college outreach
programs, AP tests, and access to important college access tests (Amicus, Florida Governor, 2007).

c. Local Control Doctrine

In the 1971 Swann case, in which de jure segregation was found and a desegregation plan ordered, the Court explained the doctrine of local control, saying:

“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” (Swann, 1971; Amicus, Swann Fellowship et al., 2007, p. 8-10; Coalition to Defend Affirmative Action et al., 2007, p.7-8).

Local control in the area of education is a long-standing legal tradition, rooted in both the 10th Amendment and Supreme Court jurisprudence, such as in Milliken v. Bradley and Rodriguez. In Milliken, an inter-district desegregation plan was found to be an improper remedy for de jure segregation within the Detroit metro district. The Milliken court emphasized that co-opting students from outside the specific district in which segregation was found was a violation of local control and would cause serious logistical problems (Milliken, 1974). In Rodriguez, in which the Court held that Texas’ inequitable school finance system passed rational basis review, the Court relied on the doctrine of local control in its analysis. Citing precedent from the previous year, the Rodriguez Court explained that “[d]irect control over decisions vitally
affecting the education of one's children is a need that is strongly felt in our society,” and that "[l]ocal control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well” (Rodriguez, 1973, p.49). Under local control, states are laboratories for experiment, ultimately producing an approach fit to each state and providing examples of best practices to other states (Rodriguez, 1973, p.50).

Amicus parties in Parents Involved argued that K-12 schools should be granted deference in terms of determining compelling interests for racial classifications. Under this view, segregation should be addressed by democratically elected and locally accountable government officials, including school officials. These authorities are capable of both understanding the problem in its local context and crafting solutions to address it (Amicus, Caucus for Structural Equity, 2007; Louisville, 2007). Moreover, states and local school boards may determine whether racial integration produces educational benefits that these local authorities desire to promote in their area (States of New York et al., 2007). The counter-argument to local control is that “the Equal Protection Clause cannot take a backseat to the discretion of elected local school boards” (Amicus, Pacific Legal Foundation et al., 2007, p.10). In this way, opponents of race-conscious student assignment plans do not distinguish between the motives of the use of race in government policies. From this viewpoint, the potential for abuse of the use of race is too great.

ii. Parents Involved Court Opinion

Because the voluntary integration plans in Parents Involved considered race, the Supreme Court applied strict scrutiny review used for race-based classifications. Despite the strong arguments from amicus briefs, the Court found that the plans were not narrowly tailored and
therefore were unconstitutional, leaving open whether the school districts’ alleged interests were deemed sufficiently compelling.

The Roberts’ majority opinion identified two potential compelling state interests that could justify the use of race in the plans: “1) to remedy the vestiges of intentional discrimination” and “2) to attain the beneficial, educational effects of diversity” (Green et al., 2011, p. 509). To the first interest, that of remedying the effects of past discrimination, the Court responded that neither district was currently under a court-ordered desegregation decree at the time the plans were implemented, though Jefferson had previously been under court supervision (Green et al., 2011, p. 509; Parents Involved, 2007, p. 721). In effect, the Court said that unless segregation has been officially recognized by a court as intentionally authorized by the state (de jure segregation), that discrimination does not exist for purposes of justifying the use of racial classifications in another official policy. Quoting the Court in Milliken, the Court stated that “the Constitution is not violated by racial imbalance in the schools alone, without more” (Parents Involved, 2007, p. 721).

The second interest, to attain diversity’s benefits, has only been recognized by the Supreme Court in the higher education context in the Grutter decision explained above. In Grutter, the Court emphasized that race was only one factor in creating a diverse student body (Parents Involved, 2007, p. 722). Other factors for diversity might include whether students “have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields” (Parents Involved, 2007, p. 722, quoting Grutter at 338). Because of the differences between the higher education and K-12 education contexts, as well as the narrower approach to diversity in Seattle and Jefferson County, the Court did not use
Grutter as mandatory precedent for analyzing the Parents Involved districts (Parents Involved, 2007, p. 724-25; Green et al., 2011, p. 510).

In moving away from Grutter, the Parents Involved school districts claimed a compelling interest in racial diversity because of the intangible “educational and broader socialization benefits” inherent in a diverse learning environment (Parents Involved, 2007, p. 726-7). Whether these claimed benefits actually result from racially diverse environments continues to be a subject of debate, as outlined in the amicus briefs above. The districts also claimed compelling interests in reducing racial concentration in the schools and ensuring that minority students had access to the best schools (Green et al., 2011, p. 510). In Parents Involved, the Court side-stepped definitively determining whether these interests were actually compelling by holding that the student assignment plans were not narrowly tailored to meet the interests, regardless of their legitimacy (Parents Involved, 2007, p. 726), although Justice Kennedy sided with the dissent in finding compelling interests. Kennedy’s key opinion is beyond the scope of this paper currently. However, in recent years the Office of Civil Rights under the Obama administration has confirmed that a majority of the justices recognized diversity and avoiding racial isolation as compelling government interests (Guidance, 2011, p.2).

a. Narrow Tailoring

The plans failed the second prong of strict scrutiny review—narrow tailoring—because the plans had “minimal effect” on student assignment and therefore could not be said to accomplish any of the claimed government interests (Parents Involved, 2007, p. 710-11; Green et al., 2011, p. 510-11). Based on this assessment, it is possible the plans did not go far enough in
purposefully integrating students. The Court held additionally that the school districts failed to demonstrate that they had given sufficient consideration to race-neutral alternatives, which is required under strict scrutiny review.

Justice Stevens’ dissent argued that the Court was misinterpreting the landmark decision in Brown. Justice Stevens distinguished between “a decision to exclude a member of a minority race” and “a decision to include a member of the minority” and stated that these different state motives should be treated differently for purposes of Constitutional review (Green et al., 2011, p. 515). In his dissent, Justice Breyer argued that case precedent supported the doctrine of local control and broad local discretion in matters of primary and secondary education (Green et al., 2011, p. 516). He argued additionally that Grutter requires consideration of context in reviewing state action for constitutionality (Green et al., 2011, p. 518-19).

b. Local Control

In a footnote, the Court disregarded the suggestion in previous opinions that racial balancing in schools might be constitutional “as a matter of ‘educational policy’” (Parents Involved, 2007, Footnote 10). This footnote effectively limited the deference to education administrators in the K-12 context that the Court in Grutter identified for the higher education context.
B. Lower Merion Case

i. Lower Merion Factual Background

In Parents Involved, Justice Kennedy explicitly endorsed alternatives to the racial classifications used in the two districts. These included strategic school site selection, allocating resources for special programs, recruiting students and faculty in a targeted manner, tracking enrollments, performance and other statistics by race, and drawing attendance zones with general recognition of the racial demographics of neighborhoods, which was the method used in the Lower Merion case. Kennedy approved the use of race as a “component of other assignment methods as long as they reflect a ‘more nuanced, individual evaluation of school needs and student characteristics’” (Tefera et al., 2011, p.12-13).

Like Parents Involved, the Lower Merion case involved a constitutional challenge to a school assignment plan (“Plan 3R”). The Lower Merion Township in Montgomery County, Pennsylvania operates two high schools, Harriton and Lower Merion. The Lower Merion Board of School Directors (Board) is responsible for student assignment to one of the two high schools. Plaintiffs were a group of African-American students living in the “Affected Area,” the “South Ardmore” area of Lower Merion in which a significantly greater population of African-Americans lives compared to other parts of the Township. Two other areas in the district, “North Ardmore” and Bryn Mawr, contain higher concentrations of African-American students as well (Lower Merion District, 2010). As part of a “capital improvement program,” the District chose to build two equally-sized high school buildings on the existing Lower Merion and Harriton sites. The site of Lower Merion High School included a historic walk zone, but for student safety reasons Harriton High School did not (Lower Merion District, 2010, p. 17-18).
The history of Lower Merion’s redistricting and assignment plan are crucial to understanding the kind of race-consciousness that is constitutionally acceptable. Here, the redistricting process began with the Board’s adoption in April 2008 of a list of five “Non-Negotiables,” factors which must be considered in assigning students to schools: 1) equalization of enrollment between the two middle schools and between the two high schools, 2) elementary school enrollment must be at or below capacity, 3) necessary number of buses must not increase, 4) the class of 2010 may choose to follow the new plan or remain in their previously-assigned high school, and 5) redistricting decisions should be based on current and future expectations rather than past practices (Lower Merion District, 2010, p.24-25). The district hired two consultants who worked with residents through public forums and online surveys, a common practice with the TASAP grants discussed below, to compile a list of five Community Values. The fifth value asked that the district’s plan “explore and cultivate whatever diversity—ethnic, social, economic, religious and racial—there is in Lower Merion” (Lower Merion District, 2010, p.25). A third consultant, Dr. Haber, then analyzed the district’s enrollment data and produced eight possible redistricting plans, called “Scenarios” (Lower Merion District, 2010, p. 29).

In its opinion, the 3rd Circuit reviews the race-related data included in Dr. Haber’s scenarios:

Dr. Haber prepared informational handouts of the Scenarios for the Administration. The handouts regarding Scenarios 1, 2, 3, 4, and 5 included the number of African-American students, but did not include any other racial/ethnic data or any data regarding socioeconomic status or disability. Dr. Haber reported data on race, ethnicity, and socioeconomic disability for Scenarios 4a, 7, and 8. The summaries of the Scenarios on the District’s website did not include the
statements regarding the racial/ethnic numbers for each Scenario. Dr. Haber testified that this information was probably reported because the Administration expressed concerns regarding African-American students and that he was never directed to create or change a Scenario based on diversity outcomes. A chart dated August 26, 2008 lists the *African-American and socioeconomically disadvantaged population estimates for the Scenarios* (Lower Merion 3rd, 2011, p. 533, italics mine).

The school board adopted Plan 3R, a modification of the third Scenario. Plan 3R used two feeder patterns to maintain K-12 continuity. The plan ultimately directed plaintiffs to attend Harriton High School despite their physical proximity to Lower Merion (Lower Merion 3rd, 2011, p. 533). Plaintiffs’ complaint alleged that by assigning them to Harriton on the basis of their race, the plan discriminated against them.

ii. Lower Merion Court Opinion

The district court determined that Lower Merion’s redistricting plan passed strict scrutiny review. The 3rd Circuit reviewed this level of Constitutional analysis and determined that the redistricting plan only required rational basis review. Because rational basis review is historically easier to pass, the plan survived review and was upheld. The Supreme Court declined to hear the case.

The District Court, faced with the question of which level of scrutiny to apply, had to determine “whether race was a motivating factor” in the District’s student assignment plan. Because Plan 3R did not use individual racial classifications to assign students, the court
determined that Parents Involved did not apply. However, a strict scrutiny analysis was still required under other cases (Pryor, Arlington Heights) because race was considered a “motivating factor in the decision making” at issue.

At the district court, Plan 3R required strict scrutiny and was found to be narrowly tailored to meet four compelling educational interests. Plan 3R was the only plan that met the four goals of the redistricting plan, which were to (a) equalize high school populations; (b) minimize travel time/transportation costs; (c) foster educational continuity; and (d) foster walkability (Lower Merion 3rd, 2011, p. 541-42). The Court noted that “the mere fact that the District considered racial demographics in redistricting students in the Affected Area to attend Harriton does not render the District’s adoption of Plan 3R unconstitutional” because Plan 3R would have been adopted regardless of the consideration of racial demographics (Lower Merion 3rd, 2011, p.554). The plan thus passed strict scrutiny review and was found constitutional at the federal trial court level.

In reviewing the appropriateness of applying strict scrutiny to Plan 3R, the 3rd circuit looked for any discriminatory intent or purpose in the state’s actions. As the Court noted, actions are not necessarily purposeful discrimination simply because they involve the use of race. Discriminatory intent or purpose can be shown when: 1) a law explicitly classifies citizens based on race (explicit classification), 2) a facially neutral law is applied differently based on race (discriminatory manner), or 3) a facially neutral law, though applied equally, is motivated by discriminatory intent and has a discriminatory impact (discriminatory intent/impact).

Looking to the first option, the 3rd Circuit determined that Plan 3R was facially neutral and therefore did not explicitly classify citizens on the basis of race. The Court distinguished Plan 3R from the racial classifications used in Parents Involved, Grutter, Brown, and other
significant race cases. The plaintiffs also failed to show that the plan was applied in a discriminatory manner. To prove this second option, the evidence would have had to demonstrate the District enforced the plan within some areas or with respect to some students, on the basis of race, while not enforcing the plan within other areas or with respect to other students.

For the third option, a plaintiff must demonstrate both a discriminatory intent and a discriminatory impact. Neither was found in Lower Merion’s plan. The plan did not have a disproportionate impact, nor did any aspect of the plan’s history “spark suspicion” of intent to discriminate. In fact, the Court found evidence that the Board was affirmatively trying to avoid racial discrimination. The mere awareness of racial demographics data was not enough to prove a discriminatory intent or awareness of a potential discriminatory impact. Other, non-racial grounds for the policy were important to the Court’s decision. These included “minimizing travel time and transportation costs, increasing educational continuity such that students who attended the same elementary school would stay together through middle school and high school, and fostering walkability” (Lower Merion 3rd, 2011, p. 554). Any discriminatory impact, therefore, could plausibly be explained by a neutral intent.

Because no purposeful discrimination occurred in choosing Plan 3R, the 3rd Circuit reviewed the plan under rational basis review. The plan was found to be rationally related to the goals of ensuring educational continuity and saving state funds by fostering walkability. Notably, the Lower Merion concurrence reasoned that Parents Involved required the application of strict scrutiny to Plan 3R but explained that the plan would have passed strict scrutiny review because the racial composition of neighborhoods was not the primary motive of the Board.

The key to the constitutionality of Plan 3R appears to lie at least in part in the school board’s affirmative efforts to avoid racial discrimination. During the redistricting process, the
district was aware of the Parents Involved case and the potential for the unconstitutional use of race. The District Court found that awareness of this case evidenced a “good faith effort” to be mindful of the boundaries of the law (Lower Merion District, 2010, p. 39-40). In a footnote, the District Court noted that “understanding [the Parents Involved decision] is challenging for judges and lawyers, let alone for a professional educator” (Lower Merion District, 2010, Footnote 12).

In the aftermath of the Fisher decision in which a presumption of good faith behavior was a sticking point for the Supreme Court, the 3rd circuit’s Lower Merion decision might hold less influential value for other circuits. Moreover, the court appeared to devalue evidence that the plan might not be narrowly tailored because of the lack of effect on diversity, as in Parents Involved. For example, evidence presented at trial showed that one member of the school board who voted against Plan 3R stated that “Plan 3R created an ‘additional stressor’ for African-American students by ‘asking Ardmore kids to take one for the team,’ when there ‘just aren’t a lot of A[frican]-A[merican] families,’” and that she “did not think it was ‘worth it’ to redistrict Ardmore in order to ‘marginally increase diversity’” (Lower Merion 3rd, 2011, p. 537-38).

As we will see in Spurlock, evidence is building that a return to local control combined with the careful avoidance of too-explicit considerations of race creates an environment in which some “race aware” student assignment plans might flourish. As Justices Ginsburg has said, “those [policies] that candidly disclose their consideration of race [are] preferable to those that conceal it” (Fisher, 2013, p. 40 and Dissent p.3). Ginsburg and other Justices have suggested that the supposedly “race neutral” alternative to candid consideration of race, to actually fulfill a diversity objective, will merely be a race conscious policy that is “deliberate[ly] obfuscated” (Fisher, 2013, p. 39).
iii. **Lower Merion Amicus Briefs**

On the plaintiffs’ side, Professor Earl Maltz filed an amicus brief urging the 3rd Circuit to apply strict scrutiny and find that Plan 3R failed the analysis. Earl M. Maltz is a resident of the Lower Merion School District and a Distinguished Professor of Law at Rutgers University School of Law in Camden, New Jersey. The plaintiffs’ also filed a supplementary brief. For the school district, the United States and a small group of interested organizations filed amicus briefs urging the 3rd Circuit to affirm the lower court’s finding that Plan 3R was constitutional. The group of interested organizations consisted of the NAACP Legal Defense & Educational Fund, Inc., the Lawyers’ Committee for Civil Rights Under Law, and the American Civil Liberties Union Foundation (NAACP et al.).

a. **Strict Scrutiny**

Professor Maltz argued that strict scrutiny should be applied because of the assignment of schools based on race, regardless of whether it was used as geographic criteria rather than on an individual basis. Strict scrutiny was crucial, he argued, because attendance zones have historically been used for segregation purposes, as in Keyes (Amicus, Maltz, 2011).

Citing to Kennedy’s key concurrence in Parents Involved, the U.S. argued that strict scrutiny should not apply when a merely race-conscious plan does not classify individuals on the basis of their race. Because race was considered solely to “maximiz[e] the education offered to all students,” Plan 3R aligned with Kennedy’s vision. Specifically, the district sought to reduce racial isolation and increase student achievement (Amicus, U.S., 2011, p.35-36). The NAACP et al. also made this argument, stating that Kennedy’s concurrence left school districts with “a
limited degree of latitude to pursue *Brown’s* objective of racially inclusive, high-quality education” (Amicus, NAACP et al., 2011, p.7). Both the U.S. and the NAACP et al. heavily emphasized the distinction between race-consciousness and individual racial classifications. Race-consciousness allows school districts to have a “general recognition of the racial demographics of its neighborhoods at the aggregate level” (Amicus, NAACP et al., 2011, p.9). Individual classifications, on the other hand, often explicitly discriminate, according to these parties.

b. **Compelling Government Interests**

Professor Maltz argued that the goals of the redistricting plan—equal school populations, less travel time, increased walkability, and educational continuity—have never been declared compelling government interests (Amicus, Maltz, 2011, p.9).

The amicus parties disagreed on many of the facts of the case. In particular, the plaintiff students filed a supplementary brief in part to rebut the alleged factual errors made in the United States’ amicus brief for the school district. First, the United States argued that the consideration of race in choosing an assignment plan was limited and incidental to other considerations. Conversely, the plaintiffs’ supplementary brief quotes the factual findings as establishing that:

“[t]he Administration’s recommendation to the Board, to redistrict [Students Doe] to Harriton High School, was based largely on the fact that [Students Doe’s] neighborhood of residence has a heavy concentration of African-American students, and that Harriton had a significantly lower African-American student population than Lower Merion High School prior to redistricting” (Amicus, Appellants, 2011 p.20).
The plaintiffs’ brief described the consistent consideration of achieving racial parity between the schools as “like a leitmotif in a Wagner opera, a recurring theme with variations,” rather than limited and incidental consideration, as the U.S. and school district asserted (Amicus, Appellants, 2011 p.2). Second, the parties could not agree as to whether the two schools were of equal quality. In Professor Maltz’s brief, he argued that the court’s factual findings indicated that Lower Merion was the preferred school of white parents (Amicus, Maltz, 2011, p.6). The NAACP et al. stated that both high schools were “ranked among the best in the nation” (Amicus, NAACP, 2011, p.2). Also unclear was whether Plan 3R would have been adopted regardless of the consideration of race. Professor Maltz noted that no evidence was presented to establish this fact (Amicus, Maltz, 2011, p. 12-13).

C. Spurlock Case – Facts and Opinion

Metropolitan Nashville Public Schools District (Nashville) was under a court-ordered desegregation plan as a result of de jure segregation until it achieved unitary status in 1998 (Spurlock, 2013, p. 3). After achieving unitary status, Nashville operated a student assignment plan in which most students were assigned to geographically-based clusters of feeder schools with a handful of noncontiguous clusters. As a result of under-utilization of some schools and a failure to achieve increased funding, the district began studying other assignment options. As in the Lower Merion case, a list of factors was drawn up, including diversity (Spurlock, 2013, p. 6). The task force assigned with analyzing possible plans considered demographics data (Spurlock, 2013, p. 7). Ultimately, the task force recommended a plan that changed any noncontiguous clusters to “choice zones” in which students in these zones could opt to attend a geographically
contiguous school rather than being bused to a more distant school. However, the plan changed the school to which students would be bused if they chose the more distant school. The 6th circuit noted that the school district claimed the newly-designated noncontiguous and more distant schools “were those that had the capacity to take in more students and stood to gain more from a diverse student body” (Spurlock, 2013, p. 8). The plaintiffs, however, argued that the newly-designated schools “effectively directed the overwhelmingly black student population in noncontiguous zones away from the racially diverse schools in higher-income neighborhoods and toward the racially isolated schools in their own poverty-stricken neighborhoods” (Spurlock, 2013, p. 8). They argued that while, like in Lower Merion, individual students’ races were not considered, that geographic locations could serve as a proxy for race (Spurlock, 2013, p. 18).

When the plan was presented to the community for consideration, many argued that it would “increase racial and socioeconomic isolation” without accomplishing the district’s original goals. The plan was adopted by a 5-4 school board vote with four black members in the minority black and four white members in the majority with a black member joining. While the data suggests that the plan has been successful in refocusing attention on underutilized schools, the plan does not appear to have been successful in increasing academic achievement in underserved schools or in increasing diversity, especially in “academically superior” schools (Spurlock, 2013, p. 11-12).

The district court determined that rational basis review should apply because while a segregative effect was proven, the plaintiffs had not proven that the board acted with the intent to segregate students. Accordingly, the plan passed the low bar of rational basis review (Spurlock, 2013, p. 15). The 6th circuit agreed, reasoning that if any use of race or geography as race-by-proxy were found to be discriminatory and therefore unconstitutional, this would have the effect
of eliminating “any neighborhood-school policy adopted in a community with racially identifiable housing patterns,” and private choices are simply not under the control of the Constitution.

The 6th circuit highlighted evidence supporting the lack of segregative intent, and this evidence can provide guidance for other districts’ plans. First, a long-standing problem was directly addressed by the plan, evidencing a good faith effort. Second, the procedure used to generate the plan was “well-defined, well-regulated, and transparent.” In particular, the task force’s diverse makeup and evidence by them that their members were free of racial prejudice was valued by the court. Additionally, all of the task force’s meetings were open to the public (Spurlock, 2013, p. 21-22). As was emphasized in Lower Merion, the 6th circuit also emphasized the “firmly established principle that awareness of a disparate impact does not prove an intent to segregate” (Spurlock, 2013, p. 25).

D. Responses from the Executive Branch

i. Bush and Obama Office of Civil Rights Responses

In 2011 the Obama administration provided guidance for promoting student diversity and integration. The new guidance corrected what were seen as overly restrictive guidelines issued in 2008 during the Bush administration. The 2011 guidance promoted strategies that would not consider the race of individual students. These strategies can fall into one of two approaches: race-neutral and generalized race-based. Race-neutral approaches are defined as approaches that “take racial impact into account but do not rely on race as an express criterion.” Generalized race-based approaches consider race as one factor but do not classify individual students on the
basis of race (Guidance, 2011, p. 5). In considering race as one factor, the guidance gave general
advice similar to that used in higher education affirmative action policies (Guidance, 2011, p. 6-7). The guidance includes many race-specific examples that often rely on socioeconomic
diversity to help promote racial diversity (Guidance, 2011, p. 9-10).

One example resembles the situation in Lower Merion:

“A school district could create feeder patterns for elementary schools that
expressly include the racial makeup of the population of the elementary school as
a whole as a criterion in determining which elementary schools would feed into
which middle schools. All students at a particular elementary school would then
be assigned to the same middle school, without regard to the race of any
individual student” (Guidance, 2011, p. 10).

At the time of this writing, the Bush Administration’s guidance had been removed from the
Department of Education’s website and was unavailable for discussion here.

E. TASAP Grants & SFUSD: Challenges of Race-Neutral Plans

In 2009, the Department of Education created the Technical Assistance for Student
Assignment Plans grant program. The plan provided “one-time competitive grants to local
educational agencies (LEAs) to procure technical assistance in preparing, adopting, or
modifying, and implementing student assignment plans to avoid racial isolation and
resegregation in the Nation’s schools, and to facilitate student diversity, within the parameters of
current law” (TASAP). Eleven districts participated, though only a few ultimately focused on
racial diversity. The San Francisco Unified School District (SFUSD), one of the grant-receiving
districts, used its grants to research a new student assignment plan after a long legal history surrounding its assignment plans.

i. SFUSD as an Example of TASAP Grant Usage

SFUSD has struggled with racial integration for over four decades and has been involved in two related lawsuits. San Francisco NAACP v. SFUSD resulted in a settlement with a consent decree, though de jure segregation was not proven. A settlement team co-chaired by Professor Harold Howe II and Professor Gary Orfield was charged with creating a plan that would ensure that, according to Paragraph 13 of the consent decree, “no single racial/ethnic group shall comprise more than 45 percent of the enrollment of any school” (San Francisco NAACP, 2005, p. 1054). Additionally, each school’s population must include at least 4 different racial/ethnic groups (San Francisco NAACP, 1983, p 19). The court retained jurisdiction over SFUSD to enforce the consent decree and check its progress with an option to terminate judicial oversight after 6 years, provided significant progress was made.

In 1994, a group of Chinese-American students filed a class action against SFUSD alleging that the implementation of parts of the consent decree--namely, Paragraph 13--constituted discrimination based on race in violation of the Equal Protection Clause of the U.S. Constitution (Ho by Ho, 1998). Ultimately, the parties settled out of court, resulting in a new assignment plan that would not use race as a factor for assigning students and court supervision through a consent decree that ended in 2005 (San Francisco NAACP, 2005).

Because of these two suits, the legal history of San Francisco’s school integration provides an example relevant to districts across the country. While it was never declared legally
segregated, San Francisco, like many districts, became subject to long-lasting judicial oversight. Like the districts in Parents Involved, SFUSD experimented with race-conscious integration policies that were found to violate the Constitution. Judge Orrick, who presided over SFUSD’s legal history for decades, eloquently summarized the problem of racial classifications:

“This employment of race may be compared to the building of a back fire as a means of containing a conflagration. Skilfully [sic] done, carefully controlled, the back fire will work to extinguish the greater blaze and not function to increase the devastation. The comparison suggests how tight a hand must be kept on race lest, employing it to remedy racial evil, it slip out of control and inflict fresh harm” (Ho by Ho, 1998, p. 864).

Judge Orrick is tapping into the difficulty of regulating officials’ motives in the use of race and suggests that tight regulations—such as the use of strict scrutiny review—maybe necessary to prevent further harm.

With the help of the TASAP grant, SFUSD has been able to make an in-depth study of the best race-neutral student assignment plan for its unique community. Past plans included attempts at creating diverse student populations without the explicit use of race, such as the Diversity Index Lottery that considered “(1) extreme poverty; (2) socioeconomic status; (3) student’s home language; (4) academic performance of student’s prior school; and (5) student’s prior achievement” (SFUSD Update, 2009, p. 16). The process of studying past plans and their failings, as well as observations of the current SFUSD assignment plan, demonstrates some of the challenges to any pro-diversity plan. An interview with a district representative indicated that already existing housing segregation, differences in parental involvement rates by race and socioeconomic class, and parents’ perceptions of school quality are challenges districts may face
in promoting diversity. The representative asserted that race-conscious plans simply have not been successful in the past, perhaps because of the difficulty of contending with these outside factors.

IV. Discussion

A. Standard of Constitutional Review

The level of constitutional review distinguishes the court opinion in Parents Involved and that of Lower Merion and Spurlock. In Lower Merion, both the District Court and the 3rd Circuit explained that the plan at issue in Lower Merion “starkly differ[ed] from the use of race in Parents Involved as well in the affirmative action cases (see Grutter, Bakke) (Lower Merion 3rd, 2011, p. 545-46). The 3rd Circuit relied on these cases in determining whether Plan 3R required strict scrutiny review. In the Seattle and Louisville school districts, students were assigned to schools on an individual basis rather than based on geographic areas, as in Lower Merion and Spurlock. In Lower Merion, the plaintiffs’ neighborhood was “targeted... for redistricting... in part because that community has one of the highest concentrations of African-American students in the District.” The District Court described this “targeting” approach as “novel” (Lower Merion District, 2010, p. 6). In Spurlock, the racial isolation that resulted was acceptable because the policy-makers involved did not have the requisite discriminatory intent.

Ultimately, Lower Merion and Spurlock suggest that the consideration of race on a geographic rather than individual level may be acceptable for future plans. However, neighborhood-based redistricting may not successfully achieve the desired diversity in schools. As seen in Lower Merion and Spurlock, evidence is building that a return to local control
combined with the careful avoidance of too-explicit considerations of race or any discriminatory intent may create an environment in which some race conscious student assignment plans might flourish. Yet race-conscious policies with positive diversity and integration-focused motives that use what some argue are the most effective method—race on an individual basis—will not be tolerated. As the Fisher opinion emphasizes, the Supreme Court will review these kinds of policies with the most stringent level of scrutiny.

An underlying problem inherent in considering race on an individual basis is that it often requires individual students to travel to schools at a distance from their neighborhood school. When individuals have a problem with the quality of their neighborhood school, they are often unable to remedy the problem through a lawsuit because the right being denied is not legally cognizable. The Rodriguez case has effectively prevented any future lawsuits challenging inequitable funding, and education is not a fundamental right protected by the U.S. Constitution. Most state constitutions protect a base line minimum of “adequate” education quality. Thus, parents in communities with fewer resources, who also often happen to be minority parents, have little recourse to attain a higher quality education but to allow their children to be bussed to a higher quality school. This was the case in Spurlock and the redirection of these black students to an allegedly lower quality school was central to the case. In Lower Merion, by contrast, black students challenged their assignment because of the distance it forced them to travel, though some evidence suggests that the school to which they were bussed was perceived as lower in quality as well. In SFUSD, some view the district as moving away from their past, controversial attempts to integrate—having tried and failed multiple times to achieve a plan that was both legal and effective—and instead directing the district’s energy toward improving schools in historically underserved, and often racially isolated, communities.
B. Local Control & the Neighborhood School

All of these examples point to the underlying idea that, while diversity is valued and integration a key to a healthy society, parents simply want their children to attend a high quality school. Moreover, as Goldring et al. explain, neighborhood schools are generally preferred, and in fact, “parents, black and white, have expressed the desire for their children to be schooled closer to home even if it means they attend more segregated schools” (Goldring et al., 2006, p. 336, italics mine). The reasons for this preference are intuitive but important to understand. Goldring et al. attribute the modern attractiveness of neighborhood schools to beliefs about the attendant benefits. Neighborhoods schools are expected to “boost community attachment to schools, encourage resource sharing, and increase parental involvement and social capital,” as well as to “drive community development and revitalization” (Goldring et al., 2006, p. 336). In short, neighborhood schools are widely presumed to knit communities more closely together and thereby strengthen both the community and the school itself.

However, the focus on neighborhood schools is in direct tension with the promotion of integrated and diverse schools. Discussing their findings in Nashville, the authors conclude that neighborhood schools are not necessarily beneficial, especially for racially isolated schools with few human or economic capital-type resources (Goldring et al., 2006, p. 357). In particular, high poverty and high crime neighborhoods tend to promote child-rearing in isolation, which contributes to a dearth of community and especially school involvement. As the authors explain, “social isolation restricts access to social networks essential for individual economic advancement in a modern industrial society” (Goldring et al., 2006, p. 358). Because of the nature of these communities, the advantages of neighborhood schools that more affluent communities might experience are often unavailable to the less affluent neighborhoods.
Goldring et al. explain that “a persistent relationship” exists “between the percentage of minority students in a school and the financial resources allocated to it” (Goldring et al., 2006, p. 338). Wells and Frankenberg (2007) identified the major harms associated with racially segregated schools which generally center around unequal resources: “concentrated poverty [in certain schools], poor teacher quality and high teacher turnover, inadequate curriculum and supplies, and limited aspirations and social networks,” as well as harmful effects such as “low academic achievement and graduation rates” and “instability and lack of public support” (p. 180). Minority and low socioeconomic communities may prefer neighborhood schools because of perceived benefits, and policy-makers may prefer not to bear the expense of transporting students to non-neighborhood schools. However, only two possibilities exist to improve the education received by minority and low-income students: 1) provide greater resources to these communities, as SFUSD is attempting to do, or 2) transport these students to communities with greater resources. In some communities, students are given a choice, and the emphasis on choice is part of a larger push to create a competitive marketplace of schools. While this choice movement is beyond the scope of this paper, providing the option of remaining in a low quality neighborhood school is unlikely to produce better results for these students.

C. Brief Recommendations

The concerns of the parents in both Spurlock and Lower Merion and of the Supreme Court in Parents Involved must be met for student assignment plans to be both effective and constitutional. Parents’ preference for neighborhood schools must be assuaged—by ensuring free and timely transportation and by promoting connections between the home neighborhood and the
distant school—and parents’ preference for high quality schools must be addressed. Moreover, policy-makers, who often come from the majority group, must understand the necessity of ensuring diversity and high quality education occur in the same place. Stevens et al. (2008) assert that majority-group support for an integration approach is crucial because nonminorities “represent overlooked, yet critical, stakeholders in diversity issues,” (p. 121) and they advocate for the AIM approach which promotes “high-quality relationships among dissimilar others” (p. 124). As stated above, the kind of positive relationship described by Stevens et al. correlate strongly with the expectation articulated in Grutter and in the amicus briefs for Parents Involved that diversity in educational settings leads to the interpersonal skills necessary for survival in the global marketplace and increasingly diverse workforce.

The concerns of courts must also be met. While the future of the Fisher case and another affirmative action case set to be heard by the Supreme Court in 2014 will shape the legal landscape further, social science researchers must do more to recognize the court’s concerns. Specifically, the compelling government interest in diversity in K-12 must be more clearly articulated and defended. As the amicus briefs make clear, the interest in racial diversity remains “too amorphous” and “too insubstantial” (Amicus, Merits of Mountain States, 2007, p. 23). However, the benefits of diversity in the workplace have been demonstrated and are of interest to stakeholders of all races in business and the economy. Therefore, researchers ought to focus on fully articulating the socialization that occurs in K-12 and clearly link this socialization to behavior in higher education and the workforce.
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