THE CIVIL RIGHTS PROJECT

HARVARD UNIVERSITY

CONSITUTIONAL REQUIREMENTS FOR RACE-CONSCIOUS POLICIES IN K-12 EDUCATION

Voluntary efforts to promote racial integration at the K-12 level have met strong resistance from the courts in recent years, despite the long history of court involvement in desegregration litigation. Race-conscious policies have invoked both the integration ideals growing out *Brown v. Board of Education* and the diversity rationale in higher education stemming from Justice Powell's opinion in *Regents of the University of California v. Bakke.* The policy making and recent case law in this area are unsettled, however, because two bodies of equal protection law can apply to race-conscious policies in the K-12 setting. One body of law applies to court-ordered desegregation remedies, and the other applies to voluntary programs and policies, either remedial or non-remedial in nature. The general legal principles and recent case developments are discussed below.

SUMMARY OF DESEGREGATION PRINCIPLES

Since the U.S. Supreme Court's decision in *Brown v. Board of Education,* the desegregation of intentionally segregated public schools is constitutionally mandated and must occur "with all deliberate speed." The *Brown* case did not set a clear timeline to remedy segregation, however, and responsibility for desegregation and the implementation of *Brown* has been left to local school boards and the federal district courts to achieve. In recent years, the U.S. Supreme Court has scaled back the protections available through the courts and provided increasing latitude to school districts. The frequent result has been the **"resegregation"** of integrated or partially integrated school districts.

A. DESEGREGATION AND THE INTEGRATION IDEAL

Through the 1960s and early 1970s, the courts entertained a large number of desegregation cases and ordered a variety of remedies - including the use of busing, transfer policies, and magnet schools - to redress intentional segregation policies. For example, in *Swann v. Charlotte-Mecklenberg Board of Education,* the Supreme Court struck down race-neutral student assignment plans that produced school segregation because school district actions built on segregated housing patterns, and the Court approved busing as a remedy. The Supreme Court did, however, impose some limits on desegregation litigation in the 1970s, ruling in *Milliken v. Bradley* that a federal court cannot, in almost all cases, impose an *interdistrict* remedy between a city and its surrounding suburbs in order to integrate the city schools. The Court did recognize, though, that a court could order a state to pay for educational programs to repair the harm caused by segregation. (*Milliken v. Bradley II*)

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Desegregation remedies have been particularly attentive to numerical goals and to balancing the compositions of student bodies. For example, a 1983 court-enforced consent decree to remedy segregation in San Francisco's school district recognized nine racial groups: whites, blacks, Hispanics, Chinese, Japanese, Koreans, Filipinos, American Indians, and other non-whites. Under the decree, no racial group could constitute more than 45% of the student enrollment at any regular school or 40% at alternative schools, and at least four racial groups had to be represented at each school site. (*San Francisco NAACP v. San Francisco Unified School District*)

B. EROSION AND RESEGREGATION

In ***Green v. County School Board,*** the U.S. Supreme Court held that segregated school systems must be dismantled "root and branch," which means that desegregation must be achieved among students and with respect to (1) facilities, (2) staff, (3) faculty, (4) extracurricular activities, and (5) transportation. The **"*Green* factors"** have been used as a guide in crafting desegregation plans, but in recent years they have become the standard by which to determine whether schools have achieved **"unitary status,"** the term used to characterize schools that are no longer subject to court supervision.

In a set of cases during the 1990s, the U.S. Supreme Court pared back the requirements of *Green,* and signaled a new era of increasing local control for school districts:

In ***Board of Education of Oklahoma v. Dowell,*** the Supreme Court ruled that a school system meeting the *Green* factors can be declared "unitary," and thus freed from any affirmative obligations to end segregation. Moreover, the Court held that any government action recreating racially segregated schools will be presumed to be innocent.

In ***Freeman v. Pitts,*** the Supreme Court held that the *Green* factors do not have to be met simultaneously for a school to be declared unitary. Rather, the court can withdraw from its supervisory role for each aspect of desegregation, one step at a time. "Unitary" means that (1) the school is in full compliance with the decree in the aspect of the system where supervision is being withdrawn, (2) judicial control over this aspect is no longer necessary to achieve compliance with other aspects of the decree, and (3) the school has demonstrated a good faith commitment to the decree as a whole.

In ***Missouri v. Jenkins,*** the Supreme Court found that the concept of "white flight" does not justify an interdistrict remedy (here, city magnet schools used to make city schools more attractive). Furthermore, school districts do not need to show any actual correction of the harms caused by segregation (such as the vestiges of discrimination demonstrated by lower averages on test scores) to be declared unitary; rather, all court-imposed equalization remedies should be limited in time.

VOLUNTARY POLICIES AND STRICT SCRUTINY

Court-ordered remedies have been an appropriate response to **de jure** (purposeful or intentional) segregation. With the passage of time since 1954, the ability of school districts to

engage in de jure segregation has been severely limited, and perhaps eliminated. The result, however, has not been the integration ideal. Instead, we face a system struggling with **de facto** segregation and the remaining effects of past discrimination.

To combat this problem, many schools have resorted to voluntary integration efforts that have taken the form of race-conscious admissions, transfer, and other policies. Race-conscious policies must comply with the equal protection clause, and the courts apply "strict scrutiny" analysis to test a policy's constitutionality. The courts evaluate (1) whether the policy serves a ***compelling state interest*** and (2) if it does, whether the policy is ***narrowly tailored*** to serve that interest.

A. COMPELLING INTERESTS

1. Remedial Interests

Remedying the present effects of past discrimination is widely recognized as a compelling interest by the courts. However, a school system must have a **"strong basis in evidence"** to prove the present effects of past discrimination. In the case of school districts that are still under court desegregation orders and have not yet been declared unitary, there will be extensive evidence to document the interest in remedying the vestiges of discrimination.

However, once a school system has been declared unitary, a school board may not be able to rely solely on a prior judicial finding of de jure segregation to successfully invoke the need to remedy the present effects of past discrimination. In that case, additional evidence must be offered to document both the present effects of discrimination and the linkage between the past segregation policies and the present effects.

For example in *Wessman v. Gittens,* the First Circuit required the school to provide evidence that racial disparities were not caused by any factor other than past discrimination, including societal discrimination. The *Wessman* court assumed that an achievement gap between minority and non-minority students could be a vestige of past discrimination, but the court found that the school did not present satisfactory evidence of a causal connection between its past discrimination and the present effects.

Legal and Evidentiary Questions. A school district that has never been found to have committed de jure segregation will have to provide extensive evidence of past discrimination and present effects. This evidence can include historical evidence, testimonial and documentary evidence, and statistical evidence that documents racial disparities. It is not clear from the case law, however, whether the evidence necessary to justify a voluntary plan must be the same or equal to the amount of evidence necessary to support a finding of intentional segregation, which justifies a court-ordered remedy.

Even with prior findings of de jure segregation, it is also not entirely clear how extensively a school district must document the varied sources of discrimination that may have created current achievement gaps. The case law suggests that there must be a clear and strong link between the present effects and the past discrimination.

2. Non-Remedial Interests

A majority of the U.S. Supreme Court has yet to rule that a non-remedial interest can constitute a compelling interest, but the lower courts have suggested several non-remedial interests in the K-12 area. Up to five distinct non-remedial interests can be gleaned from the recent cases in which courts have held or assumed that the interests are compelling:

- Maintaining a Desegregated System (Preventing Resegregation)
- Reducing Racial Isolation
- Promoting Racial Diversity
- Promoting Educational (*Bakke*-style) Diversity
- Promoting Educational Research

Each interest is discussed below.

a. *Maintaining a Desegregated System (Preventing Resegregation)*

Closely related to a remedial interest is an interest in maintaining a desegregated school system. Once a desegregation order has been dissolved, a school district still has an interest in preventing the resegregation of the system. In June 2000, in *Hampton v. Jefferson County Board of Education,* a federal district court in Kentucky dissolved a 20-year-old desegregation decree and recognized that it would be "incongruous that a federal court could at one moment require a school board to use race to prevent resegregation of the system, and at the very next moment prohibit that same policy." The court found that continued maintenance of a desegregated system is a compelling interest.

However, the *Hampton* court struck down a policy that limited African American admissions to a magnet school in order to maintain a racial balance in the district. The court found that since the magnet school in question had special curricular offerings, there was a burden on black students that would be unacceptable under a narrow tailoring analysis. The court did suggest, however, that between basically equal schools, the use of race could be acceptable to advance the interest in preventing resegregation of the system.

Legal and Evidentiary Questions. The interest in maintaining a desegregated system may be strongest at the point when a desegregation decree is dissolved, as was the case in *Hampton.* It is not clear, however, whether the interest remains as strong with the passage of time. Arguably, preventing resegregation is an ongoing interest, but the courts may be inclined to draw parallels to principles in remedial cases, in which the courts strike down race-conscious policies when the linkages between past discrimination and present effects are too remote.

b. *Reducing Racial Isolation*

Another interest that a school district may advance is the interest in reducing racial isolation. The courts have diverged on this issue, and the U.S. Supreme Court has not ruled explicitly on whether an interest in either reducing racial isolation or preventing racial isolation is compelling.

One federal court of appeals has found **reducing** racial isolation to be a compelling interest. In May 2000, in ***Brewer v. West Irondequoit Central School District,*** the Second Circuit upheld a voluntary interdistrict transfer program whose main goal was to reduce racial isolation within the participating school districts. To achieve this goal, the program allowed minority students to transfer from a city school to a suburban school, and non-minority students to transfer from a suburban school to a city school. The plaintiff challenged a restriction on non-minority student transfers from the city to the suburbs. The court upheld the policy and drew on previous desegregation cases in the Second Circuit which held that **combating de facto segregation** is a compelling interest and that voluntary efforts to ensure that schools are relatively integrated are constitutional.

However, in *Equal Open Enrollment Association v. Board of Education of Akron City School District,* a federal district court in Ohio found that the interest in **preventing** racial isolation was not a compelling interest because concerns about preventing racial isolation were based on a statistical analysis of how trends might play out in the future. The court specified that the school district would have had to show that preventing white students from taking advantage of an open transfer policy was necessary to prevent extensive "white flight." The court rejected the district's articulated interest in preventing the "worst case scenario."

Legal and Evidentiary Questions. It is unclear what evidence is needed to justify a compelling interest in reducing racial isolation, but the cases seem to indicate that there needs to be a *current* racial imbalance, rather than a *potential* future imbalance. In addition, because the "strong basis in evidence" standard has arisen in remedial cases, it is not entirely clear what is required to demonstrate the strength of a non-remedial interest in reducing racial isolation.

Under any evidentiary standard, evidence documenting (1) the negative educational effects of racially isolated schools, and (2) the positive educational effects of racially integrated schools can prove useful in establishing a compelling interest in reducing racial isolation. However, as is the case in higher education, it remains unclear what types of studies will be most useful for the courts and what quantum of evidence is necessary to establish a compelling interest.

c. *Promoting Racial Diversity*

One federal court of appeals has equated an interest in avoiding racial isolation with an interest in promoting racial diversity. (*Eisenberg v. Montgomery County Public Schools*) However, the two interests may be legally distinct. A school district promoting an interest in avoiding racial isolation might first measure the extent of the racial isolation and develop a policy to minimize the isolation. For example, a district might set a 51% population figure for a single racial group at a school as an indicator of racial isolation, and then set a goal of alleviating that segregation by lowering the percentages through transfers between schools. On the other hand, a district promoting an interest in racial diversity might start with an ideal breakdown (for example, the overall proportions of racial groups in a district), and attempt to reach that goal through race-conscious admissions or transfers. **In essence, the distinction between avoiding racial isolation and promoting racial diversity may lie in defining a "desegregated" school versus defining an "integrated" school.**

In April 2001, a federal district court held in *Parents Involved in Community Schools v. Seattle School District No. 1* that achieving racial diversity and mitigating the effects of de facto residential segregation are compelling interests. In doing so, the court upheld a student assignment plan in which race was used a "tie-breaker" factor to correct significant deviations between a school's racial breakdown and overall racial breakdown in the school district. However, on appeal, the Ninth Circuit reversed the lower court's decision on the grounds that the "racial integration tie-breaker" violated the Washington Civil Rights Act, a voter initiative which prohibits preferential treatment in public education on the basis of race. The Ninth Circuit did not decide whether the policy violated the federal constitution.

A number of federal courts of appeals have assumed that promoting racial diversity is a compelling interest (relying inexactly on *Bakke*), but the courts have proceeded to strike down race-conscious admissions and transfer policies on narrow tailoring grounds. (*Wessman v. Gittens; Tuttle v. Arlington County School Board; Eisenberg v. Montgomery County Public Schools*) A *racial* diversity interest should, however, be seen as distinct from a *Bakke*-type interest in promoting "educational diversity" in higher education, which is a broader form of diversity. (*See* point (d) below.)

Legal and Evidentiary Questions. Evidence that promoting racial diversity is a compelling interest might parallel the evidence used to show that reducing racial isolation is a compelling interest: demonstrating the negative effects of isolation and the positive effects of integration. As in other areas, however, the courts have not clearly defined the types and amounts of evidence that are sufficient to establish the argument.

d. *Promoting Educational* (*Bakke*-type) *Diversity*

Another possible compelling interest is promoting a generally diverse student body, an interest that is rooted in Justice Powell's opinion in *Bakke*. Several school districts have advanced educational diversity as an interest to justify race-conscious admissions and transfer policies, although the actual programs have not been as broadly defined as Justice Powell suggests in his *Bakke* opinion.

For example, in *Wessman v. Gittens,* the First Circuit addressed the constitutionality of a race-conscious admissions program for the Boston Latin School, a prestigious school whose selective admissions policy was comparable to a higher education admissions policy. Although educators argued that the program furthered an interest in promoting *Bakke*-type educational diversity, the program focused on race and ethnicity. The court assumed but did not decide that diversity could be a compelling interest, and struck down the policy on narrow tailoring grounds.

In *Tuttle v. Arlington County School Board,* the school board employed a race-conscious alternative school admissions policy based on its interests in (1) preparing students for a diverse society and (2) serving the needs of diverse students in the district. The policy looked at three equally weighted factors: (1) low-income status, (2) English-language ability, and (3) race or ethnicity. The court focused on the racial element of the program, assumed that diversity could be a compelling interest, and then struck down the policy based on narrow tailoring.

Legal and Evidentiary Questions. Because the educational diversity rationale grows out Justice Powell's opinion in *Bakke,* the application of educational diversity to K-12 settings is not entirely settled because of Justice Powell's reliance on First Amendment academic freedoms traditionally associated with colleges and universities. These freedoms may not apply at the elementary and secondary levels, where curricula are more uniform and teachers and administrators may have less discretion.

Nevertheless, evidence that parallels the documentation of educational benefits of diversity in higher education can be offered to support the argument that promoting K-12 diversity is a compelling interest. Arguably, the justification for upholding a diversity interest in elementary and secondary school is stronger than for upholding it in higher education, because of the larger body of social science research linking exposure to individuals of different backgrounds with beneficial effects for child development and for the overall quality of education.

An additional issue revolves around clarifying the distinction between racial diversity and "educational" or "true" diversity (*Bakke*-type diversity). For example, the court in *Tuttle v. Arlington County School Board* addressed an admissions policy in which race and ethnicity were weighed equally with two other factors, socioeconomic status and English-language ability. The court focused on the racial factors, however, to make its assumptions and to strike down the policy as a form of racial balancing. Under Justice Powell's *Bakke* analysis, race could be considered as one of several admissions factors. The *Tuttle* court looked at race as one of three factors, and focused its analysis on the racial factor. It is unclear whether such a heavy weighting of race within a multi-factor policy is consistent with a *Bakke* admissions approach.

e. *Promoting Educational Research*

In *Hunter ex rel. Brandt v. Regents of the University of California,* the Ninth Circuit upheld a race-conscious admissions policy designed to promote educational research. The school at issue was a laboratory school affiliated with UCLA that was engaged in conducting research relevant to the improvement of the state's public education system. The school asserted an interest in operating a research-oriented elementary school with a specific racial make-up in order to disseminate and apply the acquired information. The court held that the interest in educational research was a compelling interest. The facts in *Hunter* may be unique, but the case does provide general support for the argument that non-remedial interests can be compelling, as well as specific support for educational research programs that require a particular racial composition.

f. *Additional Interests*

There may be additional non-remedial interests that could be advanced as compelling interests, such as **"providing a quality education"** or **"providing equal educational opportunity."** These interests find support in state laws that mandate a free public education or state laws that require educational equity or equal opportunities to learn for students. The interests might be used to justify policies that employ traditional desegregation methods, such as transfers and magnet schools, as well as policies that set requirements for more equitable funding and access to resources. (Note, *The Constitutionality of Race-Conscious Admissions Programs in Public*

Elementary and Secondary Schools, 112 Harvard Law Review 940 (1999))

B. NARROW TAILORING

The narrow tailoring requirement examines the "fit" between the underlying goal of a race-conscious policy and the means used to achieve the goal. There is no single test for narrow tailoring, but the courts are particularly attentive to the necessity of a policy and the availability of race-neutral alternatives that might accomplish the same goals and objectives. If equally effective alternatives are available, the court will likely strike down the policy as not narrowly tailored.

Recent K-12 cases have struck down non-remedial policies that have been characterized as **"racial balancing,"** even though similar types of policies have been widely used as remedies in desegregation litigation.[1] (*Wessman v. Gittens; Tuttle v. Arlington County School Board; Eisenberg v. Montgomery County Public Schools*) However, one court, in upholding a voluntary interdistrict transfer program, has noted that "[i]f reducing racial isolation is -- standing alone -- a constitutionally permissible goal . . . , then there is no more effective means of achieving that goal than to base decisions on race." (*Brewer v. West Irondequoit Central School District*)

1. *Paradise* Factors

In *United States v. Paradise*, the U.S. Supreme Court analyzed narrow tailoring in the remedial employment context. The courts have adapted the *Paradise* factors to K-12 educational settings and typically employed the following inquiries:

- How necessary is the relief and are there alternative race-neutral policies that would effectively accomplish the same goal?
- What is the planned duration of the policy?
- What is the relationship of any numerical goals to the relevant student population?
- How much flexibility is there in the policy, including the provision of waivers?
- How great is the burden imposed by the policy on innocent third parties?

In applying the *Paradise* factors, some courts have indicated that a racial classification must have a logical stopping point and cannot continue in perpetuity (factor #2) and that outright racial balancing is not allowed (factor #3).

2. Narrow Tailoring and Diversity Interests

Some courts which have assumed that diversity is a compelling interest have relied on the *Paradise* factors, while other courts have drawn support from Justice Powell's opinion in *Bakke.* In *Bakke,* the Court struck down a medical school admissions policy that created a set-aside for minority students in which non-minority students could not compete. Justice Powell suggested,

[1] For instance, in September 2001, the Fourth Circuit, in *Belk v. Charlotte-Mecklenburg Board of Education,* upheld the constitutionality of a school district's magnet school program which was administered while the school district was under a desegregation court order and prior to a unitary status determination.

however, that race could be used a "plus" factor in an admissions policy that considered several factors designed to promote a diverse student body.

Consistent with *Bakke,* the courts have thus far suggested the following principles in evaluating whether a policy is narrowly tailored to promote an interest in K-12 diversity:

- a school should define the applicant pool as narrowly as possible and tailor the policy goal to that applicant pool
- a school can use race as a factor, but it should not be the sole factor that determines access for an individual student
- a school should not use rigid quotas, ratios, or racial balancing

A recent case involving diversity-based admissions in higher education may also provide some guidance on whether K-12 policies are narrowly tailored. In August 2001, in *Johnson v. Board of Regents of the University of Georgia,* the Eleventh Circuit offered a four-factor test based on the *Paradise* factors. The court's narrow tailoring inquiry focused on (1) whether the policy uses race in a rigid or mechanical way that does not take sufficient account of the different contributions to diversity that individual candidates may offer; (2) whether the policy fully and fairly takes account of race-neutral factors which may contribute to a diverse student body; (3) whether the policy gives an arbitrary or disproportionate benefit to members of the favored racial groups; and (4) whether the school has genuinely considered, and rejected as inadequate, race-neutral alternatives for creating student body diversity.

3. Burden Allocation in K-12 Settings

In weighing the burdens of race-conscious policies, the courts have been attentive to students' ability to access basic educational resources. However, unlike the higher education setting, students denied access to a particular elementary or secondary school through a race-conscious admission or transfer policy still have the opportunity to attend another public school. At least one court has distinguished *Bakke* in this respect. (*Brewer v. West Irondequoit Central School District*) The argument is weaker, though, when applied to magnet school programs in which there may be no equivalent alternative offered. (*Wessman v. Gittens; Hampton v. Jefferson County Board of Education*)

In addition, a claim of "merit" for a student who is denied access to a program is less in an elementary school setting than in a higher education setting, since students applying to college have accumulated several years of work and preparation. Therefore, there may be a lighter burden on third parties at the elementary and secondary school level, a burden which can be outweighed by the pedagogical ends in promoting a diverse student body or remedying the present effects of past discrimination.

GENERAL GAPS IN THE LAW AND EVIDENTIARY REQUIREMENTS

Because the courts have decided so few cases, and almost all of those cases have resulted in courts' striking down voluntary race-conscious programs, it remains unclear what evidence is sufficient for a court to uphold a program.

Courts facing a diversity interest - whether racial diversity or "true" diversity - have turned to cases from the higher education setting to answer the question. It is unclear whether such an approach is required or appropriate, given the differences in social science research, ages, and pedagogy that separate elementary and secondary school children from college-age adults.

One additional uncertainty comes from the *Hunter* case, which upheld a race-conscious admissions policy designed to promote educational research at a laboratory school. It remains unclear whether the holding will be limited to the unique facts of the case or whether there may be broader principles that will be useful in future litigation.

Citations:

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