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Drawing the Lines: Pushing Past *Arlington Heights* and *Parents Involved* in School Attendance Zone Cases

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DRAWING THE LINES: PUSHING PAST ARLINGTON HEIGHTS AND PARENTS INVOLVED IN SCHOOL ATTENDANCE ZONE CASES

I. INTRODUCTION

Racial segregation is increasing in the nation's public K-12 schools.1 Minority students, specifically Black and Latino youth, attend schools that are racially isolated from the schools of their white peers.2 Racially isolated schools are harmful for minority students. Voluminous social science evidence shows segregated minority schools have high teacher turnover, fewer educational resources, and lower educational outcomes.3 By contrast, integrated elementary and secondary schools benefit students of all races by reducing racial prejudice, promoting cross-racial understanding, improving critical thinking, and

1. See INST. ON RACE & POVERTY, UNIV. OF MINN., TABLE 6: PERCENTAGE DISTRIBUTION OF SCHOOLS BY RACIAL MIX IN THE 25 LARGEST METROPOLITAN AREAS: 1992-2002, available at http://www.iris-mn.org/ls/resources/projects/Dist_of_schools_in_25_largest_metros.pdf (showing the increase in school segregation for each of the twenty-five largest metropolitan areas in the United States); GARY ORFIELD & CHUNGMEI LEE, CIVIL RIGHTS PROJECT, RACIAL TRANSFORMATION AND THE CHANGING NATURE OF SEGREGATION 9 (2006), ("The percentage of black students attending majority nonwhite schools increased in all regions from 66 percent in 1991 to 73 percent in 2003-4."); ADAM TEFERA ET AL., INTEGRATING SUBURBAN SCHOOLS: HOW TO BENEFIT FROM GROWING DIVERSITY AND AVOID SEGREGATION 4 (2011) ("The racial segregation often associated with schools in the cities... is now spreading into parts of suburbia."); Erica Frankenberg & Chinh Q. Le, The Post-Parents Involved Challenge: Confronting Extralegal Obstacles to Integration, 69 OHIO ST. L.J. 1015, 1023-1027 (2008) (citing that in 2005-2006 28 percent of black students and 39 percent of Latino students were in schools were more than 90 percent of the students were minority).

2. See GARY ORFIELD & CHUNGMEI LEE, CIVIL RIGHTS PROJECT, HISTORIC REVERSALS, ACCELERATING RESSEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES 21 (2007) ("The average white student attends schools where 77 percent of the student enrollment is white... Black and Latino students attend schools where more than half of their peers are black and Latino (52% and 55% respectively)").

3. See Brief of 553 Social Scientists as Amici Curiae Supporting Respondents at 10-12, App. 31-40, Parents Involved in Cnty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (Nos. 05-908, 05-915). A large group of social scientists filed an amicus brief in Parents Involved, the most recent Supreme Court case on public school integration, which collected and summarized key social science evidence supporting mixed race schools.
enhancing life opportunities such as high school and college graduation and higher incomes. Across the country, many students, parents, and community members recognize the benefits of diversity and would like their public schools to embody these values. Responding to community needs, urban, suburban, and rural school districts seek to implement voluntary plans that will diversify the student bodies of their schools. However, these districts fear potential legal consequences that can result from such plans. This fear has risen since the U.S. Supreme Court decision in Parents Involved in Community Schools v. Seattle School District No. 1, where the Court struck down the voluntary integration plans of Seattle, Washington and Louisville, Kentucky. Despite this


5. See METRO. CTR. FOR URBAN EDUC., “WITH ALL DELIBERATE SPEED”: ACHIEVEMENT, CITIZENSHIP AND DIVERSITY IN AMERICAN EDUCATION 23 (2005) (finding that nearly three-fifths of survey respondents, including 60 percent of white parents, said they believed integrated schools were better for their children); GARY ORFIELD & ERICA FRANKENBERG, EXPERIENCING INTEGRATION IN LOUISVILLE: HOW PARENTS AND STUDENTS SEE THE GAINS AND CHALLENGES 25 (2011) (finding that 89 percent of parents think that the school district’s guidelines should “ensure that students learn with students from different races and economic backgrounds”).

6. There are no reliable estimates on the total number of school districts that currently have voluntary integration plans in place. However, many studies have looked at voluntary plans in effect after Parents Involved as examples. See, e.g., Erica Frankenberg, Integration After Parents Involved: What Does Research Tell Us About Available Options?, in INTEGRATING SCHOOLS IN A CHANGING SOCIETY: NEW POLICIES AND LEGAL OPTIONS FOR A MULTICULTURAL GENERATION 53 (Erica Frankenberg & Elizabeth Debray eds., 2011) [hereinafter INTEGRATING SCHOOLS] (discussing examples in Berkeley, CA, Capistrano, CA; TEFERA, supra note 1, at 27-33 (Louisville, KY, Monclair, NJ, Rock Hill, SC, Cambridge, MA); Danielle Holley-Walker, After Unitary Status: Examining Voluntary Integration Strategies for Southern School Districts, 88 N.C. L. REV. 877, 894-97 (2010) (providing data on the voluntary integration strategies of all post-unitary southern school districts since 2004).

7. See TEFERA, supra note 1, at 8-9 (cautioning a school district that it “must be careful as it explores the development and adoption of a comprehensive set of integrative school policies,” otherwise it may be “vulnerable to legal challenges”).

transformative decision, many school districts remain committed to finding constitutional methods to integrate their public schools.9 Using the case of Lower Merion School District in Montgomery County, Pennsylvania as an example, this Comment argues that even in a post-Parents Involved world there is space for school districts to embark on voluntary integration plans using school attendance zone lines.

In January 2009, the Lower Merion School District adopted a redistricting plan which redraw the attendance boundaries for the two district high schools.10 Nine African American students filed a complaint in federal district court alleging that the school district discriminated against them based on their race, taking away their choice to attend either of the two district high schools.11 On June 24, 2010, the district court found that the school district did not unconstitutionally discriminate on the basis of race and declared that the redistricting plan did not violate the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.12 The students appealed this decision.13 On December 14, 2011, the Third Circuit Court of Appeals affirmed the district court’s order, upholding the constitutionality of Lower Merion’s school assignment plan.14 According to news reports, the students intend to petition the U.S. Supreme Court for a writ of certiorari.15

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9. See Kimberly Jenkins Robinson, The Constitutional Future of Race-Neutral Efforts to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools, 50 B.C. L. Rev. 277, 279 (2009) ("Although some districts abandoned efforts to promote diversity after the Parents Involved decision, many school districts continue to pursue diversity but have adjusted their approach to doing so.").


11. Id.


Student Doe 1 v. Lower Merion School District is one of the first contemporary challenges to a school district's drawing of attendance zone boundaries in a manner that increases the diversity of the district high schools and decreases racial isolation. This Comment examines the racial discrimination issue presented in this case through the lenses of two constitutional structures. First, given that the redistricting plan can be viewed as facially race-neutral, this Comment will begin with an analysis under Arlington Heights, which is used to determine the constitutionality of a race-neutral law that is motivated by discriminatory intent and has a racially discriminatory impact. The second part of the Comment proceeds to examine the case under the structure outlined in Justice Kennedy's concurring opinion in Parents Involved, the Supreme Court's most recent case on the use of race in school reassignment plans. Under either analysis, this Comment concludes that school districts that seek to diversify their high schools may do so by redrawing local attendance zone boundaries. However, the two precedent cases provide both caution and structure to districts embarking on these redistricting plans.

This Comment seeks to assist school districts that aim to integrate their schools via attendance zone redistricting by highlighting potential legal problems posed by relevant Supreme Court precedents and by suggesting courses of action that avoid these legal pitfalls. Following these recommendations, school districts may be able to avoid costly legal battles such as the one brought against the Lower Merion School District, while maintaining their desired diversity plan. Even if the courts continue to uphold Lower Merion's plan, as of May 2010—only twelve months into what is now a three-year legal battle—the school district had spent over $1,120,000 in legal fees defending this case. Since then, the students appealed the district court decision, and the school district's

law firm defended the appeal in the Third Circuit, and may need to continue to defend the plan before the Supreme Court. Therefore, it is probable that at least another million dollars in legal fees have accrued in the two years since May 2010, and will continue to amass in the coming years. Given the alarming economic shortfalls faced by public schools across the country, school boards and taxpayers rightfully fear any unnecessary budgetary expenses, such as costly litigation, that shift money away from educational programs and teacher retention.\textsuperscript{19} In addition to their high cost, legal challenges to voluntary integration plans are increasing with alarming frequency. Foreseeing this trend, the dissenters in \textit{Parents Involved} recognized that the plurality's exceptional decision to strike down the school districts' use of race would lead to an increase in school-based integration litigation.\textsuperscript{20} A simple search of federal district court cases in the five years since \textit{Parents Involved} turned up over one hundred cases challenging plans similar to Lower Merion's.\textsuperscript{21} This is not to suggest that school districts forgo attendance line integration plans to avoid litigation. Instead, this Comment hopes to identify precautions that districts can take to avoid probable and costly litigation resulting from their plan. Drawing on this guidance, school districts and their constituents can ensure tax dollars are

\textsuperscript{19} See Sam Dillon, \textit{Tight Budgets Mean Squeeze in Classrooms}, N.Y. TIMES, Mar. 7, 2011, at A1, available at http://www.nytimes.com/2011/03/07/education/07classrooms.html ("Millions of public school students across the nation are seeing their class sizes swell because of budget cuts and teacher layoffs."); see also Sylvanus Bowser, Comment to \textit{Legal Fees Mount for LMSD}, \textbf{MAIN LINE TIMES}, Aug. 12, 2010, http://www.mainlinemedianews.com/articles/2010/08/12/main_line_times/news/doc1c62bd0f7bda151351309.txt ("Teacher layoffs, program cuts during this Depression, and a district that has the nerve to provide all the students with laptops is forced to spend, spend, spend, on a herd of lawyers, as punishment.").

\textsuperscript{20} \textit{Parents Involved}, 551 U.S. at 861 (2007) ("At a minimum, the plurality's views would threaten a surge of race-based litigation. Hundreds of state and federal statutes and regulations use racial classifications for educational or other purposes. In many such instances, the contentious force of legal challenges to these classifications, meritorious or not, would displace earlier calm.").

\textsuperscript{21} Search of federal district court cases completed on Westlaw on March 10, 2012. One notable voluntary integration plan that is strikingly similar to Lower Merion's is that of Ascension Parish School District in Southeast Louisiana, which was challenged in \textit{Lewis v. Ascension Parish Sch. Bd.}, 662 F.3d 313 (5th Cir. 2011). See also Robinson, supra note 9, at 281-82 (noting potential legal challenges to attendance zone line redistricting plans in Milton, Massachusetts and Bibb County, Georgia).
expended on educational improvements, and not legal fees. While parents and students can benefit from the diversity that results from the district plan.

This Comment proceeds in four parts. To begin, the Comment provides a detailed account of the relevant facts from the Lower Merion School District case in Part II.22 This section allows school districts to compare their demographics and plan to those from Lower Merion in order to identify the relevant elements of the subsequent legal analysis. Next, in Part III, the Comment completes an analysis of the attendance zone redistricting plan using the Arlington Heights framework, identifying the lessons all school districts can learn from the Lower Merion example.23 Part IV continues with a legal analysis under Parents Involved, focusing on Justice Kennedy’s concurrence and the two points of caution he reiterates.24 Specifically, under Kennedy’s inquiry, school districts must look carefully at whether their plan may stigmatize a group of students and whether the diversity the district seeks is sufficiently inclusive. Finally, the Comment takes a holistic view of districts pursuing attendance zone line integration plans, balancing the points of legal caution mentioned throughout the Comment with district needs to respond to a community interested in and committed to integration. This final part seeks to balance the constitutional constraints on school districts’ use of race against Justice Kennedy’s aspiration that school districts “continu[e] the important work of bringing together students of different racial, ethnic, and economic backgrounds.”25

II. STUDENT DOE 1 V. LOWER MERION SCHOOL DISTRICT

Lower Merion is a suburb of Philadelphia and has approximately 62,000 residents.26 The school district serves

25. Id. at 798 (Kennedy, J., concurring).
7,300 students in grades kindergarten to twelve.\textsuperscript{27} The district schools rank among the highest in Pennsylvania on SAT and PSAT scores, Advanced Placement participation rates, and total number of National Merit Semifinalists and International Baccalaureate diplomas.\textsuperscript{28} Approximately 94 percent of Lower Merion high school graduates attend institutions of higher learning.\textsuperscript{29}

Lower Merion School District operates six elementary schools, two middle schools, and two high schools.\textsuperscript{30} Both high schools, Harriton High School and Lower Merion High School, are ranked as among the best in the state.\textsuperscript{31} The nine-member elected school board is in charge of drawing the district attendance zone lines with input from the school administration including the superintendent.\textsuperscript{32}

In December 2009, the two district high schools served 2,298 students. Approximately 80 percent of the students were white, 11 percent African American, 6 percent Asian American, 2 percent Hispanic, and .4 percent American Indian.\textsuperscript{33} Only two neighborhoods in the district, North Ardmore and South Ardmore, contain heavy concentrations of African American families with school age children.\textsuperscript{34}

Prior to redistricting, 46 African American students, or 5.7 percent, attended Harriton High School, which had a student population of 805 students, and 204 African American

\textsuperscript{27} Id.
\textsuperscript{28} Id.
\textsuperscript{29} Id. \textit{See also} Lower Merion SD, PENNSYLVANIA DEPARTMENT OF EDUCATION, ACADEMIC ACHIEVEMENT REPORT: 2010-2011, http://paayp.emetric.net/District/Overview/c16/123464502?schoolID (last visited Mar. 10, 2012) (providing an online version of Lower Merion School District’s report card showing that the district met all but two of its Academic Yearly Progress goals in 2010-11).
\textsuperscript{31} Id. at *8.
\textsuperscript{32} Id. at *7-8.
\textsuperscript{33} Student Doe 1 v. Lower Merion Sch. Dist., 689 F. Supp. 2d 742, 745 (E.D. Pa. 2010).
\textsuperscript{34} Student Doe 1, 2010 U.S. Dist. LEXIS 47051, at *13. On September 2008, South Ardmore had 308 students in Lower Merion schools, of which 140 were white, 140 were African American, 9 were Asian American, and 18 were Hispanic American. North Ardmore had 167 school age children, of which 32 were white, 107 were African American, 12 were Asian American and 16 were Hispanic American. Id. at n.2.
students, or 13.6 percent, attended Lower Merion High School, which had 1,493 total students. Both North and South Ardmore were districted for Lower Merion High School, but students had the choice to attend Harriton.

Generally, under this original plan, students districted to any one of three elementary schools would move together onto one of the middle schools and then onto one of the high schools, ensuring continuity of the student population from elementary through high school. However, despite this "3-1-1 feeder plan," any student districted to attend Lower Merion High School had the choice to attend Harriton. In addition, Harriton offered two magnet programs, an International Baccalaureate program and a college-level program, designed to attract more students. Nevertheless, the populations of the schools remained unequal. Some of the discrepancy may be explained by the existence of a historic walk zone around Lower Merion High School. Since 1983, any student who lived within the walk zone was eligible to attend Lower Merion High School, even if the student's neighborhood was districted for Harriton.

In 2004, the district recognized that both high schools were outdated and needed significant infrastructure investments. The school board convened a Community Advisory Committee, which voted in favor of a plan to build two new high schools of equal enrollment capacity. The Committee reasoned that the smallest possible schools have pedagogical benefits including providing all students with equitable access to programs, facilities, courses, and cocurricular activities, in addition to alleviating traffic and parking problems. The school board accepted the Committee's plan, but recognized that this plan would require redistricting in order to eliminate the population

35. Id. at *20.
36. Id. at *14.
37. Id. at *20-21. For example, students districted to attend Belmont Hills, Gladwyne, or Penn Valley Elementary Schools would attend Welsh Valley Middle School and then go on to attend Harriton High School.
38. Id. at *21.
39. Id.
40. Id. at *22, *61-65.
41. Id. at *19.
42. Id. at *19-20.
disparity between the high schools.\textsuperscript{43}

In preparation for the lengthy redistricting process, the school board created a list of "non-negotiables" to guide them.\textsuperscript{44} The five non-negotiables were: (1) high school enrollment will be equalized, (2) elementary schools will be at or under capacity, (3) the plan will not increase the number of required buses, (4) the class of 2010 will have the choice to follow the plan or attend their original high school, and (5) redistricting will be based on current and expected needs.\textsuperscript{45} In addition to the non-negotiables, the district compiled a list of community values from Lower Merion residents. One of the community values included "explor[ing] and cultivat[ing] whatever diversity-ethnic, social, economic, religious and racial-there is in Lower Merion."\textsuperscript{46}

The redistricting process lasted over eighteen months. The district administration considered eight scenarios prepared by a consultant, and they presented four of these to the school board.\textsuperscript{47} All eight scenarios determined what high school each student in the district would attend based on where the student lived. The school board voted on only one plan, Plan 3R, and it passed in a six to two vote.\textsuperscript{48}

In its consideration of several plans, the administration analyzed projected student data on racial composition, socioeconomic status, and disability.\textsuperscript{49} At times, the data prepared and presented focused specifically on the projected population of African American students.\textsuperscript{50} In addition, some of the proposed scenarios were eliminated due, at least in part, to "inequitable racial balancing," in which all of the African American students in the district were zoned to one of the high

\textsuperscript{43} Id. at *20.  
\textsuperscript{44} Id. at *22.  
\textsuperscript{45} Id. at *23-24.  
\textsuperscript{46} Id. at *25. The remaining Community Values were: (1) "Social networks are at the heart of where people live, and those networks expand as people grow older;" (2) "Lower Merion public schools are known for their excellence: academic as well as extracurricular;" (3) "Those who walk should continue to walk while the travel time for non-walkers should be minimized;" and (4) "Children learn best in environments when they are comfortable—socially as well as physically." Id.  
\textsuperscript{47} Id. at *29-30.  
\textsuperscript{48} Id. at *71.  
\textsuperscript{49} Id. at *32-34.  
\textsuperscript{50} Id. at *32.
In all four of the proposed plans considered by the school board, either, but not both, North Ardmore or South Ardmore—the two geographic areas with the highest concentrations of African American students—were redistricted to attend Harriton High School. Other considerations that played into the school board decisions to reject proposed plans included excessive travel time for students, educational continuity from kindergarten through high school, and maintaining students’ ability to walk to their local high school.

Throughout the redistricting process, community members, school board members, and school administrators made comments orally and in writing regarding the proposed plan’s effect on racial composition. On its website, the district posted slides containing information on each of the proposed redistricting scenarios. However, the slides containing the diversity data, which were presented to the administration, were purposefully removed from the online postings. In addition, several emails between board members and the superintendent discussed the effects the proposed plans would have on racial isolation of students from North and South Ardmore.

After the school board considered, opened up for public

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51. Id. at *35-37.
52. Id. at *80-81. As such, under each proposed plan, the projected African American population numbers for Harriton High that the school board examined showed an increase from 46 students to anywhere between 74 and 100 African American students depending on the plan. Id. at *81.
53. Id. at *48.
54. Id. at *52 ("Educational continuity means that students who attend the same kindergarten, continue to grade twelve, rather than having the group of students who attend one elementary school split up between the District’s two middle schools, or having the group of students who attend one middle school split up between Harriton and Lower Merion High Schools.").
55. Id. at *62.
56. Id. at *44-46.
57. Id. at *56. For example, in a November 20, 2008 email from the Superintendent to a school board member he “vent[ed] frustration” because he was “concerned about the Ardmore side of the map” and “the ‘history gotcha’ tied to the achievement gap tied to redistricting.” He wrote that he “wish[ed] there was a way to extend the option area into [South Ardmore] but doing so would not only mean another hundred at Lower Merion High School but many fewer African American kids at Harrington.” Id.
comment and eventually rejected three plans, the school board finally voted to adopt Plan 3R on January 12, 2009. Based largely on community input, Plan 3R continued a “3-1-1 feeder pattern.” However, under the new pattern, students in South Ardmore and two other predominantly white neighborhoods were now districted for Harriton High School, instead of Lower Merion High. Students could receive an exemption from the feeder pattern if (a) they lived within the historic walk zone of Lower Merion High School or (b) they wanted to enroll in either of Harriton’s magnet programs. However, students in South Ardmore and other areas districted for Harriton High School outside of Lower Merion’s walk zone did not have a choice of high school. The plan also included “grandfathering,” which allowed students who were already enrolled in high school to complete their education at that school.

For the 2009-2010 school year, the first year after Plan 3R went into effect, 897 students were enrolled at Harriton High School, of which 740 were white, 74 were African American, 55 were Asian American, 23 were Latino, and 5 were American Indian. Lower Merion High School had 1,401 students, of whom 434 were white, 107 were African American, 145 were Asian American, 58 were Latino, and 6 were American Indian.

58. Id. at *71.
59. Id. at *59-60. In discussing their reasons for adopting a feeder pattern, board members found it enabled students to “transition more easily” from elementary, to middle and high school, and it “permitted teachers at the middle and high schools to become knowledgeable about what their students previously learned and to build upon that foundation.” Id. at *60.
60. Id. at *64. Essentially, Plan 3R shifted the Penn Valley Elementary School students to a feeder pattern which culminated at Harriton High School instead of Lower Merion High School. See Student Doe 1 v. Lower Merion Sch. Dist., 689 F. Supp. 2d 712, 745 (E.D. Pa. 2010).
61. Student Doe 1, 2010 U.S. Dist. LEXIS 47051, at *64. The historic walk zone extends outward from Lower Merion High School up to a radius of one mile. The walk zone does not include North or South Ardmore and does not have a high concentration of African American families. Id.
62. Id. at *65.
63. Id. at *66. South Ardmore was not within the historic walk zone, therefore, they could not elect to attend Lower Merion High School. Also, since students in South Ardmore already were designated to attend Harriton high school, there was no need to transfer to benefit from the magnet programs.
64. Id. “Grandfathering” only affected students enrolled in 9th through 12th grade in school year 2009-10. Therefore, grandfathering will be entirely phased out by school year 2013-14.
65. Id. at *76.
which 1,098 were white, 176 were African American, 90 were Asian American, 29 were Latino, and 4 were American Indian. During this year, the restricting plan affected 21 students from South Ardmore 14 of which were African American. In addition, 23 students from other neighborhoods were redistricted, none of whom were African American. Thus, about one third of the redistricted students from South Ardmore were African American.

The nine plaintiffs are African American students living in South Ardmore. Prior to the plan, plaintiffs were districted for Lower Merion High School and had the choice to attend Harriton if they so desired. Under the new redistricting plan, they are required to attend Harriton High School. Plaintiffs contend that the school district discriminated against them based on their race by adopting a redistricting plan that removed their ability to choose to attend either of the high schools. They contend these actions violate the Equal Protection Clause of the Fourteenth Amendment as well as several statutory provisions not at issue in this Comment.

Procedurally, the District Court for the Eastern District of Pennsylvania denied Lower Merion’s motion for summary judgment. Subsequently, a nine-day bench trial was held where the parties presented twenty-eight witnesses. At the conclusion of trial, the district court issued findings of fact and conclusions of law in favor of defendant, Lower Merion.

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66. *Id.*
67. *Id.* at *77.*
68. *Id.*
69. *Id.*
70. *Id.* at *2.*
71. *Id.*
72. *Id.*
73. *Id.*
School District. After finding that race was a motivating factor in the school board’s decision to adopt the redistricting plan, the district court applied strict scrutiny and held that Plan 3R was narrowly tailored to compelling state interests.78

Plaintiffs appealed the district court’s decision.79 Interested parties and the government filed three amicus briefs.80 The Third Circuit handed down its decision on December 14, 2011, upholding Lower Merion School District’s redistricting plan as not being in violation of the Equal Protection Clause.81 The Court of Appeals found that race was not a motivating factor in the school board’s adoption of Plan 3R, nor was there a disproportionate impact on African American students.R2 Therefore, the court applied only rational basis review and held that Plan 3R is rationally related to legitimate government interests.s:i

III. ARLINGTON HEIGHTS ANALYSIS: DISPROPORTIONATE IMPACT AND DISCRIMINATORY INTENT

In the circumstances of a facially race-neutral law or policy purportedly motivated by racially discriminatory purpose, the Supreme Court applies an analysis initially set forth in the 1977 case Village of Arlington Heights v. Metropolitan Housing Development Corp.84 In Arlington Heights, the plaintiffs submitted a request to the Village to rezone a fifteen-acre

78. Id. at *29-51.


81. Student Doe 1 v. Lower Merion Sch. Dist., 665 F.3d 524, 530 (3d Cir. 2011).

82. Id. at 549-555.

83. Id. at 556-57.

parcel of land from single-family to multi-family dwellings in order to allow the building of apartments for low- and moderate-income families. The city council denied the zoning request. Although the denial was facially neutral because it contained no mention of race, the plaintiffs claimed it was racially motivated to exclude minorities from the neighborhood. First, the court found that the "Village's decision does arguably bear more heavily on racial minorities," noting that 40 percent of the eligible tenants were racial minorities although they comprised only 18 percent of the population. Next, the Court found that the city council was not motivated by a discriminatory intent, as the rezoning request followed usual procedures and the policy justifications offered were standard zoning criteria, not racial considerations.

The resulting two-pronged Arlington Heights analysis considers a race-neutral decision to determine if it (1) resulted in a disproportionate impact on minority groups, and (2) was motivated by discriminatory intent or purpose. Although the analysis dates back to 1977, it has continuing force in cases of race-neutral laws, having been cited frequently by the Supreme Court in redistricting cases, including Justice Kennedy's opinion in *Parents Involved in Community Schools v. Seattle School District No. 1.* Several lower federal courts in addition

86. *Id.* at 269.
87. *Id.* at 269-70.
88. *Id.* at 264-66.
89. *See, e.g.*, City of Cuyahoga Falls v. Buckeye Cnty. Hope Found., 538 U.S. 188, 189 (2003) (holding that the respondents' claim of injury resulting from a referendum petitioning process was not unconstitutional because respondents could not show discriminatory intent as required by *Arlington Heights*); Easley v. Cromartie, 532 U.S. 234 (2001) (finding that race did not impermissibly drive the legislature's redistricting decision in conformity with the standard in *Arlington Heights*).
90. *See* Bush v. Vera, 517 U.S. 952 (1996) (plurality opinion), a voter redistricting case, for the proposition that "[s]trict scrutiny does not apply merely because redistricting is performed with consciousness of race. . . . Electoral district lines are 'facially race neutral' so a more searching inquiry is necessary before strict scrutiny can be found applicable in redistricting cases than in cases of classifications based explicitly on race." *Id.* at 958 (citing *Arlington Heights* v. Metro. Haus. Dev. Corp., 429 U.S. 252 (1977)). Therefore, Justice Kennedy's reliance on *Vera* is a circuitous means of citing the framework used in *Arlington Heights* for race-
to the district court and court of appeals in Lower Merion have also relied on the Arlington Heights framework to examine a school district’s race-neutral policies. Therefore, the Arlington Heights analysis has continuing validity for contemporary school districts seeking to employ a race-neutral redistricting plan.

In the instant case, Lower Merion’s redistricting plan did not include an explicit mention of race, instead zoning students to particular schools on the basis of their residential neighborhoods. Nevertheless, the plaintiffs argue that this facially race-neutral policy was motivated by a racially discriminatory purpose, making an Arlington Heights analysis appropriate.

A. Disproportionate Impact on Minorities

Under an Arlington Heights framework, the court first looks at whether the decision or chosen plan has a disproportionate impact on a minority group—African Americans in Lower Merion’s case. Just as in Arlington Heights where the Court found disparate impact when 40 percent of the affected individuals were African American, but were only 18 percent of the population, here, disproportionate impact may be shown because one-third of the students affected by redistricting in 2009 were African American,
although they comprised only one-tenth of the district.95

By way of counter argument, in the affected area of South Ardmore, an equal number of African American and white students—140 each—were affected by redistricting.96 Moreover, the redistricted areas outside South Ardmore were substantially white, reducing the proportion of African American students, as compared to white students, that were affected.97 Therefore, the argument goes, since only one-third of the affected students were African American and two-thirds were white, there was not a disproportionate impact on minority students.98 However, in a district where over 80 percent of the students are white, almost any plan will involve redistricting a larger percentage of white students than nonwhite students.99 Thus, this comparison cannot be the correct one. Instead, the percentage of affected African American students, one-third, should be compared to the total percentage in the district, one-tenth. In accordance with Arlington Heights, if the percentage of minorities affected is disproportionate to the total percentage in the population, than the plan will be found to have a disproportionate impact.100

Another potential counter argument is that approximately equal numbers of African American students lived in the neighborhoods that were and were not redistricted. That is,

96. Id. at *14 n.2.
97. See supra note 34 and accompanying text.
98. See Student Doe 1 v. Lower Merion Sch. Dist., 665 F.3d 524, 550 (3d Cir. 2011) (making this argument).
99. Even the proposed plans that redistricted both North and South Ardmore redistricted a substantial portion of nonwhite students. See Student Doe 1, 2010 U.S. Dist. LEXIS 47051, at *31.
100. Arlington Heights, 429 U.S. at 269. In the Lower Merion case, the Third Circuit applied a different test to find there was no disproportionate impact. Citing no authority in support, the court stated that in order to find a disproportionate impact plaintiffs “must show that similarly situated individuals of a different race were treated differently.” Student Doe 1, 665 F.3d at 550. Applying this test, the court found that there was no disproportionate impact because white students in South Ardmore were also affected by the redistricting plan. Id. Given that no support for this test exists in Arlington Heights, it was not applied here. Moreover, under the analysis supplied by the Third Circuit, only a plan that redistricted solely African American students would be found to have a disproportionate impact. This takes the Supreme Court’s disproportionate impact test too far.
140 African American students in South Ardmore were redistricted, while 107 African American students in North Ardmore were not.\textsuperscript{101} Therefore, African Americans were not disproportionately impacted, since almost 50 percent of African American students were unaffected by the redistricting plan.\textsuperscript{102} Again, this argument fails to apply the test used in \textit{Arlington Heights}. Instead of comparing the minority percentage affected against the total minority percentage, it compares the projected minority percentages affected and unaffected. Moreover, using the neighborhood numbers projected to be affected by redistricting further bolsters the disproportionate impact under the \textit{Arlington Heights} test. If nearly 50 percent of the African American student population is eligible for redistricting under the plan, that is substantially disproportionate to the 10 percent of the student population that is African America. Yet “official action will not be held unconstitutional solely because it results in a racially disproportionate impact.”\textsuperscript{103}

B. Discriminatory Intent

Because a racially disproportionate impact alone is insufficient, the court must next determine whether a majority of the body that issued the law or policy—the school board in the case of Lower Merion—possessed a discriminatory intent.\textsuperscript{104} Discriminatory intent “implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’” the action’s beneficial or adverse effects “upon an identifiable group.”\textsuperscript{105} Despite the amici urging otherwise,\textsuperscript{106} the Court

\textsuperscript{101} See supra note 34.

\textsuperscript{102} See \textit{Student Doe 1}, 665 F.3d at 550 (making this argument by stating that there is no evidence that “Plan 3R treats black individuals outside of [South Ardmore] in the same way in which it treats Students Doe or other black individuals who live in [South Ardmore].”).

\textsuperscript{103} \textit{Arlington Heights}, 429 U.S. at 264-65.

\textsuperscript{104} \textit{Id.} at 265 (“Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.”). See also \textit{Student Doe 1}, 665 F.3d at 551 (stating the same).

\textsuperscript{105} Pers. Adm’r of Mass. V. Feeney, 412 U.S. 256, 279 (1979). See also \textit{Student Doe 1}, 665 F.3d at 551-52 (stating the same).

\textsuperscript{106} See Brief for NAACP, \textit{supra} note 80, at 20 (stating incorrectly that the
has consistently held that a discriminatory intent may consist of either benign uses of race designed to integrate or invidious reliance on race designed to segregate. The Court requires that a discriminatory intent be a "motivating factor" in the decision to select the chosen attendance boundaries. This determination "demands a sensitive inquiry into [the] circumstantial and direct evidence of intent." In this case, the most relevant factors involved in the inquiry are the historical background of the decision, the specific sequence of events leading up to the redistricting plan, and the legislative history, including statements by members of the school board, school administration, and consultants. Nonetheless, "conscious awareness on the part of the [decisionmaker] that the [policy] will have a racially disparate impact does not invalidate an otherwise valid law, so long as that awareness played no causal role' in the adoption of the policy."

Several facts may point to race being an integral, if not motivating, factor in the school board’s decision to adopt Plan 3R. First, all of the proposed plans redistricted one of the two heavily African American neighborhoods, indicating that the racial outcome was key to their choice of plan. Second, under principles set forth in Arlington Heights were designed only to "ferret[] out when government actions are motivated by segregative intent or an otherwise invidious discriminatory purpose.").

107. See, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) ("Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."); Johnson v. California, 543 U.S. 499, 506 (2005) (citing Croson for the same); Adarand Constructors v. Pena, 515 U.S. 200, 227 (1995) (same). See also Student Doe 1, 665 F.3d at 552 ("Racially discriminatory purpose means that the decisionmaker adopted the challenged action at least partially because the action would benefit or burden an identifiable group."). Cf. Bush v. Vera, 517 U.S. 952, 958-60 (1996) (applying the Arlington Heights framework and finding that race was a "predominant factor" in the facially race-neutral redistricting process where the intent was to create additional minority voting districts).


109. Id. at 266.

110. Id. at 267-268 (listing the factors to be considered when looking for a discriminatory intent).

111. Student Doe 1, 665 F.3d at 552 (citing Pers. Adm'r of Mass. v. Feeney, 112 U.S. 256, 279 (1979)).

the chosen plan, the projected racial composition included nearly a ten-percent population of African American students at both Harriton and Lower Merion, showing a planned racial balance between the schools. Third, e-mails and conversations between decision-makers show a concerted effort to combat racial isolation at both schools. Fourth, the school board’s focus on the African American student population data in the proposed scenarios highlights its focus on race from the outset. Lastly, at least some of the proposed scenarios were wholly eliminated due to their failure to foster sufficient racial diversity, which was highlighted by the community as a value it sought to encourage by way of the redistricting process. While consideration of racial data alone is likely not enough to show that race was a motivating factor, the continuous return to racial considerations throughout the redistricting process may rise to the level of a discriminatory purpose.

On the other hand, race may not have been an impermissible motivating factor. Rather, race may have been one consideration among many, more imperative race-neutral concerns, addressed only in response to the community’s expressed interest in racial diversity and to tackle the achievement gap between African American students and students of other races in Lower Merion. First, race was not

113. Id. at *31.
114. For a summary of the relevant e-mails showing discriminatory intent, see Brief and Appendix at 32-34, Student Doe I v. Lower Merion Sch. Dist., 665 F.3d 524 (3d Cir. 2011) (No. 10-3824), 2010 WL 5557616.
116. Id. at *27-28, *36.
117. See Student Doe I v. Lower Merion Sch. Dist., 665 F.3d 524, 553 (3d Cir. 2011) ("Awareness of [racial demographic] data or omitting such data, however, does not constitute discriminatory intent.") (citing Pers. Adm’r of Mass. V. Feeney, 412 U.S. 256, 279 (1979)); Student Doe I, No. 09-2095, 2010 U.S. Dist. LEXIS 47051 at *55 ("[T]he Court rejects Plaintiffs’ contention that providing diversity data is itself evidence of discrimination. The record shows that the Board Members wanted to be made aware of the effects that various plans would have on diversity, in general, given that the community had expressed an interest in such information."). See also No Child Left Behind Act of 2001, 20 U.S.C. § 6311(b)(2)(C)(v) (2001) (requiring each state and school district to report and be held accountable for the disaggregated achievement of “economically disadvantaged students; students from major racial and ethnic groups; students with disabilities; and students with limited English proficiency.").
a sufficient motivating factor, but merely one of several factors that played into the overall redistricting decision. Like in *Arlington Heights* where the Court found that the usual zoning criteria were the board’s primary concerns, here, race-neutral factors played an equal or more dominant role in redistricting, including the district and community interest in maintaining the 3-1-1 feeder patterns, avoiding excessive travel time for students, equalizing the student population at the two high schools, and maintaining the historic walk zone.\(^{119}\) Second, the decision to redistrict was not motivated by an interest in reapportioning the African American population, but rather was born out of recognition that the district high schools were outdated and needed modernization and replacement.\(^{120}\) Third, consideration of racial demographics or racial outcomes by the board members may not rise to the level of discriminatory intent because “conscious awareness ... that the policy will have a racially disparate impact does not invalidate and otherwise valid law.”\(^{121}\) Finally, race was considered in response to the community’s expressed interest in achieving racial diversity and lessening the achievement gap between African American students and students of other races in the district.\(^{122}\) In its amicus brief, the United States supported the school district’s consideration of the racial impact of the plan because it “helps ensure the creation of diverse classrooms that often will promote cross-racial understanding and tolerance while reducing racial prejudice and the experience of minority students as ‘token’ representatives of their race.”\(^{123}\) Thus, the school board’s consideration of race during the redistricting process may have been “an attempt not to discriminate on the basis of race.”\(^{124}\)

\(^{119}\) *See Student Doc 1.*, 665 F.3d at 552 (arguing that the presence of these race-neutral objectives led to the conclusion that Plan 3R was not selected based on a discriminatory purpose); Brief for the United States, *supra* note 80, at 28 (listing the non-race objectives sought by the school district to argue that “the racial impact of the plans was only one consideration among many in rezoning students”).

\(^{120}\) *See Student Doc 1*, 665 F.3d at 553.

\(^{121}\) *Id.* at 552-53 (citing Pers. Adm’r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)). *See also* United States v. Hays, 515 U.S. 737, 744 (1996) (noting that the decisionmaker “always is aware of race when it draws district lines”).

\(^{122}\) Student Doc 1, No. 09-2095, 2010 U.S. Dist. LEXIS 47051, at *8-9, *12.

\(^{123}\) Brief for the United States, *supra* note 80, at 20.

\(^{124}\) *See Student Doc 1*, 665 F.3d at 553.
Given that there are credible arguments on both sides of the discriminatory intent analysis, it is difficult to determine whether the school board formulated or adopted Plan 3R at least in part because of the plan’s beneficial or adverse effects upon African American students. Drawing the line between whether school board members were simply “aware” of or “considered” race, which is presumptively valid, versus whether race was a “caus[e]” of school board members’ adoption of the chosen policy, which is presumptive invalid, can be very a very fact intensive process open to differing interpretations. The Third Circuit found that the school board’s adoption of the plan was not motivated by a racially discriminatory intent, deferring to the district court’s finding that the Board members credibly testified that race was not the basis of their votes for Plan 3R. This discriminatory intent holding in conjunction with their earlier finding that the redistricting plan did not have a disproportionate impact led the Third Circuit to apply rational basis review, asking only whether “Plan 3R is reasonably related to a legitimate state interest...” However, given the same facts, the district court—and perhaps even the Supreme Court—was persuaded that a majority of the board voted for the plan for a racially discriminatory purpose. Thus, the board’s action must meet strict scrutiny—the court’s most demanding standard of review. At various times, the Supreme Court has referred to strict scrutiny as “strict in theory, but fatal in fact,” indicating the Court’s struggle to uphold a law once it decides that strict scrutiny applies.

C. Lessons from Arlington Heights

One way for school districts to ensure that their

125. Id. at 548.
126. Id. at 552.
127. Id. at 554-55.
128. Id. at 556.
redistricting diversity plans are not challenged in court or struck down under a strict scrutiny analysis is to avoid a finding that race was a "motivating factor" in their decisionmaking process. Four lessons from the Lower Merion School District are instructive here. First, school districts should avoid e-mail conversations, public statements, and press releases which could lead an objective observer to conclude that a plan was chosen solely or primarily because of its racial outcomes. In the Lower Merion case, candid e-mails between the superintendent and the redistricting consultant were offered by the plaintiffs to show that the administration was cognizant that its racially laden decisions were questionable. This warning is not intended to induce racial silence or ignorance of racial outcomes, but to provide a word of caution to board members and school administrators to think carefully about all communication relating to racial issues. As seen by the different interpretations provided by the district court and Third Circuit, public or private communications concerning race can be understood and interpreted many ways. Therefore, clarity of thought and process in these communications is key.

Second, school districts should provide multiple non-race-related criteria for the elimination, as well as selection, of redistricting plans. For example, in Lower Merion, the district court and Third Circuit were able to find support for their decisions to uphold the redistricting plan because the school board considered many non-race-related factors in its selection of Plan 3R, including student travel time, school size equalization, and educational continuity from kindergarten through twelfth grade. These considerations are not

132. Student Doe 1, No. 09-2095, 2010 U.S. Dist. LEXIS 47051, at *37-10 (describing an e-mail written by the superintendent to the consultant asking, "How does our plan connect to [the Parents Involved] decision if we split Ardmore for high school?") The consultant responded by offering to "create a 'color blind' scenario.").

133. Compare id. at *36-37 (finding that testimony that scenario 1 was "eliminated due to inequitable racial balancing" meant that the scenario was "eliminated due to race") with Student Doe 1, 665 F.3d at 553 (finding that elimination of scenario 1 "due to inequitable racial balancing could indicate that the Administration did not... treat students differently on the basis of race....") (emphasis added).

134. Student Doe 1, No. 09-2095, 2010 U.S. Dist. LEXIS 47051, at *50; Student Doe 1, 665 F.3d at 552.
exclusive. Districts should document and give thorough weight to any rational and legitimate race-neutral objectives identified by students, families, teachers, administrators, and community members, such as teacher retention, public transportation routes, or curricular offerings. Furthermore, districts should be explicit about the multiple reasons for rejecting a considered plan and should identify compromises made between interested parties in the final selection of a plan. Because “the majority of Board members’ discussion regarding Lower Merion redistricting focused on neutral factors,” the Third Circuit was comfortable upholding its plan. However, had Lower Merion been more explicit about its race-neutral considerations throughout the process instead of waiting until trial to reveal them, the school district may have avoided litigation.

Third, the greater the number and variety of plans considered, the less likely that potential plaintiffs will identify a pattern of race-related goals. For example, the Third Circuit praised the Lower Merion administration for considering, but eventually rejecting multiple scenarios that would have redistricted both North and South Ardmore. Nevertheless, the four plans that were reviewed by the school board all redistricted at least one of the two heavily African American populated neighborhoods. To avoid insinuation that race was a motivating factor and potentially avoid litigation, Lower Merion could have brought plans before the board and community that did not disrupt the attendance of these neighborhoods. Even if these plans were eventually eliminated, public consideration of racially benign plans would provide additional evidence that the school board was intent on examining all redistricting options, not only those with preordained diversity outcomes.

This suggestion includes the added benefit of providing stakeholders and community members with opportunities to comment on plans that otherwise may be discussed only in private session or not at all. Multiple opportunities for public comment on diverse plans may help stymie feelings of

135. Student Doe 1, 665 F.3d at 554.
136. Id. at 553.
disparate impact or maltreatment by local interest groups. In turn, after having their own voices heard and listening to valid points in opposition, community members may be less likely to pursue litigation at the conclusion of the process, having participated in a sufficient airing of grievances. More generally, public discussion of multiple scenarios may uncover new community needs and help school boards stay in touch with constituent concerns.

Lastly, it is important to remind board members and decisionmakers that diversity is not merely racial or ethnic. Diversity, if and when considered, encompasses many aspects and should be considered throughout the process as one of many elements comprising an effective redistricting plan. As expressed by Justice Powell, plans that promote the value of diversity must "encompass a far broader array of qualifications and characteristics, of which racial or ethnic origin is but a single though important element."138

The Lower Merion school administration initially considered data only on African American student populations in examining the first four scenarios,139 and the district court was suspect of the school administration's use of this limited notion of diversity.140 However, when the school board began reviewing plans, it assessed more general diversity data that included the projected student breakdowns for Harriton and Lower Merion High Schools by race, ethnicity, socio-economic status, and disability.141 The district court, mainly under the direction of Kennedy's decision in Parents Involved—discussed more fully infra—found that consideration of general diversity data was appropriate.142 The Third Circuit, on the other hand,

138. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978). See also Grutter, 539 U.S. at 338 (The plan may not "limit in any way the broad range of qualities and experiences that may be considered valuable contributions to student body diversity.").

139. Student Doe 1, No. 09-2095, 2010 U.S. Dist. LEXIS 47051, at *32 ("For scenarios 1 through 5, the handouts Dr. Haber prepared for the Administration included only the number of African-American students, excluding any other racial or ethnic data, and data respecting socio-economic status and disability.").

140. Id. at *35 ("[T]he District ... employed a 'limited notion of diversity' similar to the plans criticized and ultimately held to be unconstitutional in [Parents Involved].").

141. Id. at *42.

142. Id. at *43 ("There is nothing objectionable in the District's decision to include
was less concerned with the school board’s inclusion or exclusion of data on racial demographics, finding that “awareness of such data or omitting such data” was not enough to find discriminatory intent.143

Given these conflicting views, school districts should air of the side of caution when examining diversity data in order to avoid potential litigation. When school districts and the community review and evaluate proposed neighborhood redistricting plans, it is wise to consult data and evidence on multiple forms of diversity, including but not limited to those considered by Lower Merion. Other relevant diversity elements may include English language learners, gifted and talented students, or foster care youth. By recognizing that diversity is not solely racial or ethnic, school districts communicate their commitment to valuing diversity in all of its forms and avoid potential litigation from racial and ethnic minority students.

If followed, these four recommendations may help districts redrawing neighborhood attendance zone boundaries avoid a finding of discriminatory intent under the Arlington Heights framework. The lesson of the Lower Merion School District and its litigation thus far shows that redistricting, when evaluated as a facially race-neutral policy, can be used to foster diversity, ameliorate the achievement gap, and cure racial isolation. With simple precautions and a more holistic view of the redistricting process as an incorporation of many goals and multiple constituencies, school districts can appease most stakeholders and avoid costly litigation.

IV. PARENTS INVOLVED ANALYSIS: A GENERAL RECOGNITION OF THE DEMOGRAPHICS OF NEIGHBORHOODS

The parties’ and amicus briefs and the district court’s opinion in Student Doe 1 v. Lower Merion School District reveal that the Arlington Heights analysis is not the only framework that can be used to determine the constitutionality of school redistricting policies. Parents Involved in Community Schools

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143. Student Doe 1 v. Lower Merion Sch. Dist., 665 F.3d 524, 553 (3d Cir. 2011).
Seattle School District No. 144 is the Supreme Court's most recent ruling on a race-based student reassignment plan. The opinion in Parents Involved, particularly Justice Kennedy's concurring opinion, provides a second avenue under which integration-based redistricting cases can be evaluated.145

A. Parents Involved Background

The Parents Involved case dealt with challenges to school assignment plans in Seattle, Washington and Louisville, Kentucky. The districts employed school assignment plans that permitted incoming students to rank their preferences among the district schools, employing a series of tiebreakers to fill open slots at oversubscribed schools.146 In Seattle, one of the tiebreakers was whether the student's race helped rebalance the school's white/nonwhite composition to be within ten percentage points of the district's overall racial makeup.147 In Louisville, students were assigned to a school based on whether the student's race would comply with the district policy of keeping schools' black enrollment between fifteen and fifty percent.148

The Court struck down the Seattle and Louisville plans as unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment.149 The plurality opinion, written by Chief Justice Roberts, joined by Justices Scalia, Thomas, and Alito, applied strict scrutiny to both plans because they involved the "government[al] distribu[tion of] burdens or benefits on the basis of individual racial classifications."150 In order to satisfy strict scrutiny, "classifications are


145. Student Doe 1. v. Lower Merion Sch. Dist., 689 F. Supp. 2d 742, 746-47 (E.D. Pa. 2010)(detailing plaintiff's argument). See also Lewis v. Ascension Parish Sch. Bd., 662 F.3d 343, 349 (5th Cir. 2011) (per curium) (arguing that under Parents Involved, the assumption that it "might be justifiable to use racially-based decisions for the 'benign' purpose of maintaining post-unitary 'racial balance' among the schools in the system" should be questioned).

146. Parents Involved, 551 U.S. at 711-12.

147. Id.

148. Id. at 716.

149. Id. at 711.

150. Id. at 720 (plurality opinion).
constitutional only if they are narrowly tailored measures that further compelling governmental interests.” Chief Justice Roberts found that achieving diversity was not a compelling governmental interest in the context of secondary education. He also found that the plans did not meet the requirement of narrow tailoring because they had only a minimal effect on increasing diversity, and the districts failed to “show that they considered methods other than explicit racial classifications to achieve their stated goals.”

Coming to the opposite conclusion, Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, wrote a scathing dissent criticizing the plurality’s approach to the Seattle and Louisville plans. Because the school districts used race as a method to “include” rather than “exclude” students, the dissent preferred a less stringent standard of strict scrutiny, countering the plurality’s use of traditional strict scrutiny for all racial classifications. Under this level of review, the dissenters found that the plans in Parents Involved were narrowly tailored to serve a compelling interest in racially integrating the public schools, citing the remedial, educational, and democratic benefits for students and society.

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152. Parents Involved, 551 U.S. at 723-24 (plurality opinion). It is important to note that in the context of racial classifications in schools, only two interests have qualified as compelling: diversity and remedying past discrimination. Id. at 721-22. In the case of Parents Involved, Seattle had never been de jure segregated and Louisville was previously subject to a desegregation decree which was dissolved in 2000, so neither district could rely on remedying past discrimination as a compelling interest. Similarly, Lower Merion has never been segregated by law, nor has it ever been subject to a desegregation order. Therefore, it cannot put forth remedying past discrimination as a compelling government interest to satisfy strict scrutiny.

153. Id. at 734 (“While we do not suggest that greater use of race would be preferable, the minimal impact of the districts’ racial classifications on school enrollment casts doubt on the necessity of using racial classifications.”).

154. Id. at 735 (“Narrow tailoring requires serious, good-faith considerations of workable race-neutral alternatives.”) (internal quotations omitted).

155. Id. at 833 (Breyer, J., dissenting) (relying on the purposes of the Fourteenth Amendment to suggest a differential view of strict scrutiny that “appl[ies] the strict scrutiny test in a manner that is ‘fatal in fact’ only to racial classifications that harmfully exclude; [but] appl[ies] the test in a manner that is not fatal in fact to racial classifications that seek to include.”).

156. Id. at 803, 838-40 (Breyer, J., dissenting). The three values supported by racial integration are: (1) “an interest in continuing to combat the remnants of
addition, they found that the plans were narrowly tailored because race "constitute[d] but one part of plans that depend primarily upon other, nonracial elements." Moreover, the dissenters noted that the districts undertook a deliberate and substantial process involving "local experience and community consultation" to devise plans that involved a diminishing use of race where no reasonable alternative could produce the same results. The dissent's narrow tailoring requirements coincide with Justice Kennedy's concurrence to provide school districts with cautious optimism regarding the success of future challenges to school district integration plans.

In fact, Justice Kennedy's concurring opinion may act as controlling precedent for integration-based attendance zone redistricting and will consequently be used as a framework to evaluate Lower Merion and provide suggestions for school boards in similar situations. Because four Justices vigorously dissented from the plurality opinion, Justice Kennedy's concurrence presents the key holdings on which a majority of the court agrees. Under Marks v. United States, "when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the segregation caused in whole or in part by these school-related policies, which have often affected not only schools, but also housing patterns, employment practices, economic conditions, and social attitudes. It is an interest in maintaining hard-won gains. And it has its roots in preventing what gradually may become the de facto resegregation of America's public schools"; (2) "an interest in overcoming the adverse educational effects produced by and associated with highly segregated schools... Studies suggest that children taken from those schools and placed in integrated settings often show positive academic gains."; and (3) "an interest in producing an educational environment that reflects the pluralistic society in which our children will live... It is an interest in helping our children learn to work and play together with children of different racial backgrounds." Id.

157. Id. at 846.
158. Id. at 848.
159. Id. ("[E]ach plan's use of race-conscious elements is diminished compared to the use of race in preceding integration plans.").
160. Id. at 850 ("I have found no example or model that would permit this Court to say to Seattle and to Louisville: 'Here is an instance of a desegregation plan that is likely to achieve your objectives and also makes less use of race-conscious criteria than your plans.' And, if the plurality cannot suggest such a model—and it cannot—then it seeks to impose a 'narrow tailoring' requirement that in practice would never be met.").
narrowest grounds." Therefore, any section of Justice Kennedy's opinion that garnered the support of four other Justices, either in plurality or dissent, offers the controlling position of the Supreme Court. Since the plurality and dissent appear to agree on very little, Justice Kennedy's opinion, which invalidates the plans but does not restrict a district's use of race as severely as Chief Justice Roberts, provides a guiding framework for courts applying Parents Involved.

Accordingly, under the direction of Marks, numerous courts have relied on his opinion for purposes of applying Parents Involved in novel settings. Moreover, legal scholars almost uniformly recognize that judges and school districts will look to Justice Kennedy's opinion for guidance when evaluating voluntary school integration plans.

162. Id. at 193 (internal quotations omitted).
163. See Parents Involved, 551 U.S. at 858-63 (Breyer, J., dissenting).
164. See, e.g., United States v. Alamance-Burlington Bd. of Educ., 640 F. Supp. 2d 670, 683 n.5 (M.D.N.C. 2009) ("[T]his Court has relied on the concurring opinion of Justice Kennedy . . . in setting out the framework governing the School System going forward."); Hart v. Cnty. Sch. Bd. of Brooklyn, 536 F. Supp. 2d 274, 283 (E.D.N.Y. 2008) ("Accordingly, it is the view of Justice Kennedy in [Parents Involved], which represents the applicable approach under Marks, and the guiding standard on the use of race as one of a number of appropriate admissions factors."); N.N. ex rel. v. Madison Metro. Sch. Dist., 670 F. Supp. 2d 927, 937 (W.D. Wis. 2009) ("Because no single opinion in Parents Involved garnered a majority of the Court, Justice Kennedy's opinion is controlling, at least to the extent it represents 'the narrowest grounds' for invalidating the two plans."). See also Lewis v. Ascension Parish Sch. Bd., 662 F.3d 343, 319 (5th Cir. 2011) (Jones, C.J., concurring) (recognizing that Justice Kennedy's concurrence in Parents Involved is the most applicable framework in which to analyze a school district's redrawing of race-conscious boundary lines).

It is important to note that the Third Circuit in Lower Merion refused to apply the analysis in Justice Kennedy's concurrence in Parents Involved. The Third Circuit found that since the plurality and Justice Kennedy all agreed that the Seattle and Louisville assignment plans required the application of strict scrutiny and that the plans did not survive strict scrutiny, that was sufficient to be a "single rationale explaining the result." Student Doe 1 v. Lower Merion Sch. Dist., 665 F.3d 521, 514 n.32 (3d Cir. 2011) (citing Marks, 430 U.S. at 193). Therefore, any statements Justice Kennedy made beyond that which were necessary to "explain the result" for Seattle and Louisville are not controlling. Id. The Third Circuit concludes that "[t]he portion of Justice Kennedy's concurrence discussing race-conscious measures is not binding because it is dicta; it refers to hypothetical facts and is not materials to the result in Seattle." Id. However, given the plethora of other jurisdictions that have adopted Justice Kennedy's opinion as controlling, the analysis used by Justice Kennedy is relevant for school districts seeking to integrate via attendance zone line redistricting.

B. Justice Kennedy’s Analysis

Although Justice Kennedy struck down the redistricting plans in Parents Involved, his opinion expresses a willingness to uphold other plans that take race into account, so long as they do so in a limited fashion.166 Contrary to the plurality, he accepted both avoiding racial isolation and achieving a diverse student population as compelling interests in the secondary school context.167 Nevertheless, Kennedy found that the Seattle and Louisville plans failed to meet the narrow tailoring prong of the strict scrutiny test. Specifically, he found that the Louisville plan was imprecisely drawn and its limits undefined.168 Similarly, the Seattle plan was substantially under- and over-inclusive because it employed “the crude racial categories of ‘white’ and ‘non-white,’” resulting in an illogical characterization of racially balanced schools.169

Similar to the school districts in Parents Involved, the Lower Merion School District identified diversity and remedying racial isolation as compelling government interests

735 (2008) (“Justice Kennedy’s opinion will likely come to define the terms upon which public school districts, school administrators, and state officials that are still inclined to pursue school integration can implement and maintain the practice.”); J. Harvie Wilkinson III, The Seattle and Louisville School Cases: There Is No Other Way, 121 HARV. L. REV. 158, 170 (2007) (“As the narrowest rationale in support of the prevailing judgment, the Kennedy opinion becomes the controlling one and the subject of close scrutiny for educators and lawyers alike.”).

166. See Parent Involved, 551 U.S. at 787 (Kennedy, J., concurring) (“The Chief Justice impl[i]es an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account.”).

167. Id. at 797-98 (Kennedy, J., concurring) (“A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population.”).

168. Id. at 785 (Kennedy, J., concurring) (“[Louisville] fails to make clear, for example, who makes the decisions; what if any oversight is employed; the precise circumstances in which an assignment decision will or will not be made on the basis of race; or how it is determined which of two similarly situated children will be subjected to a given race-based decision.”).

169. Id. at 786-87 (Kennedy, J., concurring). Seattle’s characterization of racial balance was irrational because “a school with 50 percent Asian-American students and 50 percent white students but no African-American, Native-American, or Latino students would qualify as balanced, while a school with 30 percent Asian-American, 25 percent African-American, 25 percent Latino, and 20 percent white students would not.” Id. at 787 (Kennedy, J., concurring).
for its consideration of race in its redistricting plan.170 Given their parallel government interests, which Justice Kennedy recognized as compelling, the two cases are instructive for comparing the limits placed on school boards looking to use race-conscious attendance zones as a method of integration. The remaining sections of this Comment examine the limited grounds where racial considerations may be valid and compare them to the factual scenario in Lower Merion. Such comparisons reveal several points of caution and suggestion for school districts that plan on engaging in attendance line redistricting while considering the racial composition of its neighborhoods.

In his concurrence, Justice Kennedy explicitly defines the type of plan used by the Lower Merion School District as the kind that would be found presumptively valid under the Equal Protection Clause, writing that, “[s]chool boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including... drawing attendance zones with general recognition of the demographics of neighborhoods... and tracking enrollments, performance, and other statistics by race.”171 Although Justice Kennedy presupposes that racially integrative attendance zone lines are “unlikely... [to] demand strict scrutiny to be found permissible,”172 it is the specific content of the plan and the manner in which it was drawn that controls the “likelihood” of permissibility.173 Stating that schools can “draw[] attendance

171. Parents Involved, 551 U.S. at 789 (Kennedy, J., concurring).
172. Id. (Kennedy, J., concurring).
173. After stating that attendance zone line cases are unlikely to demand strict scrutiny, Justice Kennedy quotes the electoral voting redistricting case Bush v. Vera, 517 U.S. 952 (1996) (plurality opinion), which states that “district lines are ‘facially race neutral’ so a more searching inquiry is necessary before strict scrutiny can be found applicable in redistricting cases than in cases of ‘classifications based explicitly on race.’” Id. at 958. Vera quotes Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 213 (1995), which then directs the reader to the standard defined in Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977). As such, Justice Kennedy himself suggests that the Arlington Heights standard for facially race-neutral laws, detailed in full infra Part III, is required in cases of attendance zone line redrawing. However, since it is not clear how many of Kennedy's fellow Justices would agree with him on this point, and Justice Kennedy continues to provide a cogent rationale for examining these cases in his own Parents Involved concurrence, this Comment will continue to
zones with *general recognition* of the demographics of neighborhoods."}\footnote{174 ParentsInvolved, 551 U.S. at 789 (Kennedy, J., concurring) (emphasis added).} Justice Kennedy puts two express parameters on how schools may draw attendance zone lines in order to avoid strict scrutiny. First, Justice Kennedy’s language deliberately limits school districts’ use of race to a “general recognition.”\footnote{175 *Id.* (Kennedy, J., concurring).} Second, Justice Kennedy purposefully states that the school district’s recognition should be focused on neighborhood “demographics,” including but not limited to a neighborhood’s racial composition.\footnote{176 *Id.* (Kennedy, J., concurring).} In these two ways, Justice Kennedy defines the limits on a school district’s ability to employ integration plans using school attendance zone lines without incurring the application of strict scrutiny. In order to determine whether a school district’s plan stays within these boundaries, it is necessary to look into the specific facts of a district’s plan and how the plan will affect the community.\footnote{177 *Id.* at 781 (Kennedy, J., concurring). To satisfy Justice Kennedy’s inquiry, school districts should have a “thorough understanding of how a plan works.” *Id.*}

1. A “general recognition” of race to avoid stigmatization

Justice Kennedy first seeks to limit the school district’s use of race to a mere “general recognition” fearing that, as the Court and Kennedy have expressed several times, there is an increased likelihood of racial stigma when a student is “defined by race,”\footnote{178 *Id.* at 789 (Kennedy, J., concurring). See also Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94 (1989) (Racial classifications, regardless of their intended purpose, “carry a danger of stigmatic harm” and “[u]nless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility. [Racial preferences] ‘may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth.’”) (internal citation omitted) (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978)).} and forced to “live under a state-mandated racial label.”\footnote{179 ParentsInvolved, 551 U.S. at 797 (Kennedy, J., concurring).} As Professor Black details in his analysis of stigma in Justice Kennedy’s opinion, Kennedy fears that specific
categorizations of students in groups such as “white” or “non-white” “imply that whiteness is the standard by which everyone should be measured.” Thus, the Court has found that racial classifications inherently stigmatize because they define individuals based on an irrelevant characteristic.

In addition, these labels, which individuals are powerless to change, run counter to the individualistic ethic that runs deep within American society. Therefore, Justice Kennedy therefore seeks to limit the use of race to only a general consideration to avoid the potential feelings of stigma a student may internalize if a school district relies too heavily on racial typology. In particular, Justice Kennedy emphasizes that school districts must avoid the individualized stigma that results from plans like those in Seattle and Louisville, writing that:

[i]f school authorities are concerned that the student-body compositions of certain schools interferes with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.

In the case of Lower Merion, the neighborhood-based attendance zone lines do not involve assignment of individual students typed by race. Instead, students are assigned to schools on the basis of the location of their families’ residences. No individual characteristics are considered and individuals are not singled out for special treatment, making it difficult to argue that any individual student is stigmatized by the plan. Accordingly, it is likely that Justice Kennedy would not consider Lower Merion’s redistricting plan to stigmatize any individual since it “does not involve assigning particular students to attend Harriton High School based on individual

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181. See generally id. at 107 (recognizing that Justice Kennedy’s fundamental concern in Parents Involved is that using a racial classification to achieve voluntary desegregation racially stigmatizes students).
182. Parents Involved, 551 U.S. at 797 (Kennedy, J., concurring). See also Black, supra note 180, at 109-10.
183. Parents Involved, 551 U.S. at 788-89 (Kennedy, J., concurring) (emphasis added).
racial classification" and addresses racial diversity in a more general way, via neighborhoods. In its amicus brief, the NAACP supports this conclusion and its conformity with Justice Kennedy's goals of nonstigmatization when it states that "[a]ny racial considerations were made on a general, aggregate level, and students were assigned on the basis of their geographic residence rather than their race."

For school districts looking to adopt a similar plan, it is important to ensure that individual students are not singled out in the redistricting process and that a race-based message is not being sent to or received by a minority group. First, school boards must be careful to ensure that the attendance boundaries are not gerrymandered. Abnormally drawn attendance boundaries that fail to preserve existing neighborhoods or single out particular residences or streets may be found deserving of strict scrutiny. In addition, exemptions from the plan for individual students or groups may be similarly suspect. Therefore, school boards should ensure that the plan is adopted uniformly and without exception for definable students or student groups. These measures will help avoid a finding that the plan is a "crude system of individual racial classifications" that stigmatizes those who are favored and disfavored.

Another way to examine whether stigma is a factor in a redistricting plan is to inquire whether a race-based message is being sent to a disfavored group and whether that message is

184. Student Doe 1 v. Lower Merion Sch. Dist., No. 09-2095, 2010 U.S. Dist. LEXIS 62797, at *17 (E.D. Pa. June 24, 2010) ("The District assigned particular neighborhoods including [South Ardmore] to attend Harriton High School, and all students in those neighborhoods, both those who were African-American and those who were not, lost their choice of high school.").


186. Student Doe 1 v. Lower Merion Sch. Dist., 665 F.3d 524, 555 (3d Cir. 2011) ("For strict scrutiny to apply to facially race neutral electoral redistricting legislation, the plaintiff must prove that (1) the statutes, 'although race neutral, are on their face, unexplainable on grounds other than race,' or that (2) 'legitimate redistricting principles were subordinated to race' such that 'race must be the predominant factor motivating the legislature's [redistricting] decision.'") (internal citations omitted) (quoting Shaw v. Reno, 509 U.S. 630, 643 (1993) and Bush v. Vera, 517 U.S. 952, 958-59 (1996)). Applying this test to Lower Merion, the Third Circuit found that strict scrutiny did not apply to Plan 3R because the primary factors motivating redistricting were not race-related. Id. at 556.

187. Parents Involved, 551 U.S. at 789 (Kennedy, J., concurring).
subsequently received. The *message sent, message received* framework is useful for determining when an intangible stigmatic harm has occurred as a result of school board actions that send the message that a racial group is inherently different, intellectually inferior, or less worthy of a benefit. For example, in the context of the Seattle reassignment plan in *Parents Involved*, the plurality assumed the school board was sending the message that an individual student deserved or did not deserve to attend a school based on that student’s race. The message was subsequently received when the student was notified that his or her newly assigned school did not match the school the student had initially selected.

In the context of *Lower Merion*, the plaintiffs could argue that by adopting Plan 3R, the school board was sending a message that African American students did not deserve to attend their choice of high school, while other non-African American students deserved the choice. However, as pointed out in the United States amicus brief and the Third Circuit’s opinion, under Lower Merion’s plan, the redistricting affected multiple races. All of South Ardmore, plus two other neighborhoods in Lower Merion were denied their choice of high school. At the time of redistricting, in South Ardmore alone, 140 students were African American, while 140 were

188. See Black, *supra* note 180, at 117 (discussing the message sent, message received methodology in the context of segregated schools); *id.* (“Decades of previous discrimination have a direct impact on private perceptions of race that continue to linger. Schools, in particular, were structured to send the message that blacks were inferior to whites. Through schools and other institutions and policies, many individuals learned to perceive anything ‘black’ or minority as negative.”). See generally Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1257–59 (2002); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 336–39 (1987).


190. See Student Doe 1 v. Lower Merion Sch. Dist., 665 F.3d 524, 552 (3d Cir. 2011) (“Plan 3R redistricts to Harriton a significant number of students who are not African American.”); Brief for the United States, *supra* note 80, at 26–27 (“[T]he Plan subjects similarly situated students of different racial backgrounds to the same treatment . . . While students in South Ardmore and two heavily white redistricted areas previously had the choice of attending LMHS despite living outside of the walk zone, they are all now assigned to HHS.”).

white, 9 were Asian American, and 18 were Hispanic American. Therefore, a greater number of non-African American students would have received the same message. Consequently, even if plaintiffs argue that a message was “sent” by the school board, it is difficult to say that African American students would have properly “received” the message that their lack of high school choice was due to race. Therefore, it is unlikely that Justice Kennedy would be persuaded that the Lower Merion plan resulted in racial stigmatization.

Additionally, the African American students who live in North Ardmore continue to be given the choice to attend Lower Merion or Harriton High School to benefit from its magnet programs. Since only a portion of the overall African American student population is affected by the redistricting plan and loses its choice of school, the African American community as a whole was not denied a benefit and could not have uniformly received the stigmatized message.

However, the case of Lower Merion provides caution for other school districts. Students could easily perceive stigma where the attendance zone lines are drawn around districts that are nearly or entirely racially uniform. As a result, school districts drawing boundaries that deny some students school choice (or any other student benefit) must be cognizant that the burden—or lack of choice—is not inflicted upon a racially uniform group. Lower Merion avoided this legal pitfall by including multiple racial groups in the neighborhoods designated for redistricting; therefore, the burden of pre-set attendance was dispersed across several racial groups. Another way to cure this problem is to allow all students school choice, although this plan might recreate the same racial isolation or segregation problems the plan was designed to fix. An alternative remedy would be to deny all students choice. However, under this scenario, school districts would need to be careful to not deny students assigned to one school

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192. Id. at *14 n.2.
193. This suggestion may be difficult to implement in districts where neighborhoods are racially segregated due to the constraint, mentioned above, that attendance zones should try to preserve the boundaries of previously defined neighborhoods.
194. See Student Doe 1, 665 F.3d at 550; Student Doe 1, No. 09-2095, 2010 U.S. Dist. LEXIS 47051, at *14 n.2.
opportunities available at another. Regardless of the remedy chosen, school districts must be aware of the messages that the chosen redistricting plan may send to a racial group and whether those messages are effectively conveyed.

It is important to mention, too, that both Lower Merion and Harriton High Schools were regarded as excellent schools "ranked as being among the best in the state, if not the nation." Therefore, when assigning students to schools, the school board did not need to worry about sending the message that one group deserved to receive an inferior education. However, in most districts across the nation, particularly those in urban communities, school quality varies greatly between neighborhoods and zip codes. Accordingly, when redistricting, school districts must be cognizant not to assign racially uniform students to attend inferior schools, thereby conveying that those students are worthy of only a mediocre or substandard education. In his concurrence, Justice Kennedy stresses this point when he writes, "[t]his Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children."  

2. A nuanced view of diversity to integrate "demographics" other than race

Justice Kennedy also warns that districts should consider the full range of "demographics" relevant to a given neighborhood because he, and a majority of the Court, believe that race is not the sole criteria by which diversity or integration should be measured. In describing why the

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195. For example, all AP courses cannot be offered at one high school and not the other, such that no other students can opt into them.
196. Student Doe 1, No. 09-2085, 2010 U.S. Dist. LEXIS 47051, at *7-8.
197. See Brief for NAACP, supra note 80, at *29 ("[T]he School District's attendance zone changes did not involve reassignment of African-American students to schools regarded as ineffective or inferior in the community.").
199. See id. at 788 (Kennedy, J., concurring) ("[I]t is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition."); id. at 798 (Kennedy, J., concurring) ("Race may be one component of that diversity, but other demographic
Seattle plan was unconstitutional, Justice Kennedy points out that "a blunt distinction between 'white' and 'non-white'" does not further the compelling interest of diversity. Instead, Justice Kennedy describes a presumptively valid method of increasing diversity as one which includes "a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component." Under Justice Kennedy's understanding of diversity, a school district recognizes the value of all of the characteristics a student brings to the school culture. A school district that seeks to further the goal of diversity must do so by examining all of the relevant neighborhood demographics, not only those related to race. Race alone is not sufficient to create school diversity; diversity includes a multitude of factors.

In Lower Merion, the school board examined data on many subgroups, including African Americans, Asian Americans, Hispanic Americans, Native Americans, and whites. In addition, the district also examined the projected populations of students of low socioeconomic status and students with disabilities. Therefore, the district's consideration of multiple factors that contribute to diversity may weigh in favor of finding the plan presumptively valid under Justice Kennedy's analysis. However, it is unclear whether the factors considered are sufficient to represent complete diversity. The Court may therefore require a more nuanced examination of the student population, considering factors contributing to diversity such as English language learners, gifted and talented students, and foster care youth. For this reason, as discussed supra Part

200. Parents Involved, 551 U.S. at 787 (Kennedy, J., concurring).
201. Id. at 790 (Kennedy, J., concurring).
202. See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 314-15 (1978) ("It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups" that can justify the use of race); Grutter, 539 U.S. at 325 (Diversity includes "a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.").
203. See Parents Involved, 551 U.S. at 793 ("To be valid, students must be "considered for a whole range of their talents and school needs with race as just one consideration."); see also Grutter, 539 U.S. at 341 (The plan must be "flexible enough to
III.C, school districts considering neighborhood-based redistricting should try to accumulate data on as many elements of diversity as possible and use that information to evaluate whether the resulting schools are sufficiently diverse.

The nuanced notion of diversity advocated by Justice Kennedy includes more than a consideration of demographic data. As reiterated by Justice Kennedy and the Supreme Court in several of its opinions, diversity should also include flexibility in size and number of diverse students. More specifically, in order to serve the compelling interest of diversity, a school district plan cannot include a fixed racial quota or set balance among the factors considered. For example, in discrediting Seattle’s plan, Justice Kennedy writes that it “relies upon a mechanical formula that has denied hundreds of students their preferred schools.” The rationale behind this consideration is that the Equal Protection Clause is designed to protect equal treatment under the law, not necessarily equal results. Just as districts are required to consider multiple elements of diversity, a flexible diversity goal ensures that the individualist ethos is preserved and that each student is treated as a valuable member of the community and not merely as a statistic or figure.

In Lower Merion’s plan, there is evidence that the district

consider all pertinent elements of diversity.”)

In addition, consideration of multiple elements of diversity also serves the interest, mentioned above, of preserving the individualistic ethic valued by our society. By incorporating multiple facets of diversity, students are valued for the multiple contributions they make to the school environment and culture. School districts must respect that each student brings something distinctive and beneficial to the classroom. See Parents Involved, 551 U.S. at 797 (Kennedy, J., concurring) (“Under our Constitution the individual, child or adult, can find his own identity, can develop his own persona, without state intervention that classifies on the basis of his race or the color of her skin.”).

204. See Freeman v. Pitts, 503 U.S. 467, 494 (1992) (“Racial balance is not to be achieved for its own sake.”); see also Richmond v. J. A. Croson Co., 488 U.S. 469, 507 (1989); Bakke, 438 U.S. at 307 (“If petitioner’s purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected . . . as facially invalid”); Grutter, 539 U.S. at 330 (“Outright racial balancing” is “patently unconstitutional.”).

205. Parents Involved, 551 U.S. at 793 (Kennedy, J., concurring).


207. See supra note 160.
had a racial balancing scheme in mind when they created the redistricting structure. Under the projected statistics, the African American population at both high schools would be almost ten percent each, mirroring the district’s overall African American population at just over ten percent.\textsuperscript{208} In its brief, the school district argues that these percentages are the product of chance—an inevitable outcome when North and South Ardmore are split to attend two different high schools. The United States amicus brief supports the inevitability argument.\textsuperscript{209} While this explanation may be plausible in a small school district with few African American students and only two African American neighborhoods, the Court may find that it too closely resembles intentional racial balancing. Not only do the two schools resemble each other in racial population, but the schools are also reflective of the district’s overall population, providing evidence that a mechanized formula may have been used.

Small school districts in particular need to be careful to ensure their redistricting plans do not resemble racial quotas or racial balancing. For example, Lower Merion could have drawn the attendance zone lines so that the African American population was not split precisely in half. The record supports this alternative: one of the two school board members who rejected the plan did so because he believed the line between North and South Ardmore was artificially drawn.\textsuperscript{210} The school board could have drawn the lines to more closely resemble neighborhood patterns, which perhaps may have avoided any signs of racial balancing.

In sum, school districts can work to avoid racial isolation and encourage diversity among the district students without

\textsuperscript{208} Student Doe 1 v. Lower Merion Sch. Dist., No. 09-2095, 2010 U.S. Dist. LEXIS 17051, at *31 (E.D. Pa. May 13, 2010).

\textsuperscript{209} See Brief for the United States, supra note 81, at 30-31 (“Because Ardmore is assigned to two elementary schools that feed into different high schools of roughly the same size, any zone-based attempt to reap the educational benefits of diversity is likely to result in a similar percentage of African-American students at each high school.”).

\textsuperscript{210} Student Doe 1 v. Lower Merion Sch. Dist., No. 09-2095, 2010 U.S. Dist. LEXIS 47051, at *75 (E.D. Pa. May 13, 2010)(stating that David Ebby considered North and South Ardmore “as making up a single community that is unique within the District because it has long had ‘generations of families living there that have pride in the area.’”).
having equal numbers of each diversity category within each school. According to the Supreme Court, no set number of minority students creates diversity; therefore, school districts have the difficult, but not impossible task of preserving neighborhood communities while ending racial isolation in schools.

V. CONCLUSION AND CAUSES FOR OPTIMISM

The Arlington Heights framework and Justice Kennedy's concurring opinion in Parents Involved provide several points of caution for school districts looking to avoid litigation following adoption of a neighborhood-based attendance zone plan. Because the chances of litigation and the likelihood of success or failure in court are impossible to predict in the abstract, such words of warning are not meant as dictates which if overlooked will inevitably cost millions of dollars. Instead, the case of Lower Merion and its relationship to Supreme Court precedent is intended to provide school districts with a momentary pause before embarking on the uncertain, yet highly important journey of integrating their schools.

This Comment is not designed to discourage interested school boards from pursuing integration. In fact, just the opposite is true. Race neutral methods, including the redrawing of attendance zone lines, remain constitutional and viable options for school district integration. As recognized by Justice Kennedy in his concurrence, "school districts [should] continu[e] the important work of bringing together students of different racial, ethnic, and economic backgrounds.... Those entrusted with directing our public schools can bring to bear the creativity of experts, parents, administrators, and other concerned citizens to find a way to achieve the compelling interests" in avoiding racial isolation.

In order to ensure that this important work is preserved and avoid legal challenge, school board members educated on the legal issues and potential pitfalls will be well suited to craft these integration plans. Consequently, school districts will be

211. See Craig R. Heeren, "Together at the Table of Brotherhood" Voluntary Student Assignment Plans and the Supreme Court, 24 HARV. BLACKLETTER L.J. 133, 174-87 (2008).

212. Parents Involved, 551 U.S. at 798 (Kennedy, J., concurring).
able to continue to serve their communities while ensuring that American schools reach the "objective of equal educational opportunity." 213

School board members may feel that the legal guidance provided in this Comment amounts to subterfuge of the district's true goals and the community's actual interests in racial integration. However, communities and districts do not choose to redistrict or enact redistricting plans with the sole purpose of racial integration. School boards and communities like Lower Merion have several reasons for adopting such plans in order to accomplish various goals such as reducing student travel time, maintaining continuity, or balancing numerical student populations. All of these goals are reasonable and, in conjunction with racial diversity, are presumptively legally valid. Therefore, it is not subterfuge nor disingenuous for a school district to accord due weight to all goals it pursues in adopting its redistricting plan. To the contrary, school boards are likely to be respected for their accommodation of various community viewpoints and their ability to find common ground among constituencies.

As parents clamor for integrated schools, school board members are loath to deny these justifiable demands due to Supreme Court precedent. As Justice Breyer explained in his dissent in Parents Involved, school boards "work in communities where demographic patterns change, where they must meet traditional learning goals, where they must attract and retain effective teachers, where they should (and will) take account of parents' views and maintain their commitment to public school education, [and] where they must adapt to court intervention . . ." 214 In this manner, the Court recognized the difficult work demanded of school districts and understood district needs to respond to community concerns while working within the Supreme Court's framework. In an attempt to accommodate the school boards as they navigate this difficult task, Justice Breyer is willing to "giv[e] some degree of weight to a local school board's knowledge, expertise, and concerns in these particular matters," 215 deferring to local school boards

213. Id. at 788 (Kennedy, J., concurring).
214. Id. at 822 (Breyer, J., dissenting).
215. Id. at 848 (Breyer, J., dissenting).
because they "better understand their own communities and have a better knowledge of what in practice will best meet the educational needs of their pupils." As a result, school boards should feel less reticent in responding to their communities' calls for integration.

In addition to understanding the need for community responsiveness, a majority of the Court understood and supported the educational benefits of integration plans. In *Parents Involved*, five members of the Court explicitly recognized "an interest in overcoming the adverse educational effects produced by and associated with highly segregated schools," citing numerous studies showing that children placed in integrated settings often show positive academic gains. Therefore, given integration's proven educational benefits, school districts should not be hesitant to pursue a method that is likely to improve educational performance, particularly for the most vulnerable minority students. As the United States noted in its amicus brief, because Lower Merion's efforts were designed "to ensure the educational success of all students and to combat the achievement gap between minority and nonminority students, the school district rightfully considered the racial impact of its plan." With federal and state programs focused on student outcomes and equal educational performance among subgroups, school districts rightfully seek to use all tools at their disposal to overcome vestiges of segregation and increase academic performance writ large. Understanding this landscape, Justice Kennedy insists that the *Parents Involved* decision "should not prevent school districts from continuing the important work of bringing together students of different racial, ethnic, and economic backgrounds." This Comment hopes that school districts will continue to implement new and creative methods to combat segregation, including the revision of school attendance zone plans with a complete and thorough understanding of the Supreme Court's conceptual legal

216. Id. at 849 (Breyer, J., dissenting).
217. Id. at 839 (Breyer, J., dissenting).
219. Brief for the United States, supra note 80, at 29.
framework.

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