

# In Defense of Race Proportionality

*“The future of our Nation rests on the quality of the education its young people receive. And for our Negro children, quality education is especially vital because it is the key to equality. Although we have made substantial progress in ending formal segregation of schools, racial isolation in the schools persists—both in the North and the South—because of housing patterns, school districting, economic stratification, and population movements. It has become apparent that such isolation presents serious barriers to quality education. The problems are more subtle and complex than those presented by segregation imposed by law. The remedies may be difficult.”*

—President Lyndon B. Johnson, 1965

**I**N *PARENTS INVOLVED IN Community Schools v. Seattle School District No. 1*, the Supreme Court held that public school districts may not, consistent with the Fourteenth Amendment’s Equal Protection Clause, employ race-specific measures when seeking to achieve district-wide racial integration. Seattle, Washington, and Jefferson County, Kentucky—the two school districts involved in the litigation consolidated in the Supreme Court—each had adopted procedures for student assignment that looked to the racial composition of their district-wide student populations and had attempted to reproduce that distribution, more or less, in each school within the district.

Applying strict scrutiny, a plurality of justices, in an opinion authored by Chief Justice Roberts, took the position that none of the purposes proffered by the two defendant districts met the constitutional requirement that a state interest be “compelling,” and in addition expressed the view that the race-specific means adopted were not “necessary” to achieve the asserted objectives. The plurality was joined in the holding by Justice Kennedy, who wrote separately to explain that, in his judgment, districts seeking to achieve racial balance among schools might in some cases be permitted to employ race-conscious, but not race-specific, means of advancing that goal.

Much of the discussion in each of the Court’s various opinions focuses on the districts’ interest in promoting racial diversity in the school classroom, an understandable locus of attention given that an interest in student body diversity at the university level was found to be a “compelling” purpose in *Grutter v. Bollinger* in 2003. However, this essay will look instead at two interests asserted by Seattle before the Supreme Court that are distinct from the diversity interest, but which did not garner much comment from the Court. These are interests in avoiding “racial isolation” and in providing “equitable access” to all of Seattle’s high schools for all students within the district. These state objectives, especially



the goal of avoiding “racial isolation,” have been part of the education policy conversation since the 1960s, and continue to deserve attention today, the holding in *Parents Involved* notwithstanding. . . .

I do not consider the demands of equal educational opportunity as they apply across school districts, even though

that may be the arena in which the problem is greatest and the need for reform most pressing.

I focus instead on the issue of equity within school districts,

because that is the setting in which the *Parents Involved* case arose . . . and because it represents an aspect of the problem that receives relatively little attention. Racial isolation and attendant resource inequities remain pressing issues at the intradistrict level. As one commentator puts it: “Something systemic about a school serving predominantly black, or predominantly white, students—covering both resources and expectations—contributes to the success or failure of all students who attend.” Thus this essay examines race proportionality within, rather than between, school districts, considering the racial distribution of students at the school level.

Many commentators caution that integrating schools does not necessarily solve, or even address, the problem of racially equitable educational opportunities; inequalities along racial lines can and often do exist *within* individual schools as well. Indeed, Seattle’s own Garfield High is a case in point. One of the oversubscribed Seattle high schools to which the challenged race-specific student assignment procedure was applied, Garfield is the only such school located in a predominantly black neighborhood; students assigned to Garfield under the race-specific criterion were white. However, the desirable racial diversity seen at the school level (approximately 46% white, 30% black, 17% Asian, 6% Latino, and 2% Native American in 2004) did not translate into integration within Garfield (in AP classes, 64% were white, 22% Asian, and only 8% black). Thus, “[i]n the remedial class, all but one of the students [were] black; in the honors class, white students fill[ed] the seats, along with a handful of Asian students.” . . .

Clearly, race proportionality implemented only at the school level is not a panacea. Even so, I think it a good place to begin. Race proportionality among schools would constitute some progress relative to the racially skewed educational opportunities that currently are available in many large urban districts. Moreover, the dynamics of pupil assignment within schools undoubtedly would be different in a racially proportionate system than would be the case in ones with racially identifiable schools such as Garfield. We don’t yet have the experience with such systems to be able to reason competently regarding classroom assignment policies that might make sense in a genuinely race proportional district. . . .

A final preliminary comment: there is good reason to be concerned that inequality of educational opportunity is both a result and a cause of racial hierarchy in the United States, especially as regards blacks and whites. Many studies show that black children underperform white children on standardized tests even before entering school, and that the gap between the two groups grows through the school years. However, there is recent evidence that: a) the black–white test gap has “generally been declining over time”; b) the preschool gap disappears if one takes into account a relatively small number of other variables; and c) the “leading explanation for the worse trajectory of black students in our sample is that they attend lower-quality schools.” The stereotype that blacks are intellectually inferior to whites traces directly back to the era of slavery, where it was one significant element of the discourse that permitted a country committed to the principle that “all men are created equal” simultaneously to hold other human beings as “property.” Putting that past entirely behind us will require, among other things, putting to rest the notion that blacks are inferior to whites. In turn, it appears that providing genuinely equal educational opportunities to black children is a necessary, and likely sufficient, means of dismantling the myth of black intellectual inferiority; it thus is an indispensable ingredient in the fight for racial justice.

\*\*\*

**THE COMMISSION** on Civil Rights Report on Racial Isolation was prepared not long after the end of legalized segregation in the United States. One might wonder, then, whether “racial isolation” still exists today, more than 40 years later. The data indicate that it does persist, and that in fact it is on the increase after a period of decline. Even so, “racial isolation” (often defined as a circumstance in which all or most minority students attend schools that are 90 percent or more minority) and “race proportionality” are rather stark contraries. Surely there is an intermediate condition, one in which all or some of the schools within a large school district do not mirror the composition of the district as a whole, but at the same time are not so racially disproportionate as to bring to mind the term “racial *isolation*.”

I’ll call these schools “racially identifiable,” and define that term functionally: when the racial composition of a school’s student body is distinctive enough, relative to the larger community, that community members think of it in racial terms (consciously or unconsciously), that school is “racially identifiable.” In this taxonomy, “racially identifiable schools” and “race proportionality” become functional opposites, “race proportionality” referring to a situation in which each school within a district approximates the racial make-up of the district as a whole closely enough that schools are not thought of in racial terms.

Unlike “racial isolation,” which generally refers to the isolation of nonwhite students, “racial identifiability” is not limited to schools with disproportionately large black, Hispanic, Asian, or other nonwhite student populations; a school might also be

identified as “white.” Indeed, it is crucial to keep whiteness in the foreground of the analysis when considering racial identifiability, because it may be that whiteness is more determinative of educational opportunity effects than are other racial classifications. That is, the perception that a given school is “white” may have greater impact on educational opportunity in a particular school district than the perception that other schools are “black” or otherwise nonwhite. The issue to be explored in this part is whether a policy of race proportionality is justified as a means of avoiding the harms associated with systems of racially identifiable schools. ...

Turning to the deeper substantive issue, a policy of race proportionality would obviate the harms associated with racially identifiable schools. Pursuing relatively strict race proportionality is the one countermeasure that would address the factors generating resource allocation inequities, such as unconscious racial bias and color stigmatization. Distributing students proportionally throughout a district eliminates any possibility that race will influence the allocation of resources at the school level. This is not to say that resources automatically would be distributed equally in such a system, as factors other than race might come into play, nor, as noted in the introduction to this essay, to say that one might not see race effects *within* schools.

But race proportionality would constitute a step forward, and it would resolve the problems of educational opportunity inequities along racial lines that have persisted for the past 50-plus years, in spite of *Brown*. The lesson of that period is that equality of educational opportunities requires the intertwining of white and nonwhite interests; that is most easily achieved by ensuring that white and nonwhite students attend the same schools.

\*\*\*

**RACE PROPORTIONALITY** ... is one means of avoiding inequalities of resource allocation that otherwise are likely to occur. As a matter of policy, its benefits in providing equal educational opportunity across racial lines clearly outweigh the costs of individual racial identification it imposes on all students, both white and nonwhite. Race proportionality is consistent with an anti-subordinationist interpretation of the Equal Protection Clause, an interpretation at least as persuasive as the colorblindness interpretation adopted by the Supreme Court in recent years. For these reasons race proportionality ought not to be taken off the educational policy table. ||||

*Barbara J. Flagg, professor of law, is an expert on constitutional law and critical race theory. The author of the book, “Was Blind, But Now I See”: White Race Consciousness and the Law, Flagg served as the John S. Lehmann Research Professor in 2008–09.*

Excerpted with permission from “In Defense of Race Proportionality,” 69 *Ohio State Law Journal* 1258 (2009) [moritzlaw.osu.edu/lawjournal/issues/volume69/number6/Flagg.pdf](http://moritzlaw.osu.edu/lawjournal/issues/volume69/number6/Flagg.pdf)