



# Innovating Inclusion: Promoting Racial Diversity in a 209 State

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**DATE:**  
August 10, 2016

# Purposes

- New era: although invidious discrimination persists, structural exclusion is the underlying problem
- “The Pipeline”
  - E.g. “Not enough minority teachers.”
- 21<sup>st</sup> Century needs require diverse workforce
- How can government overcome these challenges? What can government do?
- A lot.

# Purposes

- Our industry has a legacy or history of discrimination or segregated labor markets. What can we do about it?
- Statistically, our labor force is almost all white and male, what can we do about it?
- Can our public agency employ racial classifications in hiring, promoting or contracting?
- How can our city take advantage of minority business opportunities?

# Purposes

- Most lawyers will tell you what you *can't* do.
  - Fear of litigation/being sued.
- My focus here is on what you *can* do.
  - Careful structuring of your goals
  - Identify safe harbors
  - Provide creative, but permissible, solutions

# I. Prop 209 & Anti-Affirmative Action Ballot Initiatives

# Ward Connerly & the ACRI



- In 1995, Ward Connerly began his campaign to outlaw affirmative action across the country at the state level through ballot measures.
- Beginning with California, he gathered enough signatures that Proposition 209 (“The California Civil Rights Initiative”) was moved to the ballot in 1996, and passed with 54% of the vote and was championed by Gov. Wilson.
  - Article 1, Section 31

# Prop 209: The Language

(a) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

(f) For the purposes of this section, “state” shall include, but not necessarily be limited to, the state itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state.

# Prop 209: The Language cont.

(c) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting.

(d) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.

# Prop 209



- 48% of women voted for it, and 26% of blacks and 24% of Latinos
- Connerly then moved to Washington State and Michigan and succeeded with similar measures
- In 2008, however, his efforts fell short in Colorado, Nebraska, Arizona, and Oklahoma

# II. Jurisprudence under Prop 209

# The 14<sup>th</sup> Amendment



- The U.S. Constitution permits government officials to consider race in policymaking in a variety of ways. It does not, however, permit racial classifications
- If a racial classification is employed, “strict scrutiny” review triggers, and policy is presumptively impermissible
- If the policy, action or program is race-conscious, but does NOT employ racial classifications, then the rational basis test applies, and policy is generally permissible

# Comparing 209 & the EPC



- The Equal Protection Clause prohibits discrimination on the basis of race or other protected groups
  - If there is a compelling state interest, however, and it is narrowly tailored, then the discrimination or preferential treatment will be permitted under the EPC
- Proposition 209, also known as Article 1, Section 31 of the California Constitution prohibits race and gender conscious programs that the Equal Protection Clause (EPC) *permits* but not *requires*
  - However, “Section 31 poses no obstacle, to race- or gender-conscious measures required by federal law or the federal Constitution.” *Coral Construction, Inc. v. City and County of San Francisco*, 235 P.3d 947, 950

# Coral Construction, Inc. v. City and County of San Francisco



- In Coral Construction, Two contractors challenged the validity of a city ordinance requiring preferential treatment to women and minorities in the awarding of city contracts
  - The trial court entered a permanent injunction prohibiting the city from enforcing the ordinance or any similar program in the future
- The Supreme Court of California found that Proposition 209 was in fact constitutional due to the fact that State governments are not required to permit compelling interests as a legitimate exception to classifications of protected statuses

# Hi-Voltage Wire Works, Inc. v. City of San Jose



- A contractor and a general contracting firm filed an action challenging a city's program to encourage public works projects participation by minority business enterprises (MBE's) and women business enterprises (WBE's).
  - For each contract, the city set a participation goal based on the availability and ability of the MBE's and WBE's to do the work to be contracted. To qualify as a responsible bidder, a contractor had to meet or exceed this goal or demonstrate reasonable efforts to obtain MBE and WBE participation
- Hi-Voltage established that the Ballot initiatives of Proposition 209 are not exhaustive of the legislative intent of the Constitutional Amendment
  - Furthermore, the California Supreme Court also found that since the bill was democratically enacted, it was completely legitimate in broadly preventing classifications based on protected statuses.

# III. Race Consciousness & Racial Classification

AN OVERVIEW

# Is there a Racial Classification?

## Racial Classifications

- Uses explicit/facial racial categories
- Classifies (labels) individuals on the basis of race
- The classification is the basis for sorting, promoting, admitting, or otherwise awarding a resource or benefit.
- The classification is a means of achieving some end.

## Race Conscious

- May or may not use explicit racial categories (labels).
- May or may not involve individuals.
- May or may not involve sorting or a benefit on the basis of a classification.
- May be a means or an end.

# Race-Conscious? Racial Classification?

- A state law requiring railway carriers to provide different cars for “white” and “colored” passengers?
- A federal statute restricting naturalization to “free white persons”?
- An administrative regulation tracking student performance by race?
- A financial incentive for hiring minority employees?

# Race-Conscious? Racial Classification?

- A scholarship fund established for minority youth?
- A state based set aside program for minority businesses?
- A program of city financing for small firms who cannot meet bonding or capital requirements?
- A state law mandating the admission of the top 10% of each high school graduating class to a state university?



J. Kennedy, in *Parents Involved in Community Schools v. Seattle School Dist. No. 1*. (2007)

In the administration of public schools by the state and local authorities, it 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.



# J. Kennedy, Concurring

School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including ***strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of the neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.*** These mechanisms are race-conscious but do not lead to different treatment based on a classifications that tells each student he or she is to be defined by race.

# IV. Innovating Inclusion: Strategies for Inclusion

# Race-Conscious, but No Racial Classification



## Strategies:

- Geography: Strategic Site Selection & Local Hiring
- Socio-Economic Status
- Marketing & Outreach
- Anchor Institution Strategies

# The High Speed Rail Act of 2016

- Suppose Congress passed a law, which the President signed, to fund the creation of a new high speed rail system in every state.
- The HSRA divvies up funds for the construction of rail hubs and track by state by mileage and ratio of hubs.
- It also has many unique labor, working conditions, and safety requirements.

# The High Speed Rail Act of 2016

Suppose the HSRA, among others, provides for:

1. A higher federal minimum wage for employees hired by funds provided by the Act.
2. A higher federal minimum wage for employees subcontracted by states with funds provided by the Act.
3. Has a clawback provision for funds expended by states who do not comply with (1) & (2), in addition to denial of federal highway funds.
4. Requires states to implement specific safety regulations, including new equipment and suits for workers building hubs or suffer the same penalties as provided in (3).

# The High Speed Rail Act of 2016

5. Requires each state to hire +/- 10 % under-represented minorities or economically disadvantaged groups to the state's population as a whole.
6. Requires each state and all sub-contractors to set aside 15% of the total value of contracts for minority-owned or economically disadvantaged firms.
7. Requires that 25% of all workers hired for hub construction are from the census tract in which the hub is located.

▶ The HSRA is passed under the Commerce Clause, 13<sup>th</sup> and 14<sup>th</sup> Amendments.

- ANALYZE

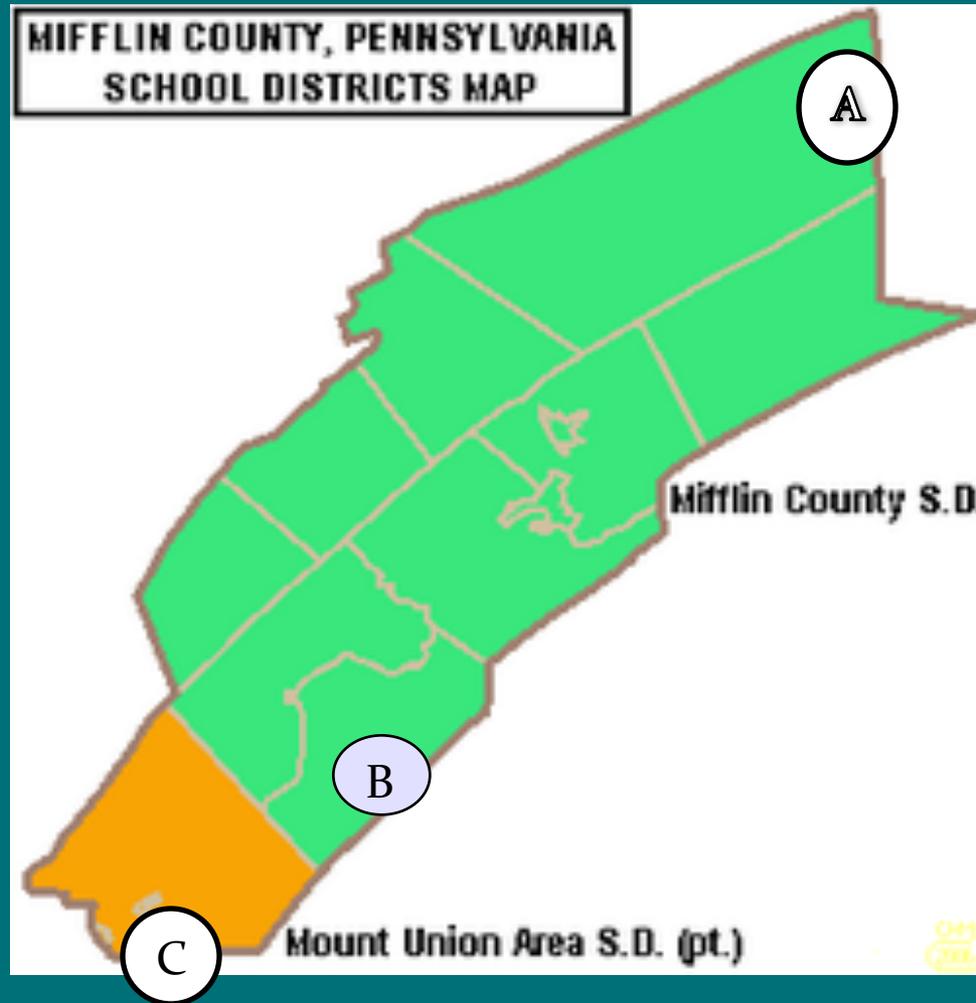
- Opportunity Structures are primarily (although not exclusively) geographic structures.
  - Segregation by race and income is primarily geographic, and neighborhoods and municipalities are key conduits of opportunity resources.
- Geography serves as a powerful proxy for opportunity, and can be broadly used to achieve race-conscious goals (the upside of segregation)

# Example 1: School Site Selection



- The location of a school is the chief determinant of student diversity, and a major determinant of the level of diversity within the district as a whole.
- A new school strategically sited to promote diversity can draw students from racially isolated neighborhoods into a diverse educational environment.
- Conversely, a new school located in a racially isolated neighborhood will not only replicate those demographics, but may reduce the overall degree of diversity within the district by drawing students from other, more integrated schools.

# Which school site would promote diversity the best?



# Strategic Site Selection

- Strategic site selection for school openings and closing reduces the need for more elaborate student assignment policies.
- Strategic site selection is probably the most efficient and cost-effective ways to reduce racial isolation and promote diversity within a district.
- Race-conscious strategic site selection or school closure does not trigger strict scrutiny review. See *Parents Involved & Lower Merion*

# Example 2: Public Housing

- Suppose that the Marin County Public Housing Authority has a long history of siting public housing in racially and economically concentrated neighborhoods.
- The Marin County PHA creates new public housing siting criteria to improve the racial integration of public housing residents.
- Suppose further that 78% of the families on the PHA's waiting list are Black or Latino.
- Could PHA require siting or rehab in predominantly white neighborhoods?

# Example 3: Local Hiring

- Local hiring can allow greater diversity. Many municipalities hire outside of themselves, especially those that need diversity in emergency service departments such as police and fire.
- Local hiring targets trigger rational basis review, but may be a powerful mechanism for promoting diversity.
  - Under Constitution, can even set local hire quota.

# DMV Hypothetical

- The California Department of Motor Vehicles (DMV) discovers that 70% of its labor force is female, and that 75% of its labor force is white.
- Moreover, it appears that 88% of the supervisory and managerial positions at the DMVs throughout the state are occupied by Caucasian or Asian workers.
- You have been assigned counsel to ensure compliance.

# DMV Affirmative Action Plan

Suppose the DMV implemented the following policies as part of its affirmative action plan:

- 1) The DMV set numerical targets for minority hiring (particularly black and Latino).
- 2) A local hiring requirement, that at least 50% of new DMV hires reside in census tract of the DMV branch location, and that at least 50% reside in the same county.

# DMV Affirmative Action Plan

- 3) The DMV implements branch site selection requirements that BMV branch sites be located in 'distressed' neighborhoods, defined as census tracts with 40% or more low income or poverty.
- 4) The DMV develops managerial job training programs, and requires that 50% of enrollees be minority.
- 5) Being black, Hispanic, or female is a 'plus' factor in entry-level hiring.

**ANALYZE**

# Example # 4: Analyze the Diversity Enhancement Act

- Suppose the California State Legislature passes the Diversity Enhancement Act, which creates a state funded scholarship program.
- The purpose of the act is to foster diversity in higher education.
- Scholarships are awarded according to three criteria:
  - 1) Racial and ethnic diversity of applicant
  - 2) Family Income
  - 3) Academic Achievement and Potential

# Analyze the Diversity Enhancement Act

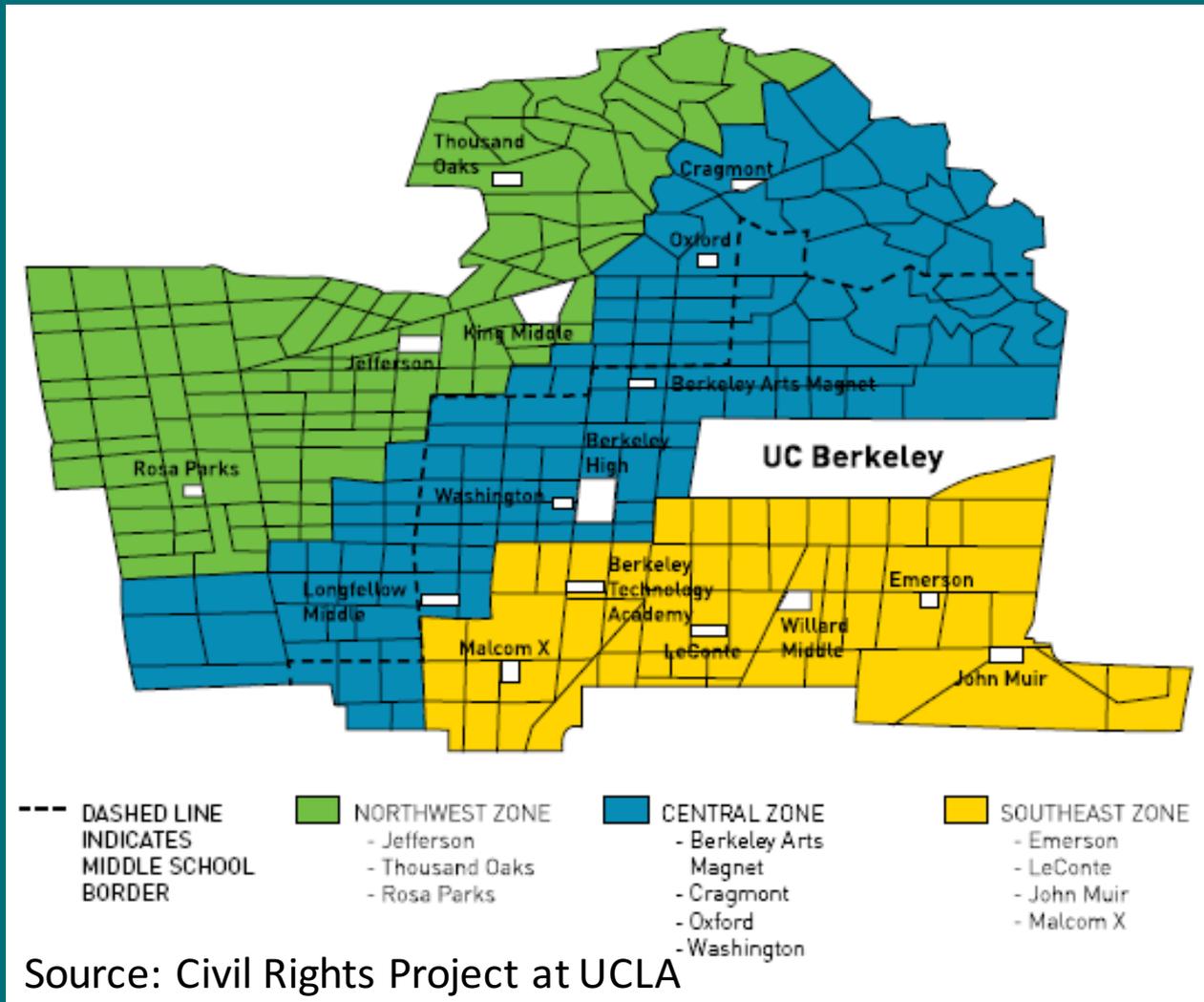
- 1) What level of scrutiny applies?
- 2) Is there a compelling governmental interest?
- 3) Is the DEA scholarship program narrowly tailored?

# Multi-Factor Strategies



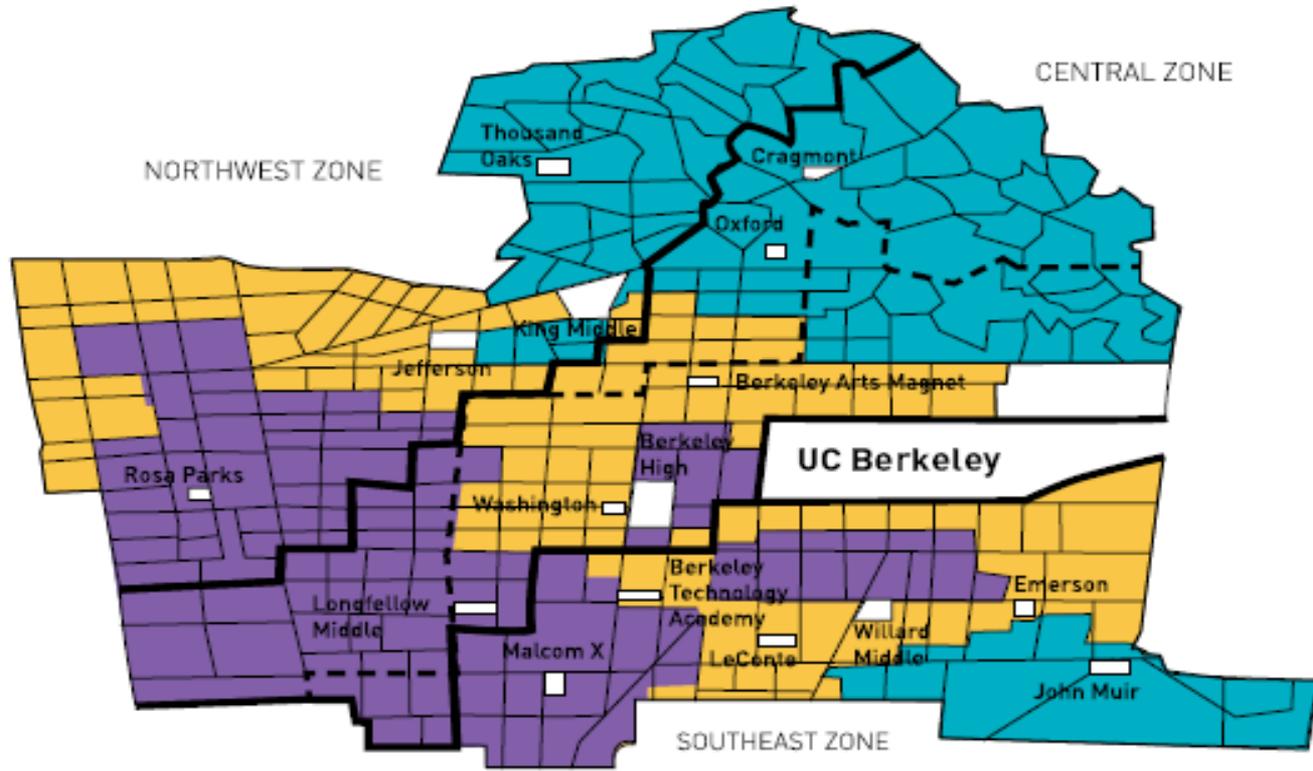
1. Instead of using race, may combine SES & geographic factors together.
2. Create education zones, and then set quotas or ranges for enrollment from each zone.
  - Zones need not be contiguous.

# Berkeley Zones



# Diversity Map

**Berkeley Unified School District Composite Diversity Map**



--- DASHED LINE INDICATES MIDDLE SCHOOL BORDER

■ DIVERSITY CATEGORY 1      ■ DIVERSITY CATEGORY 2      ■ DIVERSITY CATEGORY 3

Source: Civil Rights Project at UCLA

“We conclude that the particular policies challenged here – which aims to achieve social diversity by using neighborhood demographics when assigning students to schools – is not discriminatory. The challenged policy does not use racial classifications; in fact, it does not consider an individual student’s race at all when assigning the student to a school.”

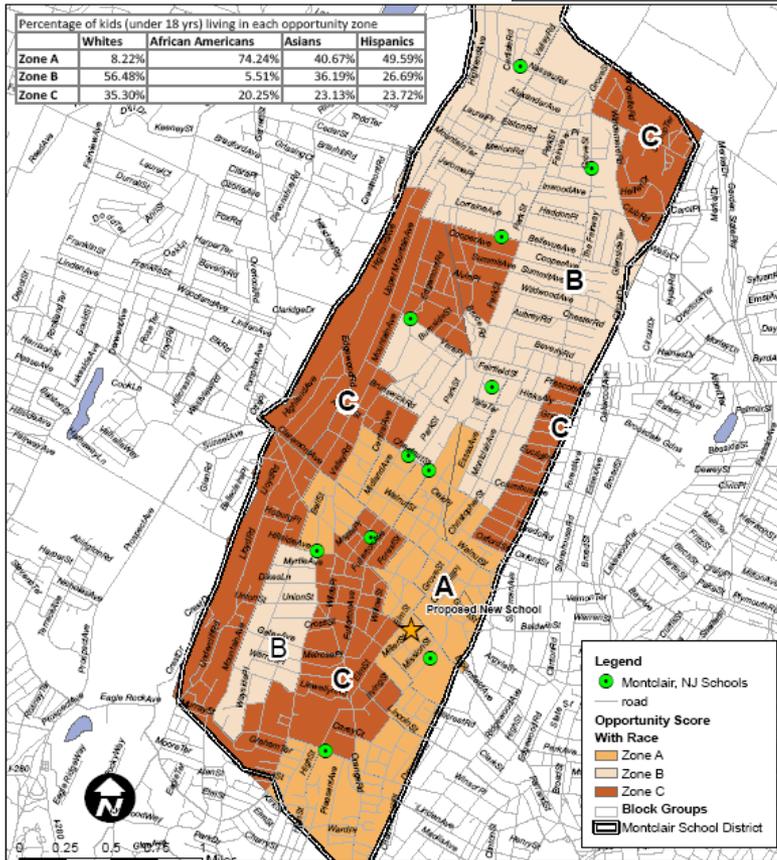
***ACRF v. Berkeley Unified School Districts***

# Three Zone Integration Model: Montclair, NJ

Montclair, NJ  
Three-zones Opportunity Scenario



	Whites	African Americans	Asians	Hispanics
Zone A	8.22%	74.24%	40.67%	49.59%
Zone B	56.48%	5.51%	36.19%	26.69%
Zone C	35.30%	20.25%	23.13%	23.72%



This map displays three opportunity zones in Montclair School District based on multi-factor analysis including race as a factor. P.S. Census block groups (our unit of analysis) are demarcated by street layout. Thus residences on one side of the street might belong to different zone than residences on the other side.

Source: U.S. Census Bureau 2000; Montclair Public Schools  
Date: Nov. 20, 2009

- ▶ GOAL: Each school has diversity of students from each zone, within 5% point deviation of K class zone baseline.
- ▶ K and transfer students are assigned based on parental preference and zone balance.

# Marketing & Outreach

- Networks are racialized
  - Between 70-80% of jobs are landed through networks, either by referral or by informing applicants of the position.
  - Research on Fair Share housing suggested network effects
    - towns “cherry-picked” their poor, targeting the elderly, divorced moms, and college students
- Targeted outreach and marketing into racially identifiable communities/neighborhoods is perfectly constitutional.

# Anchor Institution Strategies

- “Anchor institutions” are community embedded employers, such as universities and hospitals

## **Goal: Align Anchor Mission with Community Needs**

- In their capacity as major employers, purchasers of goods and services, conduits for investment, and training and education partners, these anchors shape the neighborhood conditions and pathways that link communities to assets and industries in their region

# To learn more...



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# Government Alliance on Race & Equity (GARE)



- A national network of government working to achieve racial equity and advance opportunities for all.
  - Supporting jurisdictions at the forefront
  - Expanding jurisdictions – in 30 states and over 100 cities – all levels of government
  - Providing tools and resources to put theory into action

TEMPLE  
POLITICAL & CIVIL RIGHTS  
LAW REVIEW

WHAT CONSTITUTES A "RACIAL CLASSIFICATION"?:  
EQUAL PROTECTION DOCTRINE SCRUTINIZED

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Volume 24

Fall 2014

Number 1

24 Temp. Pol. &  
Civ. Rts. L. Rev. 81