9-15-2006

Section 7: Civil Rights

Institute of Bill of Rights Law, William & Mary Law School

VII. CIVIL RIGHTS

In This Section:

Parents Involved in Community Schools v. Seattle School Dist. No. 1

(05-908)

Ruling Below: (*Parents Involved in Community Schools, Petitioner v. Seattle School District No. 1, et al.*, 426 F.3d 1162 (9th Cir. C.A. 2005), *cert granted* 126 S. Ct. 2351, 74 U.S.L.W. 3676 [2006]).

A group of parents with children in defendant's school district challenged the constitutionality of the school district's plan which selected children by race to enter public high schools to maintain a balanced racial proportion in that school. The parents claimed that by denying students enrollment in a public high school on the basis of race this plan violated the Equal Protection Clause of the Fourteenth Amendment as well as the Washington Civil Rights Act by discriminating on the basis of race. The Ninth Circuit Court upheld the plan by applying *Grutter v Bollinger*, finding that racial diversity in high schools is a compelling interest that justifies the use of race, and that the plan was narrowly tailored to accomplish the goal of racially balanced high schools.

Questions Presented: 1. Whether the rationale for promoting student body viewpoint diversity in institutions of higher education, as discussed in *Grutter v. Bollinger,* 539 U.S. 306 (2003), and *Gratz v. Bollinger,* 539 U.S. 244 (2003), should be limited and not extended into the context of elementary and secondary public schools.
2. Is racial diversity a compelling interest that can justify the use of race in selecting students for admission to public high schools?
3. May a school district that is not racially segregated and that normally permits a student to attend any high school of her choosing, deny a child admission to her chosen school solely because of her race in an effort to achieve a desired racial balance in particular schools, or does such racial balancing violate the Equal Protection Clause of the Fourteenth Amendment?

PARENTS INVOLVED IN COMMUNITY SCHOOLS, Petitioner,
Plaintiff-counter-defendant - Appellant
v.
SEATTLE SCHOOL DISTRICT NO. 1, et al.
Defendants-counter-claimants - Appellees

United States Court of Appeals
for the Ninth Circuit

Decided June 21, 2005

[Excerpt: some footnotes and citations omitted]
FISHER, Circuit Judge:

This appeal requires us to consider whether the use of an integration tiebreaker in the open choice, noncompetitive, public high school assignment plan crafted by Seattle School District Number 1 (the "District") violates the *federal Constitution's Equal*

Protection Clause. Our review is guided by the principles articulated in the Supreme Court's recent decisions regarding affirmative action in higher education, *Grutter v. Bollinger, 539 U.S. 306, 156 L. Ed. 2d 304, 123 S. Ct. 2325 (2003)*, and *Gratz v. Bollinger, 539 U.S. 244, 156 L. Ed. 2d 257, 123 S. Ct. 2411 (2003)*, and the Court's directive that "context matters when reviewing race-based governmental action under the *Equal Protection Clause*." *Grutter, 539 U.S. at 327*. We conclude that the District has a compelling interest in securing the educational and social benefits of racial (and ethnic) diversity, and in ameliorating racial isolation or concentration in its high schools by ensuring that its assignments do not simply replicate Seattle's segregated housing patterns. We also conclude that the District's Plan is narrowly tailored to meet the District's compelling interests.

I. Background

A. Seattle Public Schools: A Historical Perspective

. . . Seattle is a diverse community. Approximately 70 percent of its residents are white, and 30 percent are nonwhite. Seattle public school enrollment breaks down nearly inversely, with approximately 40 percent white and 60 percent nonwhite students.

The District operates 10 four-year public high schools. . . . For over 40 years, the District has made efforts to attain and maintain desegregated schools and avoid the racial isolation or concentration that would ensue if school assignments replicated Seattle's segregated housing patterns. Since the 1960s, while courts around the country ordered intransigent school districts to desegregate, Seattle's School Board voluntarily explored measures designed to end de facto segregation in the schools and provide all of the District's students with access to diverse and equal educational opportunities.

[The court recounted the history that led to the adoption of the current student assignment plan.]

* * *

The Board adopted the current open choice plan (the "Plan") for the 1998-99 school year. Under the Plan, students entering the ninth grade may select any high school in the District. They are assigned, where possible, to the school they list as their first choice. If too many students choose the same school as their first choice, resulting in "oversubscription," the District assigns students to each oversubscribed school based on a series of tiebreakers. If a student is not admitted to his or her first choice school as a result of the tiebreakers, the District tries to assign the student to his or her second choice school, and so on. Students not assigned to one of their chosen schools are assigned to the closest school with space available; students who list more choices are less likely to receive one of these "mandatory" assignments. The most recent version of the Plan, which the School Board reviews annually, is for the 2001-02 school year and is the subject of this litigation.

B. The Plan

. . . For the academic year 2000-01, approximately 82 percent of students selected one of the oversubscribed schools as their first choice, while only about 18 percent picked one of the undersubscribed high schools as their first choice. Only when oversubscription occurs does the District

become involved in the assignment process.

If a high school is oversubscribed, all students applying for ninth grade are admitted according to a series of four tiebreakers, applied in the following order: First, students who have a sibling attending that school are admitted. In any given oversubscribed school, the sibling tiebreaker accounts for somewhere between 15 to 20 percent of the admissions to the ninth grade class.

Second, if an oversubscribed high school is racially imbalanced—meaning that the racial make up of its student body differs by more than 15 percent from the racial make up of the students of the Seattle public schools as a whole—and if the sibling preference does not bring the oversubscribed high school within plus or minus 15 percent of the District's demographics, the race-based tiebreaker is "triggered" and the race of the applying student is considered. (For the purposes of the race-based tiebreaker, a student is deemed to be of the race specified in his or her registration materials.) Thus, if a school has more than 75 percent nonwhite students (i.e., more than 15 percent above the overall 60 percent nonwhite student population) and less than 25 percent white students, or when it has less than 45 percent nonwhite students (i.e., more than 15 percent below the overall 60 percent nonwhite student population) and more than 55 percent white students, the school is considered racially imbalanced.

* * *

The race-based tiebreaker is applied to both white and non-white students. . . . These assignments accounted for about 10 percent of admissions to Seattle's high schools as a whole. That is, of the approximately 3,000 incoming students entering Seattle high schools in the 2000-01 school year, approximately 300 were assigned to an oversubscribed high school based on the race-based tiebreaker.

In addition to changing the trigger point for the 2001-02 school year to plus or minus 15 percent, the District also developed a "thermostat," whereby the tiebreaker is applied to the entering ninth grade student population only until it comes within the 15 percent plus or minus variance. Once that point is reached, the District "turns-off" the race-based tiebreaker, and there is no further consideration of a student's race in the assignment process. The tiebreaker does not apply, and race is not considered, for students entering a high school after the ninth grade (e.g., by transfer).

The District estimates that without the race-based tiebreaker, the nonwhite populations of the 2000-01 ninth grade class at Franklin would have been 79.2 percent, at Hale 30.5 percent, at Ballard 33 percent and at Roosevelt 41.1 percent. Using the race-based tiebreaker, the actual nonwhite populations of the ninth grade classes at the same schools respectively were 59.5 percent, 40.6 percent, 54.2 percent and 55.3 percent.

* * *

II. Discussion

A. Strict Scrutiny

We review racial classifications under the strict scrutiny standard, which requires that the policy in question be narrowly tailored to achieve a compelling state interest. The strict scrutiny standard is not "strict in theory, but fatal in fact." *Adarand, 515 U.S. at 237* (internal quotation marks omitted).

"Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it." *Grutter, 539 U.S. at 326-27.* . . . In evaluating the District's Plan under strict scrutiny, we also bear in mind the Court's directive that "context matters when reviewing race-based governmental action under the *Equal Protection Clause*." *Grutter, 539 U.S. at 326.*

* * *

The District's interests fit into two broad categories: (1) the District seeks the affirmative educational and social benefits that flow from racial diversity; and (2) the District seeks to avoid the harms resulting from racially concentrated or isolated schools.

1. Educational and Social Benefits that Flow from Diversity

The District has established that racial diversity produces a number of compelling educational and social benefits in secondary education. First, the District presented expert testimony that in racially diverse schools, "both white and minority students experienced improved critical thinking skills—the ability to both understand and challenge views which are different from their own."

Second, the District demonstrated the socialization and citizenship advantages of racially diverse schools. School officials, relying on their experience as teachers and administrators, and the District's expert all explained these benefits on the record. . . .

* * *

The District's interests in the educational and social benefits of diversity are similar to those of a law school as articulated in *Grutter*. The contextual differences between public high schools and universities, however, make the District's interests compelling in a similar but also significantly different manner.

The Supreme Court in *Grutter* noted the importance of higher education in "preparing students for work and citizenship." *539 U.S. at 331.* For a number of reasons, public secondary schools have an equal if not more important role in this preparation. First, underlying the history of desegregation in this country is a legal regime that recognizes the principle that public secondary education serves a unique and vital socialization function in our democratic society. . . .

Second, although one hopes that all students who graduate from Seattle's public schools would have the opportunity to attend institutions of higher learning if they so desire, a substantial number of Seattle's public high school graduates do not attend college. For these students, their public high school educational experience will be their *sole* opportunity to reap the benefits of a diverse learning environment. . . .

Third, the public school context involves students who, because they are younger and more impressionable, are more amenable to the benefits of diversity. *See Comfort, 418 F.3d at 15-16* ("In fact, there is significant evidence in the record that the benefits of a racially diverse school are more compelling at younger ages."); *Comfort v. Lynn School Committee, 283 F. Supp. 2d 328, 356 (D. Mass. 2003).*

The dissent insists that racial diversity in a public high school is not a compelling interest, arguing that *Grutter* endorsed a law school's compelling interest in diversity only in some broader or more holistic sense.

To attain this broader interest, the dissent contends, the District may only consider race along with other attributes such as socioeconomic status, ability to speak multiple languages or extracurricular talents. We read *Grutter*, however, to recognize that racial diversity, not some proxy for it, is valuable in and of itself.

In short, the District has demonstrated that it has a compelling interest in the educational and social benefits of racial diversity similar to those articulated by the Supreme Court in *Grutter* as well as the additional compelling educational and social benefits of such diversity unique to the public secondary school context.

2. Avoiding the Harms Resulting from Racially Concentrated or Isolated Schools

The District's interest in achieving the affirmative benefits of a racially diverse educational environment has a flip side: avoiding racially concentrated or isolated schools. . . . Research regarding desegregation has found that racially concentrated or isolated schools are characterized by much higher levels of poverty, lower average test scores, lower levels of student achievement, with less-qualified teachers and fewer advanced courses - "with few exceptions, separate schools are still unequal schools." . . . Accordingly, the District's Plan strives to ensure that patterns of residential segregation are not replicated in the District's school assignments. Although Parents make much of the fact that "Seattle has never operated a segregated school system," and allege that "this is not a school desegregation case," each court to review the matter has concluded that because of Seattle's housing patterns, high schools in Seattle would be highly segregated absent race conscious measures. . . .

* * *

2. Absence of Quotas

In *Grutter*, the Court approved the law school's plan, in part, because it did not institute a quota, whereby a fixed number of slots are reserved exclusively for minority groups, thereby insulating members of those groups from competition with other candidates. Although the law school's plan did not seek to admit a set number or percentage of minority students, during the height of the admission's season, the law school would consult "daily reports" that kept track of the racial composition of the incoming class. The Court held that this attention to numbers did not transform the law school plan into a quota, but instead demonstrated that the law school sought to enroll a critical mass of minority students in order "to realize the educational benefits of a diverse student body." *Id.* Similarly, we conclude that the District's 15 percent plus or minus variance is not a quota because it does not reserve a fixed number of slots for students based on their race, but instead it seeks to enroll a critical mass of white and nonwhite students in its oversubscribed schools in order to realize its compelling interests.

a. No fixed number of slots

The District's race-based tiebreaker does not set aside a fixed number of slots for nonwhite or white students in any of the District's schools. The tiebreaker is used only so long as there are members of the underrepresented race in the applicant pool for a particular oversubscribed school. If the number of students of that race who have applied to that school is exhausted, no further action is taken, even if the 15 percent variance has not been satisfied. That is, if the applicant pool has been exhausted, no students are required or recruited to attend a

particular high school in order to bring it within the 15 percent plus or minus range for that year.

Moreover, the number of white and nonwhite students in the high schools is flexible and varies from school to school and from year to year. This variance in the number of nonwhite and white students throughout the District's high schools is because, under the Plan, assignments are based on students' and parents' preferences. The tiebreakers come into play in the assignment process only when a school is oversubscribed. . . .

b. Critical mass

[The court discussed the District's goal of having a critical mass of both white and nonwhite students enrolled.]

* * *

Accordingly, we conclude that the District's 15 percent plus or minus trigger point tied to the demographics of the Seattle school population is not a quota. It is a context-specific, flexible measurement of racial diversity designed to attain and maintain a critical mass of white and nonwhite students in Seattle's public high schools.

3. Necessity of the Plan and Race-Neutral Alternatives

Narrow tailoring also requires us to consider the necessity of the race-based plan or policy in question and whether there are equally effective, race-neutral alternatives.

a. Necessity of the Plan

The District argues that the compelling interests that it seeks are directly served by the race-based tiebreaker. The tiebreaker allows the District to balance students' and parents' choices among high schools with its broader compelling interests—achieving the educational and social benefits of diversity and the benefits specific to the secondary school context, and discouraging a return to enrollment patterns based on Seattle's racially segregated housing pattern.

i. Need for race-based tiebreaker

[The court discussed and rejected possible non race-based solutions and concluded that the race-based plan was necessary]

* * *

Although the District has the burden of demonstrating that its Plan is narrowly tailored, *see Gratz, 539 U.S. at 270*, it need not "exhaust[] every conceivable race-neutral alternative." *Grutter, 539 U.S. at 339.*

* * *

In sum, the District made a good faith effort to consider feasible race-neutral alternatives and permissibly rejected them in favor of a system involving a sibling preference, a race-based tiebreaker and a proximity preference. Over the long history of the District's efforts to achieve desegregated schools, it has experimented with many alternatives, including magnet and other special-interest programs, which it continues to employ, and race-conscious districting. But when a racially diverse school system is the goal (or racial concentration or isolation is the problem), there is no more effective means than a consideration of race to achieve the solution. . . . The logic is self-evident: When racial diversity is a principal element of the school district's compelling interest, then a narrowly tailored plan may explicitly take race into account.

4. Undue Harm

A narrowly tailored plan ensures that no member of any racial group is unduly harmed. Parents argue that every student who is denied his or her choice of schools because of the integration tiebreaker suffers a constitutionally significant burden. We agree with the Supreme Court of Washington, however, in its assessment that the District's Plan imposes a minimal burden that is shared equally by all of the District's students. Indeed, public schools, unlike universities, have a tradition of compulsory assignment.

Moreover, it is undisputed that the race-based tiebreaker does not uniformly benefit one race or group to the detriment of another. At some schools, white students are given preference over nonwhite students, and, at other schools, nonwhite students are given preference over white students. . . .

In sum, because (1) the District is entitled to assign all students to any of its schools, (2) no student is entitled to attend any specific school and (3) the tiebreaker does not uniformly benefit any race or group of individuals to the detriment of another, the tiebreaker does not unduly harm any students in the District.

5. Sunset Provision

A narrowly tailored plan must be limited not only in scope, but also in time. *Grutter, 539 U.S. at 342*. The Court held in *Grutter* that this durational requirement can be met by "periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity." *Id.* The District's Plan includes such reviews. . . .

* * *

III. Conclusion

For the foregoing reasons, we hold that the Plan adopted by the Seattle School District for high school assignments is constitutional and the use of the race-based tiebreaker is narrowly tailored to achieve the District's compelling interests. Accordingly, we **AFFIRM** the district court's judgment.

CONCURING:
KOZINSKI, Circuit Judge:

* * *

The Seattle plan...is not meant to oppress minorities, nor does it have that effect. No race is turned away from government service or services. The plan does not segregate the races; to the contrary, it seeks to promote integration. There is no attempt to give members of particular races political power based on skin color. There is no competition between the races, and no race is given a preference over another. That a student is denied the school of his choice may be disappointing, but it carries no racial stigma and says nothing at all about that individual's aptitude or ability. The program does use race as a criterion, but only to ensure that the population of each public school roughly reflects the city's racial composition.

Because the Seattle plan carries none of the baggage the Supreme Court has found objectionable in cases where it has applied strict scrutiny and narrow tailoring, I would consider the plan under a rational basis standard of review. By rational basis, I don't mean the standard applied to economic regulations, where courts shut their eyes to

reality or even invent justifications for upholding government programs, but robust and realistic rational basis review, where courts consider the actual reasons for the plan in light of the real-world circumstances that gave rise to it.

Under this standard, I have no trouble finding the Seattle plan constitutional. Through their elected officials, the people of Seattle have adopted a plan that emphasizes school choice, yet tempers such choice somewhat in order to ensure that the schools reflect the city's population. Such stirring of the melting pot strikes me as eminently sensible.

* * *

When the Supreme Court does review the Seattle plan, or one like it, I hope the justices will give serious thought to bypassing strict—and almost always deadly—scrutiny, and adopt something more akin to rational basis review. Not only does a plan that promotes the mixing of races deserve support rather than suspicion and hostility from the judiciary, but there is much to be said for returning primacy on matters of educational policy to local officials. . . .

* * *

When it comes to a plan such as this—a plan that gives the American melting pot a healthy stir without benefiting or burdening any particular group—I would leave the decision to those much closer to the affected community, who have the power to reverse or modify the policy should it prove unworkable. It is on this basis that I would affirm the judgment of the district court.

DISSENTING: BEA, Circuit Judge, with whom Circuit Judges KLEINFELD, TALLMAN and CALLAHAN join:

* * *

I agree with the majority that the District's use of the racial tiebreaker is a racial classification, and all racial classifications are subject to "strict scrutiny" review under the *Equal Protection Clause*. Yet the majority conceives of strict scrutiny as some type of relaxed, deferential standard of review. I view it differently.

* * *

The right to equal protection provides a liberty; it represents freedom from government coercion based upon racial classifications. Thus, under strict scrutiny, all racial classifications by the government, regardless of purported motivation, are "inherently suspect," and "presumptively invalid,". They are permissible only where the government proves their use is "narrowly tailored to further compelling governmental interests."

It follows, then, that the government carries the burden of proving that its use of racial classifications satisfies strict scrutiny.

Despite this formidable standard of review, the majority does not hesitate to endorse the District's use of the racial tiebreaker. Rather than recognizing the protections of the individual against governmental racial classifications, the majority instead endorses a rigid racial governmental grouping of high school students for the purpose of attaining

racial balance in the schools. For the reasons expressed below, I do not share in the majority's confidence that such a plan is constitutionally permissible.

III.

The District contends it has a valid compelling governmental interest in using racial balancing to achieve "the educational and social benefits of racial . . . diversity" within its high schools and avoid "racially concentrated" schools. The District argues its interest will enhance student discussion of racial issues in high school and will foster cross-racial socialization and understanding, both in school and later in the students' lives.

* * *

The [U.S. Supreme] Court has endorsed two race-based compelling governmental interests in the public education context. First, the Court has allowed racial classifications to remedy past racial imbalances in schools resulting from past *de jure* segregation. Second, the Court has allowed undergraduate and graduate universities to consider race as part of an overall, flexible assessment of an individual's characteristics to attain student body diversity.

Besides those two valid compelling interests, the Court has struck down every other asserted race-based compelling interest that has come before it.

Thus, we face a landscape littered with rejected asserted "compelling interests" requiring race-based determinations, but with two exceptions still standing. The first exception is inapplicable here because the Seattle schools have never been *de jure* segregated.

The second exception is also inapplicable, albeit not so directly acknowledged. At oral argument, the District conceded that it is not asserting the *Grutter* "diversity" interest; the majority recognizes this in stating the District's asserted interest is "significantly different" in some ways from the interest asserted in *Grutter*. Nonetheless, the majority concludes those differences are inconsequential because of the different "context" between high schools and universities, and the District's asserted interest is a compelling governmental interest in its own right.

Not so. The very differences between the *Grutter* "diversity" interest and the District's asserted interest illustrate why the latter violates the *Equal Protection Clause* as opposed to the former. The *Grutter* "diversity" interest focuses upon the individual, of which race plays a part, but not the whole. The District's asserted interest, however, focuses only upon race, running afoul of equal protection's focus upon the individual.

B.

In *Grutter* and *Gratz*, the Court made clear that the valid compelling interest in "diversity" does *not* translate into a valid compelling interest in "racial diversity." The "diversity" interest 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 . . . . Rather, the diversity that furthers a compelling state interest encompasses *a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Grutter, 539 U.S. at 324-25* (emphasis added).

The *Grutter* "diversity" interest focuses upon the individual, which can include the applicant's race, but also includes other

factors, such as the applicant's family background, her parent's educational history, whether she is fluent in other languages, whether she has overcome adversity or hardship, or whether she has unique athletic or artistic talents. *See 539 U.S. at 338.* Such a focus is consistent with the *Equal Protection Clause*, which protects the individual, not groups.

But here, the District's operation of the racial tiebreaker does not consider the applicant as an individual. To the contrary, the racial tiebreaker considers only whether the student is white or nonwhite. While the *Grutter* "diversity" interest pursues *genuine* diversity in the student body (of which race is only a single "plus" factor), the District pursues an interest which considers only *racial* diversity, *i.e.*, a predefined grouping of races in the District's schools. Such an interest is not a valid compelling interest; it is simple racial balancing, forbidden by the *Equal Protection Clause*.

* * *

But here, the District's concept of racial diversity is a predetermined, defined ratio of white and nonwhite children. The racial tiebreaker works to exclude white students from schools that have a 50-55% white student body (depending on the tiebreaker trigger used in a particular year), and works to exclude nonwhite students from schools with a 70-75% nonwhite student body (depending on the tiebreaker trigger used). Thus, the District's concept of racial diversity does not permit a school with a student body that is *too* white, or a school with a student body that is *too* nonwhite.

The District argues its concept of racial diversity is necessary to foster classroom discussion and cross-racial socialization. That argument, however, is based on the stereotype that all white children express traditional white viewpoints and exhibit traditional white mannerisms; all nonwhite children express opposite nonwhite viewpoints and exhibit nonwhite mannerisms, and thereby white and nonwhite children will better understand each other. Yet there is nothing in the racial tiebreaker to ensure such viewpoints and mannerisms are represented within the preferred student body ratio. As noted in *Grutter*, the only way to achieve diverse viewpoints and mannerisms is to look at the individual student. . . .

* * *

Besides the District's reliance on racial stereotypes, there is good reason categorically to forbid racial balancing. The process of classifying children in groups of color, rather than viewing them as individuals, encourages "notions of racial inferiority" in both white and nonwhite children and incites racial hostility. Indeed, those risks are particularly great here because of the blunt nature of the racial tiebreaker. The District's racial grouping of students, either as white or nonwhite, assumes that each minority student is the same, regardless whether he is African-American, Asian-American, Latino, or Native American; the only difference noted by the District is that the minority student is not white. . . .

Unlike a voluntary decision by parents to expose their children to individuals of different races or background, the District classifies each student by skin color and excludes certain students from particular schools—solely on the basis of race—to ensure those schools remain racially

balanced. Even if well intentioned, the District's use of racial classifications in such a stark and compulsory fashion risks perpetuating the same racial divisions which have plagued this country since its founding

* * *

The District's asserted interest may be supported by noble goals. But the stereotypes on which it is based, and the risks that it presents, make that interest far from compelling.

C.

The sociological evidence presented by the District, relied upon strongly by the majority, does not change my view. The majority discusses much of the evidence that supports the District's position that racially balanced schools foster cross-racial socialization and understanding in school and later in the students' lives. Yet the majority puts aside the other evidence suggesting there is no definitive agreement as to the beneficial effects of racial balance in K-12 schools, that the benefits attributed to racially balanced schools are often weak, and that any benefits do not always have a direct correlation to racial balance. . . .

* * *

But despite the inconsistencies in the sociological evidence and the vivid risks of the District's asserted interest, the majority implicitly defers to the District's position. *Grutter* took a similar approach, emphasizing that its endorsement of the "diversity" interest relied in large part upon deference to the educational judgment of the Michigan Law School.

Yet perhaps to steal a line from the majority, the "context" here is different. We are not faced with a university's "academic freedom," which arises from "a constitutional dimension, grounded in the *First Amendment*, of educational autonomy," and which includes the freedom to select its student body. *Id.* We instead consider a public high school's admissions plan which admits or excludes students from particular schools solely on the basis of their race. For several reasons, we should not defer to such a plan.

First, other than for race-conscious university admissions based on holistic diversity, deference to a government actor is inconsistent with strict scrutiny.

* * *

Moreover, there is a crucial difference between the "robust exchange of ideas" theory referenced in *Grutter* and the District's claim that its interest "brings different viewpoints and experiences to classroom discussions and thereby enhances the educational process." The District applies the racial tiebreaker only to entering ninth-grade students. It is self-evident that classroom discussion plays a significantly more vital role in universities with their typical dialectic or Socratic teaching method, than in ninth-grade high school courses with their typical didactic or rote teaching method.

Last, the District's claim that its asserted interest helps to foster cross-racial socialization and understanding later in the students' lives is a sociological judgment outside the expertise of the District's educators. . . .

Strict scrutiny cannot remain strict if we defer to judgments not even within the

particular expertise or observation of the party being scrutinized. Hence, deference is not due to the District regarding the benefits the District contends are attributable to its claimed interest.

* * *

IV.

Even if the District's asserted interest were a compelling governmental interest, the means used by the District must still be narrowly tailored to serve that interest. *See Grutter, 539 U.S. at 333*. . . .

A.

The first narrow-tailoring factor requires the District to engage in an individualized consideration of each applicant's characteristics and qualifications. *See Grutter, 539 U.S. At 337*. . . .

Yet the majority concludes that individualized consideration of each applicant is irrelevant here "because of the contextual differences between institutions of higher learning and public high schools." Majority op. at 36. I could not disagree more. By removing consideration of the individual from the narrow tailoring analysis, the majority threatens to read the *Equal Protection Clause* out of the Constitution. It is the very nature of equal protection to require individualized consideration when the government uses racial classifications: "the *Fourteenth Amendment* "protects *persons*, not *groups*." *Grutter, 539 U.S. at 326* (quoting *Adarand, 515 U.S. at 227*) (emphasis in original). . . .

Individualized consideration of an applicant does not require an admissions program to be oblivious to race; the program may consider race, but in doing so, it must remain "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight." *Id. at 334*.

Here, the racial tiebreaker works to admit or exclude high school students from certain oversubscribed schools solely on the basis of their skin color. No other consideration affects the operation of the racial tiebreaker.

. . .

[The dissent notes the program categorizes students broadly as "white" or "nonwhite" and suggests this is not narrowly tailored.]

* * *

B.

The second narrow-tailoring factor prohibits the use of quotas based upon race. *Grutter, 539 U.S. at 334*. A quota is defined as "a program in which a certain fixed number or proportion of opportunities are reserved exclusively for certain minority groups. Quotas impose a fixed number or percentage which must be attained, or which cannot be exceeded." *Id. at 335*.

Here, when a District school is oversubscribed and "integration positive"–*i.e.*, the white or nonwhite student body of the school deviates by plus or minus 10% or 15% (depending on the school year) of the preferred 40% white/60% nonwhite ratio—the District uses the racial tiebreaker to admit students whose presence will move the overall student body closer to the preferred ratio. . . .

By its nature, the tiebreaker aims for a rigid, predetermined ratio of white and nonwhite students, and thus operates to reach "a fixed number or percentage." (emphasis supplied).

Gratz specifically rejected such a plan as not narrowly tailored. *See 539 U.S. at 270.*

Yet the majority argues no quota exists here because the racial tiebreaker "does not set aside a fixed number of slots for nonwhite or white students," nor is the 10 or 15% variance always satisfied (generally because there are insufficient numbers of white or nonwhite students needed to balance the school). Majority op. at 46. With respect, the majority misses the point. A quota does not become less of a quota because there are an insufficient number of whites or nonwhites to fill the preselected spots. The District created a quota when it established the predetermined, preferred ratio of white and nonwhite students. . . .

* * *

C.

The third narrow-tailoring factor requires the District to have engaged in a "serious, good-faith consideration of workable race-neutral alternatives." *See id. at 339.* The majority concludes the District made such an effort. For several reasons, I disagree.

First, the District's superintendent flatly admitted the District did not engage in a serious, good-faith consideration of race-neutral alternatives.

The record supports this concession. The District never asked its demographer to conduct any analysis regarding the effect of using a race-neutral lottery. The District also never asked its demographer to conduct any analysis regarding a diversity program with non-racial indicia such as a student's eligibility for free lunch or the students's socioeconomic background. [The dissent goes on to discuss various other alternatives the District did not consider.]

* * *

D.

The fourth narrow-tailoring factor requires that the District's use of the racial tiebreaker "must not unduly burden individuals who are not members of the favored racial and ethnic groups." The majority adjusts this test slightly to consider "any racial group," rather than just members of the disfavored group. Because the racial tiebreaker disadvantages both white and nonwhite children, I agree that the modification is valid. But unlike the majority, I conclude the District's operation of the racial tiebreaker fails this factor as well.

The racial tiebreaker unduly burdens thirteen- and fourteen-year-old school children by (1) depriving them of their choice of school, and (2) imposing on them tedious cross-town commutes, solely upon the basis of their race.

* * *

Yet the majority discounts the burdens imposed by the racial tiebreaker, concluding that (1) the "minimal burden" of the tiebreaker is shared equally among white and nonwhite students; (2) no student is entitled to attend any specific school in any event; and (3) the tiebreaker does not uniformly benefit one race over the other because the tiebreaker operates against both whites and nonwhites. Regarding the first point, the U.S. Supreme Court has long rejected the notion that a racial classification which burdens races equally is any less objectionable under the *Equal Protection Clause*. . . .

Second, I think I have already disposed of the majority's argument that no student is entitled to attend any specific District school. The students and parents clearly value some of the District's schools above the others, and limiting access to those higher quality schools on the basis of race is just the same as any other preferential racial classification.

Third, I agree the tiebreaker does not uniformly benefit one race over the other and can exclude both white and nonwhite students from the preferred schools. Yet that does not lessen the injury of being subject to a racial classification. Equal protection is an individual right, and whenever the District tells one student, whether white or nonwhite, he or she cannot attend a particular school on the basis of race, that action works an injury of constitutional proportion.

E.

The fifth and final narrow-tailoring factor requires the District's use of the racial tiebreaker to "be limited in time," and "have a logical end point." *See Grutter, 539 U.S. at 342.*

* * *

Citing *Grutter*, the majority contends the racial tiebreaker satisfies this factor because "this durational requirement can be met by periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity," and the District engages in such periodic reviews. Majority op. at 65. Yet citing *Grutter* in full shows that "the durational requirement can be met by sunset provisions in race-conscious admissions policies *and* periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity." *539 U.S. at 342* (emphasis added). Periodic reviews are not enough; there must be some "durational requirement," some "logical end point," to the racial classifications.

* * *

V.

As pointed out in the majority opinion, other courts have concluded that a school district's use of a racial tiebreaker in search of racial balance in the student body passes muster under the *Equal Protection Clause*. I respectfully disagree. The District's use of the racial tiebreaker to achieve racial balance in its high schools infringes upon each student's right to equal protection and tramples upon the unique and valuable nature of each individual. We are not different because of our skin color; we are different because each one of us is unique. That uniqueness incorporates our opinions, our background, our religion (or lack thereof), our thought, *and* our color. *Grutter* attempted to strike a balance between the individual protections of equal protection and being conscious of race even when looking at the individual. The District's use of the racial tiebreaker, however, attempts no such balance; it instead classifies each ninth-grade student solely by race. Because of that, I must conclude such a program violates the *Equal Protection Clause*.

* * *

Meredith v. Jefferson County Board of Education

(05-915)

Ruling Below: (*McFarland v. Jefferson County Pub. Schs* 330 F. Supp. 2D 834, upheld by *McFarland v. Jefferson County Public Schools*, 416 F.3d 513 (6th Cir. 2005), *cert granted* 126 S. Ct. 2351, 74 U.S.L.W. 3676 [2006]).

The Jefferson County Public Schools system voluntarily adopted a plan to assign students to its schools based on a number of factors, including race, in order to maintain a certain proportion of black students at each school. Plaintiffs are the parents of students in the Jefferson County public schools who claim that the school student assignment plan violates the rights of their children under the Equal Protection Clause of the United States Constitution to be admitted to a school without consideration of their race. Because the plan did not conflict with *Grutter v Bollinger* and was narrowly tailored, the court allowed the school board to take race into account. The selection process for the school board's traditional magnet schools was found to not be narrowly tailored, and was ordered to be revised.

Question Presented: 1. Should *Grutter v. Bollinger,* 539 U.S. 306 (2003) and *Regents of University of California v. Bakke,* 438 U.S. 268 (1978) and *Gratz v. Bollinger,* 539 U.S. 244 (2003) be overturned and/or misapplied by the Respondent, the Jefferson County Board of Education to use race as the sole factor to assign students to the regular (non-traditional) schools in the Jefferson County Public Schools?
2. Whether the race-conscious Student Assignment Plan with mechanical and inflexible quota systems of not less than 15% nor greater than 50% of African American students without individually or holistic review of any student, meets the Fourteenth Amendment requirement of the use of race which is a compelling interest narrowly tailored with strict scrutiny.
3. Did the District Court abuse and/or exceed its remedial judicial authority in maintaining desegregative attractiveness in the Public Schools of Jefferson County, Kentucky?

David McFARLAND, Parent and Next Friend of Stephen and Daniel McFarland, et al., Plaintiffs
v.
JEFFERSON COUNTY PUBLIC SCHOOLS, Defendants

United States District Court
for the Western District of Kentucky

Decided June 29, 2004

[Excerpt: some footnotes and citations omitted]
JOHN G. HEYBURN II, Chief Judge:

For twenty-five years, the Jefferson County Public Schools ("JCPS" or "the Board") maintained an integrated school system under a 1975 federal court decree. After release from that decree four years ago, the JCPS elected to continue its integrated

schools through a managed choice plan that includes broad racial guidelines ("the 2001 Plan"). This case arises because some students and their parents say that the Board's student assignment plan violates their rights under the Equal Protection Clause of the United States Constitution.

* * *

I. SUMMARY

. . . For guidance, the Court has focused on the divided opinions of the Supreme Court in two recent cases: *Grutter v. Bollinger,* 539 U.S. 306, 156 L. Ed. 2d 304, 123 S. Ct. 2325 (2003), and *Gratz v. Bollinger*, 539 U.S. 244, 156 L. Ed. 2d 257, 123 S. Ct. 2411 (2003). The first of these opinions upheld race-conscious admissions policies at the University of Michigan Law School; the latter struck down different policies at the University of Michigan's College of Literature, Science and the Arts. These two cases set out the requirement that any use of race in a higher education admissions plan must further a compelling governmental interest and must be narrowly tailored to meet that interest. The Court considered these principles in the slightly different context of an elementary and secondary school student assignment plan.

JCPS meets the compelling interest requirement because it has articulated some of the same reasons for integrated public schools that the Supreme Court upheld in *Grutter*. Moreover, the Board has described other compelling interests and benefits of integrated schools, such as improved student education and community support for public schools, that were not relevant in the law school context but are relevant to public elementary and secondary schools.

In most respects, the JCPS student assignment plan also meets the narrow tailoring requirement. Its broad racial guidelines do not constitute a quota. The Board avoids the use of race in predominant and unnecessary ways that unduly harm members of a particular racial group. The Board also uses other race-neutral means, such as geographic boundaries, special programs and student choice, to achieve racial integration.

The student assignment process for the traditional schools is distinct from that employed at all other programs and schools. In that process, JCPS separates students into racial categories in a manner that appears completely unnecessary to accomplish its objectives. To the extent the 2001 Plan incorporates these procedures, the Court concludes that it violates the Equal Protection Clause. The Board may continue to administer the 2001 Plan in every respect in all of its schools, with the exception of its use of racial categories in the traditional school assignment process.

II. FACTUAL BACKGROUND

Plaintiffs all have children who attend or have attended Jefferson County public schools and have participated in the student assignment process. Each, in different ways, is dissatisfied with the procedure or result of his or her child's assignment to a Jefferson County public school. Plaintiffs seek to enjoin the use of racial guidelines under the 2001 Plan, including the use of racial categories in the traditional school assignment process. This Court has stated that, because the student assignment plan applies at all grade levels in all school settings in the Jefferson County schools, any ruling would necessarily apply to the entire school system.

* * *

A.

JCPS is the 28th largest public school system in the United States. Its district boundaries mirror those of the new Metropolitan Louisville which is now the 16th largest city in the nation. In 2003-2004, about 97,000 students were enrolled in JCPS: approximately 5,000 in preschool programs; 42,500 in elementary schools; 21,650 in middle schools; 24,750 in high schools; 2,100 in alternative schools; and about 1,000 in special schools and special education centers. The racial profile of students subject to the 2001 Plan is about 34% Black and 66% White.

* * *

B.

This case and its legal predecessors are inseparable from JCPS's ongoing commitment to racial integration within its individual schools. One can find the complete legal and historical background of this case in Hampton I, 72 F. Supp. 2d 753, 754-67 (W.D. Ky. 1999). [The court described this case. A 1975 court order directed the Board to implement a desegregation plan. In 1996 the Board revised its student assignment plan and students and parents filed a lawsuit alleging the students were denied admission to a high school because of their race. The court concluded that the original desegregation order was still in place, and the plaintiffs moved to dissolve the decree.]

* * *

In June 2000, this Court dissolved the 1975 desegregation decree, ordered JCPS to cease using racial quotas at Central High School, and ordered JCPS to complete any reevaluation and redesign of the admissions procedures in other magnet schools before the beginning of the 2002-2003 school year. Hampton II, 102 F. Supp. 2d 358, 377-81 (W.D. Ky. 2000).

To comply with the Court's order, the Board ended its use of racial quotas at Central High School and at three other magnet schools . The Board determined that the Court's order did not address the use of race at magnet traditional schools. In April 2001, after considering public feedback from opinion surveys and community meetings, the Board adopted the 2001 Plan.

III. THE 2001 STUDENT ASSIGNMENT PLAN

. . . The 2001 Plan contains three basic organizing principles: (1) management of broad racial guidelines, (2) creation of school boundaries or "resides" areas and elementary school clusters, and (3) maximization of student choice through magnet schools, magnet traditional schools, magnet and optional programs, open enrollment and transfers. Using these principles, JCPS provides a form of managed choice in student assignment for its students individually and for the system as a whole.

A.

The racial guidelines broadly influence the overall student assignment plan. This is not surprising since one of the Board's current stated goals under the 2001 Plan is to provide "substantially uniform educational resources to all students" and to teach basic skills and critical thinking skills "in a

racially integrated environment." To accomplish these objectives, the 2001 Plan requires each school to seek a Black student enrollment of at least 15% and no more than 50%. This reflects a broad range equally above and below Black student enrollment systemwide.

Prior to any consideration of a student's race, a myriad of other factors, such as place of residence, school capacity, program popularity, random draw and the nature of the student's choices, will have a more significant effect on school assignment. The guidelines mostly influence student assignment in subtle and indirect ways. For instance, where the racial composition of an entire school lies near either end of the racial guidelines, the application of any student for open enrollment, transfer or even to a magnet program could be affected. In a specific case, a student's race, whether Black or White, could determine whether that student receives his or her first, second, third or fourth choice of school.

For the most part, the guidelines provide administrators with the authority to facilitate, negotiate and collaborate with principals and staff to maintain schools within the 15-50% range.

B.

Geographic boundaries greatly influence student assignments. Each JCPS school, [except the traditional program schools,] has a designated geographic attendance area, which is called its "resides area." Each student is assigned a "resides school" based upon the residence address of his or her parent(s) or guardian. In 2002-2003, 57.5% of all students attended their resides school.

At the elementary school level, all non-magnet elementary schools are grouped into twelve clusters. The elementary schools in a cluster, which includes a student's resides school, are designated as "cluster resides schools" for that student. Racial demographics have influenced the boundaries for contiguous and non-contiguous resides areas and the composition of some elementary school clusters. Elementary schools are clustered so that combined attendance zones, assuming normal voluntary choices, will produce at each school student populations somewhere within the racial guidelines.

Each non-magnet middle and high school has its own resides area. There are no clusters at those levels. Apart from age, graduation from previous grade and residence, no selection criteria govern admission of any student to his or her resides school or a school within his or her cluster. The geographic boundaries of resides areas and cluster schools determine most school assignments.

C.

Student choice may be the most significant element of the 2001 Plan. In addition to a choice of geographic location, JCPS offers students the choice of numerous and varied specialized schools and programs.

[The court discussed various magnet programs students can choose in the Jefferson district]

* * *

An important part of student choice is the ability of virtually any student to apply for open enrollment (high school freshmen only) or transfer to any non-magnet school. The process for each is similar. After the

initial assignment process is complete, any student may apply for transfer to any non-magnet school. Rising freshmen may apply for open enrollment to any non-magnet high school. If the student is accepted, the receiving school becomes the student's resides school. In each case, the receiving school makes the original decision to accept or reject the applicant. The number of students actually requesting transfer or open enrollment is quite small.

D.

School geographic boundaries and student choice interact to create a huge array of choices and flexibility within the assignment process. [The court described various educational options available to students in the district].

* * *

The admissions process for non-traditional magnet schools, magnet programs and optional programs at all grade levels is relatively straightforward. Admissions decisions for the four non-traditional magnet schools are based upon: (1) objective criteria established by the school or program, such as a survey and/or essay, recommendations by adults, a work sample or audition, attendance data, course grades and CATS and/or standardized test scores; (2) available space in the school or program; and (3) for students applying to Brown, position on a computer-generated random draw list and residence within a zip code that will make the student body representative of the entire county. In addition to objective criteria and program capacity, the racial guidelines are a factor in admission to all the other magnet and optional programs. Admission to one of the middle school Math, Science and Technology Programs is also based upon position on a computer-generated random draw list.

E.

Traditional schools have a more complex admissions process, which combines elements of student choice, program and school capacity, geographic boundaries, pure chance, broad racial guidelines and the use of racial categories to separate applicants. Some Plaintiffs initiated this litigation because they object to JCPS's use of the racial guidelines in general, and the use of racial categories in particular, in the traditional school admissions process.

JCPS first developed traditional programs for the 1976-1977 school year. Traditional schools offer the same comprehensive curriculum offered by every other non-magnet school. These schools emphasize basic skills in a highly structured educational environment, discipline and dress codes, learning with daily follow-up assignments, and concepts of courtesy, patriotism, morality and respect for others. . . .

The traditional program is offered as the sole structure at nine schools: four elementary, three middle and two high schools. In addition, JCPS offers the traditional program at two resides elementary schools, Foster and Maupin. In 2002-2003, about 9.3% of all JCPS students were enrolled in the traditional program.

1.

Place of residence and position on the random draw lists are the primary factors for entry into the traditional program. With the exception of the programs at Foster and Maupin, which are open to students

districtwide, each traditional elementary and middle school has its own geographic zone. Students attend the traditional school in their geographic zone. After initial acceptance, the so-called "pipeline" becomes the dominant influence in traditional school assignment. The "pipeline" guarantees each current traditional school student a spot in the next grade level without submitting a new application. The "pipeline" enlarges in each grade, thus creating openings for new applicants to the traditional program.

Middle schools are larger than elementary schools. Consequently, the "pipeline" increases by about 450 students at the sixth grade level and by sixty students at the seventh grade level. About 800 students graduate from the three traditional middle schools. These students can state a preference to attend either Butler or Male [. . .which] have available space for 946 ninth graders, 446 at Butler and 500 at Male. . . . Butler typically has about 200 openings for students outside the traditional school "pipeline." Consequently, students not in the "pipeline" may apply for Butler. Their applications are considered to the extent space is available.

Students who are not accepted to a traditional school have other opportunities to join the "pipeline." For instance, a student may elect to apply to the traditional programs at Foster or Maupin. . . . [The court notes that most of the plaintiffs did not reapply when denied admission or did not apply to the traditional program.]

2.

The racial guidelines also apply to the traditional schools. The process for employing the guidelines, however, is significantly different from the process as it is applied to all other schools. Applicants are separated and randomly sorted into four lists at each grade level: Black Male, Black Female, White Male and White Female.

The principal has discretion to draw candidates from different lists in order to stay within the racial guidelines for the entire school student population. The racial guidelines apply to the entire school, not per grade. Generally speaking, depending on how many spaces are available for new applicants, a principal will first take a certain number of applicants from each list—for instance, the first ten names on each list—and notify the parents. If the parent declines to enroll the child in that school, the principal can now move to the next name on one of the four lists, using his or her discretion as to which list to choose from. If all of the parents accept, depending upon space availability, the selection process may be complete or may require selection of a few more students. The Office of Demographics gives final approval on a principal's selections to ensure that the school is within the racial guidelines.

A principal may not deviate from the order in which the names appear on the lists. If a principal has chosen all the names on a given list, he or she is not permitted to recruit additional applicants for that race/gender category. Similarly, if few or no Black students apply to a traditional school, a principal would be limited to admitting only those Black students who apply at that time. JCPS, however, makes a concerted effort through the Parent Assistance Center and the Department of Student Assignment to ensure adequate Black student participation in the traditional program.

IV. THE STANDARD OF REVIEW

[The court establishes that strict scrutiny is the proper standard of review for racial classifications]

* * *

Most recently, in *Grutter* and *Gratz*, the Supreme Court explicitly reaffirmed strict scrutiny for review of racial classifications in higher education admissions programs.

* * *

V. JCPS HAS ESTABLISHED A COMPELLING INTEREST IN MAINTAINING INTEGRATED SCHOOLS

Strict scrutiny means that racial classifications must further a compelling governmental interest and must be narrowly tailored to meet that interest. . . .

The Supreme Court has said that universities and graduate schools may state a compelling interest in obtaining "the educational benefits of a diverse student body." Id. at 328. The Board's interests articulated here overlap with those of the Michigan Law School at the individual student level. In addition, in its statement of interests, the Board has articulated broader concerns in the different context of public elementary and secondary education. The different context "matters" because, under the Equal Protection Clause, "not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context." Id. at 327. No particular interest, however, is categorically compelling. The interest asserted must be examined and approved in each case in light of the particular context in which it is asserted.

To give all students the benefits of an education in a racially integrated school and to maintain community commitment to the entire school system precisely express the Board's own vision of Brown's promise. The benefits the JCPS hopes to achieve go to the heart of its educational mission: (1) a better academic education for all students; (2) better appreciation of our political and cultural heritage for all students; (3) more competitive and attractive public schools; and (4) broader community support for all JCPS schools. Mem. Op., at 1-2.

Whether an asserted interest is truly compelling is revealed only by assessing the objective validity of the goal, its importance to JCPS and the sincerity of JCPS's interest. For the reasons that follow, the Court has no doubt that Defendants have proven that their interest in having integrated schools is compelling by any definition.

A.

Traditionally, Americans consider the education of their children a matter of intense personal and local concern. Not surprisingly, over many years and in a variety of circumstances, the Supreme Court has strongly endorsed the role and importance of local elected school boards as they craft educational policies for their communities. *Freeman v. Pitts*, 503 U.S. 467, 489-90, 118 L. Ed. 2d 108, 112 S. Ct. 1430 (1992); *Wash. v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 481-82, 73 L. Ed. 2d 896, 102 S. Ct. 3187 (1982). The historical importance of the deference accorded to

local school boards goes to the very heart of our democratic form of government. It is conceptually different—though perhaps more accepted—than the deference discussed in *Grutter* and *Bakke*.

Democratically elected school boards across the country are struggling to improve our schools and the education of children in them and to retain the public support of their communities. The Court's deference to JCPS's efforts here is neither absolute nor determinative.

* * *

B.

Now removed from the mandate of a federal court decree, the Board has made its choice. This Court must consider the importance and validity of that choice.

Integrated schools, better academic performance, appreciation for our diverse heritage and stronger, more competitive public schools are consistent with central values and themes of American culture. Access to equal and integrated schools has been an important national ethic ever since *Brown v. Board of Education* established what Richard Kluger described as "nothing short of a reconsecration of American ideals." What Kluger and others have articulated is that *Brown's* symbolic, moral and now historic significance may now far exceed its strictly legal importance. Alluding to that very point, this Court has said that "*Brown* and its progeny established a moral imperative to eradicate racial injustice in the public schools." *Hampton II*, 102 F. Supp. 2d at 379. Congress recently affirmed the value of racial integration and interaction by its enactment of the No Child Left Behind Act and by the statements contained in that legislation. See 20 U.S.C. § 6301 et seq. Likewise, the Supreme Court has reiterated that "education . . . is the very foundation of good citizenship." *Grutter*, 539 U.S. at 331 (quoting *Brown*, 347 U.S. at 493).

* * *

For the majority in *Grutter*, cross-racial understanding and racial tolerance, preparation for a diverse workplace and training of the nation's future leaders were "substantial" benefits of diversity in higher education. Id. at 330-32. Like institutions of higher education, elementary and secondary schools are "pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society." Id. at 331 (quoting *Plyler v. Doe*, 457 U.S. 202, 221, 72 L. Ed. 2d 786, 102 S. Ct. 2382 (1982)). For that reason, these same benefits accrue to students in racially integrated public schools. Several JCPS witnesses testified that, in a racially integrated learning environment, students learn tolerance towards others from different races, develop relationships across racial lines and relinquish racial stereotypes. These values transcend their experiences in public school and carry over to their relationships in college and in the workplace. As a result, these students are better prepared for jobs in a diverse workplace and exhibit greater social and intellectual maturity with their peers in the classroom and at their job. These benefits that the Board seeks from an integrated school system are precisely those articulated and approved of in *Grutter*. The Court finds that the benefits of racial tolerance and understanding are equally as "important and laudable" in public elementary and secondary education as in higher education. Id. at 330.

Other benefits the Board seeks are quite

different from those articulated in *Grutter*. Nevertheless, they seem equally compelling. The Board believes that integration has produced educational benefits for students of all races. Over the past twenty-five years, White and Black students in JCPS have progressed by every measure. In Hampton II, this Court found that "the Board is convinced that integrated schools provide a better educational setting for all its students; [and] that concentrations of poverty which may arise in neighborhood schools are much more likely to adversely affect black students than whites." 102 F. Supp. 2d at 371 n.30. The evidence presented in this and earlier cases "seems to suggest that African-American student achievement has improved substantially" during the past twenty-five years. Id. at 365 n.12. Indeed, one of Defendants' experts testified that racial integration benefits Black students substantially in terms of academic achievement. The Court cannot be certain to what extent the policy of an integrated school system has contributed to these successes. Opinions surely vary on this issue. The Court certainly need not resolve this ongoing debate. But, the Fourteenth Amendment does not enact any particular preference of educational policy. As a matter of evidence, however, this Court can find that the Board has valid reasons for believing that its student assignment policies may aid student performance.

The Board also believes that school integration benefits the system as a whole by creating a system of roughly equal components, not one urban system and another suburban system, not one rich and another poor, not one Black and another White. It creates a perception, as well as the potential reality, of one community of roughly equal schools. Student choice and integrated schools, the Board believes, invest parents and students alike with a sense of participation and a positive stake in their schools and the school system as a whole. This is vital to JCPS because, in a very real sense, it competes for students with many types of private and parochial schools throughout Jefferson County. In recent years, it has competed very successfully. . . .

The evidence on each of these points demonstrates that maintaining an integrated system may help the Board to achieve its goals for individual students and the system as a whole. The Court concludes, therefore, that the Board's policy of integrated schools is both important and valid.

* * *

VI. THE 2001 PLAN IS NARROWLY TAILORED IN MOST RESPECTS

Even to achieve a compelling purpose, the Board may use race only by means that are "specifically and narrowly framed to accomplish that purpose." *Grutter*, 539 U.S. At 333. . . . To be narrowly tailored, the Board's use of race must "'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *J.A. Croson Co.*, 488 U.S. at 493. The Court's narrow tailoring inquiry must be carefully "calibrated to fit the distinct issues raised by the use of race" in this case. *Grutter*, 539 U.S. at 334. Consequently, the Court will evaluate whether the 2001 Plan is narrowly tailored, or is a proper "fit," in light of the factual and analytical differences between this case and the admissions programs reviewed in *Grutter* and *Gratz*.

The complexity of these legal issues and the absence of judicial unanimity mean that

fundamental truths about narrow tailoring are difficult to discern. The *Grutter* and *Gratz* opinions reveal a starkly divided court that determines equal protection jurisprudence by a shifting coalition of views in a given context or case. The Court must proceed carefully. For that reason, the Court will not accord even limited deference to the Board's implementation of its goals.

With these principles in mind, in order to determine whether the 2001 Plan is narrowly tailored, the Court will evaluate the four primary factors that the Supreme Court considered in *Grutter*: (1) whether the 2001 Plan amounts to a quota that seeks a fixed number of desirable minority students and insulates one group of applicants from another, (2) whether the applicant is afforded individualized review, (3) whether the 2001 Plan "unduly harm[s] members of any racial group," and (4) whether JCPS has given "serious, good faith consideration of workable race-neutral alternatives" to achieve its goals. Together, these factors constitute the "fit" that is so important to the narrow tailoring analysis. Id. at 333. The Court's analysis will focus upon elements of the 2001 Plan that govern assignment to non-traditional schools. In a separate section, the Court will consider whether the student assignment process for traditional schools is narrowly tailored.

A.

The most important narrow tailoring issue, and Plaintiffs' primary argument, concerns whether the 2001 Plan operates as a racial quota. "Properly understood, a 'quota' is a program in which a certain fixed number or proportion of opportunities are 'reserved exclusively for certain minority groups.'" Id. at 335. The Supreme Court said that a race-conscious admissions program cannot use a quota system because it would almost always violate the narrow tailoring requirement. Id. at 334-35. As the Supreme Court also wisely noted, however, "'some attention to numbers,' without more, does not transform a flexible admissions system into a rigid quota." Id. at 336 (quoting *Bakke*, 438 U.S. at 323). Common sense and the Supreme Court suggest that any strict or de facto racial quota has a couple of known characteristics: it has a precise target, and it insulates some applicants from competition with other applicants. The Court concludes that, for the most part, the 2001 Plan's use of the racial guidelines lacks these attributes.

1.

By definition, a quota must present a relatively precise target. While this would appear clear enough, everyone appears to have different ways of applying this definition to a given set of facts.

The 2001 Plan's racial guidelines for all schools present a quite flexible and broad target range. The Board's goal is to achieve a racial mix of between 15% and 50% Black students at each school. That the actual percentage of Black students at individual schools ranges between 20.1% and 50.4% demonstrates the extent of the Board's flexibility in achieving its goals. Even within this broad range, the Court finds a wide dispersal among the percentages of Black students in JCPS schools. For instance, 62 out of 87 elementary schools, 17 of 23 middle schools, and 15 of 20 high schools have a racial mix of over 40% or under 30% Black students. In other words, only about 30% of all schools show a racial mix within even five percent of either side of the systemwide average. This represents a widely dispersed range in Black students among JCPS schools rather than a precise

target.

Everyone seems to have an opinion about the meaning of statistics. In *Grutter*, for instance, Justices O'Connor and Kennedy battled over statistics and what constituted a quota. Justice O'Connor called the Michigan Law School's percentages of minority students, which varied between 13.5% and 20.1%, "a range inconsistent with a quota." *Grutter*, 539 U.S. at 336. Justice Kennedy, however, concluded that the percentage of minority law students fell in a much tighter range that he called a quota. He viewed race as almost "an automatic factor" that made the law school's "numerical goals indistinguishable from quotas." Id. at 389 (Kennedy, J., dissenting). He said that "the narrow fluctuation band [among rates of admission for Black applicants] raises an inference that the Law School subverted individual determination, and strict scrutiny requires the Law School to overcome the inference." Id. at 390-91. Justice Kennedy cited Amherst College, which admitted between about 8.5% (81 out of 950 offers) and 13.2% (125 out of 950 offers) minority applicants over a ten-year period, as an example of a range not suggestive of a quota. Id. In our case, one finds neither an automatic assignment nor a "narrow band" of percentages of Black students among JCPS schools. Indeed, the range in the percentage of Black students among all JCPS schools is much broader than the range in minority admissions at either Amherst College or Michigan Law School. This wide fluctuation suggests a lesser use of race and the absence of a specific target. Finally, even a cursory review of assignment data reveals that neither Black students nor White students are guaranteed assignment to a particular school. Too many race-neutral factors affect assignment for that to be true.

2.

A quota also insulates "each category of applicants with certain desired qualifications from competition with all other applicants." Id. at 334 (quoting *Bakke*, 438 U.S. at 315 (Powell, J.)). In other words, it "put[s] members of those groups on separate admissions tracks." Id. Except for traditional school assignment, all JCPS students are subject to the same criteria within the 2001 Plan. Criteria such as residence, student choice and random lottery are significant assignment factors for every student. No JCPS student is insulated from competition with all other students, and no student is placed on a separate admissions track.

It is constitutionally permissible to set racial goals to achieve truly compelling interests. It is impermissible, however, to seek that racial goal so assiduously and precisely that it amounts to a quota. JCPS's conduct resembles the former because it has set "a permissible goal . . . requir[ing] only a good-faith effort . . . to come within a range demarcated by the goal itself." Id. at 335 . The broad range in the guidelines shows that the Board does not operate a de facto quota that imposes or arrives at a "fixed number or percentage which must be attained." Id. (quoting *Sheet Metal Workers Int'l Ass'n,* 478 U.S. at 495). Thus, the evidence simply does not support the conclusion that the broad racial guidelines actually mask a tighter range, create a de facto quota or insulate one group of applicants from competition with another group.

B.

In *Grutter*, Justice O'Connor noted that the law school's "highly individualized" review of applications meant that the admissions process did not contain "mechanical" or

"predetermined diversity bonuses." Id. at 337. For her, the law school's approach was more nuanced than that of the undergraduate admissions program because the law school conducted a meaningful review of the individual candidate's application. In fact, in her *Gratz* concurrence joined by Justice Breyer, she noted the absence of individualized attention when finding the undergraduate program's use of race in its admissions policy impermissible. *Gratz*, 539 U.S. at 276-77 (O'Connor, J., concurring). The switch that Justices O'Connor and Breyer made between *Grutter* and *Gratz* reveals a potential fault line in the narrow tailoring analysis: the presence or absence of individualized review. Consequently, the Court must determine whether the 2001 Plan incorporates some sufficient form of individualized attention in the assignment process. The Court concludes that it does.

"Highly individualized, holistic review" of each applicant ensures that "each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application." *Grutter*, 539 U.S. at 337. . . . Under those circumstances, race is "one of many factors" to consider and may be used as a permissible "tipping" factor in deciding a particular student's placement. Id. at 339 (citing *Bakke*, 438 U.S. at 316).

One must analyze the 2001 Plan in its totally different context. Unlike the law school, JCPS does not deny anyone the benefits of an education. . . . Rather than excluding applicants, the Board's goal is to create more equal school communities for educating all students. But, like the law school, the JCPS assignment process focuses a great deal of attention upon the individual characteristics of a student's application, such as place of residence and student choice of school or program. It is individualized attention of a different kind in a different context than the Supreme Court found in *Grutter*.

In significant ways, the 2001 Plan actually operates like the "plus" system of which the Supreme Court has spoken so approvingly. Id. at 335 (citing *Johnson v. Transp. Agency*, 480 U.S. 616, 638, 94 L. Ed. 2d 615, 107 S. Ct. 1442 (1987)). Many factors determine student assignment, including address, student choice, lottery placement, and, at the margins, the racial guidelines. But, race is simply one possible factor among many, acting only occasionally as a permissible "tipping" factor in most of the JCPS assignment process. The Supreme Court has said this narrow use of race is permissible given a compelling reason. Specifically, Justice Powell stated in *Bakke* that "when the [Harvard] Committee on Admissions reviews the large middle group of applicants who are 'admissible' and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor. . . ." 438 U.S. 265, 316, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978) (quoting from amicus brief regarding aspects of Harvard admissions policy). In *Grutter*, the Supreme Court echoed these sentiments, stating that situations where race makes a difference in admissions could happen in "any plan that uses race as one of many factors," including the Michigan Law School plan. 539 U.S. at 339.

In light of the foregoing analysis, the Court concludes that the 2001 Plan allows for the consideration of several factors, including race. Moreover, except as to traditional schools, the appropriate consideration of individual factors within the assignment context ensures that race does not become "the defining feature" of a student's application.

C.

Another factor in the narrow tailoring analysis is that the Board's use of race does not "unduly harm members of any racial group." *Grutter*, 539 U.S. at 341. This is neither a new nor surprising concept. Some twenty-six years ago, Justice Powell referenced the same distinction between denial of admission to a selective graduate school and the assignment of a student to an alternative but appropriate public school. *Bakke*, 438 U.S. at 300 n.39. His observation seems applicable here.

* * *

The workplace, marketplace, and higher education cases are poor models for most elementary and secondary public school education precisely because they always involve vertical choices—one person is hired, promoted, receives a valuable contract, or gains admission. Ordinarily, when JCPS assigns students to a particular elementary, middle, or high school, the assignment has no qualitative or 'vertical' effects. This is so because the Court concludes that as between two regular elementary schools, assignment to one or another imposes no burden and confers no benefit. The same education is offered at each school, so assignment to one or another is basically fungible. As a logical consequence, most courts have concluded that there is no individual right to attend a specific school in a district or to attend a neighborhood school. As among basically equal schools, the use of race would not be a 'preference.' As among basically equal schools, therefore, JCPS's policy is not one of 'affirmative action.'

102 F. Supp. 2d at 380 (citations and footnotes omitted). The difference between the use of race in graduate school admissions and the JCPS student assignment plan results from the vastly different concept of each system. The law school admissions program excludes many applicants because of its goal of creating an elite community. The JCPS policy of creating communities of equal and integrated schools for everyone excludes no one from those communities. Consequently, when the Board makes a student assignment among its equal and integrated schools, it neither denies anyone a benefit nor imposes a wrongful burden.

. . . [T]he Board uses race in a limited way to achieve benefits for all students through its integrated schools.

D.

* * *

"Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative." Id. For instance, the Board could accomplish its objective through some form of an assignment lottery covering the entire school system. Such a system, however, would require a "dramatic sacrifice" in student choice, geographic convenience and program specialization. Id. at 340. Moreover, it could only be achieved at a huge financial cost. This is not required.

In every area of school assignment except the traditional schools, the Board has undertaken considerable effort to achieve its goals without the overt use of race in student assignments. It encourages students of all races to exercise choices. It recruits Black and White students for academic programs that promote educational improvement and enhance school integration. As a consequence, the Board's goal of an integrated school system is achieved

primarily through alternative measures that are educationally laudable and restrained in the use of race. The Court concludes that, throughout most of the assignment process, the Board sufficiently considered and used alternatives, which either were race-neutral or made minimal use of race, to meet narrow tailoring requirements.

E.

In summary, except for the traditional school assignment process, which will be discussed separately, the 2001 Plan is a proper "fit" because it is sufficiently flexible to determine school assignments for all students by a host of factors, such as residence, student choice, capacity, school and program popularity, pure chance and race. . . .

The 2001 Plan also "fits" its intended objectives because it does not unduly harm other students. The Plan works so that most students attend a school of their choice. Because all schools have similar funding, offer similar academic programs and comprise more similar ranges of students than possible in neighborhood schools, an assignment to one school over another does not cause constitutional harm to any student.

Except as to traditional schools, the Court cannot see that JCPS has any other workable race-neutral alternatives for accomplishing its compelling objective.

VII. THE TRADITIONAL SCHOOL ASSIGNMENT PROCESS IS NOT NARROWLY TAILORED

The sole exception to the Court's narrow tailoring inquiry concerns the traditional school assignment process. Traditional school enrollment amounts to a small portion of the overall student census. The assignment process for those schools has features that make it distinct from other aspects of the 2001 Plan and present particularly difficult constitutional questions. In the end, the Court finds that the use of race in the traditional school assignment process is not narrowly tailored.

In some respects, the traditional schools are no different than others throughout JCPS. Traditional schools have the same curriculum, financial resources and student discipline regulations as nearly every other school. They offer a distinct atmosphere for the same educational curriculum available at most other schools. The broad racial guidelines cover traditional schools in the same manner as every other school. Were the traditional school assignment process to function under the same broad racial guidelines and operational principles as previously discussed, it would be entirely permissible.

The traditional school assignment process, however, differs in two respects that have constitutional significance: (1) the assignment process puts Black and White applicants on separate assignment tracks, and (2) its use of the separate lists appears to be completely unnecessary to accomplish the Board's goal.

The significance of separating traditional school applicants into explicit racial categories is that students are placed on separate assignment tracks where race becomes "the defining feature of his or her application." *Grutter*, 539 U.S. at 334, 337. . . . The assignment process insulates one group of applicants from the randomness of choice and "competition" with other applicants. The use of categories, therefore, makes race the "defining feature" rather than

merely the "tipping" factor. In this Court's view, the Supreme Court would likely find these racial categories highly suspect.

An even more troublesome aspect of these racial classifications is that they appear entirely unnecessary to achieve the Board's stated goal of racial integration. The Court has compared data regarding the racial make-up of the applicant pools in the last two academic years with the racial make-up of the student populations in individual traditional schools at the same time. Overall, the percentage of Black applicants each year to a particular traditional school rather closely approximated the percentage of Black students in that school's population. Under the general law of probabilities, if applicants were selected off of one random draw list, the ratio of Black to White students in the applicant pool at a particular school would be reflected in the ratio of Black to White students in the pool of admitted students and, consequently, in the school's student population at large. More importantly, given the current numbers of Black students applying to traditional schools, the laws of probability predict that each school would fall within the racial guidelines. This is true even at Greathouse Elementary and Johnson Middle where numbers of Black applicants hover at either end of the guidelines. This evidence suggests that the use of racial categories is completely unnecessary.

JCPS says that separate racial lists are necessary to maintain solid levels of Black student participation in traditional schools. JCPS fears that, without the lists, Black students would be admitted in fewer numbers, racial isolation would result, and Black students would be discouraged from applying in the future. Even if this speculation should prove true, the Board has much less intrusive and more precisely targeted means at its disposal to maintain present levels of Black student participation in the traditional program or to rectify decreased future participation at certain schools. JCPS can enhance its recruitment efforts for White and Black students at various traditional schools. It can redraw traditional school boundaries (at least at the elementary and middle school levels) to increase the chances of attracting more Black students from neighborhoods in which Blacks reside and increase outreach to Black families. As the 2001 Plan provides, the Board could then use race as a "tipping" factor if necessary to achieve its compelling goals.

The Court must conclude that the initial separation of traditional school applicants into racial categories makes race a defining feature of the student's application and is entirely unnecessary to accomplish the Board's stated objective of racial integration. This use of race in the 2001 Plan therefore is not narrowly tailored. By revising the 2001 Plan in a manner consistent with this Memorandum Opinion, the Board may maintain its current assignment process. Although the Court has found that the use of racial categories under the 2001 Plan violates Plaintiffs' rights under the Equal Protection Clause, their children are not entitled to admission to the school of their choice. . . . While the Court will enjoin the use of the racial categories in the traditional school assignment process, equity does not require that Plaintiffs' children be admitted to the school of their choice in the upcoming school year.

"Justices to Hear Cases of Race-Conscious School Placements"

Washington Post
June 6, 2006
Charles Lane

The Supreme Court announced yesterday that it will rule on the race-conscious assignment of students to public schools, in a pair of cases that could produce some of the most important decisions on school integration since the busing battles of the 1960s and '70s.

The court agreed to hear arguments in separate lawsuits by white parents in Seattle and Jefferson County, Ky., which encompasses Louisville, who say each public school system unconstitutionally discriminates based on skin color. The jurisdictions' programs differ, but each seeks to maintain racial balance with the help of numerical targets for minority enrollment.

Although the court has addressed race-conscious admissions for diversity in higher education, upholding them on a 5 to 4 vote in 2003, this would be the first time it has addressed the "diversity rationale" as it affects the country's 48 million public elementary and secondary school students. It will also be the first race-related constitutional case for President Bush's two appointees, Chief Justice John G. Roberts Jr. and Justice Samuel A. Alito Jr.

The court's decision to take the cases was something of a surprise, since all three federal appeals courts to rule since 2003 sided with the school systems. The court usually intervenes to settle lower-court conflicts.

Six months ago, before Alito replaced Sandra Day O'Connor, who wrote the 2003 opinion, the court declined to hear the challenge of a parent in Lynn, Mass., to a race-conscious plan.

"It's bad news for desegregation advocates," said Goodwin Liu, a Clinton administration education official who teaches constitutional law at the University of California at Berkeley. "It looks like the more conservative justices see they have a fifth vote to reverse these cases."

But lawyers for the Seattle and Louisville parents argued there was a circuit split because the post-2003 lower-court rulings clashed with three pre-2003 rulings against race-conscious policies.

Sharon Browne, principal attorney of the Pacific Legal Foundation, which supports the parents' lawsuits, said she "was pleased that the Court has decided to hear these cases. Together, these cases could put an end to schools using race as a factor to decide where children can attend public school."

Yesterday's decision returns the court to an area of American life that it revolutionized in 1954 with *Brown v. Board Education*—and the lower-court desegregation orders, including busing in many cities, that flowed from that decision.

In the intervening years, however, direct court supervision of public school racial composition has generally lapsed, and schools face student demographics determined not only by the country's historic black-white divide, but also by immigration from around the world.

Embracing diversity not as a legal requirement but as an educational objective, school districts frequently offer alternatives

to geographical assignment, including school choice and magnet school options. But these, in turn, can result in competition for spots at the most-sought-after schools.

"The decision and the opinions will be impactful," said Francisco Negron, general counsel of the National School Boards Association, which has supported the school districts in the lower courts. "We're in the post-integration era. Many desegregation lawsuits filed in the '70s have come to a natural ending point. . . . Schools are trying to implement policies that recognize the need for diversity."

Seattle and Louisville say their plans are consistent with the Supreme Court's 2003 ruling—which allowed universities to consider race as one of many factors when assembling diverse colleges and graduate schools.

They say their use of race is necessary to meet compelling educational goals, and accounts for a modest number of school assignments.

But the plaintiffs argue that school officials have gone beyond what the court permitted in 2003, because they ultimately rely on fixed numerical targets for assigning students.

Each system adopted its plan voluntarily, but against the backdrop of different social and legal histories.

In Louisville, the 97,000-student public school population is 34 percent black, with the rest predominantly white. In 1973, a federal court ruled that it was officially, and unlawfully, segregated. This led to court-ordered busing from 1975 to 1984. The system remained under court supervision until 2000.

The current Louisville plan says that all schools, including magnets, must have a minimum black enrollment of 15 percent and a maximum of 50 percent.

The only exceptions are for pre-kindergarten, kindergarten, alternative and special schools—and four magnet schools covered by a federal judge's ruling barring the use of race to allocate educational opportunities not widely available.

Parent Crystal D. Meredith, however, argues that the plan cost her son admission to the school in his neighborhood. In Seattle, which has substantial Asian and Hispanic populations as well as large numbers of whites and African Americans, no court has ever found the 47,000-student school system guilty of official segregation. Instead, the school board says that diversity is a key educational value and that segregated housing patterns must be changed.

The city began busing in 1977 but stopped in 1988. Under an "Open Choice" plan adopted in 1998, the goal was to have schools close to the city's overall racial composition: 60 percent minority, 40 percent white. Children can attend any school. At schools where demand for spaces exceeds supply, however, siblings of current students have priority—and an "integration tiebreaker" favors students whose race would tip a school toward 60-40.

The tiebreaker has not been in use since 2002 because of the litigation, which was brought by Parents Involved in Community Schools, a group of white parents who say it cost their children admission to the popular Ballard High School.

The tiebreaker was initially invalidated by a three-judge panel of the San Francisco-based U.S. Court of Appeals for the 9th Circuit. But an 11-judge panel granted a new hearing and upheld it 7 to 4.

The cases are *Parents Involved in Community Schools v. Seattle School*

District No. 1 , No. 05-908, and *Meredith v. Jefferson County Board of Education* , No. 05-915. Argument will take place in December, with decisions due by July 2007.

"Court to Weigh Race as Factor in School Rolls"

New York Times
June 5, 2005
Linda Greenhouse

The Supreme Court agreed on Monday to rule on what measures, if any, public school systems may use to maintain racial balance in individual schools.

The eventual decision on whether they can take race into account could affect hundreds of school systems in all areas of the country. The court accepted challenges to plans in Louisville, Ky., where the schools were once racially segregated by law, and in Seattle, where segregation was never official but was widespread because of residential patterns.

Federal appeals courts upheld these plans, both of which offer students a choice of schools while taking race into account in deciding which transfer applications to accept. Variations of this approach are common, and have been under legal attack around the country.

The Supreme Court's decision to add the cases to the calendar for its next term, a step that by all appearances was controversial within the court and unexpected outside it, plunged the new Roberts court into one of the country's deepest constitutional debates.

The action came three years after the court upheld a racially conscious admissions plan at the University of Michigan Law School. Writing for the majority in that 5-to-4 decision, *Grutter v. Bollinger*, Justice Sandra Day O'Connor suggested that, at least in higher education, affirmative action might be necessary for another 25 years.

The new cases do not ask the court to revisit that decision, and the justices are unlikely to do so. But the implications are far-reaching nonetheless. The eventual decision, roughly a year from now, could not only set the court's path in this area but could also shape the climate in which government policies with respect to race will be debated.

One difference between the Michigan decision and the new cases is that while the University of Michigan sought to use affirmative action to achieve a measure of racial balance, the school districts are trying to maintain such a balance.

In December, with Justice O'Connor still on the court, the justices refused to hear a challenge to a racially conscious student assignment plan in the public schools of Lynn, Mass. That plan, which a federal appeals court had upheld, is basically indistinguishable from the plans at issue in the new cases: *Parents Involved in Community Schools v. Seattle School District*, No. 05-908, and *Meredith v. Jefferson County Board of Education*, No. 05-915.

What has changed is the Supreme Court itself, with the retirement in January of Justice O'Connor and her replacement by Justice Samuel A. Alito Jr. One lawyer involved in the challenges to the Seattle and Louisville plans, Sharon L. Browne of the Pacific Legal Foundation, a conservative public-interest law firm, expressed the view

that this change made the difference. "I think the writing's on the wall, or at least I hope it is," Ms. Browne said in an interview Monday.

The plans under review in the new cases differ in details that are unlikely to prove constitutionally significant. The Jefferson County, Ky., school board adopted the Louisville plan in 2001, shortly after the school system was declared desegregated and was released from 25 years of federal court supervision.

The "managed choice" plan applies to all schools, kindergarten through 12th grade. In a district that is one-third nonwhite, every school is required to seek a black student enrollment of at least 15 percent and no more than 50 percent.

The Louisville case was taken to the Supreme Court by Crystal D. Meredith, a white parent whose son, Joshua McDonald, did not receive a requested transfer to attend kindergarten in a school that was trying to maintain a sufficient number of black students.

The plan in Seattle, which has struggled for decades to deal with the effects on its school system of segregated housing patterns, applies only to the city's 10 high schools. The policy is one of "open choice," subject to various "tiebreakers," one of which is race. Other factors include geographic proximity and whether a student has a sibling at the desired school, both of which count in favor of an application.

Under the "integration tiebreaker," high schools that deviate by more than 15 percent from the systemwide balance, which is 60 percent nonwhite, must take account of an applicant's race in order not to deviate further.

A group of parents organized as a nonprofit corporation called Parents Involved in Community Schools to fight the plan, and filed the Supreme Court appeal after losing by a vote of 7 to 4 in the United States Court of Appeals for the Ninth Circuit.

Both appeals reached the court in January and evidently provoked a vigorous internal debate among the justices, who considered the Seattle case six times and the Louisville case seven times before issuing the one-line order accepting both. Prolonged review of this sort is unusual.

Briefs are now likely to pour into the court in advance of a November argument; the University of Michigan case drew more than 100 briefs. But one of the more influential analyses may prove to be a brief concurring opinion in the Seattle case by Judge Alex Kozinski, the Ninth Circuit judge whose views carry great weight among legal conservatives.

Describing the Seattle plan as one "that gives the American melting pot a healthy stir without benefiting or burdening any particular group," Judge Kozinski addressed the Supreme Court justices directly, on the assumption that they would soon be reviewing the decision.

"There is much to be said for returning primacy on matters of educational policy to local officials," he said.

* * *

"Supreme Court Will Hear Affirmative-Action Cases With Potentially Broad Meaning for Higher Education The Chronicle of Higher Education"

Chronicle of Higher Education
June 16, 2006
Jeffrey Selingo

Deciding once again to weigh in on the explosive debate over affirmative action, the U.S. Supreme Court agreed last week to take up the question of whether race can be a factor in assigning students to public schools.

The court accepted two cases that are the first involving racial preferences at educational institutions since it handed down two landmark rulings on race-conscious college admissions in 2003, and since the appointment of two new justices by President Bush.

How the two appeals from a Seattle parents' group and from a parent in Louisville, Ky. may ultimately affect the Supreme Court's decisions in the 2003 cases, which involved the University of Michigan at Ann Arbor, is unclear and is already the subject of much debate among lawyers and legal scholars. Last week a few higher-education lawyers laid out several scenarios that could result for colleges from rulings in the two school-district cases:

* Scenario 1. The decisions would contain language that provided colleges with guidance on how to apply the Michigan rulings. The court did not endorse a single admissions method in its mixed decisions in 2003. In one case, the court upheld the race-conscious admissions policies used by Michigan's law school because the school considered each applicant individually. In the other case, the justices struck down the admissions policy at Michigan's main undergraduate college because it awarded each black, Hispanic, and American Indian applicant a 20-point bonus on a 150-point scale.

* Scenario 2. The rulings would suggest that the court was open to revisiting the Michigan decisions through another case involving race-conscious admissions at colleges.

* Scenario 3. The decisions would be narrowly tailored and would apply only to public school districts.

The wild cards in these cases, lawyers and legal scholars agreed, are the two new members of the court: Chief Justice John G. Roberts Jr. and Justice Samuel A. Alito Jr., both of whom have right-of-center reputations. The two appeals accepted last week are similar to a case the court refused to hear in December, when Justice Sandra Day O'Connor was still on the bench. Justice O'Connor wrote the majority opinion in the Michigan case that upheld the use of race in admissions.

Colleges May Get Involved

Roger B. Clegg, general counsel for the Center for Equal Opportunity, an advocacy group that opposes racial preferences, said last week that he found it interesting that the two cases accepted by the court and the one it rejected in December all upheld the use of race in assigning students.

"There is no conflict in the circuits," he said, referring to the court's common practice of resolving judgments at variance among the different federal Courts of Appeal. "And the conventional wisdom," he said, "is that the Supreme Court doesn't take cases in order to affirm."

Still, Mr. Clegg said, the Supreme Court is not likely to use this occasion to overturn the Michigan cases. "That's not going to happen," he said. "But I think the court may give some indication that the majority will be willing reconsider the cases."

As a result, higher-education lawyers said, it is probable that colleges will get involved in the run-up to oral arguments in the school-district cases by writing, for example, briefs in support of the schools.

"I would frankly be surprised if the higher-education community doesn't step up," said Arthur L. Coleman, who is a partner with the law firm of Holland & Knight here and who helped write such a brief on behalf of several public schools in the Michigan higher-education cases. Mr. Coleman was one of several lawyers who said the two cases taken by the Supreme Court on Monday could provide colleges with much-needed legal guidance on how to tailor their admissions systems narrowly enough to remain within the law.

The Seattle case accepted by the Supreme Court *Parents Involved in Community Schools v. Seattle School District*, No. 05-908 dates to 2000. That's when a group called Parents Involved in Community Schools sued the school district, arguing that its method of using race as a tiebreaker when it had more applicants than openings in high schools was unconstitutional.

The plan, which allowed students to pick among high schools, was upheld by the Washington State Supreme Court. It was struck down by a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit, but was later upheld by a 7-to-4 vote of the entire appeals court.

The Kentucky case *Meredith v. Jefferson County Board of Education*, No. 05-915 stems from a federal-court order to end segregation in Louisville's schools. When that federal decree ended, in 2001, the county school district started to use race as one of many factors in assigning schools. A mother, Crystal Meredith, sued, asserting that her son had been denied entrance into a neighborhood school because he was white. The plan was upheld by the U.S. Court of Appeals for the Sixth Circuit.

The Supreme Court is expected to hear the cases in the term that begins in October.

"Analysis: An Unanswered, Delicate Race Question"

SCOTUSblog
Monday, June 05, 2006
Lyle Denniston

Last October, judges on the Ninth Circuit Court observed that "the Supreme Court has never decided a case involving the consideration of race in a voluntarily imposed school assignment plan intended to promote racially and ethnically diverse [public] schools." A year ago, judges on the First Circuit Court said much the same thing: the Supreme Court "has not yet considered a constitutional challenge to a voluntary race-based transfer policy for elementary and secondary schools..." The Court had a chance to consider that issue last December, but passed up the chance. Now, with a change in composition, the Court has opted to take it on. There may be a connection.

In more than a half-century of dealing with racial issues in the public schools, the Court has not ruled on a case in which race is not used as a way to separate the races in the K-12 grades, in which race is not used to provide a benefit to one race but not to others, and in which racial assignments or busing are not used to dismantle official segregation of schools, classrooms or faculties. In other words, the new generation of cases on schools and race are not the traditional kind under the original 19th Century purpose of the Fourteenth Amendment's equal protection clause. "We are here working from doctrines concerning the use of race-based criteria that are mainly the product of 20th Century jurisprudence," remarked First Circuit Judge Michael Boudin.

Put in the most benign way, the new race-based plans are designed to achieve educational and social benefits of "exposing youngsters to those of different races," in Judge Boudin's phrase. That is a precise echo of some of the Supreme Court's sentiments in ending official school segregation in 1954 in *Brown v. Board of Education*, and thus gives such plans their most positive cultural character.

But, to opponents of such plans, they are nothing but "racial balancing" that sends "the wrong message to our children—that racial discrimination is more important than individual rights and liberties in today's society," as the Pacific Legal Foundation's Sharon L. Browne has put the matter.

The Supreme Court may not embrace either one of those descriptions when it rules on the two cases that it accepted on Monday for review at its next Term: *Parents Involved v. Seattle School District* (05-908) and *Meredith v. Jefferson County Board of Education* (05-915). But it has given itself the task of drawing some historic constitutional conclusions, and its change in membership may make the difference in how those are framed. At this stage, it may be a matter of total uncertainty how the Court will come out, making the new cases potentially the most closely-watched of the new Term.

The Court, it seems clear, has not been eager to get involved in this new racial controversy. Before it granted review of the two cases from Seattle and Louisville, Ky., it had considered them at six consecutive Conferences. That was not an indication that the Court thought the cases lacked

importance. It more likely was a sign of hesitancy about whether there really is a conflict in the lower courts in judging such plans, so it wanted to be satisfied that the time had definitely come for it to move into the fray. There also could have been some defensive concerns, supporting a resistance to review when the voting lineup would not be predictable.

When the Court had before it one of these plans, from Lynn, Mass. (in *Comfort v. Lynn School Committee* [05-348]), Justice Sandra Day O'Connor was still on the bench. At that point last December, however, it was still uncertain when O'Connor's retirement would occur, and when her replacement, Justice Samuel A. Alito, Jr., would arrive. Although this cannot be known by outsiders, the chances are that the Court at that time was avoiding major controversies in which the Justices almost certainly would wind up deeply divided. It took but one look at the Lynn case, and passed, even though the differences between that case and the ones now granted are by no means glaring, and the constitutional issues are virtually identical.

Justice O'Connor, of course, wrote the majoity opinion in 2003 when the Court—dividing 5-4—decided the constitutional issue that is newly at stake in the public school cases, but it did so in *Grutter v. Bollinger*, a case confined to the public college level, dealing with admissions criteria. The Court then allowed limited use of race in college admissions decisions. O'Connor's opinion was joined by the Court's four moderate to liberal members—Justices Stephen G. Breyer, Ruth Bader Ginsburg, David H. Souter and John Paul Stevens.

Those other four remain on the Court, as do three of the dissenters—Justices Anthony M. Kennedy, Antonin Scalia and Clarence Thomas. Chief Justice William H. Rehnquist, the fourth dissenter, is now deceased. There is no way to predict how Chief Justice John G. Roberts, Jr., will approach the new public school cases, nor is there about Justice Alito. But the two of them do appear, at least at this early stage, to hold the balance of voting power.

Part of the cloud of doubt surrounding the new cases is that there is little in O'Connor's *Grutter* opinion that suggests definitively how she or her voting colleagues would have viewed the same constitutional question in the K-12 context. The lower courts that have applied it to elementary and secondary schools find in that ruling a set of principles flowing out of the notion that racial diversity is a positive value, at whatever level of public education it might be pursued. The difficulty for them—and this is likely to be true, too, for the Supreme Court—is in determining whether the details of a particular plan make the means of achieving that goal valid.

But, perhaps before getting to those crucial details, the Court may have to confront directly the core claim of opponents of those plans: that race cannot be used at all in public school student assignment, unless it is "remedial"—that is, correcting for identifiable, continuing discrimination against identifiable students. And that could force the Court to answer a simple but profound question: is the achievement of racial diversity itself in any way "remedial", and, if it is, what evils does it remedy?

It is not clear, yet, how many school districts across the country may have plans akin to those now before the Court. By one

estimate, some 1,000 districts are using or experimenting with "racial diversity" in their student assignments. No doubt, the numbers will get more precise by the time the Court takes up the cases in early winter. A flood of amici filings are sure to come.

"The Alito Difference"

The Washington Times
June 13, 2006
Bruce Fein

Supreme Court Justice Samuel Alito is unlike his vacillating predecessor Justice Sandra Day O'Connor. Everything in her constitutional universe was opaque. Justice Alito's philosophy is made of sterner stuff.

The difference will first find dramatic expression in matters of racial discrimination under the Equal Protection Clause of the 14th Amendment. Last week, the high court agreed to review twin conflicting decisions addressing use of race in public elementary and secondary school admissions to achieve racially balanced student bodies: *Parents Involved In Community Schools v. Seattle School District, No. 1;* and, *Meredith v. Jefferson County Public Schools.*

Justice O'Connor, writing for a thin 5-4 majority in *Grutter v. Bollinger* (2003), upheld racial preferences in selecting applicants for admission to public universities. She rhapsodized over educational, economic and sociological wonders allegedly derived from racially diverse campuses. Whites better understand blacks and vice versa. Racial stereotypes are dispelled. Classroom discussion is enriched and enlightened. Student achievement climbs. Students are better prepared to prosper in an increasingly diverse work force and society. And, success in a global marketplace requires exposure to widely diverse people, cultures, ideas and viewpoints. (But after 25 years, Justice O'Connor opined, progress in race relations will have superceded the contemporary justifications for diversity and make their constitutionality highly dubious).

With Justice Alito having replaced Justice O'Connor, the court granted review of Seattle School District and Meredith either to overrule or to sharply confine *Grutter.* Justice O'Connor was largely an echo chamber for the media and academic elite. Accordingly, she advanced unconvincing reasons sustaining racial preferences to avert their tart criticism. If racial diversity yielded the fabulous nontrivial educational, economic and sociological benefits Justice O'Connor celebrated, parents and students would be demanding the Michigan Law School admissions policy blessed in *Grutter* be aped everywhere. Employers would similarly place a premium on their graduates, and ask applicants to disclose the racial compositions of the schools they attended. Students from racially balanced schools would be overrepresented among recipients of educational, business, community or international honors. They would be more vocal than others in preaching against racial discrimination. And they would be clearly superior to their counterparts who graduated before initiation of racial preferences.

Yet none of these expectancies has been substantiated by ocular evidence. The University of Chicago Law School, for example, eschews racial preferences without any apparent handicap to its graduates in any respect, including racial attitudes.

Justice Alito, in contrast to Justice O'Connor, has been immersed in the

philosophy that racial distinctions are inherently odious. As Justice Antonin Scalia elaborated in *Adarand Constructors v. Pena* (1995), in the eyes of the government there is only one race. It is American. Thus, the Supreme Court held in *Anderson v. Martin* (1964) that identifying the race of a candidate on ballots violated the Equal Protection Clause by encouraging racial bloc voting and the subordination of merit to skin color. Justice Alito will be inclined to overrule *Grutter* because it sanctions a two-track government admissions policy pivoting on race, simpliciter.

The Seattle School District litigation underscores *Grutter*'s vulnerability. In 2001-2002, the School District employed race in high school student assignments to avoid racial concentration on any campus. Reminiscent of Justice O'Connor, the district explained: "Diversity in the classroom increases the likelihood that students will discuss racial or ethnic issues and be more likely to socialize with people of different races. Diversity is thus a valuable resource for teaching students to become citizens in a multiracial/multi-ethnic world." The district added that diversity enhances education and racial and cultural understanding. But it abandoned race in school assignments during the Seattle School District litigation. A colorblind standard has prevailed for the last four school terms with no evidence that educational achievement or race relations have suffered.

The nation's history of racial discrimination is admittedly ugly. Slavery was enshrined in the Constitution. Jim Crow succeeded Reconstruction. The "separate but equal" doctrine of *Plessy v. Ferguson* defiled the 14th Amendment. Blacks risked and gave that last full measure of devotion in World Wars I and II in defense of freedom while fighting in segregated ranks and subjected to racial discrimination at home. The South's "massive resistance" to *Brown v. Board of Education* segued into Bull Connor's dogs and Jim Clark's cattle prods to foil black voter registration.

This history and much more teaches that racial distinctions championed by government are convulsive. They war with the objective of a colorblind society by sending a message that individuals should be sorted by race.

The way to get beyond racism is by prohibition—including the overruling of *Grutter*—not by winking at its practice for 25 years in the fatuous belief that racial preferences then will be voluntarily surrendered.

"Perhaps Not All Affirmative Action Is Created Equal"

New York Times
June 11, 2006
Jeffrey Rosen

Now that the Supreme Court has agreed to hear two cases challenging racial balancing in public schools, some conservatives hope the end of affirmative action is near.

After all, they say, why would the Supreme Court suddenly agree to hear cases about racial balancing in Seattle and Louisville when the court—with Sandra Day O'Connor still serving—refused last December to hear a similar case from Massachusetts? It must be, the thinking goes, that the court, with two new and more conservative justices, John G. Roberts Jr. and Samuel A. Alito Jr., wants to overturn affirmative action.

That optimism may be premature, and not because there is a hidden liberal streak on the court. Instead, there is a vigorous debate among prominent Republican judges and legal scholars about whether racial balancing in public schools is an acceptable form of affirmative action. Some conservatives believe that racial balancing plans, while not colorblind, are still constitutional.

The unexpected fissures among conservatives about how colorblind the Constitution should be suggest that certain forms of affirmative action might be more acceptable to conservatives than liberals had feared.

The Seattle and Louisville cases, which the Supreme Court will hear next fall, involve challenges to plans known as "managed choice" or "open choice." In Seattle, parents can apply to send their children to any public high school in the district.

If a school is oversubscribed, students are chosen based on a number of "tie-breakers," including racial targets designed to ensure that each school's racial makeup doesn't differ by more than 15 percent from the racial composition of the Seattle public schools as a whole.

Last October, no one was surprised when the famously liberal United States Court of Appeals for the Ninth Circuit upheld the Seattle plan. It cited a 2003 Supreme Court opinion, by Justice O'Connor, which held that classroom diversity was a compelling governmental interest for law schools and universities.

But it was eye-opening that Judge Alex Kozinski, a conservative libertarian on the Ninth Circuit, wrote an unexpected concurring opinion. "That a student is denied the school of his choice may be disappointing, but it carries no racial stigma and says nothing at all about that individual's aptitude or ability," he wrote.

And Judge Kozinski quoted the opinion of Chief Judge Michael Boudin of the United States Court of Appeals for the First Circuit, another Republican judge, who upheld the use of racial balancing in a Massachusetts school choice plan. Unlike "modern affirmative action," Judge Boudin had written, these plans do not "seek to give one racial group an edge over another."

Some conservative scholars suggest that there may be significant differences between

racial balancing for public elementary and high schools and racial preferences for competitive public universities.

"When you're talking about public schools, everybody's got to go somewhere, and it's not as if some schools are necessarily better than others," said Charles Fried, a conservative law professor at Harvard. "At some point, the government has to have some basis for breaking the tie."

Professor Fried said he had not made up his mind on the issue. "I think Roberts and Alito are both men who are open to arguments, and I would trust them to think long and hard about this," he said.

Conservatives have also long emphasized the importance of deferring to local school officials, a reaction in part to judicially imposed busing programs.

In the Seattle and Louisville cases, the plans were designed by local politicians.

"This is not the result of some liberal master plan; it was adopted from the ground up," said Samuel Issacharoff, a liberal legal scholar at Columbia Law School. Judicial deference is as deeply held a conservative principle as the importance of a colorblind society, and conservative judges and activists are conducting a vigorous internal debate about how these principles should be reconciled.

Last year, for example, the Supreme Court, in another opinion by Justice O'Connor, struck down California's policy of racially segregating new prisoners to prevent gang violence. Justice Clarence Thomas and Justice Antonin Scalia, ordinarily fierce champions of colorblind policies, argued that an exception should be made in this case because of the importance of deferring to the expertise of local prison officials.

Opponents of affirmative action don't buy conservative arguments that racial balancing is acceptable. Parents don't view all public schools as equal, they argue, so racial tie-breakers force some parents to send their children to worse schools farther from home because of their race.

"In some ways, the damage may be greater than in the university context, since this may limit the ability of black families to escape inferior schools by transferring to schools where the authorities deem there to be too many blacks," says Peter H. Schuck of Yale Law School, author of "Diversity in America," a prominent critique of affirmative action.

In the Seattle case, the conservative dissenting judges wrote that the educational benefits of diversity for university students were less obvious for lower-school students. The dissenters quoted David J. Armor, a George Mason professor who has reported finding little connection between racial integration and student achievement.

"Where we have had very substantial long-term desegregation, we did not find the achievement gap changing significantly," Mr. Armor said in an interview. "I did find a modest association for math but not reading in terms of racial composition and achievement, but there's a big state variation."

Professor Armor estimated that "at least dozens or maybe hundreds of school districts still use race in some way" and said he hoped that the Supreme Court would put an end to all race-conscious assignment

plans. "We have racially imbalanced neighborhoods and cities based on where people choose to live. What's wrong with racially imbalanced schools?"

IF the court agrees with him, it might require districts to consider "race-neutral alternatives," like a lottery, to decide which students gain admission to popular schools. But given segregated housing patterns, that might mean the end of integration.

Chief Justice Roberts, in his first term, has shown a skill in persuading his colleagues to join unanimous opinions decided on narrow grounds. The race cases may test his leadership abilities more than any he has confronted so far. And the fact that conservatives disagree so vigorously about how to apply the principle of colorblindness in different contexts makes the outcome especially hard to predict.

"Ninth Circuit, in En Banc Ruling, Allows Use of Race As 'Tiebreaker' in High School Pupil Assignments"

Metropolitan News
October 21, 2005

The Ninth U.S. Circuit Court of Appeals ruled en banc yesterday that a plan used by the Seattle public schools to assign students to high schools, taking into consideration the race of students competing for limited spots at popular schools, did not violate the Fourteenth Amendment.

In a 7-4 decision citing the 2003 Supreme Court rulings on affirmative action in college admissions, the judges said that the Seattle plan was "narrowly tailored to meet the District's compelling interests" in promoting diversity and avoiding the isolation of racial minorities.

Judge Raymond C. Fisher wrote the majority opinion, with the concurrence of Chief Judge Mary M. Schroeder and Judges Harry Pregerson, Michael Daly Hawkins, William A. Fletcher, and Johnnie B. Rawlinson. Judge Alex Kozinski concurred separately.

Fisher said it may be even more important for high schools to use race as an admissions factor than it is for colleges, because not all students go on to college.

"For these students, their public high school educational experience will be their sole opportunity to reap the benefits of a diverse learning environment," the judge wrote.

Judge Carlos T. Bea dissented. While there is unquestioned value in diversity, he wrote, "[t]he issue here is whether this idea may be imposed by government coercion, rather than societal conviction; whether students and their parents may choose, or whether their government may choose for them."

Judges Andrew J. Kleinfeld, Richard C. Tallman, and Consuelo M. Callahan joined Bea in dissent.

.A three-judge Ninth Circuit panel ruled in 2002 that the use of race as a factor in school assignments violates I-200, a 1998 initiative similar to California's Proposition 209. But it later vacated that ruling and asked the Washington Supreme Court to rule on whether the plan violated I-200.

When the Washington high court said the plan did not violate the state law, the case came back to the Ninth Circuit for resolution of the case under the Equal Protection Clause. A panel ruled 2-1 in February that it did, but a majority of the judges voted to review that decision en banc.

The "open choice" plan, which was first adopted in the 1970s, allows students to give a first, second, or third preference as to which of the city's 10 public high schools they wish to attend. But because the overwhelming majority 82 percent for the 2000-2001 school year prefer to attend one of five particular schools, certain students are given preference in determining whose wishes will be honored first.

The highest preference is given to those who wish to attend a school in which their siblings are already enrolled. After that, however, preference was given to those wishing to attend a school in which

members of their racial group were significantly underrepresented in comparison to their percentage of the district as a whole.

The district modified the plan several years ago by eliminating the racial "tiebreaker" pending the outcome of the litigation. A spokeswoman said it would be up to the school board to decide whether the district will reinstate the tiebreaker immediately or wait to see if the Supreme Court agrees to hear the case.

When the tiebreaker was in effect, some whites were prevented from attending three high schools in which white enrollment was limited to 55 percent, while non-white enrollment was limited at one school. Because the third tiebreaker was distance, some students had to attend schools located far from home.

The group that challenged the plan, Parents Involved in Community Schools, said it would continue its efforts.

"We are going to petition the U.S. Supreme court to look at this," PICS president Kathleen Brose, who is white, told The Associated Press. "It's too important a decision for the city of Seattle. These children need access to their neighborhood schools, and they're not going to get it if the district uses a racial tiebreaker."

Brose said the tiebreaker kept her oldest daughter out of the high school closest to their home, and her other top choices as well. As a freshman, she wound up having to commute 30 minutes to another high school. The Pacific Legal Foundation, a Sacramento-based advocacy group that has brought a number of Proposition 209 enforcement proceedings, filed an amicus brief in support of PICS. PLF previously represented an Orange County citizen who won a Fourth District Court of Appeal ruling that a similar plan in the Huntington Beach Union High School District violated the California initiative.

But the Ninth Circuit majority yesterday agreed with the district that maintaining racially diverse student bodies "increases the likelihood that students will discuss racial or ethnic issues and be more likely to socialize with people of different races," trains pupils "to become citizens in a multi-racial/multi-ethnic world, "brings different viewpoints and experiences to classroom discussions and thereby enhances the educational process," and "fosters racial and cultural understanding, which is particularly important in a racially and culturally diverse society such as ours."

The ruling is the second federal appeallate opinion this year to uphold voluntary desegregation plans by city school districts, cases that are helping define how far districts can go to ensure diversity in their classrooms. In June, a 3-2 ruling by the First Circuit upheld a plan used by the school district of Lynn, Mass.

The case is *Parents Involved in Community Schools v. Seattle School District, No. 1*, 01-35450.

"Rulings may back Seattle schools' racial tiebreaker"

The Seattle Times
July 7, 2003
Keith Ervin

High Court decisions might lend support for the policy, but lawyers are reluctant to predict a verdict.

The highest courts of Washington and the nation recently gave the Seattle School District added clout in its legal defense of race-based assignments of students to schools.

But the optimism of the district's lawyers is tempered by their awareness that predicting court rulings is risky at best.

While the U.S. Supreme Court affirmed the theoretical underpinning of some efforts to boost racial diversity, it struck down a university admission process that automatically gave an advantage to underrepresented minorities.

The future of a racial tiebreaker used to assign some students to Seattle schools will depend largely on how the 9th U.S. Circuit Court of Appeals applies issues of federal law in a challenge filed by parents.

Parents Involved in Community Schools (PICS) and the school district have been battling for three years over PICS' claim that state law and the U.S. Constitution forbid race-based student assignment.

The district maintains it can legitimately consider students' race in order to give them an integrated education that will prepare them for a diverse society.

Seattle's student-assignment plan generally allows parents to choose their children's schools, but it uses a series of tiebreakers to determine who gets into a school where the number of requests exceeds available seats.

For high-school assignments, the first tiebreaker favors a student who has a sibling in his or her preferred school. The next tiebreaker, race, is used only if a school's racial composition differs by more than 15 percentage points from the districtwide racial balance.

The Washington state Supreme Court on June 26 gave a ringing endorsement to the assignment plan, which it said does not violate Initiative 200's ban on racial discrimination or preferences.

"This court has repeatedly and clearly found that segregation offends the values of our national constitution, be that segregation de factor or de jure, and that school districts are empowered to work to end that discrimination," the state court ruled.

Because the Seattle tiebreaker favors whites in some schools and racial minorities in others, the state Supreme Court called the plan "racially neutral."

The federal 9th Circuit, after initially striking down the race tiebreaker last year, asked the state Supreme Court to determine whether the tiebreaker is consistent with state law. The case now goes back to the 9th Circuit, which will decide whether the tiebreaker violates the U.S. Constitution.

Three days before the state Supreme Court opinion, the U.S. Supreme Court endorsed affirmative action in a case *Grutter v. Bollinger* involving the University of Michigan Law School. But in *Gratz v. Bollinger*, the high court struck down an undergraduate admission process at the university that automatically gave an advantage to underrepresented minorities.

Justice Sandra Day O'Connor wrote in *Grutter v. Bollinger* that creating a diverse student body was "at the heart of the Law School's proper institutional mission" and that tomorrow's lawyers need exposure to "widely diverse people, cultures, ideas, and viewpoints."

Seattle School District General Counsel Mark Green hailed that ruling and the state Supreme Court opinion as "a huge judicial statement about diversity" a view many lawyers share.

Assessing The Details

But will the finer points of the Seattle plan survive judicial review when the case is finally resolved, either by the 9th Circuit or the U.S. Supreme Court?

On that question, lawyers are in sharp disagreement.

In reviewing affirmative-action and desegregation cases, federal courts apply two tests known as "close scrutiny." The *Gratz* case suggests Seattle's racial policy will easily pass the first test, a showing that the district has a compelling interest in promoting diversity.

The second test is whether the plan is "narrowly tailored," that is, causes the least possible disruption of people's lives to accomplish its goals.

When the U.S. Supreme Court approved the Michigan Law School's individualized system of giving minority students a preference in admissions, it also struck down a more rigid, numerical plan at Michigan's undergraduate College of Literature, Science and the Arts.

The undergraduate plan, which gave underrepresented minorities an automatic 20-point advantage on a 150-point scale, made race the decisive factor for "virtually every minimally qualified" minority student, the court found. Therefore, Chief Justice William Rehnquist wrote in *Gratz v. Bollinger*, the plan was not narrowly tailored.

In the PICS case, the 9th Circuit will decide whether the *Gratz* narrow-tailoring standard applies to public-school assignments as well as to a selective university-admission process.

Key Test in Question

PICS attorney Harry Korrell said *Gratz* "does affirm that you cannot have just plain race balancing as your goal, which in our view is exactly what the school-district plan does. It says race cannot be the deciding factor, it can be only one factor among many, which is not what the school-district plan does."

Atlanta attorney Alfred Lindseth, who has represented school districts in desegregation cases and once advised Seattle on an earlier assignment plan, agreed with Korrell.

"I think they'll have a tough time passing that test," Lindseth said. "They depend solely on the race of the student, they're

completely mechanical, there's no judgment or meaningful review. ... If the decision is based just on the race of the child, I think the Michigan cases would say you can't do it."

Others Disagree

Washington, D.C., lawyer William Taylor, who has litigated desegregation cases since the 1950s when he worked with the late Thurgood Marshall, said the U.S. Supreme Court's narrow-tailoring standard might apply to a few high schools around the country with selective admissions. He said the standard does not seem relevant to regular high schools, which are "fungible," or interchangeable.

"The reason they outlawed a more mechanical system," Taylor said, "is they have a system based on merit and they want to make sure that merit isn't mechanistically applied. But in a situation where the school opportunities are largely fungible, you wouldn't have any reason to have a complicated review system of each applicant."

Curt Levey, an attorney for the Washington, D.C.-based Center for Individual Rights, which represented students who sued the University of Michigan, said that if courts were "perfectly logical," the Seattle district would have something else going for it: the state Supreme Court ruling.

"Certainly if something passes the test for I-200, which allows no racial preferences, then it must pass the standard for the Michigan cases," Levey said. "The I-200 standard is a tougher standard."

"On the Docket: Meredith, Crystal v. Jefferson County Bd. of Education, et al."

Medill News Service
June 5, 2006
David Gialanella

Since desegregation, many Americans have considered diversity to be an invaluable societal quality, but in Jefferson County, Kentucky, some students are being bused upwards of three hours a day roundtrip in the interest of diversity.

In an effort to ensure that no one public school has an overwhelming black or white population, Jefferson County has an enrollment plan that places students in different schools according to racial demographics. It requires that each school maintain a black population of no greater than 50 percent, but no less than 15 percent.

The plan, which has existed in varying forms since a court-ordered desegregation policy for the county was handed down by a federal judge in 1975, offers a choice of schools, but not all preferences can be accommodated, and an application process is involved. However, according to statistics, about 95 percent of students are able to enroll in one of their two top choices of non-magnet schools.

The current arrangement, instituted in 2001, has some students being bused cross-county, taking up more time per day than most students spend in transit in several weeks. It poses obvious logistical issues and detaches children and their parents from the communities they call home, parents say.

Jefferson County parents who became fed up with busing and the complexities of enrollment (both magnet and non-magnet schools have long admissions processes) brought a civil suit against the county in the U.S. District Court for the Western District of Kentucky. They claim their children's constitutional rights have been violated based on the Equal Protection Clause of the 14th Amendment, the purpose of which is to ensure that all Americans enjoy equal protections under all laws.

The District Court upheld the plan almost in full, holding: "The 2001 Plan is a proper 'fit' because it is sufficiently flexible to determine school assignments for all students by a host of factors, such as residence, student choice, capacity, school and program popularity, pure chance and race." In other words, race is a factor but not the main factor in the enrollment process.

The court based its opinion on the idea that the Jefferson County plan does not amount to a quota system, which is prohibited, according to precedent.

In *Regents of the University of California v. Bakke*, a 1978 U.S. Supreme Court decision, it was established that hard racial quotas (such as requiring that each school maintain a 34 percent black population, which would be consistent with the county average) violate the Constitution.

The District Court touched on this subject and found the county plan inoffensive to Equal Protection: "...some attention to numbers, without more, does not transform a flexible admissions system into a rigid quota. Common sense and the Supreme Court suggest that any strict or de facto

racial quota has a couple of known characteristics: it has a precise target, and it insulates some applicants from competition with other applicants."

The district court also noted that the plan is "narrowly tailored" to achieve a "compelling interest," which, in this case, is diversity; that is, race is used as a placement factor in a narrow and limited way. That standard was set forth three years ago in a pair of opinions issued by the U.S. Supreme Court that dealt with undergraduate and law school admissions at the University of Michigan. Opponents to the plan argue that an opinion pertinent to higher education cannot apply to public schools at the kindergarten through 12th grade level.

The 6th Circuit Court of Appeals called the lower court's opinion "well-reasoned" and thus affirmed the decision without issuing an opinion of its own, which is rare. But now the U.S. Supreme Court has agreed to hear the case, which allows parents to take their Equal Protection challenge up one more level.

"It is the parents' feeling that this is no longer a segregated society ... we are not going back to the 1950s," said Honi Goldman, Media Relations Coordinator for attorney Ted Gordon, who represents parents opposed to the plan. So, she said during a phone interview, it is high time to do away with an enrollment plan that is based on demographics from thirty years ago; that Kentuckians are serving their diversity interest without need for the plan.

Proponents of the plan argue that students are still not being exposed enough to racially diverse environments, and that busing creates only a limited inconvenience.

"The number of students who end up making a trip they wouldn't normally make is a small price to pay for having diversity throughout the system," said Francis J. Mellen Jr., the attorney representing the county.

The case has gotten little media coverage in Jefferson County since the Supreme Court announced on June 5, 2006 that it would hear the case, but residents understand the implications of the Court's decision on their everyday lives.

"There seems to be a strong sense of maintaining integrated schools and fear about returning to the 'way things were'," stated Lauren E. Roberts, Public Information Officer for Jefferson County Public Schools, in an e-mail.

When the Court accepted review in the Louisville case, it announced it would set oral arguments in tandem with Parents Involved in *Community Schools v. Seattle School District #1*.

"Schools' Efforts Hinge on Justices' Ruling in Cases on Race and School Assignments"

New York Times
June 24, 2006
Sam Dillon

School officials in Berkeley, Calif., take race as well as parent income into account as they assign students to public schools, with a result that many black children who live downtown are bused to classes in the mostly white neighborhoods on the hills that overlook San Francisco Bay.

In Lynn, Mass., the authorities guarantee that children can attend their neighborhood school, but consider race in weighing students' transfer requests, sometimes blocking those that would increase racial imbalance.

And here in Louisville, the school board uses race as a factor in a student assignment plan to keep enrollments at most schools roughly in line with the district's overall racial composition, making this one of the most thoroughly integrated urban school systems in the nation.

As different as they are, all these approaches and many more like them could now be in jeopardy, lawyers say, because of the Supreme Court's decision this month to review cases involving race and school assignment programs here and in Seattle.

"We'll be watching this very closely, because whichever way the Supreme Court rules, it will certainly have an impact on our district," said Arthur R. Culver, superintendent of schools in Champaign, Ill., where African-American students make up 36 percent of students. Under a court-supervised plan, the district keeps the proportion of black students in all schools within 15 percentage points of that average by controlling school assignments.

Over the past 15 years, courts have ended desegregation orders in scores of school districts. But many districts around the country seek to maintain diversity with voluntary programs like magnet schools and magnet programs, clustering plans that group schools in black neighborhoods with those in white, and weighted admissions lotteries that assign classroom seats by race.

All of this is now a gray area of the law until there is guidance from the Supreme Court on how far school systems may go in the quest for racial diversity.

Courts in the 1990's mostly struck down the use of race in assignment decisions, but three federal rulings since 2003 have permitted its use. As the legal ambiguity has grown, hundreds of districts have dropped voluntary efforts to maintain racial balance. Others have vigorously pursued them, even as a debate has emerged over whether racially mixed schools provide the nation with important educational benefits.

"Most school districts believe that there are educational benefits in having students attend school with other students of different backgrounds," said Maree Sneed, a lawyer who filed a brief in the Louisville case on behalf of the Council of the Great City Schools, a coalition of the nation's largest urban districts. "It prepares them to be better citizens."

But Roger Clegg, president of the Center for Equal Opportunity, a Washington group critical of affirmative action, said such assertions were based on "touchy-feely social science."

"It'd be dangerous for the court to allow discrimination whenever a school board produces some social scientist who claims that racially balancing schools to the nth degree is essential for teaching students to be good citizens," Mr. Clegg said.

The debate comes as immigration, housing patterns and ethnic change have made achieving racial balance in the schools an increasing challenge.

A study published this year by the Civil Rights Project at Harvard University reported that partly because of the rapid growth of Latino and Asian populations, the traditional black-white model of American race relations was breaking down. Yet white students remained the most racially isolated group, even though they were attending schools with more minority students than ever before, the report said.

Although whites in 2003-04 made up 58 percent of the nation's public school population, the average white student attended a school where 78 percent of pupils were also white, the study said.

The proportion of black students attending schools where 10 percent of students or fewer were white increased to 38 percent in 2003-04 from 34 percent in 1991-92.

Gary Orfield, the project's director, said a decision barring the use of race in student assignments would most likely intensify those trends.

"School boards would be captives to the racial segregation that occurs in housing markets," Mr. Orfield said. "Boards would be forbidden to do what courts once ordered them to do, and what they now want to do voluntarily."

How many of the nation's 15,000 districts currently consider race in assigning students to schools is unclear because no one keeps track, experts said. A brief filed in the Louisville case by the Pacific Legal Foundation, a conservative public-interest law firm, asserts that "nearly 1,000 districts" have some type of race-based assignment plan.

But that figure traces from a 1990 Department of Education survey of schools, and David J. Armor, a George Mason University professor who participated in that survey, said that in the 1990's, many districts abandoned race-based plans. Still, he estimated that "many hundreds of school districts" continued to use race in assigning students to schools.

Many of the nation's largest urban districts have so few white students that large-scale plans to seek racial balance are hardly feasible. New York, where 14 percent of students are white, does not consider race in school assignments, said Michael Best, the Department of Education's general counsel. The only exception is Mark Twain Intermediate School in Brooklyn, where a 1974 federal court order requires that the school's racial demographics be kept in line with surrounding middle schools.

At least a half-dozen cities have developed voluntary student transfer programs that involve enrolling minority students from an urban district in a suburban district.

The Jefferson County district in Louisville is one of the most thoroughly integrated urban school systems in the nation. That is partly because its boundaries include suburbs as well as Louisville's urban core. Sixty percent of students are white, and 35 percent are black.

Its student assignment plan, which evolved from a court-ordered desegregation effort, keeps black enrollment in most schools in the range of 15 percent to 50 percent by encouraging, and in some cases obliging, white students to attend schools in black neighborhoods, and vice versa.

Fran Ellers and her husband are writers who are white. They live in the Highlands neighborhood east of downtown. But they enrolled their children, Jack and Zoe, at Coleridge-Taylor Montessori Elementary in the largely black West End.

"We wanted a diverse environment," Ms. Ellers said. "When I toured Coleridge-Taylor, I was struck by the mix of black and white children, quietly working together as equals in a classroom."

Nechelle D. Crawford, by contrast, who is African-American and lives in the West End, said her sons Keion and Jeron could attend Coleridge-Taylor, but instead she opted to send them to Wilder Elementary in a largely white suburb 25 minutes away by bus. "The boys love Wilder," Mrs. Crawford said, adding that there are a number of international students. "They have different opportunities, see different faces."

In a survey carried out in 2000 by the University of Kentucky, 67 percent of parents said they believed that a school's enrollment should reflect the overall racial diversity of the school district.

A white lawyer, Teddy B. Gordon, ran for a seaton the Jefferson County School Board in 2004, promising to work to end the district's desegregation plan. He finished last, behind three other candidates.

Mr. Gordon represents the plaintiff in the Louisville case, Crystal D. Meredith, who is white. She sued after the district denied her request to transfer her son Joshua from Young Elementary, in the West End, to Bloom Elementary, nearer her home. The district said the transfer would disrupt Young's racial balance.

Judge John G. Heyburn II of Federal District Court ruled against Ms. Meredith in 2004, saying that the district had shown a "compelling interest" in maintaining integrated schools. A federal appeals court upheld that ruling, but the Supreme Court has now agreed to review the case.

In an interview, Mr. Gordon predicted that if Louisville's student assignment plan was overturned, the schools would rapidly resegregate. But that should be of no concern, he said.

"We're a diverse society, a multiethnic society, a colorblind society," he said. "Race is history."

Chester Darling, the lawyer who represented parents in a 1999 suit challenging a school assignment plan in Lynn, Mass., holds similar views. "If children are in segregated schools, de facto or not, as long as they are getting the education they need that's fine," he said.

Lynn, nine miles north of Boston, is one of 20 Massachusetts school districts that

receives financial incentives for promoting racial balance under state law. Lynn's plan seeks to keep the proportion of nonwhite students in elementary schools within 15 percent of the overall proportion of minorities in the district's student population. Last year, 32 percent of students were white, and 68 percent were nonwhite.

Under the Berkeley plan, parents choose three schools, and the district weighs classroom space and parents' education and income, as well as race in assigning the child.

"New parents would prefer to have their kids in a neighborhood school, that's pretty overwhelming," said Michele Lawrence, Berkeley's superintendent. "But if I surveyed parents who have gone through the process and met teachers, they would have a high percentage of satisfaction."

"Court backs Lynn use of race in school plan"

The Boston Globe
June 17, 2005
Shelley Murphy and Maria Sacchetti

A federal appeals court yesterday ruled that the Lynn public schools could continue using race as a factor in student transfers, opening the door for other school systems to devise similar ways to guarantee diversity in schools.

The 3-to-2 decision on Lynn's voluntary desegregation plan offers an alternative for school systems at a time when most courts have eliminated busing and other mandatory race-based policies for assigning students. Lynn chose to create its own desegregation plan in the 1980s, hoping to prevent racial strife and segregation. Its case is one of a few nationwide that could redefine the role race could play in assigning students to schools.

But the ruling is not necessarily the final word on the issue. The plaintiffs in the Lynn case, a group of white and minority parents, say they will appeal to the US Supreme Court, which has never weighed in on voluntary desegregation plans in public schools.

Lynn lets students attend their neighborhood schools, regardless of race, but students cannot change schools if their departure would make either school more racially imbalanced. The plaintiffs complained that the student assignment system was discriminatory and denied their children a place in schools because of race.

"This is precedent-making," said Gary Orfield, a Harvard education professor and director of the Civil Rights Project, who testified in support of Lynn during the federal trial. "It could be the beginning of a reopening of a desegregation effort. It recognizes the very positive benefits of something that has been attacked widely."

The US Court of Appeals for the First Circuit, in the majority opinion written by Judge Kermit V. Lipez, said race relations and academic achievement in Lynn improved under the policy.

"We are persuaded by the extensive expert testimony in the record, rooted in observations specific to Lynn, that there are significant educational benefits to be derived from a racially diverse student body in the K-12 context," the court wrote. "Lynn has a compelling interest in obtaining those benefits."

Judge Bruce M. Selya, who was on a three-judge appeals court panel that found the Lynn plan unconstitutional in October, wrote the dissent.

"The majority's eagerness to justify departing from precedent frees it to strike out on its own, fashioning a rule that flies in the teeth of the Supreme Court's stalwart opposition to the use of inflexible, race-determinative methods in granting or denying benefits to citizens," Selya wrote.

Lynn crafted its voluntary desegregation plan in the late 1980s. Students are not required to move to another school to achieve racial balance, but beginning in 1989, if they wanted to switch schools, they

could be denied a transfer if it would upset the racial balance.

A school is considered balanced if its nonwhite enrollment is close to the district average, 47 to 77 percent of an elementary school's student body. Roughly a third of Lynn's students choose to attend a school other than their neighborhood school.

In Massachusetts, the ruling allowing Lynn to keep race as a factor will help 21 other school systems with voluntary desegregation plans, educators say. The point, they say, is that the judges have said that race can be used in some fashion.

"This decision allows cities like us and Lynn and other cities to do what we think is best for education," said Salem School Superintendent Herb Levine. "Some people would call it social engineering, and so be it. But what it really is is that segregated schools don't work for minority kids. They don't work for white kids either, especially in the world as it is today."

Boston attorney Michael Williams, who represents families in the suit against Lynn, said students in Lynn and elsewhere can achieve academically without any specific racial mix. He said the system has improved because of a change in demographics.

Chester Darling, an attorney who also represents the plaintiffs, said yesterday's ruling "grates against improved race relations" by allowing Lynn to keep a plan that rejects transfers based solely on race. "What this case says is people are defined by their color," he said. "And you don't define people by their color."

Since the early 1990s, courts have released many school systems from court-ordered desegregation plans, leading to complaints that many schools have become predominantly minority again, said Chinh Le, a lawyer with the NAACP Legal Defense Fund in New York. In 1998, a federal court threw out the use of race in admissions to Boston's exam schools.

Yesterday's decision offers the highest judicial endorsement of a voluntary effort to desegregate schools, Le said.

"There have been a number of cases that have led to resegregation, and this case may be an antidote for that," said Le.

The ruling—while it only affects states under the First Circuit: Massachusetts, Maine, Rhode Island, and New Hampshire, plus Puerto Rico—could also influence pending legal battles elsewhere in the nation, he and Orfield said. Last year, the Ninth Circuit Court of Appeals threw out the Seattle public schools' high school assignment policy, which used race as a factor.

But, as occurred in the Lynn case, Seattle school officials have been granted a rehearing, scheduled for next week, before a larger panel of appeals court judges. Louisville, Ky., school officials, meanwhile, argued before the Sixth Circuit Court of Appeals last week and are awaiting a ruling on whether their voluntary plan is constitutional.

Massachusetts Attorney General Thomas F. Reilly, whose office had defended Lynn's plan in court, said the voluntary system works and "its goal is to prepare the children of Lynn for the world they will live in and work in."

The 14,300-student school system is 62

percent minority, and many credit the voluntary plan with striking a compromise on integration that averted the racial tensions that shattered Boston in the mid-1970s with court-ordered busing. But in 1999, a group of white, black, and Hispanic parents filed a lawsuit asserting that the policy was discriminatory.

Lynn's voluntary plan has not achieved balance in all schools. About half of the elementary schools and most middle schools have reached district averages for racial balance. The high schools are more diverse, and students can more easily transfer from one to the other, according to the court ruling. But Lynn officials say most schools are more diverse than they would have been if the school system didn't use race as a factor. Shoemaker Elementary School is 70 percent white, but would be almost all-white without the plan.

Barbara George, Shoemaker's PTA president, said she wanted her children to grow up in a diverse school, even if her neighborhood is largely white.

"I'm grateful for diversity," said George, who is white. "It enhances my children's experiences."

In last October's ruling against Lynn, the judges said racial distinctions should always be a last resort. They cited a 2003 decision by the US Supreme Court that upheld the University of Michigan's law school admissions policy, ruling that universities may use race as a factor, but not the sole factor, in admissions to achieve a diverse student body.

Yesterday's ruling upheld a 2003 decision by US District Judge Nancy Gertner, who found Lynn's plan was constitutional