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## The Constitution and Racial Diversity in Elementary and Secondary Education: A Legal Analysis of Pending Supreme Court Cases

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# The Constitution and Racial Diversity in Elementary and Secondary Education: A Legal Analysis of Pending Supreme Court Cases


## Summary

The diversity rationale for affirmative action in public education has long been a topic of political and legal controversy. Many colleges and universities have established affirmative action policies not only to remedy past discrimination, but also to achieve a racially and ethnically diverse student body or faculty. Although the Supreme Court has recognized that the use of race-based policies to promote diversity in higher education may be constitutional in two recent cases involving the University of Michigan's admissions policies, the Court has never considered whether diversity is a constitutionally permissible goal in the elementary and secondary education setting. To resolve this question, the Supreme Court agreed to review two cases that involve the use of race to maintain racially diverse public schools. Specifically, the Court will consider whether the school plans at issue violate the equal protection guarantee of the Fourteenth Amendment. The cases are *Meredith v. Jefferson County Board of Education* and *Parents Involved in Community Schools v. Seattle School District No. 1*, and the Court's decision is expected to be issued during its 2006-2007 term. This report provides an overview of the lower court decisions in the two cases, coupled with a discussion of the factors that the Supreme Court is likely to consider on review.

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## I. Introduction

The diversity rationale for affirmative action in public education has long been a topic of political and legal controversy. Many colleges and universities have established affirmative action policies not only to remedy past discrimination, but also to achieve a racially and ethnically diverse student body or faculty. Although the Supreme Court has recognized that the use of race-based policies to promote diversity in higher education may be constitutional in two recent cases involving the University of Michigan's admissions policies — namely *Grutter v. Bollinger* and *Gratz v. Bollinger*[1] — the Court has never considered whether diversity is a constitutionally permissible goal in the elementary and secondary education setting.[2]

To resolve this question, the Supreme Court agreed to review two cases that involve the use of race to maintain racially diverse public schools. Specifically, the Court will consider whether the school plans at issue violate the equal protection guarantee of the Fourteenth Amendment. The cases are *Meredith v. Jefferson County Board of Education* — formerly *MacFarland v. Jefferson County Public Schools* — and *Parents Involved in Community Schools v. Seattle School District No. 1*,[3] and the Court's decision is expected to be issued during its 2006-2007 term. This report provides an overview of the lower court decisions in the two cases, coupled with a discussion of the factors that the Supreme Court is likely to consider on review.

### Background in Pending Cases

In *MacFarland v. Jefferson County Public Schools*,[4] issued on the first anniversary of the University of Michigan decisions and the 50th anniversary of *Brown v. Board of Education*, a federal district court in Kentucky upheld a Louisville

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[1] 539 U.S. 306 (2003); 539 U.S. 244 (U.S. 2003).

[2] For more information on affirmative action and diversity in higher education, see CRS Report RL30410, *Affirmative Action and Diversity in Public Education: Legal Developments*, by Jody Feder.

[3] 416 F.3d 513 (6th Cir. 2003) (per curiam), cert. granted, 126 S. Ct. 2351 (U.S. 2006); 426 F.3d 1162 (9th Cir. 2005) (en banc), cert. granted, 126 S. Ct. 2351 (U.S. 2006).

[4] 330 F. Supp. 2d 834 (W.D.Ky. 2004).

district's voluntary consideration of race in making student assignments to achieve racial integration in the public schools. Jefferson County Public Schools (JCPS) were ordered by judicial decree to desegregate in 1975. Under the desegregation plan, each school was to have between 15% and 50% African-American enrollment and students were bused, if necessary, to ensure racial diversity. Twenty-five years later, in 2000, the federal courts ended their supervision of the desegregation plan, but the JCPS voluntarily opted to maintain its integrated schools through a "managed choice" plan that involved consideration of geographic boundaries, special programs, and school choice, as well as race. The plan was challenged in a lawsuit in 2000 by black parents whose children were denied admission to Central High School, which was already at the upper percentage limit for minority enrollment. The district court upheld the school plan, finding that the managed choice plan served numerous compelling state interests, many of which were similar to interests upheld by the Supreme Court in *Grutter*, and that the student assignment plan was narrowly tailored in all respects but one, which the district was required to revise.[5] For reasons "articulated in the well-reasoned opinion of the district court," the Sixth Circuit summarily affirmed the district court's decree without issuing a detailed written opinion.[6]

Meanwhile, in *Parents Involved in Community Schools v. Seattle School District No. 1*,[7] the Ninth Circuit applied *Grutter* and *Gratz* to approve a school district's plan to maintain racially diverse schools. Under Seattle's "controlled choice" high school student assignment plan, students were given the option to attend high schools across the district, but if the demand for seats exceeded the supply at a particular school, a student's race was considered as a tie-breaker in determining admittance to the oversubscribed school. The racial tie-breaker applied only to schools whose student bodies deviated by more than 15 percentage points from the overall racial makeup of the district, then "approximately 40% white and 60% nonwhite." The Seattle plan was voluntarily adopted to "achiev[e] diversity [and] limit racial isolation" in the schools, not as a part of a desegregation remedy.

In an *en banc* decision, the Ninth Circuit ruled that the school district had a compelling interest in the educational and social benefits of racial diversity and in avoiding racially concentrated or isolated schools. Further, the court held that the district's plan was sufficiently narrowly tailored to pass constitutional muster. The ruling reversed an earlier three-judge appellate panel's contrary decision that the school district's plan to maintain racially diverse schools was not sufficiently narrowly tailored.[8]

As noted above, the Supreme Court recently granted review in *MacFarland v. Jefferson County Public Schools* — now *Meredith v. Jefferson County Board of Education* — and *Parents Involved in Community Schools v. Seattle School District No. 1* to consider the question of what steps a public school district may take to

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[5] Id. at 837.

[6] McFarland v. Jefferson County Pub. Schs., 416 F.3d 513 (6th Cir. 2003).

[7] 426 F. 3d 1162 (9th Cir. 2005) (*en banc*).

[8] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 377 F.3d 949 (9th Cir. 2004).

maintain racial diversity in elementary and secondary schools. The Court's decision is expected to be issued at some point during its 2006-2007 term.

## Past Supreme Court Cases Involving Racial Diversity in Public Education

The Supreme Court has considered the constitutionality of school plans to promote racial diversity on three separate occasions. In all three of these cases, however, the Court has considered the issue in the context of higher education. Although the Court has never considered racial diversity plans in an elementary and secondary education setting, the Court's reasoning in its three higher education cases is certain to guide review of *Meredith* and *Parents Involved in Community Schools*. The three cases — *Regents of the University of California v. Bakke*,[9] *Grutter v. Bollinger*, and *Gratz v. Bollinger* — are described below.

### The *Bakke* Decision.

The *Bakke* ruling in 1978 launched the contemporary constitutional debate over state-sponsored affirmative action. The notion that diversity could rise to the level of a compelling constitutional interest in the educational setting sprang more than a quarter century ago from Justice Powell's opinion in the case. While concluding that a state medical school could not set-aside a certain number of seats for minority applicants, Justice Powell opined that a diverse student body may serve educators' legitimate interest in promoting the "robust" exchange of ideas. He cautioned, however, that "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which ethnic origin is but a single though important element."[10]

A "notable lack of unanimity" was evident from the six separate opinions filed in *Bakke*. Justice Powell split the difference between two four-Justice pluralities in the case. One camp, led by Justice Stevens, struck down the admissions quota on statutory civil rights grounds. Another led by Justice Brennan would have upheld the medical school's policy as a remedy for societal discrimination. Justice Powell held the "dual admissions" procedure to be unconstitutional, and ordered Bakke's admission. But, he concluded, that the state's interest in educational diversity could warrant consideration of students' race in certain circumstances. For Justice Powell, a diverse student body fostered the "robust" exchange of ideas and academic freedom deserving of constitutional protection.

Justice Powell's theory of diversity as a compelling governmental interest did not turn on race alone. He pointed with approval to the "Harvard Plan," which defined diversity in terms of a broad array of factors and characteristics. Thus, an applicant's race could be deemed a "plus" factor. It was considered on a par with personal talents, leadership qualities, family background, or any other factor contributing to a diverse

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[9] 438 U.S. 265 (U.S. 1978).

[10] Id. at 315.

student body. However, the race of a candidate could not be the "sole" or "determinative" factor. No other Justice joined in the Powell opinion.

Although Justice Powell's opinion announced the judgment of the Court, no other *Bakke* Justices joined him on that point. Justice Powell ruled the "dual admission program" at issue to be unconstitutional and the white male plaintiff entitled to admission, while four other Justices reached the same result on statutory rather than constitutional grounds. Another four Justice plurality concluded that the challenged policy was lawful, but agreed with Justice Powell that the state court had erred by holding that an applicant's race could never be taken into account. Only Justice Powell, therefore, expressed the view that the attainment of a diverse student body could be a compelling state interest.

For nearly two decades, colleges and universities relied on the Powell opinion in *Bakke* to support race-conscious student diversity policies, although there was some disagreement among federal appeals courts regarding the meaning and application of the ruling. The judicial divide over *Bakke*'s legacy was vividly underscored by a pair of separate trial court decisions, one upholding for diversity reasons the race-based undergraduate admissions policy of the University of Michigan,[11] the other voiding a special minority law school admissions program at the same institution.[12]

Restoring a degree of clarity to the law, the Supreme Court concluded its 2002-03 term with rulings in the Michigan cases. In *Grutter v. Bollinger*,[13] a 5 to 4 majority of the Justices held that the University of Michigan Law School had a "compelling" interest in the "educational benefits that flow from a diverse student body," which justified its consideration of race in admissions to assemble a "critical mass" of "underrepresented" minority students. But in a companion decision, *Gratz v. Bollinger*,[14] six Justices decided that the University of Michigan's policy of awarding "racial bonus points" to minority applicants was not "narrowly tailored" enough to pass constitutional scrutiny.

### The *Grutter* Decision.

Generally setting the bar for admission to the Michigan Law School was a "selection index" based on applicants' composite LSAT score and undergraduate GPA. A 1992 policy statement, however, made an explicit commitment to "racial and ethnic diversity," seeking to enroll a "critical mass" of black, Mexican-American, and Native American students. The objective was to enroll minority students in sufficient numbers to enable their participation in classroom discussions without feeling "isolated or like spokesmen for their race." To foster, "distinctive perspectives and experiences," admission officers consider a range of "soft variables" — e.g., talents,

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[11] Gratz v. Bollinger, 122 F.Supp.2d 811 (E.D.Mich. 2000).

[12] Grutter v. Bollinger, 137 F. Supp. 2d 821, 848 ( E.D. Mich. 2001) (concluding that "*Bakke* does not stand for the proposition that a university's desire to assemble a racially diverse student body is a compelling state interest").

[13] 539 U.S. 306 (2003).

[14] 539 U.S. 244 (2003).

interests, experiences, and "underrepresented minority" status — in their admissions decisions. In the course of each year's admissions process, the record showed, minority admission rates were regularly reported to track "the racial composition of the developing class." The 1992 policy replaced an earlier "special admissions program," which set a written goal of 10-12% minority enrollment and lower academic requirements for those groups.

A notable aspect of the *Grutter* majority opinion was the degree to which it echoed the Powell rationale from *Bakke*. Indeed, the majority quoted extensively from Justice Powell's opinion, finding it to be the "touchstone for constitutional analysis of race-conscious admissions policies." Overarching much of the Court's reasoning were two paramount themes, both of which drew considerable criticism from the dissent. First, in applying "strict scrutiny" to the racial aspects of the Law School admissions program, the Court stressed the situational nature of constitutional interpretation, taking "relevant differences into account." Thus, the majority opined, "[c]ontext matters when reviewing race-based governmental action" for equal protection purposes and "[n]ot every decision influenced by race is equally objectionable," but may depend upon "the importance and the sincerity of the reasons advanced by the governmental decisionmaker" for that particular use of race. Second, and equally significant, was the deference accorded to the judgment of educational decisionmakers in defining the scope of their academic mission, even in regard to matters of racial and ethnic diversity. "[U]niversities occupy a special niche in our constitutional tradition," the Court stated, such that "[t]he Law School's educational judgment . . .that diversity is essential to its educational mission is one to which we defer." Institutional "good faith" would be "presumed" in the absence of contrary evidence. One group of dissenters took particular exception to what it viewed as "the fundamentally flawed proposition that racial discrimination can be contextualized" — deemed "compelling" for one purpose but not another — or that strict scrutiny permits "any sort of deference" to "the Law School's conclusion that its racial experimentation leads to educational benefits." Indeed, the dissenters found such deference to be "antithetical" to the level of searching review demanded by strict scrutiny.

Satisfied that the Law School had "compelling" reasons for pursuing a racially diverse student body, the Court moved to the second phase of strict scrutiny analysis. "Narrow tailoring," as noted, requires a close fit between "means" and "end" when the state draws any distinction based on race. In *Grutter*, the concept of "critical mass" won the majority's approval as "necessary to further its compelling interest in securing the educational benefits of a diverse student body." According to the Court:

> We find that the Law School's admissions program bears the hallmarks of a narrowly tailored plan. As Justice Powell made clear in *Bakke*, truly individualized consideration demands that race be used in a flexible, nonmechanical way. It follows from this mandate that universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks. Nor can universities insulate applicants who belong to certain racial or ethnic groups from the competition for admission. Universities can, however, consider race or ethnicity more flexibly as a "plus" factor in the context of individualized consideration of each and every applicant.

The Court drew a key distinction between forbidden "quotas" and permitted "goals," exonerating the Law School's admission program from constitutional jeopardy. The

majority observed that both approaches pay "some attention to numbers." But while the former are "fixed" and "reserved exclusively for certain minority groups," the opinion continues, the Law School's "goal of attaining a critical mass" of minority students required only a "good faith effort" by the institution. In addition, minority Law School enrollment between 1993 and 2000 varied from 13.5 to 20.1 percent, "a range inconsistent with a quota." In a separate dissent, the Chief Justice objected that the notion of a "critical mass" was a "sham," or subterfuge for "racial balancing," since it did not explain disparities in the proportion of the three minority groups admitted under its auspices.

Other factors further persuaded the Court that the Law School admissions process was narrowly tailored. By avoiding racial or ethnic "bonuses," the policy permitted consideration of "all pertinent elements of diversity," racial and nonracial, in "a highly individualized, holistic review of each applicant's file." The Court also found that "race neutral alternatives" had been "sufficiently considered" by the Law School, although few specific examples are provided. Importantly, however, the opinion makes plain that "exhaustion" of "every conceivable alternative" is not constitutionally required, only a "serious good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." Consequently, the Law School was not required to consider a lottery or lowering of traditional academic benchmarks — GPA and LSAT scores — for all applicants since "these alternatives would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both." And, because the admissions program was based on individual assessment of all pertinent elements of diversity, it did not "unduly burden" non-minority applicants. Nonetheless, the Court emphasized the need for "reasonable durational provisions," and "periodic reviews" by institutions conducting such programs. To drive home the point, the majority concluded with a general admonition. "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."

### The *Gratz* Decision.

Undergraduate admission to the University of Michigan had been based on a point system or "student selection index." A total possible 150 points could be awarded for factors, academic and otherwise, that made up the selection index. Academic factors accounted for up to 110 points, including 12 for standardized test performance. By comparison, 20 points could be awarded for one, but only one, of the following: membership in an underrepresented minority group, socioeconomic disadvantage, or athletics. Applicants could receive one to four points for "legacy" or alumni relationships, three points for personal essay, and five points for community leadership and service, six points for in-state residency, etc. In practice, students at the extremes of academic performance were typically admitted or rejected on that basis alone. But for the middle range of qualified applicants, these other factors were often determinative. Finally, counselors could "flag" applications for review by the Admissions Review Committee, where any factor important to the freshman class composition — race included — was not adequately reflected in the selection index score.

The four *Grutter* dissenters were joined by two Justices in striking down the racial bonus system for undergraduate admissions in *Gratz*. Basically, the same factors

that saved the Law School policy, by their absence, conspired to condemn the undergraduate program in the eyes of the majority. Since the university's "compelling" interest in racial student diversity was settled in *Grutter*, the companion case focused on the reasons why the automatic award of 20 admission points to minority applicants failed the narrow tailoring aspect of strict scrutiny analysis. Relying, again, on the Powell rationale in *Bakke*, the policy was deemed more than a "plus" factor, as it denied each applicant "individualized consideration" by making race "decisive" for "virtually every minimally qualified underrepresented minority applicant." Nor did the procedure for "flagging" individual applications for additional review rescue the policy since "such consideration is the exception and not the rule," occurring — if at all — only after the "bulk of admission decisions" are made based on the point system. The Court rejected the university's argument based on "administrative convenience," that the volume of freshman applications makes it "impractical" to apply a more individualized review. "[T]he fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system." Finally, the majority made plain that its constitutional holding in *Gratz* is fully applicable to private colleges and universities pursuant to the federal civil rights laws. "We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI [of the 1964 Civil Rights Act]."

## II. Supreme Court Review

As noted above, the Supreme Court has never considered the constitutionality of the voluntary use of race as a factor in achieving diversity in elementary and secondary education. All three of the federal appeals courts to consider the issue since *Grutter* and *Gratz* were decided have upheld racial diversity measures in public schools,[15] but these opinions conflict with pre-*Grutter*/*Gratz* appellate rulings that rejected such racially based plans.[16] As a result, the Supreme Court recently agreed to review the issue,[17] and a decision is expected to be issued during the Court's 2006-2007 term. In order to illustrate the factors that the Court is likely to consider in its review, the Court's equal protection jurisprudence is discussed below, as are the appellate court decisions in *Meredith* and *Parents Involved in Community Schools*, as well as the factors that the Supreme Court is likely to evaluate when reviewing whether the Jefferson County and Seattle school diversity plans at issue violate the equal protection clause of the Constitution.

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[15] Comfort v. Lynn Sch. Comm., 418 F.3d 1 (1st Cir. 2005); McFarland v. Jefferson County Pub. Schs, 416 F.3d 513 (6th Cir. 2005); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 426 F.3d 1162 (9th Cir. 2005).

[16] See, e.g., Tuttle v. Arlington County Sch. Bd., 195 F.3d 698 (4th Cir. 1999); Eisenberg ex rel. Eisenberg v. Montgomery County Pub. Schs., 197 F.3d 123 (4th Cir. 1999); Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998).

[17] Meredith v. Jefferson County Bd. of Educ., 126 S. Ct. 2351 (U.S. 2006); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 126 S. Ct. 2351 (U.S. 2006).

## Equal Protection

The Fourteenth Amendment of the Constitution provides, in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws*.[18]

Under the Supreme Court's equal protection jurisprudence, "the general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."[19] Laws based on suspect classifications such as race or gender, however, typically receive heightened scrutiny and require a stronger state interest to justify the classification.[20] The highest level of judicial review, known as strict scrutiny, is applied to laws that contain classifications based on race. Such classifications will survive strict scrutiny only if the government can show that they: (1) further a compelling governmental interest, and (2) are narrowly tailored to meet that interest.[21]

### *Meredith v. Jefferson County Board of Education*

In *MacFarland,* the district court found that Jefferson County's school assignment plan not only served a compelling interest but also was sufficiently narrowly tailored to survive strict scrutiny. Indeed, the court held that the school plan served many of the same interests that the Supreme Court had upheld as compelling in *Grutter*, as well as additional compelling interests, such as improved student education and community support, that are not relevant in the higher education context. According to the court, "Integrated schools, better academic performance, appreciation for our diverse heritage and stronger, more competitive public schools are consistent with the central values and themes of American culture."[22] The court also found that the student assignment plan, which primarily relied on race-neutral means such as geographic boundaries, special programs, and school choice, was "narrowly tailored" in every respect except for its use of separate "racial categories" for certain schools, which the district was required to revise for the 2005-2006 school year. On July 21, 2005, for reasons "articulated in the well-reasoned opinion of the district court," the Sixth Circuit summarily affirmed the district court's decree without issuing a detailed written opinion.[23]

In the briefs they submitted to the Supreme Court, the parties to the Jefferson County lawsuit advocate two competing views regarding whether the race-based

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[18] U.S. Const. amend. XIV, § 1 (emphasis added).

[19] City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985).

[20] *Id.*

[21] Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

[22] McFarland v. Jefferson County Pub. Schs., 330 F. Supp. 2d 834, 852 (D. Ky. 2004).

[23] McFarland v. Jefferson County Public Schs., 416 F.3d 513 (6th Cir. 2003).

school assignment plan violates the Constitution, but both parties rely heavily on the Court's reasoning in *Grutter* when making their respective arguments. As noted above, the *Grutter* Court emphasized that "context matters" when evaluating the compelling interest that the University of Michigan asserted in defending its race-conscious admissions plan,[24] and the Court also accorded significant deference to the university's judgment regarding the necessity of its plan.[25] In addition, while emphasizing that "outright racial balancing" is "patently unconstitutional, [26] the *Grutter* Court identified five hallmarks of a narrowly tailored affirmative action plan: (1) individualized consideration of applicants, (2) the absence of quotas, (3) serious, good-faith consideration of race-neutral alternatives to the affirmative action program, (4) that no member of any racial group was unduly harmed, and (5) that the program has an end point.[27]

In their briefs, the original plaintiffs, composed of parents whose children were not admitted to their school of choice, argue that the plan violates the equal protection clause because it fails both prongs of the strict scrutiny test, neither fulfilling a compelling interest nor demonstrating that it is narrowly tailored to meet that interest.[28] With respect to the first prong of the strict scrutiny test, the petitioners argue that the interest asserted — that racial diversity provides educational benefits to students — is not supported by social science research, which, at best, shows only marginal improvement in educational outcomes.[29] Further, petitioners argue that deference to the school board regarding its alleged compelling interest in the use of race is unwarranted because local school boards are not entitled to the level of deference accorded colleges and universities.[30]

With respect to the second prong of the strict scrutiny test, the petitioners contend that the school district's plan to promote racial diversity is not sufficiently narrowly tailored to pass constitutional muster. First, the petitioners argue that the plan is not narrowly tailored because it is simply an automatic extension of the school district's desegregation plan and is not specifically tailored to present day circumstances. Second, the petitioners reject the district's contention that race is used only as one of many factors determining school assignment, arguing that when the nearest school reaches its specified racial capacity, then race becomes the sole determining factor governing admissions. Third, the petitioners allege that the school plan violates *Grutter's* requirement of individualized consideration because it considers only a student's membership in a particular racial group. Fourth, the petitioners contend that the school district's consideration of race is not flexible, but rather constitutes an unconstitutional quota that fixes black student enrollment at a specified minimum and

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[24] Grutter v. Bollinger, 539 U.S. 306, 327 (U.S. 2003).

[25] Id. at 328.

[26] Id. at 330.

[27] Id. at 334-42.

[28] Reply Brief: Appellant-Petitioner, Meredith v. Jefferson County Bd. of Educ., 2005 U.S. Briefs 915 (U.S. S. Ct. Briefs 2006).

[29] Id. at 8-14.

[30] Id. at 4-8.

maximum percentage. Fifth, the petitioners argue that the school district failed to properly consider race-neutral alternatives, such as various socio-economic indicators, for achieving its diversity goals.[31] Finally, the petitioners allege that the Jefferson County plan amounts to racial balancing because it seeks to achieve a student body comprised of a specified percentage of members of a particular racial group and therefore unconstitutionally stigmatizes and harms the affected students.[32]

In contrast to the brief submitted by the parent petitioners, the brief submitted by the Jefferson County school district argues that the city's plan to promote racial diversity in its schools does not violate the equal protection guarantee of the Constitution.[33] Specifically, the school district argues that its plan should survive strict scrutiny because it both serves a compelling state interest and is narrowly tailored to meet that interest.

With respect to the first prong of the strict scrutiny test, Jefferson County argues that it has a compelling interest in maintaining racially integrated schools. Noting that racial integration is the same goal the Court sought to achieve in the landmark *Brown v. Board of Education* decision,[34] the school district asserts that its interest in maintaining racially integrated schools is far more precisely focused than the diversity interest upheld in *Grutter* but nevertheless serves similar purposes. According to the district, racial integration is a compelling interest because it helps to promote important civic values, improve the academic performance of minority students, and further community support for public schools, all critical goals.[35]

Likewise, Jefferson County contends that its school assignment plan is narrowly tailored to accomplish these goals. According to the district, the plan does not attempt to achieve racial balancing or impose a quota, noting that the percentage of black students enrolled at various schools ranges from 20.1% to 50.4%, a range that is far broader than the range upheld in *Grutter*. Emphasizing that "context matters," the district contends that *Grutter's* requirement of individualized assessment does not apply to elementary and secondary education system, which do not share the University of Michigan Law School's merit-based selection process. Instead, argues the school district, its plan is similar to the plan at issue in *Grutter* because it is flexible and considers a host of factors other than race, such as residence, school choice, and capacity, when determining school assignments. In addition, the district argues that its plan does not unduly harm members of any racial group because students of all races are subject to the same guidelines and because all schools are similar in quality such that assignment to one school over another does not cause significant harm to a given student. Further, the district contends that it has considered, and indeed used, other race-neutral alternatives to achieve its goals, but that it is not required to by *Grutter* to exhaust all possible alternatives. Finally, the

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[31] Id. at 14-20.

[32] Id. at 3-4, 12-14.

[33] Initial Brief: Appellee-Respondent, Meredith v. Jefferson County Bd. of Educ., 2005 U.S. Briefs 915 (U.S. S. Ct. Briefs 2006) (hereinafter *Meredith* Respondent Brief).

[34] 347 U.S. 483 (1954).

[35] *Meredith* Respondent Brief, *supra* n. 33 at 11-13.

district argues that its school integration plan is clearly limited in time, pointing to the number of reviews of and modifications to the plan that the school board has undertaken over the years.[36]

## *Parents Involved in Community Schools v. Seattle School District No. 1*

Although the school assignment plan in *Meredith* differs somewhat from the plan at issue in *Parents Involved in Community Schools*, the two cases present similar issues. In *Parents Involved in Community Schools*, the Ninth Circuit applied *Grutter* and *Gratz* to approve a school district's plan to maintain racially diverse schools. In its *en banc* decision, the Ninth Circuit ruled that the school district had a compelling interest in the educational and social benefits of racial diversity and in avoiding racially concentrated or isolated schools.[37] Further, the court held that the district's plan was sufficiently narrowly tailored to pass constitutional muster. According to the court, the "individualized" and "holistic" review endorsed by the Supreme Court was not required of a noncompetitive, voluntary student assignment plan such as Seattle's, as long as the plan is otherwise narrowly tailored. The court held that Seattle's plan was sufficiently narrowly tailored, concluding that the 15 percentage point deviation from the overall racial make-up of the district was not a quota because it is flexible and does not reserve a certain number of fixed slots based on race. The court also ruled that school district made a good-faith effort to consider race-neutral alternatives. Finally, the court concluded that the plan imposed a minimal burden — not being permitted to attend one's preferred school — that was shared by all students and that the plan, which was subject to regular reviews, was sufficiently limited in time and in scope.[38] The ruling reversed an earlier three-judge appellate panel's contrary decision that the school district's plan to maintain racially diverse schools was not sufficiently narrowly tailored.[39]

In their briefs to the Supreme Court, the parties to the Seattle lawsuit advocate two competing views regarding whether the race-based school assignment plan violates the Constitution. Specifically, Parents Involved in Community Schools (PICS), the group representing the parents who originally sued to halt the school plan, argues that the plan violates the equal protection clause because it fails both prongs of the strict scrutiny test, neither fulfilling a compelling interest nor demonstrating that it is narrowly tailored to meet that interest.[40]

With respect to the first prong of the strict scrutiny test, PICS distinguishes the compelling interests upheld in *Grutter* from the interests articulated by the Seattle

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[36] Id. at 13-20.

[37] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 426 F. 3d 1162, 1174-79 (9th Cir. 2005) (*en banc*).

[38] Id. at 1179-92.

[39] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 377 F.3d 949 (9th Cir. 2004).

[40] Initial Brief: Appellant-Petitioner, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 2005 U.S. Briefs 908B (U.S. S. Ct. Briefs 2006) (hereinafter PICS Petitioner Brief).

school board. According to PICS, although the *Grutter* Court recognized a compelling governmental interest in racial diversity, that interest is limited to the higher education setting and is appropriate only when race is considered to be one of many factors that contribute to diversity. Furthermore, the *Grutter* Court deferred to the university out of respect for its First Amendment right of academic freedom, contends PICS, but such deference to the Seattle school board would be unwarranted.[41]

Elaborating further, PICS argues that racial diversity in high schools is not a compelling interest, asserting that the educational benefits of racial diversity are not sufficiently established to qualify as a compelling governmental interest and specifically disputing the evidence presented by the school board regarding the beneficial impact of desegregation. PICS also argues that Seattle's pursuit of racial diversity alone — as opposed to the pursuit of diversity of all types — is unconstitutional per se. Noting that the Seattle plan relies on a racial classification that distinguishes only between white and non-white students, PICS argues that the Seattle plan fails to accomplish genuine cultural, ethnic, or even racial diversity, in part because it does not acknowledge the diversity that exists among members of the non-white category.[42]

With respect to the second prong of the strict scrutiny test, PICS contends that the Seattle school district cannot demonstrate that its plan is narrowly tailored because the racial preference is not necessary to accomplish its stated purpose, arguing that Seattle's schools would be racially diverse even without the use of the preferential school assignment plan. Furthermore, PICS contends that the Seattle plan does not meet the narrow tailoring requirements established in *Grutter*. According to PICS, Seattle failed to consider a number of race-neutral alternatives, such as using geographic location or a lottery for assignment purposes, that would have accomplished the same diversity goals without consideration of race. PICS also argues that Seattle's plan operates as a quota by capping school attendance at a predetermined number of white and nonwhite students and that the race preference provides no individual consideration of the ways in which an applicant contributes to diversity, but rather automatically admits or rejects students based on their membership in a particular racial group. Finally, PICS argues that the Seattle plan is not narrowly tailored because it causes undue harm to students who are denied attendance at their preferred schools and because the plan is not adequately limited in duration.[43]

In addition to arguing that the Seattle plan does not pass the strict scrutiny test, PICS raises several other constitutional objections to the Seattle plan. First, relying on language in *Grutter* that "outright racial balancing" is "patently unconstitutional," which the Court defines as assuring a specified percentage of a particular group within the student body,[44] PICS repeatedly argues that the Seattle plan constitutes "racial balancing" because, when the racial composition of an oversubscribed school deviates from the specified ratio, a student's race is the sole determining factor in whether or

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[41] Id. at 33-34.

[42] Id. at 34-37.

[43] Id. at 39-46.

[44] Grutter v. Bollinger, 539 U.S. 306, 330 (U.S. 2003).

not he is admitted. Although the Court has permitted outright racial balancing as a remedy for past discrimination in, for example, cases involving segregated schools, PICS argues that Seattle schools are not segregated in the traditional sense in which students were deliberately placed in separate schools on the basis of race. Additionally, arguing that the equal protection clause protects individuals, not racial groups, PICS rejects Seattle's contention that its plan is justified because students who are rejected are still entitled to be admitted at another school and because the plan discriminates against both white and nonwhite students alike.[45]

In contrast to the brief submitted by PICS, the brief submitted by the Seattle school district argues that the city's plan to promote racial diversity in its schools does not violate the equal protection guarantee of the Constitution. Specifically, the school district argues that its plan should survive strict scrutiny because it both serves a compelling state interest and is narrowly tailored to meet that interest.

With respect to the first prong of the strict scrutiny test, Seattle argues that its consideration of race was designed to further the following compelling interests: "(1) to promote the educational benefits of diverse student enrollments, (2) to reduce the potentially harmful effects of racial isolation by allowing students the opportunity to opt out of racially isolated schools, and (3) to make sure that racially segregated housing patterns did not prevent non-white students from having equitable access to the most popular over-subscribed schools."[46] Each of these interests is compelling, according to Seattle, which points to the *Grutter* Court's recognition of the importance of promoting racial understanding and eliminating racial stereotypes. Emphasizing the Court's role in school desegregation cases, Seattle also argues that the Court has long recognized the harmful effects of racially isolated schools and school districts' authority to remedy the problem. Further, argues Seattle, *Grutter* emphasized that "context matters" when courts are considering racial classifications, and the Court needs to evaluate the unique context of elementary and secondary education and its fundamental role in inculcating civic values in the nation's children when reviewing Seattle's plan. Finally, Seattle rejected PICS' contention that the district is interested in "racial balancing," arguing that measures to promote racial diversity and integration are not and have never been inherently unconstitutional.[47]

Likewise, Seattle contends that its plan is narrowly tailored to serve its compelling interests. First, under *Grutter*, the school district was not required to exhaust all conceivable race-neutral alternatives, and Seattle asserts that the school board seriously considered race-neutral alternatives but determined that such measures would not achieve their compelling interests. Second, Seattle asserts that, as in *Grutter*, race was only one of many factors involved in the school assignment plan, which also considered student choice, school popularity, sibling assignment, and place of residence. Nor, argues Seattle, was its consideration of race a quota, since there was no fixed number of white or non-white students assigned to attend particular schools.

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[45] PICS Petitioner Brief, *supra* n. 40 at 25-32.

[46] Initial Brief: Appellee-Respondent at 19, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 2005 U.S. Briefs 908B (U.S. S. Ct. Briefs 2006).

[47] Id. at 19-37.

Third, Seattle asserts that no member of any racial group was unduly burdened by the plan. Unlike in *Grutter*, which involved a limited number of merit-based admissions slots, Seattle students all had the opportunity to attend a Seattle school, and, according to Seattle, no stigma would attach to a student by virtue of her attendance at a particular school. Fourth, Seattle argues that the plan is narrowly tailored because it was periodically reviewed by the school board and had altered over time, thus demonstrating that the plan is limited in duration. Finally, although *Grutter* identified individualized consideration as a hallmark of a narrowly tailored racial classification, Seattle argues that such individualized review is not required when there is no merit-based competition and every student receives a comparable school assignment.[48]

## III. Conclusion

In its *Grutter* and *Gratz* decisions, the Supreme Court clearly ruled that a school's promotion of racial diversity is a compelling interest that renders the consideration of race constitutionally permissible if such consideration is narrowly tailored to the school's diversity interest. Because there are many similarities between the plan at issue in the *Grutter* case and the school assignment plans under review in *Meredith* and *Parents Involved in Community Schools*, the Supreme Court may ultimately decide to uphold the constitutionality of the local plans to promote racial diversity in elementary and secondary schools. On the other hand, because there are differences between the higher education and elementary and secondary education context, as well as some variation among the individual school plans, the Court may just as easily decide that one or both of the school plans at issue do not present a constitutionally compelling interest or are not narrowly tailored, or both. Ultimately, its difficult to predict how the Court will rule in the pending cases, in part because it is difficult to determine how the Court, whose composition has changed since the University of Michigan cases were decided, will apply the precedents established in *Grutter* and *Gratz*.

[48] Id. at 37-50.