SORDID BUSINESS:
THE SUPREME COURT CONFRONTS THE CONSTITUTIONALITY OF RACIAL PREFERENCES IN K-12 EDUCATION

By

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It is a sordid business, this divvying us up by race.—Chief Justice Roberts[3]

INTRODUCTION

The Chief Justice's words, written in the context of a congressional redistricting case, are equally applicable to the nation's public schools in the early years of the third millennium. While *Brown v. Board of Education*[4] merely requires the elimination of the vestiges of *de jure* segregation to the extent practicable[5] and while *de facto* segregation "does not have constitutional implications,"[6] local school districts continue to insist on "divvying us up by race." Specifically, many school boards have engaged in such practices as lowering admissions standards at competitive high schools for racial minorities, reserving set percentages of places for various racial groups, and assuming that anyone who is a racial minority has a unique perspective or set of life experiences.[7] Although such programs are constitutionally dubious[8] and were repeatedly rejected by the lower federal courts,[9] the University of Michigan racial

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[3] *League of United Latin American Citizens v. Perry*, 126 S. Ct. __, ___ (2006) (Roberts, C.J., joined by Alito, J., concurring in part and dissenting in part).

[4] 347 U.S. 483 (1954).

[5] Board of Educ. v. Dowell, 498 U.S. 237, 247-48 (1991).

[6] Freeman v. Pitts, 503 U.S. 467, 493-94 (1992).

[7] While we recognize the value of a diversity of *viewpoints and experiences* in the education of older students, we have serious doubts about the educational value of using racial preferences to achieve a specific racial balance. Ultimately, there are two paradigms of educational equality—non-discrimination and numerical parity. *See* William E. Thro, *Judicial Paradigms of Educational Equality*, 174 EDUC. LAW RPTR. 1 (2003).In our view, America's schoolchildren are best served by measures that promote equal opportunity rather than those that obsess on the racial composition of the classroom.

[8] *See generally* William E. Thro, *The Constitutionality of Eliminating De Facto Segregation in the Public Schools*, 120 EDUC. L. RPTR. 895 (1997).

[9] *See* Eisenberg v. Montgomery County Pub. Schs., 197 F.3d 123 (4th Cir. 1999); Wessman v. Gittens, 160 F.3d 790 (1st Cir. 1998); Equal Open Enrollment Ass'n v. Board of Educ., 937 F. Supp. 700, 701-08 (N.D. Ohio 1996); Keyes v. Congress of Hispanic Educators, 902 F. Supp. 1274 (D. Colo. 1995), *appeal dismissed sub. nom* Keyes v. School District No. 1, 119 F.3d 1437 (10th Cir. 1997). *But see* Hunter ex rel. Brandt v. Regents of the Univ. of Cal., 190 F.3d 1061 (9th Cir. 1999) (upholding racial preferences for admission to public university's laboratory school).

preferences cases, *Grutter v. Bollinger*[10] and *Gratz v. Bollinger*,[11] have provided the school districts with new arguments for this "sordid business." Indeed, in the three years since *Grutter* & *Gratz*, four different Circuits reviewed the constitutionality of using racial preferences to eliminate *de facto* segregation.[12]

Two of those decisions—the Ninth Circuit case[13] and an opinion of the Western District of Kentucky,[14] which was summarily affirmed[15] by the Sixth Circuit, will be reviewed by the Supreme Court in the 2006 Term.[16] Anticipating the high court's ruling, the purpose of this article is to examine the two cases confronting the Supreme Court by comparing the analyses through which the lower courts resolved them to the framework mandated in *Grutter* & *Gratz*.[17] In doing so, the article demonstrates that the lower courts misunderstood or failed to follow *Grutter* & *Gratz* in terms of both whether "racial diversity" is a compelling governmental interest and whether individualized consideration is a requirement of narrow tailoring. This purpose is accomplished in two distinct sections. Section I briefly reviews the two cases and the

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[10] 123 S. Ct. 2325 (2003).

[11] 123 S. Ct. 2411 (2003).

[12] Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162 (9th Cir. 2005) (en banc), *cert. granted*, 126 S. Ct.2351 (2006); Comfort v. Lynn Sch. Comm., 418 F.3d 1 (1st Cir. 2005) (en banc), *cert. denied*, 126 S. Ct. 798 (2005); McFarland ex rel. McFarland v. Jefferson County Pub. Schs., 416 F.3d 513 (6th Cir. 2005), *cert. granted*, 126 S. Ct. 2351 (2006); Cavalier ex rel. Cavalier v. Caddo Parish Sch. Bd., 403 F.3d 246 (5th Cir. 2005). *But cf.* Doe v. Kamehameha Schs./Bernice Pauahi Bishop Estate, 416 F.3d 1025 (9th Cir. 2005), *rehearing en banc granted*, 441 F.3d 1029 (9th Cir. 2006) (non-native Hawaiian student's challenge to a private school alleging that its race-conscious admissions policy of accepting only students of native Hawaiian ancestry violated Section 1981).

[13] Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162 (9th Cir. 2005) (en banc), *cert. granted*, 126 S. Ct. 2351 (2006).

[14] McFarland v. Jefferson County Pub. Schs., (*McFarland I*), 330 F.Supp.2d 834 (W.D. Ky. 2004).

[15] McFarland ex rel. McFarland v. Jefferson County Pub. Schs., 416 F.3d 513 (6th Cir. 2005), *cert. granted*, 126 S. Ct. 2351 (2006).

[16] The cases have not been consolidated but will be argued in tandem.

[17] Because the Sixth Circuit simply summarily affirmed the trial court, the discussion of the Sixth Circuit case necessarily will focus on the reasoning of the Western District of Kentucky.

respective rationales of the courts. Section II explains how the lower federal court suits departed from the legal principles enunciated in *Grutter* & *Gratz.*

I. OVERVIEW OF THE DECISIONS

A. Western District of Kentucky/Sixth Circuit

The first of two cases confronting the Supreme Court involved a challenge by parents in Louisville, Kentucky, who questioned the use of a district-wide, race-conscious school choice plan. In the underlying dispute, the Western District of Kentucky ruled that with the exception of the school board's assignment process for its "traditional schools," its race-conscious student assignment plan was sufficiently narrowly tailored to satisfy Equal Protection Analysis. More specifically, the lower court was satisfied that the school board's general race-conscious student assignment plan was narrowly tailored. The plan did not operate as a *de facto* quota, incorporated a sufficient form of individualized attention in the assignment, used race in a manner that was calculated not to harm any particular person due to race, and there were no workable race-neutral alternatives for accomplishing its compelling objective of maintaining an integrated school system.

Turning to the assignment process for traditional schools, the court conceded that while the policy's goal of maintaining an integrated school system was a compelling goal and the board's motives were sincere and not aimed at some improper or illegitimate purpose, the policy violated the Equal Protection Clause. The court held that the plan violated equal protection because it was not narrowly tailored to accomplish its objectives insofar as the application process would have placed black and white students on separate assignment tracks, and its use of the separate lists appears to have been unnecessary to accomplish the board's goal.

B. Ninth Circuit

A procedurally complex case from Washington state, which began prior to *Grutter* & *Gratz*, involved a parental challenge to a school board's "open choice" assignment plan. The parents claimed that the plan, which used race as a tiebreaker in assigning students to high schools that were oversubscribed, violated equal protection and state laws. After a federal trial court granted the school board's motion for summary judgment,[18] the Ninth Circuit reversed in favor of the parents,[19] but withdrew its opinion when it agreed to conduct a rehearing[20] while certifying the question to Supreme Court of Washington.[21] The Supreme Court of Washington maintained that while racial diversity in education is compelling interest, the board's use of race as a tiebreaker was not narrowly tailored to further such an interest. In essentially conforming to the judgment of the Supreme Court of Washington, the Ninth Circuit reversed and remanded in favor of the parents with instructions to enjoin the plan.[22] The court was persuaded that the racial integration tiebreaker violated a state law that prohibited the preferential use of race in public education. An en banc panel of the Ninth Circuit, relying on *Grutter & Gratz*, then explained that the plan did not violate equal protection since its use of race was sufficiently narrowly tailored to achieve the compelling state interest of avoiding racial isolation while increasing student diversity.[23]

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[18] Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1, 137 F.Supp.2d 1224 (W.D. Wash. 2001).

[19] Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1, 285 F.3d 1236 (9th Cir. 2002).

[20] Parents Involved In Community Schs. v. Seattle Sch. Dist. No. 1, 294 F.3d 1084 (9th Cir. 2002).

[21] Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1, 294 F.3d 1085 (9th Cir. 2002).

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

[23] Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162 (9th Cir. 2005) (en banc), cert. granted, 126 S. Ct. ___ (2006).

After accepting the school board's argument that racial diversity produced a number of compelling educational and social benefits in secondary education, including improved critical thinking skills, socialization and citizenship advantages, opportunity networks in higher education and employment, and greater likelihood of cross-racial friendships later in life, the court turned to the requirements of narrowly tailoring.

II. DEVIATIONS FROM *Gutter & Gratz*

A. Racial Diversity as a Compelling Governmental Interest

Contrary to popular belief, *Grutter* & *Gratz* did not hold that obtaining racial diversity—correcting the underrepresentation of certain racial groups—was a compelling governmental interest.[24] Indeed, "'assur[ing], within [the] student body some specified percentage of a particular group merely because of its race or ethnic origin'… would amount to outright racial balancing, which is patently unconstitutional."[25] Rather, *Grutter* found that a state institution of higher education has "a compelling interest in obtaining the *educational benefits* that flow from a

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[24] In fact, the University of Michigan never argued that diversity was a compelling governmental interest. *Grutter*, 123 S. Ct. at 2333. Rather, the institution emphasized that enrolling certain racial groups was only "*part* of its goal of 'assembling a class that is both exceptionally academically qualified and broadly diverse.'" *Grutter*, 123 S. Ct. at 2339. (emphasis added) (quoting Brief of Respondents). Indeed, "[t]he Law School does not… limit in any way the broad range of qualities and experiences that may be considered valuable contributions to student body diversity." *Id.* at 2344. *Grutter* and *Bakke* provide examples of qualities that may contribute to diversity. Regents of the University of California v. Bakke, 438 U.S. 265 (1978). Those mentioned in *Grutter* include living or traveling widely abroad, fluency in several languages, overcoming personal adversity and family hardship, exceptional record of extensive community service, successful career in another field as well as unusual intellectual achievement, employment experience, nonacademic performance, or personal background. *Id.* (citing Michigan law school admission policy). Similarly, Justice Powell noted that "[s]uch qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important." *Bakke*, 438 U.S. at 317. These lists are, of course, not exclusive. Indeed, one significant factor not mentioned by *Grutter* or *Bakke*, but providing obviously valuable diversity, is service in the military.

[25] *Grutter*, 123 S. Ct. at ___. (quoting *Bakke*, 438 U.S. at 307 (opinion of Powell, J.)).

diverse student body."[26] The Court, embracing the concept of diversity articulated by Justice Powell in *Bakke* explained:

> Justice Powell was… careful to emphasize that in his view race "is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body." For Justice Powell, "it is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups," that can justify the use of race. 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." [27]

Insofar as diversity arises from "*a far broader array* of qualifications and characteristics"[28] and focuses on "those students who will contribute the most to the robust *exchange of ideas*,"[29] the Court "emphasized the importance of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education."[30] "Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters."[31] Of course, such an examination necessarily includes an evaluation of other factors that may shape attitudes and experiences such as one's religion, cultural background, socioeconomic class, or home life. In other words, if applicants are to be judged based on the experiences and attitudes that they would bring to the intellectual life of the institution, then an individual's race, like any other factor that shapes attitudes and experiences, becomes relevant. Race is not determinative or even dominant, but it is a factor.

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[26] *Grutter*, 123 S. Ct. at 2347.

[27] *Grutter*, 123 S. Ct. at 2337 (quoting *Bakke*, 438 U.S. at 314-315 (opinion of Powell, J.).

[28] *Grutter* at *31 (emphasis added) (quoting *Bakke*, 438 U.S. at 314-315 (opinion of Powell, J.))

[29] *Bakke*, 438 U.S. at 313 (opinion of Powell, J.) (emphasis added).

[30] *Gratz*, 123 S. Ct. at 2428.

However, in assessing the constitutionality of racial preferences in K-12 education, the lower courts have adopted a fundamentally different definition of diversity. Although *Grutter* & *Gratz* require "substantial weight to diversity factors besides race,"[32] the Ninth Circuit focused not on the educational benefits of having students with different experiences or different viewpoints, but on the supposed benefits of having students of different races present.[33] Thus, the Ninth Circuit declared that there were compelling interests "in obtaining the educational and social benefits of racial diversity in secondary education and in avoiding racially concentrated or isolated schools resulting from Seattle's segregated housing pattern."[34] Finally, the Western District of Kentucky, which was summarily affirmed by the Sixth Circuit, found that maintaining integrated schools was a compelling interest.[35]

By ignoring other characteristics that may shape an individual's viewpoints or experiences and focusing exclusively on race, the Ninth Circuit as well as the Western District of Kentucky effectively transformed the *Grutter* & *Gratz* definition of diversity into something radically different. In *Grutter* & *Gratz*, the Court did not say that achieving a specific racial balance was a compelling governmental interest. Rather, it said that obtaining the educational benefits that flow from a diverse student body—where diversity is defined as an individual's viewpoints or experiences both of which may be influenced by race—was a compelling governmental interest. This distinction is subtle but crucial. It is the difference between judging an individual on the content of his or her character and conferring benefits based on skin color. It

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[31] *Id.*

[32] *Grutter*, 123 S. Ct. at 2344.

[33] *Parents Involved*, 426 F.3d at 1174-77.

[34] *Id.* at 1179.

[35] *McFarland I*, 330 F. Supp.2d at 849-55.

is the difference between individual consideration and group rights. It is the difference between a holistic evaluation of all aspects of an application and a bureaucratic sorting of applications into various categories. It is the difference between an honest detailed examination of what a person can contribute to the intellectual life of an institution and a stereotypical assumption. As four judges of the Ninth Circuit explained:

> 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.* Such a focus is consistent with the Equal Protection Clause, which protects the individual, not groups.
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> 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.[36]

In sum, *Grutter* & *Gratz* embraced a broad definition of diversity of which race was only one consideration and then only an indirect consideration. However, these K-12 racial preference cases embraced a narrow definition of diversity in which race was the *only* consideration.

B. The Requirements of Narrow Tailoring

"Even in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still 'constrained in how it may pursue that end: [T]he means chosen to accomplish the [government's] asserted purpose must be specifically and

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[36] *Parents Involved*, 426 F.3d at 1202-03 (Bea, J., joined by Kleinfeld, Tallman, & Callahan, JJ., dissenting) (citations and footnotes omitted) (emphasis added).

narrowly framed to accomplish that purpose.'"[37] "The purpose of the narrow tailoring requirement is to ensure that 'the means chosen fit… th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.'"[38] To the extent that "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause,"[39] the narrow tailoring "inquiry must be calibrated to fit the distinct issues raised by the use of race to achieve the government's asserted goals."[40] In other words, courts must evaluate "whether the program actually furthers a different objective from the one it is claimed to remedy."[41] Indeed, the very purpose of strict scrutiny is to consider such relevant differences.[42] With respect to this narrow tailoring process in the context of educational admissions, *Grutter* & *Gratz* decreed that such programs must: (1) provide for individualized consideration; (2) be undertaken only after a serious good faith consideration of the viability of non-racial alternatives; (3) not unduly burden non-minorities; and (4) be periodically reviewed and of limited duration.[43] However, the Ninth Circuit and the Western District of Kentucky effectively abolished the individualized consideration requirement.[44] As the Supreme Court declared, "a race-conscious admissions program cannot use a quota system-it cannot 'insulat[e] each category of applicants with certain desired qualifications from

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[37] *Grutter*, 539 U.S. at 333 (quoting *Shaw*, 517 U.S. at 908).

[38] *Grutter*, 539 U.S. at 333 (quoting *Croson*, 488 U.S. at 493) (O'Connor, J., joined by Rehnquist, C.J., White and Kennedy, JJ. announcing the judgment of the Court).

[39] *Grutter*, 539 U.S. at 327.

[40] *Id.* at 333-34.

[41] Podberesky v. Kirwan, 38 F.3d 146, 158 (4th Cir. 1994).

[42] *Adarand*, 515 U.S. at 226-28.

[43] *Grutter*, 123 S. Ct. at 2329-30.

[44] The Ninth Circuit and Western District of Kentucky also misunderstood or misapplied the other narrow tailoring factors. While discussion of this aspect of the cases is outside the scope of this Article, a detailed analysis is

competition with all other applications.'"[45] Put another way, race-conscious admissions programs must be "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."[46] For example, an acceptable program "might allow for '[t]he file of a particular black applicant [to] be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism.'"[47]

Essentially, individualized consideration involves two elements.[48] First, the admissions process may not "insulate applicants who belong to certain racial or ethnic groups from the competition for admission."[49] Put another way, there cannot be separate admissions tracks for different races.[50] Thus, policies "cannot establish quotas for members of certain racial groups"[51] and may not reserve "a certain fixed number or proportion of the available opportunities… exclusively for certain minority groups."[52] However, the Court recognized a legally significant difference between the use of a quota and the "goal of attaining a critical mass

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provided in William E. Thro & Charles J. Russo, *The Constitutionality of Racial Preferences In K-12 Education After Grutter & Gratz*, 211 EDUCATION LAW REPORTER 537 (2006).

[45] *Id*. (quoting *Bakke*, 438 U.S. at 317 (Opinion of Powell, J.).

[46] *Id*. at 2343-44 (emphasis added) (quoting *Bakke*, 438 U.S. at 317 (opinion of Powell, J.)).

[47] *Gratz*, 123 S. Ct. at 2428 (quoting *Bakke*, 438 U.S. at 317 (opinion of Powell, J.)).

[48] *Grutter*, 123 S. Ct. at 2343.

[49] *Id*. at 2342. Presumably, an institution may exclude persons from consideration for a particular benefit on other, non-racial grounds, such as reserving a certain number of seats in a particular class for persons from a particular State, at least if the exclusion is not racially motivated.

[50] *Id.* at 2330.

[51] *Grutter*, 123 S. Ct. at 2330.

[52] *Id*. at 2342.

of underrepresented students."[53] While the former is prohibited, the latter is allowed. Although dissenting Justices took issue with the distinction, the majority explained its understanding of the difference between a quota and a goal. On the one hand, "quotas impose a fixed number or percentage which must be attained… and insulate the individual from comparison with all other candidates for the available seats."[54] On the other hand, "a permissible goal… requires only a good faith effort… to come within a range demarcated by the goal itself, and permits consideration of race as a 'plus' factor in any given case while still ensuring that each candidate competes with all other qualified applicants."

Second, race can be neither decisive[55] nor the "defining feature" of an application.[56] This "defining feature inquiry involves three component parts: (1) no assumption of a contribution to diversity;[57] (2) an opportunity for each individual to highlight his or her contribution to diversity;[58] and (3) a mandate that each application be read individually.[59]

The requirement of individualized consideration imposes a significant limitation on the ability of educators to use racial preferences in admissions or assignments. Indeed, a quota system "cannot be said to be narrowly tailored to any goal, except perhaps outright racial

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[53] *Id*. at 2343.

[54] *Id.* at 2342 (internal quotation marks and citations omitted).

[55] *Gratz*, 123 S. Ct. at 2428 (unlike Justice Powell's example in *Bakke*, where the race of a "particular black applicant" could be considered without being decisive, the automatic distribution of 20 points to all minority applicants by the University of Michigan's School of Literature, Science, and the Arts has the effect of making "the factor of race … decisive" for virtually every minimally qualified underrepresented minority applicant). *See also id.* at 2430 ("Additionally, this individualized review is only provided *after* admissions counselors automatically distribute the University's version of a 'plus' that makes race a decisive factor for virtually every minimally qualified underrepresented minority applicant.") (emphasis added).

[56] *Grutter*, 123 S. Ct. at 2343. ("When using race as a 'plus' factor in university admissions, a university's admissions program must remain flexible enough to ensure 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").

[57] *Gratz*, 123 S. Ct. at 2438.

[58] *Grutter*, 123 S. Ct. at 2344.

balancing," and "[r]acial balance is not to be achieved for its own sake."[60] Yet, without providing a coherent rationale, the lower courts simply ignored these requirements. In assessing Seattle's race-based student assignments, the Ninth Circuit held that individualized consideration is "irrelevant because regardless of their academic achievement, sports or artistic ability, musical talent or life experience, any student who wants to attend Seattle's public high schools is entitled to an assignment; no assignment to any of the District's high schools is tethered to a student's qualifications."[61] Moreover, the Ninth Circuit thought that individual consideration "is not germane to the district's compelling interest in preventing racial concentration or racial isolation. Because race itself is the relevant consideration when attempting to ameliorate *de facto* segregation, the district's tiebreaker must necessarily focus on the race of its students."[62] Similarly, the Western District of Kentucky, which was summarily affirmed by the Sixth Circuit, insisted that the school board met the individualized consideration standard because officials considered students' residences and choices of schools.[63]

By declaring that the requirement of individual consideration was irrelevant when the school boards simply sought to achieve a particular racial balance, the lower federal courts effectively abolished a key limitation on racial preferences. To explain, any assessment of the contributions that an individual makes to diversity must treat "each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that

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[59] *Gratz*, 123 S. Ct. at 2416.

[60] *Cavalier*, 403 F.3d at 260.

[61] *Parents Involved*, 426 F.3d at 1182.

[62] *Parents Involved*, 426 F.3d at 1183.

[63] *MacFarland I*, 330 F. Supp. 2d at 859.

individual's ability to contribute to the unique setting of higher education."[64] To that end, the evaluation must not assume "that any single characteristic automatically ensure[s] a specific and identifiable contribution to a university's diversity."[65] There should be "no policy, either *de jure* or *de facto*, of automatic acceptance or rejection based on any single 'soft' variable."[66] Instead, the institution must consider how—and, indeed, whether—the individual applicant will contribute to diversity based on his or her "own, unique experience of growing up in a society, like our own, in which race unfortunately still matters."[67] The institution must "ensure that all factors that may contribute to student body diversity are meaningfully considered *alongside* race in admissions decisions."[68] Moreover, an assessment of contributions to diversity should give "substantial weight to diversity factors besides race."[69] For example, if an institution uses race in the admissions process, admitting "nonminority applicants with grades and test scores lower than underrepresented minority applicants (and other nonminority applicants) who are rejected" may illustrate that the institution gives weight to diversity factors other than race.[70] In considering what factors cause an individual to contribute to diversity, "[a]ll applicants have the opportunity to highlight their own potential diversity contributions through the submission of a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity."[71]

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[64] *Gratz*, 123 S. Ct. at 2428.

[65] *Id.*

[66] *Grutter*, 123 S. Ct. at 2343.

[67] *Id*. at 2341.

[68] *Id*. at 2344 (emphasis added).

[69] *Grutter*, 123 S. Ct. at 2344.

[70] *Id.*

[71] *Id*. at 2344.

Yet, the Western District of Kentucky and the Ninth Circuit not only ignored these considerations, but also acted in direct contradiction of them. As four judges of the Ninth Circuit explained:

> *Grutter* emphasized the dangers resulting from lack of an individualized consideration of each applicant. Observing that the Michigan Law School sought an unquantified "critical mass" of minority students to avoid only token representation, rather than some defined balance, the Court reasoned the law school's individualized focus on students forming that "critical mass" would avoid perpetuating the stereotype that all "minority students always... express some characteristic minority viewpoint on any issue."
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> 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.
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> 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 *Grutte*r, the only way to achieve diverse viewpoints and mannerisms is to look at the individual student. White children have different viewpoints and backgrounds than other white children; the same goes for nonwhite children; and some white children have the same viewpoints and backgrounds as some nonwhite children. The assumption that there is a difference between individuals just because there is a difference in their skin color is a stereotype in itself, nothing more.[72]

Put another way**,** the Western District of Kentucky and the Ninth Circuit ignored the fact that *Grutter* & *Gratz* emphatically rejected the use of racial quotas,[73] separate admissions tracks for racial minorities,[74] and automatic assumptions about what racial minorities might contribute.[75]

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[72] *Parents Involved*, 426 F.3d at 1203 (Bea, J., joined by Kleinfeld, Tallman, & Callahan, J.J., dissenting) (emphasis original).

[73] *Grutter*, 123 S. Ct. at 2342 ("a race-conscious admissions program cannot use a quota system--it cannot 'insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants.'") (citations omitted).

CONCLUSION

More than a half-century after *Brown*, America's public schools remain segregated by race. Although there is no constitutional obligation to correct this *de facto* segregation, many school districts—believing that racial integration has inherent value—insist upon "divvying us up by race." Yet, whatever the benefits of racial integration for its own sake, any use of race must be subjected to constitutional standards. If the Supreme Court faithfully applies the principles that it announced in *Grutter* & *Gratz*, it will conclude that this "sordid business" is unconstitutional.

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[74] *Grutter*, 123 S. Ct. at 2342; *Gratz*, 123 S. Ct. at 2428.

[75] *Gratz*, 123 S. Ct. at 2428 ("The only consideration that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups") *See also Grutter*, 123 S. Ct. at 2341 ("To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students.").