

The Non-Preferment Principle and the “Racial Tiebreaker” Cases

*Samuel Estreicher**

Preferment by race, when resorted to by the State, can be the most divisive of policies, containing within it the potential to destroy confidence in the Constitution and the idea of equality.

—Justice Anthony Kennedy, dissenting in *Grutter v. Bollinger*,
539 U.S. 306, 388 (2003)

I. Introduction: “The Racial Tiebreaker” Decision

In the Supreme Court’s recent pass at “affirmative action,” the justices again divided 5-4, offering impassioned disagreements over the extent to which public schools may invoke “diversity” as a “compelling purpose” for the use of racial classifications when making certain admissions and transfer decisions, and whether the plans under challenge were “narrowly tailored” to serve that purpose.

In companion cases decided in late June 2007—*Parents Involved in Community Schools v. Seattle School District No. 1*¹—the Court struck down the use of race as an admissions and transfer “tiebreaker” by the public school systems of Seattle, Washington, and the greater Louisville area, Jefferson County, Kentucky. The plans of both systems were tied to the district-wide racial demographics; in Seattle, race was used to determine who would fill open slots at oversubscribed schools,² and in Jefferson County, race helped determine

*Dwight D. Opperman Professor of Law, New York University School of Law.

¹127 S. Ct. 2738 (2007).

²For the 2000–01 school year, five of the Seattle schools were oversubscribed in that 82 percent of students ranked them as one of their first choices. “Three of the oversubscribed schools were ‘integration positive’ because the school’s white enrollment the previous school year was greater than 51 percent. . . . Thus, more nonwhite students (107, 27, and 82, respectively) who selected one of these three schools as a top choice received placement at the school than would have been the case had race not been considered, and [geographic] proximity been the next tiebreaker.” *Id.* at 2747.

who could attend particular elementary schools within a geographic “cluster.”³ Writing for the majority, Chief Justice John Roberts insisted that all official racial classifications trigger strict judicial scrutiny and that neither a remedial purpose nor the diversity rationale accepted in *Grutter v. Bollinger*⁴—the 2003 decision sustaining the University of Michigan Law School’s preferential racial admissions program—justified the racial tiebreaker used by Seattle and Jefferson County. The tiebreaker could not be viewed as a remedy for official discrimination, the Court reasoned, because Seattle had never been found by a court to have maintained a racially segregated school system; and, while Jefferson County had maintained such a system, it successfully argued in 2000 for release from a court desegregation order on the ground that it had achieved unitary status and had eliminated “[t]o the greatest extent practicable” the vestiges of its prior policy of segregation.⁵ *Grutter*’s diversity rationale was found unavailing because *Grutter* “relied upon considerations unique to institutions of higher education”;⁶ and, in this case, “race, for some students, is determinative standing alone.”⁷ Here, the school districts used “racial classifications in a ‘nonindividualized, mechanical’ way,”⁸ unlike the one-factor-among-many “highly individualized, holistic review”⁹ engaged in by the University of Michigan Law School. Moreover, the plans under challenge used a racially

³Jefferson County required “all nonmagnet schools to maintain a minimum black enrollment of 15 percent, and a maximum black enrollment of 50 percent.” *Id.* at 2749. Students were assigned within geographic clusters: “‘Decisions to assign students to schools within each cluster are based on available space within the schools and the racial guidelines in the District’s current student assignment plan.’ If a school has reached the ‘extremes of the racial guidelines,’ a student whose race would contribute to the school’s racial imbalance will not be assigned there. . . . Transfers [between nonmagnet schools in the district] may be requested for any number of reasons, and may be denied because of lack of available space or on the basis of the racial guidelines.” *Id.* at 2749–50.

⁴539 U.S. 306 (2003).

⁵See *Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358, 360 (2000).

⁶*Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2754 (2007).

⁷*Id.* at 2753.

⁸*Id.* at 2754 (quoting *Gratz v. Bollinger*, 539 U.S. 244, 276, 280 (2003) (O’Connor, J., concurring)).

⁹*Id.* at 2753 (quoting *Grutter*, 539 U.S. at 337).

The Non-Preferment Principle and the “Racial Tiebreaker” Cases

binary “limited notion of diversity.”¹⁰ Five justices also agreed that the school districts failed the “narrow tailoring” prong of strict-scrutiny analysis because they had not seriously considered race-neutral alternatives;¹¹ and any claimed necessity for the use of race was further undermined by the minimal number of students affected by the racial preference.¹²

Chief Justice Roberts wrote only for himself and three colleagues in Parts III-B and IV of the opinion. Part IV consisted of a series of rejoinders to Justice Stephen Breyer’s dissenting opinion. In Part III-B the plurality questioned whether the plans were narrowly tailored to meet the school districts’ stated justification of reducing racially concentrated schools and taking advantage of the pedagogic benefits of educating students in a racially integrated environment. The school systems had made no effort to show how the claimed diversity benefits were tied to the racial demographics that governed use of

¹⁰“Even when it comes to race, the plans here employ only a limited notion of diversity, viewing race exclusively in white/nonwhite terms in Seattle and black/‘other’ terms in Jefferson County. . . . [U]nder the Seattle plan, a school with 50 percent Asian-American students and 50 percent white students but no African-American, Native-American, or Latino students would qualify as balanced, while a school with 30 percent Asian-American, 25 percent African-American, 25 percent Latino, and 20 percent white students would not. It is hard to understand how a plan that could allow these results can be viewed as being concerned with achieving enrollment that is ‘broadly diverse.’” *Id.* at 2754 (quoting *Grutter*, 539 U.S. at 329).

¹¹Consider the reasoning given in the Ninth Circuit’s en banc decision: “The record demonstrates that the School Board considered using a poverty tiebreaker in place of the race-based tiebreaker. It concluded, however, that this proxy device would not achieve its compelling interest in achieving racial diversity, and had other adverse effects. Although there was no formal study of the proposal by District staff, Board members’ testimony revealed two legitimate reasons why the Board rejected the use of poverty to reach its goal of racial diversity. First, the Board concluded that it is insulting to minorities and often inaccurate to assume that poverty correlates with minority status. Second, for the group of students for whom poverty would correlate with minority status, the implementation would have been thwarted by high school students’ understandable reluctance to reveal their socioeconomic status to their peers.” *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1188–89 (9th Cir. 2005) (en banc).

¹²*Id.* at 2759–61. It is interesting to note, moreover, that two of the less popular Seattle schools, at least one with a student body that had been predominantly African-American, became in the late 1990s *oversubscribed* schools not because of the racial tiebreaker—which did not apply to selection of undersubscribed schools—but because of a change in principals and a change in location of one of the schools. *Id.* at 1169 n.5.

the racial tiebreakers. Unlike in *Grutter*, Roberts noted, the school districts were “working backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits. . . .”¹³ The challenged plans were constitutionally flawed because they sought, at bottom, to achieve racial balance rather than pedagogic diversity.

Justice Anthony Kennedy, who had dissented in *Grutter*¹⁴ and joined the majority opinion in *Gratz v. Bollinger*,¹⁵ which struck down the rigid racial preferences used for University of Michigan undergraduate admissions, wrote a separate concurrence in *Parents Involved*. The challenged plans, he agreed, failed to satisfy “narrow tailoring” review, but the chief justice’s opinion was too sweeping in its condemnation of nearly all use of race. In Kennedy’s view, government can be legitimately concerned with preventing “de facto resegregation”¹⁶ of the public schools and is “free to devise race-conscious measures to address the problem in a general way and without treating each student in a different fashion solely on the basis of a systematic, individual typing by race.”¹⁷

Justice Breyer penned the principal dissent for himself and three colleagues. For the dissent, the plans were easily justified as remedial measures: Jefferson County could not be faulted for continuing measures that were considered constitutionally *required* before 2000; and Seattle had voluntarily addressed racial segregation to head off a lawsuit. In any event, strict scrutiny was not appropriate as the government’s purpose in both cases was to derive advantage from the pedagogic benefits of an integrated education rather than to make invidious judgments on the basis of race.

II. The Non-Preferment Principle

As long as analysis of racial classification cases turns on the familiar two-prong inquiry into whether government has asserted a “compelling interest” and, if so, whether the challenged program reflects

¹³ *Id.* at 2757 (plurality opinion).

¹⁴ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

¹⁵ 539 U.S. 244 (2003).

¹⁶ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2791 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

¹⁷ *Id.* at 2792.

The Non-Preferment Principle and the “Racial Tiebreaker” Cases

“narrow tailoring,” the Supreme Court jurisprudence in this area will prove deeply unsatisfying and difficult to predict. Both prongs have an “in-the-eye-of-the-beholder” quality, particularly after the *Grutter* Court (at least on some accounts) accepted as a compelling interest race-based viewpoint diversity, and the concomitant necessity of maintaining a “critical mass” of the under-represented racial viewpoint. Once that hurdle was cleared, insistence on narrow tailoring seems almost churlish; Justice Breyer certainly has a point in stressing that the program sustained in *Grutter* was a lot less narrowly tailored than the racial-tiebreakers invalidated in *Parents Involved*.¹⁸ Indeed, narrow tailoring appears paradoxical because if racial diversity is what the state is seeking (and can lawfully seek), racial preferences may be the best way to get there—hence, the lament of Circuit Judges Michael Boudin¹⁹ and Alex Kozinski,²⁰ highlighted in the Breyer dissent, that it is simply incoherent to require the state to get to a valid goal by the most circuitous route possible.

Much ink has been spilled in this area, but perhaps it is time to fish or cut bait: the Court should either articulate a clear, compelling principle or it should give up altogether the effort to place constitutional limits on government use of race or ethnicity to benefit minorities. I suggest a return to first principles: Why bar use of racial preferences at all when many well-intentioned people would agree with Justice Breyer and others that such preferences are an important part of the social arsenal for achieving equality? Indeed, one might ask, as do Justices Breyer and John Paul Stevens in their dissents: Why engage in strict scrutiny at all when the state is acting from such a beneficent wellspring of motivation?

¹⁸ “[B]road-range limits on voluntary school choice plans are less burdensome, and hence more narrowly tailored, than other race-conscious restrictions this Court has previously approved. Indeed, the plans before are *more narrowly tailored* than the race-conscious admission plans that this Court approved in *Grutter*. Here, race becomes a factor only in a fraction of students’ non-merit based assignments—not in large numbers of students’ merit-based applications. Moreover, the effect of applying race-conscious criteria here affects potentially disadvantaged students *less severely*, not more severely than the criteria at issue in *Grutter*.” *Parents Involved*, 127 S. Ct. at 2825 (Breyer, J., dissenting) (emphasis in original and citations omitted).

¹⁹ See *Comfort v. Lynn School Comm.*, 418 F.3d 1, 27–29 (1st Cir. 2005) (Boudin, C.J., concurring).

²⁰ See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1993–96 (9th Cir. 2005) (Kozinski, J., concurring).

The answer lies, of course, in the constitutional guarantee that “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” We customarily think of “equal protection” from the stand-point of preventing the state from visiting physical harm either directly through its instrumentalities or indirectly by withholding the customary protective force of the law and law enforcement authorities. But because the state can also violate equal protection by distributing goods and services or other valuable benefits or opportunities to members of a favored group rather than to those of a disfavored one—and, indeed, the classic concern over withholding of law enforcement resources is itself a form of discriminatory distribution of a government benefit—a better conceptual approach might be to think of equal protection as based on a principle of state neutrality or state non-preferment of members of one racial group over those of another.

Why care about state neutrality or non-preferment? Because we (“any person within its jurisdiction”) are at the state’s mercy when it acts. We are at the state’s mercy because the state enjoys monopoly power. The state’s principal responsibility is to produce public goods like highways, police, fire and schools—goods that are likely to be under-produced in private markets because of the natural or rational reluctance to fund goods and services that will be available to all comers, including those unwilling to pay for them. The state accomplishes this responsibility through politics (a process of identifying and aggregating individual preferences) and law (a process of coercing unconsenting minorities in the production of the public good by taxing those within its jurisdiction).

We can imagine a world where racial groups live in their own separate societies, each with its own highways, police and fire departments, and school systems. In such a world, there might have been no need for a non-preferment principle: each society would take care of its own. But when the separatist option is neither available nor unattractive, and racial groups must and do live together and function within the same polity, the non-preferment principle is essential to avoid the injustice of forcing everyone to pay for a public good that only some enjoy. It is, put simply, a denial of equal protection for the state to deny equal access to public services or opportunities to any person within its jurisdiction.

The history of African Americans in the post-bellum South illustrates the double jeopardy they faced when the state, having a

The Non-Preferment Principle and the "Racial Tiebreaker" Cases

monopoly on the use of force, denied them public protection or the means of protecting themselves against racial violence. Or the pain endured when the state, having run its own transportation systems or funded and otherwise facilitated the construction of private railroads, insisted that blacks use only crowded, poorly maintained rail cars or sections of cars. If you deny people the ability to act on their own or, through use of public monies, privilege the production or delivery of particular goods and services, you may not force them to subsidize their own disadvantage. If they are an equal part of the polity for the purpose of funding public goods and services, they are an equal part of the polity for the purpose of receiving the benefits of those goods and services.

At this level of generality it might still be possible to argue that what the majority racial group does to itself should be of no constitutional moment, for after all it is only the "discrete and insular" minority that needs constitutional protection. This, however, is both bad political science and flawed constitutional law. It is bad political science because "discrete and insular" minorities, if they are passionately committed to a political issue, may be more effective in a political struggle than a diffuse numerically dominant majority, each member of which would derive only a miniscule benefit if the political goal were achieved.²¹ And it is bad sociology, especially in America, because whites sort themselves more along ethnic, religious, geographic, economic and perhaps ideological grounds and form their political alliances more along those lines than along the broader line of skin color. In addition, despite the binary (black vs. white) use of race by the school districts in the racial-tiebreaker cases,²² it makes very little historical or political sense to group Hispanics and Asian-Americans with whites or with blacks.

It is also problematic constitutional law. The equal protection guarantee extends to "any person" within the state's jurisdiction. The constitutional injury is to the individual, even though the basis

²¹See generally Bruce A. Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713 (1985); Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (1962).

²²See *supra* note 10.

for the problematic official preferment is a group characteristic.²³ If government rewards or services are allocated on the basis of race, the injury is to the person disfavored because of his race, whether or not the individual “belongs” to a numerically predominant racial group that in some way “allowed” the racial allocation by not marshalling political forces against it. One’s skin color need not denote “membership” in a racial group, such that one can assume an almost tribal allegiance to group interests and political agenda. Few will be found to have given a decision-making proxy to “their” racial group.

The question might also be raised why the constitutional duty of non-preferment is triggered only by use of race, ethnicity, religious affiliation, and the like rather than by a host of other classifications like geography, occupation, or income informing government actions that are readily permitted. For the thorough-going libertarian, the answer might be that nearly all government action should be subject to strict scrutiny by the courts—and also by conscientious legislators, administrators, and citizens zealously preserving their liberty.

My answer would be a bit different: We know from history that certain governmental classifications, most especially race, are likely to generate intense social division and undermine commitment to national values, including the very “idea of equality.” That proposition has not been seriously contested among the justices or, in recent decades, the legal culture.

III. Accounting for Supreme Court Precedent

The non-preferment principle does a fairly good job of explaining the course of Supreme Court decision-making in this area. To begin, take the two “compelling” interests the justices have recognized in the course of implementing strict scrutiny. The first is the remedial use of race. Beneficiaries of such remedies are victims of official racial discrimination. When they receive restoration of a job opportunity they should have received but for discrimination or are transported to a majority-white school because majority-black schools continue to suffer the effects of prior official segregation, government

²³See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995) (“any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest of judicial scrutiny”).

The Non-Preferment Principle and the “Racial Tiebreaker” Cases

does not violate the duty of non-preferment. These victims are being made whole; they are being restored to the position they would have occupied had there been no prior official racial preferment. That is the justification for remedial preferment, even if applications do not always limit preferences to victims of past discrimination or confine burdens to those who have benefited from past discrimination.

So, too, with Justice Lewis Powell’s conception of diversity in *Regents of the University of California v. Bakke*.²⁴ The duty of neutrality or non-preferment does not require the state to ignore relevant differences about individuals. Thus, when a university is pursuing the goal of a diverse student body, it can take into account the whole range of skills and perspectives that a particular student will bring to the educational experience. In that multi-factored, individualized inquiry, the individual’s race is a relevant factor. The state is taking a full account of the individual applicant; no racial preference is being given; no racial spoils are being divided up. Thus, the Court in *Grutter* stated:

As Justice Powell recognized in *Bakke*, so long as a race-conscious admissions program uses race as a “plus” factor in the context of individualized consideration, a rejected applicant

“will not have been foreclosed from all consideration for that seat because he was not the right color or had the wrong surname. . . . His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.”²⁵

The problem emerges—as arguably was the case in the University of Michigan Law School admission process at issue in *Grutter*—when the state seemingly moves away from Justice Powell’s individualized conception of diversity to a pursuit of group-based viewpoint diversity through the use of racial preferences. If racial groups represent different viewpoints and a state university can act to ensure representation of diverse viewpoints through racial preferences, then individuals are being treated as members of racial groups and differential

²⁴438 U.S. 265 (1978).

²⁵*Grutter v. Bollinger*, 539 U.S. 306, 341 (2003) (quoting *Bakke*, 438 U.S. at 318).

access to a valuable educational opportunity is being differentially allocated on the basis of race.

Yet, it is possible to read *Grutter* as adopting no broader a conception of diversity or no greater latitude in using race to achieve diversity than in the position staked out by Justice Powell in his separate opinion in *Bakke*. Justice Sandra Day O'Connor's majority opinion in *Grutter* is careful to identify the relevant diversity interest as the law school's "compelling interest in attaining a diverse student body,"²⁶ rather than an interest in racial diversity or group viewpoint diversity as such. Moreover, the Court repeatedly insisted that the University of Michigan's Law School admissions program was no different than the Harvard plan discussed approvingly by Justice Powell in *Bakke*:

Here, the Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. The Law School affords this individualized consideration to applicants of all races. There is no policy, either *de jure* or *de facto*, of automatic acceptance or rejection based on any single "soft" variable. . . . Like the Harvard plan, the Law School's admissions policy "is 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."²⁷

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.²⁸

²⁶ *Id.* at 328.

²⁷ *Id.* at 334 (quoting *Bakke*, 438 U.S. at 315).

²⁸ *Id.* at 334 (quoting *Bakke*, 438 U.S. at 315–16).

The Non-Preferment Principle and the “Racial Tiebreaker” Cases

This may all be difficult to square with the *Grutter* Court’s approval of the Law School’s goal of enrolling “a ‘critical mass’ of minority students,”²⁹ but even here Justice O’Connor is careful to draw the line at “outright racial balancing, which is patently unconstitutional. Rather, the Law School’s concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce.”³⁰ It must also be remembered that while *Grutter* establishes certain general propositions—most particularly, “whether the use of race as a factor in student admissions by the University of Michigan Law School . . . is unlawful”³¹—it is not clear that the Court was predetermining the outcome of as-applied challenges to the law school’s admissions process.

In *Parents Involved*, however, there was no pretense of “holistic” or “individualized” review. Once the racial-balance guidelines were triggered, the racial tiebreaker operated automatically—in Seattle, as a second screen after considering whether there were siblings in the oversubscribed school, and in Jefferson County in determining student assignments within a geographic cluster. Given the Court’s adoption of the *Bakke* approach in *Grutter*, to uphold the Seattle and Jefferson County plans the diversity rationale would have to be significantly extended to include pursuit of racial diversity through racial preferences. Such an extension would plainly have triggered the non-preferment objection: Individuals would be placed in preferred schools or denied placement in preferred schools because of their race.

IV. Race-Conscious Objectives Through Non Racial Means

Justice Kennedy wrote separately in *Parents Involved* to make clear his view that government can seek to accomplish “race-conscious” ends—eliminating racially homogenous schools, bringing students of different races together—by race-neutral means without offending the Equal Protection Clause:

School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools;

²⁹*Id.* at 329.

³⁰*Id.* at 330.

³¹*Id.* at 311.

drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely that any of them would demand strict scrutiny to be found permissible.³²

The non-preferment principle helps explain Justice Kennedy's view. Where the state acts through racially neutral means, there is no preferential allocation of government goods and services on the basis of one's race. There is no racial division of the spoils, no basis for constitutional concern when a "magnet school" is created in a minority-dense neighborhood; the top 10 percent of every high school class is automatically granted admission to the state university system; or active recruiting for students takes place in economically disadvantaged neighborhoods—as long as the opportunity is not allocated on the basis of race and is available on equal terms to all races.³³

Under the non-preferment principle, there is also no warrant for strict scrutiny because the government classification is not based on race. Hence, one can avoid the conceptual awkwardness of recognizing an interest as "compelling" and yet declaring off-limits all direct means of pursuing the objective. One can deal affirmatively with the problem of equality through means that are consistent with government neutrality on matters of race.

³²Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2792 (2007).

³³Facts can of course arise where what is avowedly a race-neutral program emerges over time as a race-based preferential program.