



Affirmative Action Docketed

The Supreme Court takes up race-based school assignment

BY JOSH DUNN AND MARTHA DERTHICK

A relatively small proportion of the nation's school districts—fewer than 1000 out of 13,500—practice affirmative action, voluntarily using race in the design of attendance zones or in deciding who is admitted to selective schools. The Supreme Court several times refused to consider the constitutionality of this practice, but in June 2006, after extended internal debate, the Court shifted and granted certiorari in two cases.

One case before the Court is from Seattle, which has a policy of open choice for high-school attendance and uses race, along with other factors, as a tiebreaker when demand exceeds the number of spaces available. The goal of the policy is to assure that no school deviates by more than 15 percent from the district's overall racial composition, which is 60 percent minority (African American, Asian, and Hispanic).

The other case is from Jefferson County, Kentucky, which includes Louisville. There the school board tries to keep black enrollment in most schools in the range of 15 to 50 percent by encouraging or compelling white students to attend schools in black neighborhoods and vice versa. The district, which has a black enrollment of approximately 36 percent, is unusual in that it includes suburbs as well as the central city. Its ambitious policy was framed, unlike Seattle's, against a background of judicially mandated integration. Both suits were brought by white parents whose children failed to get into the school they sought.

To survive, racial preference policies must pass "strict scrutiny," the Court's most exacting level of analysis. Racial classifications are "inherently suspect" and thus must be narrowly tailored, serve a legitimate governmental interest, and use the least restrictive means possible. Federal circuit courts upheld both of the challenged plans.

Liberals fear and conservatives hope that the reconstituted court of Chief Justice John G. Roberts will rule against racial preferences. In a different context, Roberts has already shown an aversion to racial classification. In a voting rights case from Texas, he wrote, "It is a sordid business, this divvying us up by race." Samuel Alito is widely expected to be more skeptical of racial classification than the justice whom he replaced, Sandra Day O'Connor. She was the swing vote and wrote the opinion in *Grutter v. Bollinger* (2003), in which the Court upheld narrowly tailored affirmative action in higher education.

Insofar as school boards offer choice, a race-blind lottery could be an acceptable way to allocate spaces in oversubscribed schools.

Even if the Court should reject affirmative action, that would not invalidate existing lawsuits that are based on claims of unconstitutional racial segregation. Federal judicial decrees that mandate integration remain in effect in approximately 300 districts, enforced by the Justice Department's Civil Rights Division and the issuing courts. These are only the desegregation cases to which the

United States is a party. When we queried

the Department of Justice, we were told that it would be hard to determine the total number of active desegregation cases.

American parents like to choose where their children go to school. Those who are able have ordinarily done this by selecting their residence, given the long tradition of geographically defined districts and limited opportunity to cross district boundaries. But choices are multiplying. All states but Alabama, Maryland, North Carolina, and Virginia have open enrollment laws that offer varying degrees of intra- and interdistrict choice. The No Child Left Behind Act requires districts to offer choice to children in schools found to be failing. Magnet schools, charter schools, and vouchers have proliferated. Underlying the affirmative action cases is the question: to what extent should the widening scope for choice be regulated on racial grounds?

If the Court rules against affirmative action, the local districts that practice it will be compelled to search for race-neutral methods of pupil assignment. This may mean a return to geographic districts, with results that will depend on residential patterns and the politics of line drawing in particular cities. Insofar as school boards offer choice, which we would expect to be a popular position for them to take, a race-blind lottery could be a fair, practical, and constitutionally acceptable way to allocate spaces in oversubscribed schools.

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