



AMERICAN COUNCIL ON EDUCATION

Impact of *Parents Involved in Community Schools v. Seattle School District No. 1* and *Meredith v. Jefferson County Board of Education* on Affirmative Action in Higher Education¹

The Supreme Court on June 28 rendered its decision in two cases that address race- and ethnicity-conscious admissions in public elementary and secondary schools, *Parents Involved in Community Schools v. Seattle School District No. 1* and *Meredith v. Jefferson County Board of Education* (“Seattle” and “Louisville”). The Court, in a plurality opinion, held that the school districts’ plans were not narrowly tailored to satisfy a compelling state interest, and thus their use of race was unconstitutional.

Distinguishing this decision from its seemingly contrary decision in *Grutter v. Bollinger*, the Court noted that unlike the admissions plan it upheld in *Grutter*, “the plans here ‘do not provide for a meaningful individualized review of applicants’ but instead rely on racial classifications in a ‘nonindividualized, mechanical’ way.” This paper discusses the Seattle and Louisville decision and some of its implications for colleges and universities. **It is not legal advice.** Administrators should consult the institution’s counsel on the decisions’ import for their institution.

FROM MICHIGAN TO SEATTLE AND LOUISVILLE

In 2003, the Supreme Court issued landmark decisions in *Gratz v. Bollinger* and *Grutter v. Bollinger*, setting anew the boundaries for the acceptable use of race in higher education admissions decisions. In short, the creation of student body diversity was affirmed as a compelling state interest that could justify the use of race in admissions. That use, however, had to be narrowly tailored. It had to be part of an “individualized consideration” of each application and could not be the “decisive” factor in determining whether an applicant gained admission to an institution.²

While the *Gratz* and *Grutter* cases progressed through the court system, parents in Louisville and Seattle were commencing challenges to their school districts’ student assignment plans for elementary and secondary schools. According to officials in both Seattle and Louisville, their plans were designed to provide for school choice as well as maintain racial diversity in the schools. In Seattle, parent groups filed suit in federal court, claiming Seattle’s plan used race as a factor to ensure diversity in violation of the Equal Protection Clause under the Fourteenth Amendment of the Constitution. The federal district court ruled in favor of the school district. A panel of the Ninth Circuit reversed the district court, finding that Seattle’s use of the racial tiebreaker was not narrowly tailored. The full Ninth Circuit then reversed the panel, approving Seattle’s student assignment plan. In the Louisville case, parents sued alleging that the plan’s use of race to deny their children’s transfers between schools violated the Equal Protection Clause and the Fourteenth Amendment. Both the federal district court and the appellate court ruled in favor of the school district.

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² For a more detailed analysis of the *Gratz* and *Grutter* cases and their implications for higher education, see American Council on Education, “Affirmative Action in Higher Education After *Grutter v. Bollinger* and *Gratz v. Bollinger*,” available on the [ACE website](#).

The Supreme Court's announcement that it would hear the Seattle and Louisville cases generated as much interest from the higher education community as it did from those involved with K-12 education. More than 50 amicus briefs were filed in each case, including one by ACE and 20 other higher education associations.³ That interest stemmed in part from the fact that only four years had passed since the Court decided *Gratz* and *Grutter* and in part from the new composition of the Court. Since *Gratz* and *Grutter*, two of the Court's nine justices had been replaced, including Justice Sandra Day O'Connor, the author of the majority opinion in *Grutter*. Without Justice O'Connor, many wondered whether *Grutter* would be upheld.

THE PLURALITY OPINION

Acceptable Compelling Interests

Chief Justice Roberts' plurality opinion (joined by Justices Scalia, Thomas, Alito and, in part, by Justice Kennedy) affirmed the Court's reasoning in the Michigan cases that the standard of review for racial classifications in the educational context was strict scrutiny, i.e., the use of race must be narrowly tailored to satisfy a compelling state interest. The Chief Justice then identified only two acceptable compelling interests for the use of racial classifications: (1) the interest in remedying the effects of past intentional discrimination and (2) the interest in diversity in higher education.

According to the Chief Justice, only those school districts that were segregated by law and had yet to achieve unitary status could assert a compelling interest in remedying the effects of past *de jure* discrimination. For different reasons, neither Seattle nor Louisville met both criteria, therefore, neither could assert this as a compelling interest. As to the second interest, the Chief Justice noted that "universities occupy a special niche in our constitutional tradition" and that there are "expansive freedoms of speech and thought associated with the university environment." As K-12 school districts, Seattle and Louisville did not occupy this "special niche" nor were they entitled to the same academic freedom considerations. Therefore, they could not assert the compelling interest in diversity in higher education the Court recognized in *Grutter*.

After *Seattle* and *Louisville*, it appears that fostering a diverse student body remains a compelling interest for the careful use of racial classifications in higher education admissions. The Court's discussion of what constitutes a narrowly tailored plan sufficient to satisfy that compelling interest makes clear, however, that the kind of diversity the Court would find permissible for an admissions program is much broader than just racial and ethnic diversity.⁴

Narrowly Tailored Assignment Plans

Even had the Seattle and Louisville plans been governed by *Grutter*, the Chief Justice noted, the plans would have failed because *Grutter* required that a college give "serious good faith consideration of workable race neutral alternatives" before using race as one of several factors in admissions decisions. The Seattle and Louisville plans, the plurality found, had only a marginal impact on the assignment of students to schools. This proved, according to the plurality, that the districts could have achieved diverse, balanced schools through race-neutral means and failed to do so. Further, the districts' plans did not use

³ ACE's brief drew on the Supreme Court's recognition in *Grutter* that maintaining a racially diverse student population constituted a compelling state interest. According to the brief, the compelling state interest in diversity is as clear for K-12 as it is for postsecondary institutions: diversity promotes academic achievement, strengthens civic participation, and prepares students to work in the global economy.

⁴ The general principles outlined by the Court in these cases, as well in *Grutter*, apply to admissions decisions and not to other contexts in which diversity might be considered, such as financial aid. Although it can be assumed that these same principles should apply in other contexts, it is also possible that what constitutes "narrowly tailored" may differ.

race in a properly individualized manner. “The entire gist of the analysis in *Grutter* was that the admissions program at issue focused on each applicant as an individual and, not simply as a member of a particular racial group.” The Seattle and Louisville plans, according to the plurality, improperly based assignment decisions solely on the race of the student. Because race was the determinative factor and race-neutral alternatives had not been sufficiently considered, the districts’ plans were not narrowly tailored and thus were unconstitutional.

De Facto vs. De Jure Segregation as a Compelling Interest – Kennedy’s Concurrence⁵

Although not joined by Justice Kennedy and thus not part of the opinion of the Court, Part II.B. of the Chief Justice’s opinion found that even if obtaining a diverse student body were a compelling state interest justifying the use of race, Seattle’s and Louisville’s plans were not aimed at achieving diversity. Instead, they were attempting to balance the African-American and white populations so that they mirrored the demographics of the surrounding district. Such balancing was impermissible because it was attempting to remedy *de facto* not *de jure* segregation.

Justice Kennedy refrained from joining this portion of the plurality opinion, asserting that it “is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race.” He continued, “[t]o the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.” In short, Justice Kennedy believed the rationale articulated in *Grutter* for the use of racial classifications in admissions could apply in the K-12 context. School districts had a compelling interest in remedying both *de facto* and *de jure* segregation, though they had to do so without resorting to “systematic, individual typing by race.” The Seattle and Louisville plans failed to satisfy the strict scrutiny test set forth in *Grutter*, in Justice Kennedy’s opinion, not because they were seeking to remedy *de facto* segregation, but because the school districts failed to consider all possible race-neutral alternatives⁶ before devising their race-conscious assignment plans.

THE DISSENTING OPINION

Voluntary Desegregation Measures Within The Discretion of School Districts

Justice Breyer (joined by Justices Stevens, Souter, and Ginsburg) issued the primary dissenting opinion in *Seattle*, which criticized the majority for construing the Court’s precedent on affirmative action in education too narrowly. Specifically, Justice Breyer noted that the rigid strict scrutiny standard the plurality applied, including its reliance on a distinction between *de jure* and *de facto* segregation, had historically been applied to evaluate race-conscious plans school districts were required to implement. The Court, he noted, also had historically permitted school districts to develop voluntary race-conscious desegregation measures. In those instances, the Court had traditionally afforded the districts broad discretion:

School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students

⁵ Justice Thomas also filed a concurring opinion, however, he joined in the entirety of The Chief Justice’s opinion. He issued a concurring opinion simply to emphasize his belief that the only time racial classifications may be used in the education context is to remedy *de jure* segregation, i.e., “the deliberate operation of a school system to carry out a governmental policy to separate pupils in schools solely on the basis of race.”

⁶ According to Justice Kennedy, permissible race neutral alternatives include: strategic site selection of new schools, drawing attendance zones with general recognition of 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.

reflecting the proportion for the district as a whole. *To do this as an educational policy is within the broad discretionary powers of school authorities.* (quoting *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 16 (1971) (emphasis added in *Seattle*).

The reason for deferring to the judgment of school districts, according to Justice Breyer, is that voluntary desegregation plans seek to include, not exclude students and thus do not raise the same kinds of concerns as do racial classifications that seek to keep students legally separate.

Compelling Interests Existed Under Standard Articulated in *Grutter*

Moreover, even applying a heightened standard of review to these plans, Justice Breyer and the dissenters found the interests behind their creation compelling. Specifically, Justice Breyer identified three compelling interests asserted by Seattle and Louisville that he believed justified their student assignment plans: (1) diversity, balancing, and preserving greater racial integration in public schools; (2) overcoming the adverse educational effects produced by and associated with segregated schools; and (3) producing an educational environment that reflects the “pluralistic society” in which children will live.

Plans Were Narrowly Tailored

The dissenters also found the Seattle and Louisville plans to be narrowly tailored. First, the “defining feature” of both plans was enhanced school choice, not the racial criteria. According to the dissent, under *Grutter*, the use of race was permissible as long as it was one factor and not the predominant factor in the admissions decision. Second, the racial criteria established the outer boundaries of broad ranges of acceptable racial proportions within schools. For the vast majority of schools and students, the racial criteria never came into play. The dissenters believed this use of race was much narrower than previous plans the Court had approved. Third, the Seattle and Louisville plans were developed specifically to respond to the history of segregation in their respective districts. As such, they were tailored to address the narrow desegregation concerns of the Seattle and Louisville school districts. Finally, Justice Breyer warned that the plurality opinion shrinks the Court’s traditional “narrowly tailored” analysis and, as such, appears to invalidate a large number of plans similar to Seattle’s and Louisville’s that existed in school districts around the country.

IMPLICATIONS FOR HIGHER EDUCATION

The first and most important implication for higher education is that *Grutter* remains controlling law. All nine justices confirmed their support for upholding *Grutter* and five also appear to support the proposition that the use of race to eliminate racial isolation and create a diverse student population, even in the K-12 context, is acceptable under some circumstances. Justice Kennedy did not believe those circumstances existed in either the Seattle or Louisville cases because the districts had not considered all possible race neutral alternatives; and, his suggestions of possible race neutral alternatives indicate that a school district would have to consider a host of potentially costly and difficult options before resorting to the use of racial classifications. Nonetheless, he does leave the door open (even if only slightly) to the possibility that a school district could constitutionally use racial classifications to remedy *de facto* segregation.

Regardless of the reason for the use of race, Justice Kennedy agreed with the plurality that race may only be used as one of several factors that a college or university considers in making admissions decisions, and it cannot be the predominant factor. “Instead, what was upheld in *Grutter* was consideration of ‘a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.’” The Court compared the Seattle and Louisville plans to the University of Michigan Law School’s admission process, finding that unlike the University’s process, the Seattle and Louisville plans were unacceptable because race “is not simply one factor weighed with others in reaching a decision . . . ; it is *the* factor.”

Seattle and *Louisville* underscore the principle expressed in *Grutter* that admissions decisions about diversity must encompass more than racial diversity. They should consider other factors as well, such as (for example) socioeconomic factors, where a student has lived, whether he or she speaks several languages, whether a student has overcome personal adversity and family hardship, the amount of community service a student has engaged in, or whether the student has had a prior career. Ensuring this kind of diversity, as noted previously, requires an admissions process that is a “highly individualized, holistic review.”

Given the Court’s focus on an individualized review, institutions should continue to be cautious in using specific numerical goals for minority representation. Although the Court emphasized that it upheld Michigan Law School’s use of race in *Grutter* in part because that use was indispensable to tripling the School’s minority population, the Court also stressed that an institution’s quest for diversity must be forward looking from its educational mission, not backward looking from a set of numerical goals. The use of race standing alone is impermissible because it looks like trying to achieve a quota, but race may be considered along with other diversity factors, if its use yields significant results.

Finally, the Court’s rejection, based on a lack of evidence, of the argument that there is an educational benefit to maintaining a student population whose racial composition reflects that of the surrounding geographic region further suggests that colleges and universities that assert educational benefits to maintaining a diverse population must support those assertions with evidence. What kind of evidence the Court will expect to see is unclear given that there were amicus briefs providing evidence to support the districts’ arguments and the Court still rejected them. But, what is clear is that the Court has become less willing simply to defer to an educational institution’s assertion of what kinds of things provide educational benefits to students.

LESSONS LEARNED

1. ***Diversity is still a legitimate factor to consider in making admissions decisions.*** *Seattle* and *Louisville* reiterate the principle that diversity means more than racial and ethnic diversity, but race and ethnicity are still permissible factors to consider as long as they are not the only factors. Presidents and their admissions staff will need to ensure that, if they are seeking to admit a diverse student body, they have both a clear mission with a definition of diversity and a process for reviewing applications to implement that mission.
2. ***Individualized and holistic review of applications.*** Although originally discussed in *Grutter*, the concept of individualized review of admissions applications is expanded upon in *Seattle* and *Louisville*. In these cases the Court makes clear that neither racial percentages nor possibly even broad ranges will be acceptable guidelines for use in making admissions decisions. Instead, colleges and universities will have to make admissions decisions based on whether the totality of an application indicates that the applicant contributes to the school’s diversity goals, its overall mission, and its educational objectives.
3. ***Considerations of race must yield results.*** In *Seattle* and *Louisville*, the Court used the minimal impact of *Seattle*’s and *Louisville*’s racial guidelines on the racial composition of the districts’ schools to show that their plans were not narrowly tailored. Further, it highlighted the great impact that the University of Michigan Law School’s use of racial considerations had on its minority enrollment. Thus, although the Court does not explicitly state a college or university must achieve results if it is going to consider race, the implication of the Court’s reasoning is that results matter (and those results probably have to be more than minimal).
4. ***Caution regarding “critical mass.”*** In *Grutter*, the Court condoned Michigan’s search for a “critical mass” of minority students and permitted “some attention to numbers” of minority students. In *Seattle* and *Louisville*, the Court rejected the districts’ use of ranges of minority

students (rather than specific percentages) in making assignment decisions. The Court found that their focus on numbers without evidence that those numbers were tied to “any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits” was unconstitutional. Because *Seattle* and *Louisville* did not overrule *Grutter*, *Grutter*’s determination that colleges and universities could permissibly seek to enroll a “critical mass” of minority students remains the law. Nonetheless, the skepticism toward the use of numerical goals or broad ranges expressed by the Court in *Seattle* and *Louisville* suggests that institutions should use the concept of “critical mass” carefully and base it upon the educational benefits the institution seeks to obtain from enrolling a diverse student body.

5. ***Race-neutral alternatives must be considered.*** Both the plurality opinion and Justice Kennedy’s opinion rejected the *Seattle* and *Louisville* plans, in part, because the districts had not fully considered all the possible race-neutral alternatives available to them. Justice Kennedy even lists examples of acceptable race-neutral methods for achieving diversity in public school systems. A college or university that wishes to create a diverse student body must seriously consider non-race-conscious means first. If those means do not accomplish the institution’s goal, the institution may then consider race to a limited degree. However, an institution would be well-served to document its serious consideration of race-neutral efforts because, as noted above, any consideration of race may be challenged and the current Court has given indications that it may be less deferential to college and university judgments than previous Courts.
6. ***Sense of institution’s mission.*** One constant that runs through each lesson from the *Seattle* and *Louisville* cases is that a college or university must have a strong sense of its mission and educational objectives and the role, if any, diversity plays in achieving both. The college or university president can help solidify that sense of identity by ensuring that the institution has conducted the planning and research necessary to articulate and document the educational benefits consistent with its mission that students will receive from being part of a diverse student body.

CONCLUSION

Where the Court will go from here is unclear. But, college and university presidents whose institutions believe maintaining a racially diverse student body is critical to their educational mission and objectives face, at a minimum, a more difficult task. *Seattle* and *Louisville* make an institution’s consideration of race more susceptible to challenge. And, if challenged, an institution’s judgment as to the educational benefits of racial diversity is less likely to be accepted as definitive. Thus, an institution should document everything it does from the studies it conducts to determine the educational value of diversity to its students, to planning sessions on how to achieve that diversity using race-neutral and race-conscious methods, to its individualized admissions decisions. Because, to paraphrase Justice Kennedy, in the aftermath of *Seattle* and *Louisville*, “the enduring hope is that [consideration of] race should not matter, the reality is that too often it does.”

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