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**THE U.S. SUPREME COURT’S K-12 RACIAL DIVERSITY CASES: THEIR EFFECTS
ON HIGHER EDUCATION ADMISSIONS PLANS AND THE EDUCATION
“PIPELINE”**

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Introduction

The law on affirmative action in admissions was set out by the U.S. Supreme Court in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003), companion cases involving two affirmative action plans used at the University of Michigan. See generally W. Kaplin & B. Lee, *The Law of Higher Education: A Comprehensive Guide to Legal Implications of Administrative Decision Making*, 4th ed. (Jossey-Bass, Inc., 2006), sec. 8.2.5.) The Court re-visited and reviewed the *Grutter* and *Gratz* cases in *Parents Involved in*

Community Schools v. Seattle School District No. 1, 127 S.Ct. 2738 (2007), which consolidated two cases, one from Seattle, Washington, and one from Louisville (Jefferson County), Kentucky. The cases each concerned a race-conscious student assignment plan used by a school district as a means of achieving diversity in K-12 education. By a vote of 5 to 4, the Court held that each plan used racial classifications that violated the U.S. Constitution's equal protection clause.

(Hereinafter, these two cases, consolidated and resolved by the Court in one set of opinions, will usually be called "the *Seattle School District* case.")

There were five opinions issued in the *Seattle School District* case. The lead opinion by Chief Justice Roberts contains four parts. Parts I, II, III.A and III.C speak for a majority of five Justices, and Parts III.B and IV speak for a plurality of four Justices; Justice Kennedy provided the fifth vote for the parts that speak for a majority and declined to support the parts that speak only for a plurality. In addition to the Roberts opinion, there are concurring opinions by Justice Kennedy (for himself alone) and Justice Thomas (for himself alone); and dissenting opinions by Justice Breyer (for four Justices) and Justice Stevens (for himself alone). Each opinion in its own way recognizes the continuing authority of the *Grutter* and *Gratz* cases, meaning that the entire Court accepted these cases' continuing authority as applied to higher education. Thus, rather than undercutting the permissibility of college and university race-conscious admissions plans, as some in academia had feared, the *Seattle School District* case reaffirms the *Grutter* and *Gratz* cases. Nevertheless, the Roberts opinion and the Kennedy opinion add important new perspective to the understanding of *Grutter* and *Gratz*.

The Immediate Effects of the K-12 Racial Diversity Cases

Chief Justice Roberts' Opinion

In addition to reaffirming *Grutter* and *Gratz* as applied to higher education, Chief Justice Roberts' opinion places extra emphasis on certain of the *Grutter* and *Gratz* requirements for voluntary, race-conscious admissions plans and embroiders new detail into some of these requirements. By doing so, the opinion apparently sends a message that courts should be especially rigorous in enforcing these requirements in future cases. Here are the major examples of this added emphasis and detail:

- In Part III.A of the Roberts opinion (127 S.Ct. at 2751-52, for a majority) the Chief Justice quotes the statement from *Gratz* that “racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification” (*Gratz*, 539 U.S. at 270, quoting *Fullilove v. Klutznick*, 448 U.S. 448, 537 (Stevens, J. dissenting)). Roberts thus emphasized the strictness of the strict scrutiny review applicable to admissions plans that employ racial classifications. But the opinion does not similarly emphasize or commend the deference that, under *Grutter*, the courts are to accord the institution's judgments about its educational mission (see *The Law of Higher Education*, above, p. 793). Instead, in Part IV of his opinion (127 S.Ct. at 2766, for a plurality), Chief Justice Roberts sharply criticized Justice Breyer's reliance on deference in his dissent (127 S. Ct. at 2811, 2820-21, 2835-36, Breyer, J.). According to the Chief Justice, “[s]uch deference ‘is fundamentally at odds with our equal protection jurisprudence’” (127 S. Ct. at 2766, quoting *Johnson v. California*, 543 U.S.499, 506 n.1 (2005), a case decided after *Grutter* and *Gratz*). The Roberts opinion then portrays *Grutter* as the only case in which the Court has

ever “deferred to state authorities,” and the Court’s use of deference in *Grutter* as an exception unique to higher education. While the Roberts opinion does thereby acknowledge a role for deference in high education admissions cases, it also seems apparent that Chief Justice Roberts and the other three Justices joining Part IV of his opinion (for a plurality) would seek to narrowly confine the role that deference may play.

- Part III. A of the Roberts opinion also emphasizes that an institution’s interest in student body diversity may not be “focused on race alone” but must “encompass[] ‘all factors that may contribute to student body diversity’” (127 S.Ct. at 2753, quoting *Grutter*, 539 U.S. at 337). The particular factors that Roberts emphasizes are whether the applicant has “lived or traveled widely abroad,” is “fluent in several languages,” has “overcome personal adversity and family hardship,” has an “exceptional record[] of extensive community service,” or has had a “successful career[] in [another field]” (127 S.Ct. at 2753, quoting *Grutter*, 539 U.S. at 338). These delineations of “a specific type of broad-based diversity” are “key limitations” on the *Grutter* holding, according to the Chief Justice. (See 127 S.Ct. at 2753-54, Roberts, C.J., for a majority).
- Part III.A of the Roberts opinion also places great emphasis on the *Grutter* and *Gratz* requirement of “highly individualized, holistic review” of applications (see *The Law of Higher Education*, above, pp. 793-94, 802 (points 13 & 14)). The Chief Justice called this requirement “[t]he entire gist of the analysis in *Grutter*” and quoted the *Grutter* Court’s statement that “[t]he importance of this individualized consideration in the context of a race-conscious admissions

program is paramount” (127 S. Ct. at 2753, quoting *Grutter*, 539 U.S. at 337).

He also emphasized that racial classifications may be used in admissions only as “part of a broader assessment of diversity” done through individualized, holistic review. (See 127 S.Ct. at 2753, Roberts, C.J., for a majority.)

- Also in Part III.A of his opinion, Chief Justice Roberts emphasized that, even with respect to race, the institution must have a broad interest in diversity. The institution must not express its interest “exclusively in white/nonwhite terms” or “black/‘other’ terms” and instead apparently must include “African-American,” “Native American,” “Latino,” and “Asian-American” students, separately identified, in its conception of racial diversity. (See 127 S. Ct. at 2754, Roberts, C.J., for a majority.)
- In Part III.B, the Roberts opinion emphasizes that institutions must be exceedingly careful in determining the numbers or percentages of minority students that would satisfy the interest in student body diversity. Such numerical or percentage goals may not be determined “solely by reference to demographics,” and the goal may not be a “racial balance” that reflects the racial demographics of the locality, state, region, or nation, or of the applicant pool. Instead, the institution must have a “pedagogic concept of the level of diversity needed to obtain [its] asserted education benefits.” The institution thus must “work[] forward from some demonstration of the level of diversity that provides the purported benefits,” rather than “working backward to achieve a particular type of racial balance.” Taking the latter approach would be a “fatal flaw.” (See 127 S.Ct. at 2755-57, Roberts, C.J. for a plurality.)

- Part III.C of the Roberts opinion emphasizes the importance of *Grutter's* requirement that institutions identify and consider race-neutral alternatives before employing any racial classification in an admissions plan (see *The Law of Higher Education*, above, p. 802, guideline 15). This requirement, in fact, was central to the Court's holding that the two student assignment plans at issue in *Seattle School District* both violated the equal protection clause. The Seattle School District had rejected race-neutral alternatives "with little or no consideration;" and the Jefferson County district had "failed to present any evidence that it considered alternatives" Moreover, the school districts' use of racial classifications had only a "minimal effect" on student assignments, which "casts doubt on the necessity of using racial classifications" and "suggests that other [race-neutral] means would be effective." (This last point seems counter-intuitive at best.) In thus invalidating the school districts' plans, the Roberts opinion may signal not only the centrality of the race-neutral-alternatives requirement but also the strictness with which courts should apply the requirement in future cases. The opinion also emphasizes that institutions have the burden of proving that "the way in which they have employed individual racial classifications is necessary to achieve their stated ends." In addition, the opinion suggests that the use of racial classifications must be "indispensable" to achieving the institution's diversity objectives and may be used only "as a last resort" (127 S.Ct. at 2762, quoting *Richmond v. Croson*, 488 U.S. at 519 (Kennedy, J. concurring)). (Justice Kennedy uses the same quoted language to make this same point in his concurring opinion

in the *Seattle School District* case.) (See 127 S.Ct. at 2759-61, Roberts, C.J., for a majority.)

As these various examples suggest, the majority's support in *Seattle School District* for the *Grutter* case is carefully limited. There are indications throughout the Roberts opinion that at least four Justices (and sometimes five, with Justice Kennedy included) would vigorously enforce the various requirements that an institution must meet before its use of racial classifications in an admissions plan will be valid under *Grutter* and *Gratz*. There are also indications that these Justices would engraft some revised understandings onto *Grutter* that would make its requirements more difficult to meet. The mindset of the four Justices who subscribe in full to the Roberts opinion is captured in the Chief Justice's statement: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race" (127 S. Ct. at 2768) -- a statement that suggests a disinclination to accept any use of racial classifications in voluntary affirmative action plans.

Justice Kennedy's Opinion

In light of the implications of the Roberts opinion, Justice Kennedy's separate concurring opinion assumes particular importance. Justice Kennedy's vote was the fifth vote needed to form a majority, and only pronouncements in the *Seattle School District* case that are agreed upon by a majority of the Justices become law as such. Thus, the Roberts opinion -- its reasoning and the implications of its reasoning -- may be considered law, and an authoritative guide to what the courts will do in future cases, only to the extent that Justice Kennedy agrees with this reasoning and its implications. It is critical, then, to determine how Justice Kennedy's analysis differs from that of Chief Justice Roberts.

Justice Kennedy's opinion is consistent with the Roberts opinion in insisting on a vigorous enforcement of strict scrutiny review for admissions plans that employ racial classifications (127 S.Ct. at 2789-91; Kennedy, J., concurring). But within this strict scrutiny framework, Justice Kennedy, unlike Chief Justice Roberts, takes pains to carve out some room for the permissible use of race-conscious measures. According to Justice Kennedy: "[P]arts of the opinion by the Chief Justice imply an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account. The [Roberts] opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race" (127 S.Ct. at 2791). In explanation, the Kennedy opinion then emphasizes that the concept of a "color-blind" Constitution is "an aspiration [that] must command our assent," but that "[i]n the real world, it is regrettable to say, it cannot be a universal constitutional principle" (127 S.Ct. at 2791-92).

Justice Kennedy's differences with Chief Justice Roberts manifest themselves in the "compelling interest" analysis that is one component of strict scrutiny review. (The other component is "narrow tailoring" analysis, discussed below.) Justice Kennedy is more amenable than the Chief Justice to finding compelling interests sufficient to support race conscious plans. While the Chief Justice rejected the school districts' compelling interest claims, Justice Kennedy did not. Instead, Justice Kennedy determined that a "compelling interest exists in avoiding racial isolation [of students]" – at least for K-12 education and apparently for higher education as well. Moreover, Justice Kennedy, unlike Chief Justice Roberts, determined that, for K-12 education, it is "a compelling interest to achieve a diverse student population," and "[r]ace may be one component of that diversity" (127 S.Ct. at 2797). In these respects, Justice Kennedy is aligned

with the four dissenting Justices rather than with the four Justices joining in the Roberts opinion, thus making the Kennedy view the majority view.

Regarding the other component of strict scrutiny review, the “narrow-tailoring” requirement, the Kennedy opinion is consistent with the Roberts opinion, and the Kennedy analysis supplements the Roberts analysis. For his part, Justice Kennedy asserts that, to comply with narrow tailoring, a school district or higher educational institution “must establish, *in detail*, how decisions based on an individual student’s race are made,” including “who makes the decisions; what if any oversight is employed; [and] the *precise* circumstances in which” race will be used in making decisions (127 S. Ct. at 2789-90; emphasis added). The four Justices joining the Roberts opinion would apparently agree with these requirements, making them the majority view.

Of broader significance, Justice Kennedy's opinion emphasizes that, in his view, there are other "race conscious measures," beyond the specific type of admissions plans permitted by *Grutter* and *Gratz*, that educational institutions may use to "pursue the goal of bringing together students of diverse backgrounds and races" (127 S.Ct. at 2792). Examples that Justice Kennedy used include: "allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race" (127 S.Ct. at 2792). According to the Kennedy opinion: "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 any of them would demand strict scrutiny to be found permissible." This reasoning seems particularly pertinent to outreach, recruitment, financial aid, and academic support programs that take race into account in some way but do not make individual decisions based on racial classifications. Although it is not clear what specific types

of initiatives or plans would fall within Justice Kennedy's reasoning, at least he has provided us with the two ends of the spectrum on which he would analyze problems. On one end is the principle that decision makers may "with candor . . . consider[] the impact a given approach [to recruitment or allocating resources, for example] might have on students of different races" (*id.*). On the other end is the principle that decision makers may not "treat[] each student in different fashion solely on the basis of a systematic, individual typing by race." (See 127 S.Ct. at 2792-93; Kennedy, J., concurring.) Working within similar parameters, a few lower courts, prior to the *Seattle School District* case, have upheld college and university student recruitment programs; *see, e.g., Weser v. Glen*, 190 F. Supp. 2d 384 (E.D.N.Y., 2002), *aff'd* (without opinion) 41 Fed. Appx 521 (2d Cir. 2002).

The Roberts opinion, in Part IV, makes a similar point that may be supportive of at least part of Justice Kennedy's position (see 127 S. Ct. at 2766; Roberts, C.J., for a plurality). Disagreeing with Justice Breyer's reading of the breadth of his opinion, Chief Justice Roberts suggested that there may be "other means for achieving greater racial diversity in schools" that are not precluded by the *Seattle School District* ruling and may be constitutional. The examples Roberts used include "set[ting] measurable objectives to track the achievement of students from major racial and ethnic groups," "allocat[ing] resources among schools," and determining "which academic offerings to provide to attract students to certain schools." The first example, Roberts said, "has nothing to do with the pertinent issues" in the *Seattle School District* case; and the other examples "implicate different considerations than the explicit racial classifications at issue" in the case. Taking account of the character of these examples, Chief Justice Roberts' suggestion seems to be that some race-conscious planning and some race-conscious programs may be permissible when race is not used as a criterion for making decisions about particular

individuals. To the extent that the Kennedy reasoning is consistent with the Roberts reasoning, the Kennedy reasoning becomes a majority view (indeed, a view that all the dissenters would apparently accept as well).

There is one further point regarding Justice Kennedy's suggestion about alternative diversity "mechanisms" that may not require strict scrutiny review. He calls these mechanisms "facially race-neutral means." It is not clear how this characterization squares with his earlier description of these mechanisms as "race-conscious." Perhaps Kennedy means that such mechanisms do not expressly or explicitly use race to distinguish among individual students, but instead permit consideration of race in other ways to implement initiatives (perhaps using non-racial criteria for any decisions about individual students) that the decision makers have pre-determined would enhance racial diversity. If this is Justice Kennedy's reasoning, then there would be issues -- not raised in the Kennedy opinion -- of whether the facially neutral means employed would nevertheless, in its purpose and effect, benefit minority students over non-minority students and thus be subject to strict scrutiny review. (See *The Law of Higher Education*, above, p. 782; and see generally *The Law of Higher Education*, Sec. 13.5.7.2..)

Longer-Term Implications of the K-12 Racial Diversity Cases

The growth of resegregation of the nation's public schools is a well-documented phenomenon. See, e.g., G. Orfield & C. Lee, *Racial Transformation and the Changing Nature of Segregation* (Civ. Rts. Project at Harvard, 2006), available at <http://www.civilrightsproject.ucla.edu/research/deseg/deseg06.php>. In his dissent in the *Seattle School District* case, Justice Breyer reviewed the data on resegregation (much of which is in *amicus* briefs filed with the Court in the case) and explained that, despite gains in desegregating

schools in the 1970s and 1980s, “progress has stalled” since then. By 2000, the percentage of children attending segregated schools had “reversed direction,” with the percentages rising rather than falling. Now “more than one in six black children attend a school that is 99-100% minority.” (See 127 S. Ct. at 2801-02, 2833, 2837-39.)

Justice Breyer (for four Justices) then asserted that, given the current conditions depicted by the data, school districts have a “compelling interest” in “continuing to combat the remnants of segregation caused in whole or in part by . . . school-related policies, which have often affected not only schools, but also housing patterns, employment practices, economic conditions, and social attitudes.” This interest, Breyer claimed, “has its roots in preventing what gradually may become the *de facto* resegregation of America’s public schools.” Similarly, according to Justice Breyer, school districts have “an interest in overcoming the adverse educational effects produced by and associated with highly segregated schools” (see 127 S. Ct. at 2820-23.) Justice Kennedy, in his separate concurring opinion, appears to agree with some of the reasoning and sentiments in these parts of the Breyer dissenting opinion, and in particular agrees that “avoiding racial isolation and alleviating the problem of *de facto* resegregation in schooling are compelling interests” (see 127 S. Ct. at 2789, 2791, 2797). In the earlier *Grutter* case, moreover, Justice Ginsburg issued a concurring opinion containing reasoning and data supportive of that in the Breyer opinion in *Seattle School District* (see 539 U.S. at 344-46; Ginsburg, J., concurring).

In contrast to the Breyer dissent, the Roberts opinion in the *Seattle School District* case rejects the premise that the school district interests identified by Justice Breyer are “compelling” interests and asserts that, even if these interests were compelling, the school districts’ student assignment plans are not “narrowly tailored” to accomplish these interests (127 S. Ct. at 2755-59). (Justice Kennedy did not join this part of the Roberts opinion.)

What effect would the Roberts opinion's reasoning have on public education in the future? Justice Breyer is clear on this point: "[T]he Court's decision today slows down and sets back the work of local school boards to bring about racially diverse schools." It "will obstruct efforts by state and local governments to deal effectively with the growing resegregation of public schools," and it "undermines *Brown [v. Board of Education's]* promise of integrated primary and secondary education that local communities have sought to make a reality" (127 S. Ct. at 2835, 2800). Justice Breyer supports these conclusions, *inter alia*, with data and analysis suggesting that plans resembling the Seattle and Louisville plans struck down by the Court have been "promulgated by hundreds of local school boards" across the country; that the laws of various states encourage the use of such plans (127 S.Ct. at 2831-33); and that, in light of the current trend toward resegregation of public schools, "many school districts have felt a need to maintain or extend their integration efforts" (127 S.Ct at 2801-02).

Such negative effects, flowing from the *Seattle School District* case, would be most apparent if future courts follow the reasoning of the four Justices that join all parts of the Roberts opinion. If later courts instead follow the reasoning of the Kennedy opinion (much as subsequent courts followed Justice Powell's separate reasoning in the *Bakke* case; see *The Law of Higher Education*, above, pp. 788, 792), the potential negative effects would be alleviated to some significant extent.

From this understanding of resegregation in K-12 education, governmental initiatives to combat resegregation, and the potential effects of the *Seattle School District* case on such initiatives, we can also perceive the potential, longer-range effects of the case on higher education. As the *Grutter* and *Gratz* cases, and the many *amicus curiae* briefs filed in the cases, made clear, colleges and universities are strong proponents of racial and ethnic diversity. The

prevailing view is that racial and ethnic diversity has educational benefits for higher education, as well as civic benefits for the nation, and that realizing such benefits is an important part of the mission of most institutions. (See, e.g., *Grutter*, 539 U.S. at 330-333 (maj. opin.), and *Seattle School District*, 127 S. Ct. at 2820-22 (Breyer, J., dissenting); and see generally R. Linn & K. Welner (eds.), *Race-Conscious Policies for Assigning Students to Schools: Social Science Research and the Supreme Court Cases* (Nat'l Academy of Education, 2007).) How colleges and universities approach issues of diversity, however, and how hard they have to work to achieve diversity objectives, depends in large part on the extent of racial diversity in the nation's elementary and secondary schools.

To the extent that large numbers of K-12 schools become or remain racially isolated, for example, these schools will be hindered in doing the work of “promoting ‘cross-racial understanding,’ . . . break[ing] down racial stereotypes, and enabl[ing] students to better understand persons of different races” (*Grutter*, 539 U.S. at 330). Consequently, the burden of playing “catch up” with this important work will fall to higher education. Similarly, if racially isolated K-12 schools tend to be environments that are less amenable to learning and that disproportionately place minority students at risk (see generally E. Frankenberg & G. Orfield (eds.), *Lessons in Integration: Realizing the Promise of Racial Diversity in American Schools* (U. VA Press, 2007), then these schools will graduate fewer minority students qualified and prepared for higher education. Consequently, the applicant pools for higher educational institutions will not become more diverse over time, and may become less diverse, making it more difficult for institutions to achieve racial and ethnic diversity of their student bodies. In response, some institutions may lower their expectations and settle for less diversity. Other institutions may be led to admit students who are to some extent unqualified and then to cure these deficits through

offering remedial courses. Either way, there could be substantial negative effects on the institution.

Here is how one college president and recognized expert on race relations put the matter in an interview conducted shortly after the U.S. Supreme Court had issued its decision in the *Seattle School District* case:

For [Beverly Daniel] Tatum, the Spelman [College] president, the decision . . . [has] all sorts of implications By making it more difficult for school districts to desegregate, or to promote diverse student bodies in areas that are racially segregated in terms of housing, Tatum said, more students are going to grow up without meaningful interaction with students from other racial and ethnic groups. “What this means is that their views are going to be based on stereotypes,” she said, and . . . that leads to all kinds of insensitivities and incidents on college campuses.

Tatum . . . said that colleges are going to need to do “remedial work” with students who don’t know how to interact with those who are different from themselves

So too, she said, [the decision will hurt] “ the low-income, minority students whose reality isn’t reflected by the Supreme Court’s talk of a race-neutral society There is so much at risk now to students of color in K-12 who are concentrated in low-income areas.”

Scott Jaschik, "Mixed Messages on Affirmative Action," Inside Higher Ed (June 29, 2007), p. 4; available at <http://insidehighered.com/layout/set/print/news/2007/06/29/affirm>. Copyright © 2007 by Inside Higher Ed.

Conclusion

The line of analysis in this paper suggests that the *Seattle School District* case is of critical importance to higher education, not only (1) because of its immediate pertinence for institutions that have or are considering affirmative action policies for admissions (or for outreach, recruitment or academic support services), but also (2) because of the longer-range challenges it may present for institutions that experience the negative effects of resegregation and racial isolation in the nation's K-12 schools. What the U.S. Supreme Court has granted to higher education with one hand (reaffirmance of the permissibility of race-conscious admissions plans), it may have taken away, in effect, with the other (the potentially greater difficulty of achieving racial diversity and its benefits in the future).*

*For further, and broader, analysis of the *Seattle School District* case, see James Ryan, "The Supreme Court and Voluntary Integration," 121 *Harv. L. Rev.* 131 (2007); and compare J. Harvie Wilkinson III, "The Seattle and Louisville School Cases," 121 *Harv. L. Rev.* 158 (2007).