



Echoes of *Bakke*:

A Fractured Supreme Court Invalidates Two Race-Conscious K–12 Student Assignment Plans but Affirms the Compelling Interest in the Educational Benefits of Diversity

*A Policy Paper Providing Initial Analysis of Implications for Postsecondary Education
Prepared by Holland + Knight in Conjunction with the
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About the Access & Diversity Collaborative

The Access & Diversity Collaborative was created by the College Board in 2004—in the wake of the University of Michigan U.S. Supreme Court decisions—to assist colleges and universities in developing and implementing their diversity-related policies in light of core institutional goals and federal nondiscrimination law. The Collaborative has provided extensive training to higher education institutions nationwide. In just three years, 19 national seminars (with more than 1,000 representatives from 325 institutions and organizations in attendance) have been conducted, and numerous guides that address key strategic planning and policy development issues in light of federal law have been published and widely distributed. These publications may be downloaded from the Collaborative Web site at www.collegeboard.com/diversitycollaborative.

In addition to the College Board, four other national education organizations and more than 30 institutions of higher education are sponsors of the Collaborative. The Education Policy Team of Holland & Knight LLP, led by former U.S. Department of Education civil rights officials, provides core legal and policy services in support of the Collaborative's efforts in national seminars and through written guidance for higher education institutions. They may be reached at www.hklaw.com.

Key background information relevant to the areas of focus in this policy paper can be found in Coleman and Palmer, *Admissions and Diversity After Michigan: The Next Generation of Legal and Policy Issues* (College Board, 2006), which explains in detail many of the legal and policy principles affirmed by the U.S. Supreme Court in its 2007 student assignment decisions, analyzed herein.

Today we enjoy a society that is remarkable in its openness and opportunity. Yet our tradition is to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain....The enduring hope is that race should not matter; the reality is that too often it does.

— Justice Anthony Kennedy
in *Parents Involved in Community Schools v. Seattle School District No. 1*
(concurring in part and concurring in the result).

Introduction

Four years after the U.S. Supreme Court in *Grutter v. Bollinger* upheld the limited use of race in higher education admissions to promote the educational benefits of diversity, the Court returned at the end of its 2007 term to the contentious issue of race in education. This time, the Court addressed the constitutionality of two public school district student assignment policies that included racial preferences.

In a fractured 4-1-4 opinion reminiscent of the Court's 1978 decision in *Regents of the University of California v. Bakke*, the Court in *Parents Involved in Community Schools v. Seattle School District No. 1* (along with *Meredith v. Jefferson County Board of Education*) ruled 5-4 that the specific student assignment policies at issue were unconstitutional, as they were not properly designed and implemented ("narrowly tailored") to achieve their stated goals. However, five justices also determined, for the first time, that K-12 public schools have potentially compelling interests (analogous though distinct from those in higher education) to promote diversity, as well as to reduce the harms of racial isolation, and these goals may be pursued through appropriate race-conscious policies. This time, Justice Kennedy, in the role of the late Justice Powell in *Bakke*, served as the swing vote, speaking eloquently of the need for balance in the Court's approach.

In some ways, the headline from the Court's decision for colleges and universities is that *Grutter* lives. Despite the fractured opinion in the student assignment cases, all nine justices—in one form or another—affirmed the Court's decision in *Grutter* that higher education's interest in promoting the educational benefits of diversity can be compelling and can be pursued through narrowly tailored race-conscious means. The Court's decision in the student assignment cases also provided further insight into the meaning of the diversity rationale and how it can and cannot be pursued.

This policy paper addresses the implications of the Court's student assignment decision for higher education institutions in several ways. First, it outlines the central points made by the Court to provide information regarding what rulings are binding and what aspects, as a matter of pragmatic risk management, merit careful consideration. Second, this paper distills the clear rulings, as well as other points of guidance, into a list of policy implications intended to more directly guide the work of higher education officials addressing issues of access and diversity. As background for this analysis, this paper begins with a brief overview of basic federal principles that govern student-related race- and ethnicity-conscious practices in higher education.¹

1. The terms "race" and "ethnicity" are used interchangeably in this document, as they are in federal nondiscrimination law.

I. Legal Background

Federal law establishes the most rigorous standard of judicial review—the “strict scrutiny” standard—for any race-conscious plan that confers educational benefits or opportunities by state actors (pursuant to the 14th Amendment of the U.S. Constitution) and recipients of federal funds (pursuant to Title VI of the Civil Rights Act of 1964). Under that standard, federal courts require that race-conscious practices: (1) serve a “compelling interest” and (2) operate in ways that are “narrowly tailored” to achieve that interest. Applying these principles, the U.S. Supreme Court in 2003 ruled with respect to the University of Michigan’s race-conscious law school and undergraduate admissions policies that the educational benefits of diversity could support the limited use of race in higher education admissions. In *Grutter v. Bollinger*, the Court upheld as “narrowly tailored” the University of Michigan Law School’s “individualized, holistic” review of all applicants to achieve that compelling goal, with race as one factor among many, but in *Gratz v. Bollinger*, the Court struck down the undergraduate policy (where 20 out of 150 points could be awarded for race) as overly mechanical and too heavily weighted toward race.

Although the legal issues in the University of Michigan cases were similar to those in the race-conscious student assignment cases before the Court in 2007, the context and application of those principles were quite different.

Despite the distinctive features of each district’s student assignment plans, the interests underpinning the Seattle and Jefferson County student assignment policies were largely the same: achieving the educational benefits of racially diverse schools and avoiding the harms of racial isolation. The diversity-based benefits collectively asserted by the districts (and found by the lower courts) included: improved critical thinking skills; improved race relations (including a promotion of cross-racial understanding and a reduction in prejudice); improved African-American student achievement; better preparation of students for a diverse workplace and citizenship; the establishment of “a perception, as well as the potential reality, of one community of roughly equal schools;” and a “sense of participation and a positive stake” in the school system by the community. The harms associated with racially isolated schools in the districts included lower student performance and disparities in, for example, teacher quality and the number of advanced courses.

To achieve these interests, the Seattle School District adopted an “open choice” plan for its 10 high schools, 5 of which were typically oversubscribed. Under the plan, students seeking to attend oversubscribed schools were assigned according to four tiebreakers: a tiebreaker with preferences for keeping siblings in the same school; an “integration” tiebreaker; a tiebreaker relating to a student’s home distance from school; and a lottery tiebreaker. As described by the Court, the challenged “integration” tiebreaker was triggered when a high school was racially imbalanced, meaning that “white” and “nonwhite” enrollments were not within 10 percentage points of the district’s demographics. Racial imbalance was defined based on the variance between the racial composition of the school’s student body and percentages of all students in the district, in effect, focusing on whether admission would bring the racial composition of high schools closer to a 60 percent nonwhite/40 percent white balance—the aim of the district.

Jefferson County Public Schools adopted a race-conscious student assignment plan in which students were designated as “black” or “other” and schools were to seek a black student enrollment of between 15 percent and 50 percent—a range based on the overall demographics of public schools in the county. Students were assigned to their local school unless the school exceeded capacity or hovered at the extreme ends of the racial guidelines. The district considered multiple factors—including academic criteria and school capacity—in addition to race, which could be determinative when the composition of any school was at either end of the desired range.

II. The Court's Decision in the Student Assignment Cases

The Majority Opinion

In an opinion authored by Chief Justice Roberts (joined by Justices Scalia, Thomas, and Alito, and joined in part by Justice Kennedy on narrow grounds), the Court applied the strict scrutiny standard and struck down both plans on the grounds that they were not narrowly tailored to meet the districts' articulated interests. The majority reached three basic conclusions in this regard.

The Court first concluded that the student assignment policies at issue treated individual students based on race and were, therefore, subject to strict scrutiny, which required that the districts show that the policies were narrowly tailored to promote compelling government interests. In the majority's words, "when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny."

Second, the Court concluded that the previously recognized interests that could justify the use of race—remedying the effects of past discrimination and pursuing educational benefits associated with diversity—were not bases for (and therefore supportive of) the district plans. Neither of these interests was implicated in these cases because (1) the cases did not involve remedies to current effects of *de jure* segregation and (2) the programs at issue did not involve a truly holistic review of individual students based on a range of factors, but made race determinative of many student assignments and defined diversity in simple black and white or white and nonwhite terms.

Third, the Court ruled that the student assignment policies were not narrowly tailored because the districts did not prove (1) that the use of race was necessary to achieve the enumerated goals and (2) that they had fully considered race-neutral alternatives. On the former point, the Court ruled that the district policies were not "necessary" means toward diversity goals inasmuch as they had a "minimal effect" on student assignments, suggesting that other means would be effective. Elaborating in a way seldom, if ever, previously emphasized in its discrimination-in-education cases, the Court compared the impact of the district policies with the University of Michigan race-conscious law school policy in *Grutter* that was "indispensable" in more than tripling minority representation at the law school, from 4 to 14.5 percent. The Court observed that, by contrast, Seattle's racial tiebreaker "ultimately affected" only 52 students, and Jefferson County's racial classification affected only 3 percent of all school assignments. On the question of race-neutral alternatives, the Court found that in Seattle, several race-neutral alternatives were rejected "with little or no consideration," and that Jefferson County "failed to present any evidence that it considered alternatives."

Opinions by a Different Majority (Justice Kennedy and Four Dissenting Justices)

Justice Kennedy issued a separate opinion reflecting clear agreement—as well as strong disagreement—with several of the major points of the Roberts opinion. In Justice Kennedy's words, the portion of the Chief Justice's opinion that he declined to join was "too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race."

Specifically, five justices—Justices Breyer, Ginsburg, Souter, and Stevens in dissent, along with Justice Kennedy—agreed that K–12 public schools have potentially compelling interests that can be pursued through appropriate race-conscious means, including interests in promoting diversity and in avoiding racial isolation. (The four more "liberal" dissenting justices would have upheld the specific student assignment policies at issue.) Justice Kennedy, acting as the apparent swing vote on this issue, said in his concurrence:

This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children. A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population. Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered. What the government is not permitted to do, absent a showing of necessity not made here [in these specific policies], is to classify every student on the basis of race and to assign each of them to schools based on that classification....Even so, measures other than differential treatment based on racial typing of individuals first must be exhausted. The decision today should not prevent school districts from continuing the important work of bringing together students of different racial, ethnic, and economic backgrounds.

III. Implications for Higher Education

These consolidated student assignment cases involve K–12 education, and they will undoubtedly invite significant debate in dissecting the fractured opinions to determine what is binding legal opinion and what is not. However, there are several potential lessons that emerge immediately for higher education regarding the use of race in recruitment, admissions, and financial aid. Many of these implications are derived from opinions reflecting a majority (or consensus view) of the Court. Also, given the pivotal role Justice Kennedy played in the Court’s resolution—and given his likely “swing vote” status on the Court on these issues—other implications described below are grounded in the concurring opinion of Justice Kennedy, as well as in his separate dissenting opinion in *Grutter*.² (Points stemming from Justice Kennedy’s opinions are specifically noted as such.) Taken together, these implications have a direct bearing on how higher education institutions conceptualize and frame their diversity goals, as well as how they design and implement policies to achieve those aims.

1. ***Grutter* lives: Institutions of higher education must ensure compliance with *Grutter*.** In one way or another, and with reasons seeming to vary from true belief to acceptance of precedent, all nine justices affirmed the Court’s holding in *Grutter*, permitting the limited use of race in higher education to promote the educational benefits of diversity. In doing so, the Court’s majority opinion (as well as Justice Kennedy’s concurrence) strongly emphasized (1) the imperative that “diversity” encompass more than race or ethnicity and not “simply [reflect] an effort to achieve racial balance”; (2) the need for individualized review in the admissions setting, where race may be “one factor weighed with others”; and (3) the kind of deference uniquely due to institutions of higher education.

This reinforces the imperative that institutions of higher education heed the teachings of *Grutter* and *Bakke* (on which the *Grutter* majority relied)—as now informed by the Court’s rulings and observations in the K–12 student assignment cases. In particular, institutions seeking to pursue access and diversity goals through policies that confer benefits or opportunities based on students’ race or ethnicity, should: (1) ensure the mission-relevance of those goals and (2) ensure that relevant enrollment management policies are periodically reviewed and evaluated (in combination and individually) so that they remain aligned with those goals and operate in ways that consider race only to the extent necessary to materially advance achievement of those goals.

2. **Goals must be mission-driven and educationally focused: Numbers, alone, cannot drive race- and ethnicity-conscious policies.** Reaffirming a core *Grutter* and *Bakke* principle, the Court in the student assignment cases once again cautioned against the establishment of diversity goals divorced from core mission-driven aims. While “some attention to numbers” is permissible (and, indeed, required if institutions seek to assemble a critical mass of underrepresented minority students, as in *Grutter*), higher education institutions should frame diversity-related policies in light of their educational objectives, with a focus on the core educational (and related) outcomes they seek to achieve rather than on simple population-related targets.

This means that policies designed simply to achieve population parity, statistical proportionality, and the like are likely unlawful. As the Supreme Court has said in multiple cases, “[r]acial balancing is not to be achieved for its own sake.”

3. **Interests that address issues of equal opportunity—if appropriately limited and framed—may provide further support for race-conscious policies.** Justice Kennedy in his separate opinion in the student assignment cases affirmed the Nation’s “moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children.” He thus found a

2. Justice Kennedy joined the majority of the Supreme Court in 2003 in striking down the University of Michigan’s undergraduate policy on grounds that it was not narrowly tailored to achieve the university’s diversity-related goals. He also dissented from Justice O’Connor’s majority opinion in *Grutter* on narrow tailoring grounds—principally focusing on problems with the university’s conception and implementation of a “critical mass” theory. Notably, Justice Kennedy, alone among the *Grutter* dissenters, expressed the view that the diversity goals the University of Michigan sought to achieve were “compelling,” premised upon Justice Powell’s opinion in *Bakke* a quarter century before.

compelling interest in both promoting diversity and avoiding racial isolation. While the full import and interplay of his statements regarding these issues are not clear, his observations recall the language of Justice O'Connor in *Grutter*, where she recognized the “paramount government objective” in ensuring that higher education institutions are “open and available to all segments of American society,” saying: “In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.” Given that Justice Kennedy’s recognition of two compelling interests—promoting diversity and avoiding racial isolation—mirrors the conclusion of the four dissenting justices, arguments exist supporting the establishment of mission-related equal opportunity goals (distinct from goals regarding the *Bakkean* benefits of diversity) as compelling interests in a higher education setting.

That being said, it is important that institutions seeking to justify race-conscious policies in such ways heed the Court’s long-standing admonition (reaffirmed in the school assignment cases) that “societal discrimination” can never be a compelling interest justifying race-conscious measures by a discrete institution. The Court has observed consistently that interests unlimited in scope or time can never meet the threshold of strict scrutiny analysis. (Consider the following: At what point can a single institution pursuing broad social goals declare that its race-conscious policies have succeeded, and how would that institution establish such evidence?) Thus, interests supporting race-conscious policies that are more centrally derived from equal opportunity principles must be carefully—and narrowly—framed.

- 4. Critical mass objectives must be established with attention to the preservation of individualized review in which race is one factor among many.** Justice Kennedy joined with three other justices in *Grutter* to express significant reservations about the University of Michigan’s critical mass objectives. For institutions that establish critical mass benchmarks toward these diversity ends, it is important to heed Justice Kennedy’s admonition that these objectives not trump the limited but important consideration of race in admissions through an authentic individualized review process. In order not to “compromise individual review” (Justice Kennedy’s words), institutions of higher education should, in light of the views of Justice Kennedy expressed in *Grutter*, consider key issues, including: (1) whether the theory of critical mass applies to “underrepresented minority students” as a whole, to subgroups of minority students, or to both (and why); and (2) the concrete steps and supporting evidence regarding those steps that officials have taken to preserve the individual assessment of all students as they seek to enroll a class with a critical mass of underrepresented minority students.
- 5. Documented consideration of possible race-neutral alternatives is a must.** One basis for the Court’s action striking down the two student assignment policies was the failure of the school districts to sufficiently survey and evaluate the viability of race-neutral alternatives in achieving their goals. Thus, the Court reaffirmed the *Grutter* standard regarding higher education institutions that consider race or ethnicity when conferring educational opportunities or benefits (such as making admissions decisions or awarding scholarships). Institutions must give “serious, good faith consideration [to] workable race-neutral alternatives that will achieve the diversity they seek.” The Court’s disfavor of race-conscious policies, embedded in this standard, is further expressed by a majority viewing the use of race as “a last resort.”

Thus, institutions should maintain an ongoing record of their efforts to evaluate possibly viable race-neutral alternatives, along with information that supports the logic of their judgments to pursue (or not) those avenues in light of institutional goals.

Notably, Justice Kennedy in the student assignment cases expressly stated that broad-based, race-conscious but not facially race-conscious programs may not be subject to strict scrutiny:

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; 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 any of them would demand strict scrutiny to be found permissible.

This reasoning may have important implications for higher education programs that do not expressly assign benefits by race.

- 6. Access and diversity policies must reflect coherence between means and ends as they materially advance institutional goals.** A long-standing principle of federal nondiscrimination law has been that race-conscious measures must be “narrowly tailored” to the compelling ends they advance. Historically, federal courts have rejected policies on this point when the weight of the race factor was not necessary to achieve those ends, or correspondingly, when the weight was judged excessive, given related burdens on nonbeneficiaries of the race-conscious policy. Although implicit in some prior decisions, the requirement that race-conscious policies *materially advance* compelling goals is a centerpiece of the Court’s ruling—and a principle that, for the first time in the Court’s education rulings, the Court explains in detail (as discussed in Section II, above).

More broadly, Justice Kennedy’s opinion provides a strong reminder about a core concept that is central to the narrow tailoring requirement. He cautions that policies that are an “ill fit” and “threaten to defeat [their] own ends” cannot stand, citing two examples. First, ambiguous policies that reflect “inconsistent” and “*ad hoc*” considerations of race are most likely not to pass legal muster. Second, policies that are ill conceived—such as in instances where “a diversity of races” is directly relevant to institutional goals, but where schools adopt “crude” and “blunt” designations for preferences based on “white” and “nonwhite” designations—likely will fail in demonstrating the calibration needed between means and ends.

- 7. Access and diversity policies must reflect a transparent process that is well understood and followed.** Justice Kennedy also separately elaborated on the Court’s narrow tailoring requirements, with a focus on more operational aspects associated with admissions decisions. He emphasized the importance of having “a thorough understanding of how [an admissions] plan works,” as well as the need to “establish, in detail, how decisions based on an individual student’s race are made,” prior to listing key questions that may demand answers, which include:

- Who makes the decisions?
- What, if any, oversight is employed?
- What are the precise circumstances in which an assignment decision will or will not be made on the basis of race?
- How is it determined which of two similarly situated individuals will be subjected to a given race-based decision?

Conclusion

The many implications that stem from the Court’s student assignment cases, corresponding to those in *Grutter*, reaffirm the continuing obligation of institutions to periodically evaluate the implementation of race-conscious policies in order to determine if they are still needed, and if so, if they are working in ways that materially advance institutional compelling interests (doing so without an overreliance on race). Thus, the hard work of developing and implementing access and diversity policies continues. Higher education institutions, with broad-based Court support for principles articulated in *Grutter*, must address their mission-driven diversity interests with care—paying close attention to the ways in which they establish and frame their goals and the means by which they seek to achieve them.

