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High Court Leaves Michigan Cases Intact

5-4 decision on schools has little effect on college affirmative-action rulings

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Washington

The U.S. Supreme Court struck down two voluntary school- integration plans in a 5-to-4 ruling issued last week, but its decision left solidly intact its precedents dealing with affirmative action in higher education.

Rather than signaling any clear desire to revisit its past decisions on race-conscious admissions policies — as some conservative groups had urged it to do — the court majority cited those precedents repeatedly as justification for holding that the school- integration policies in the case violated the 14th Amendment's guarantee of equal protection under the law.

Education lawyers, as well as both supporters and critics of affirmative action, said the court's decision would prompt many public-school districts to alter policies they had adopted for the sake of promoting racial integration. But they said it did not significantly change the law governing colleges' use of race-conscious policies in admissions and other areas. It mainly just reaffirmed that colleges must seriously consider race-neutral alternatives, must not put too much weight on race or ethnicity, and must show that such policies have educational benefits.

"I think higher education came out as one of the big winners in this decision," said John C. Brittain, chief counsel for the Lawyers' Committee for Civil Rights Under Law.

Ada Meloy, general counsel for the American Council on Education, an umbrella organization for higher-education groups, said the majority ruling "recognizes the interest in diversity that exists in higher education" and has "a special niche in our Constitutional tradition." At the same time, however, it also makes clear that colleges need to make sure their consideration of race and ethnicity is narrowly tailored to advancing their educational missions.

The decision is expected to have no impact on higher-education desegregation plans.

Drawing Distinctions

The two cases joined in the court's decision were *Meredith v. Jefferson County Board of Education*, involving public schools in Louisville, Ky., and its suburbs, and *Parents Involved in Community Schools v. Seattle School District No. 1*. The cases differed from past disputes over race-based student-assignment policies brought before the Supreme Court in that neither of the two districts named in the complaints was under a court order to desegregate its schools. Because the integration policies were adopted voluntarily, they were subject to a higher level of judicial scrutiny than court-ordered efforts.

One of the key issues before the court was whether the policies at issue should be thought of as affirmative action and governed by the same legal principles and precedents as race-conscious college-admissions policies.

The court's last major rulings on race in admissions were two 2003 decisions involving the University of Michigan at Ann Arbor. In one of the cases, *Grutter v. Bollinger*, the court narrowly upheld the consideration of race by the university's law school, based on its conclusions that promoting racial diversity on campuses serves a compelling government interest and that the law school treated applicants as individuals and did not give their race or ethnicity too much weight. In the companion case, *Gratz v. Bollinger*, the court struck down a point-based admissions formula used by Michigan's main undergraduate school because it automatically treated students differently based on their race.

In last week's decision, the court's majority suggested that the key justification Michigan offered in defending its policies — the need to have diverse viewpoints represented on its campus — did not hold as much weight in the context of elementary- and secondary-school education.

Moreover, the court said, the school-integration policies at issue went well beyond the limits on affirmative action established in the *Grutter* and *Gratz* rulings because race was a primary factor considered in the assignment of some students.

Not Black and White

Writing for the court's majority, Chief Justice John G. Roberts Jr. said: "The entire gist of the analysis in *Grutter* was that the admissions program at issue there focused on each applicant as an individual, and not simply as a member of a particular racial group. The classification of applicants by race upheld in *Grutter* was only as part of a 'highly individualized, holistic review.'"

Even with regard to race, the school-assignment plans in these cases had only a limited concept of diversity, classifying students as white or "nonwhite" in Seattle and black or "other" in Jefferson County, Justice Roberts wrote.

Noting that the Seattle district had never been racially segregated by law, and that the Jefferson County district had been declared desegregated and released from court supervision in 2001, Chief Justice Roberts argued that the districts' interest in maintaining some level of racial integration does not justify assigning students to schools based on which of two racial categories they fall under, "an extreme approach in light of our precedents and our Nation's history of using race in public schools."

"The way to stop discrimination on the basis of race is to stop discriminating on the basis of race," his opinion said.

Whereas the court had held in its *Grutter* decision that colleges must demonstrate their "serious, good-faith consideration of workable race-neutral alternatives" if they are to argue that their race-conscious admissions policies are narrowly tailored to achieve a compelling state interest, the Seattle and Jefferson County districts had "failed to show that they considered methods other than explicit racial classifications to achieve their stated goals," the chief justice wrote.

In a dissent in which he was joined by the three other members of the court's minority, Justice Stephen G. Breyer said the chief justice's opinion ignored past Supreme Court precedents allowing voluntary integration plans that used race-based student assignments and holding that not all government use of racial classifications should be treated the same.

The majority's opinion "reverses course and reaches the wrong conclusion," Justice Breyer wrote. "In doing so, it distorts precedent, it misapplies the relevant Constitutional principles, it announces legal rules that will obstruct efforts by the state and local governments to deal effectively with the growing resegregation of public schools, it threatens to substitute for present calm a disruptive round of race-related litigation, 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."

Levels of Uncertainty

Three justices — Samuel A. Alito Jr., Antonin Scalia, and Clarence Thomas — agreed with Chief Justice Roberts on all points of his opinion. A fifth justice, Anthony M. Kennedy, concurred with the opinion on

most points — including its bottom line that the integration plans at issue fell outside the law. He dissented in part, however, to emphasize his view that school districts have a compelling interest in promoting diversity that justifies their giving some consideration to race, even in the absence of past segregation.

Justice Kennedy listed several areas where he thought school districts could take race into account, including the drawing of attendance zones, the selection of sites for new schools, and the recruitment of students and faculty. Because his view was shared by the four justices who completely dissented against Chief Justice Roberts — Stephen G. Breyer, Ruth Bader Ginsburg, David H. Souter, and John Paul Stevens — many legal analysts saw his view as representing the holding of the Supreme Court's majority in that area.

Maureen Dwyer, an education lawyer for the firm Pillsbury Winthrop Shaw Pittman, issued a statement saying that Justice Roberts's opinion places school administrators "in a challenging position" in which "the courts are on their side in seeking diverse classrooms, but the means to get there are continually scrutinized and subject to interpretation."

Terence J. Pell, president of the Center for Individual Rights, which helped represent the plaintiffs in the *Grutter* and *Gratz* cases, said last week's ruling reiterates the *Grutter* holding that colleges need to show that their race-conscious admissions policies have educational benefits. He added, however, "I think many colleges and universities are more or less in compliance with *Grutter*, so I doubt this is going to have a huge effect."

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Mixed Messages on Affirmative Action

The first reaction to Thursday's U.S. [Supreme Court ruling](#) for many officials at colleges that practice affirmative action was relief. The ruling, as expected, rejected programs under which schoolchildren in Louisville and Seattle have been assigned to schools based on race. While the case didn't involve college affirmative action, many of the legal briefs in the case cited [Grutter v. Bollinger](#), the Supreme Court's landmark 2003 ruling involving the University of Michigan's law school, which upheld the right of colleges in some circumstances to consider race in admissions.

With Sandra Day O'Connor, the author of that opinion, retired, and with a seemingly bolder conservative majority on the Supreme Court, some feared that there could be an opportunity to attack the *Grutter* decision.

Instead, the Supreme Court's ruling Thursday cited *Grutter* and used it to distinguish affirmative action that was constitutional from that which isn't. Hence the initial relief.

But as lawyers spent more time with the decision, many said its message to higher education was not a clear endorsement of affirmative action as practiced by many in academe. Rather, the justices seemed to be clarifying just what colleges need to do to comply with *Grutter* — namely be sure that all applicants are evaluated individually, that no blanket assistance or obstacles are set based on race or ethnicity, and that where race is used it must be part of a broad diversity agenda that focuses on a range of factors.

"I think one of the most important aspects of the decision is that it both limits and clarifies *Grutter*," said William Thro, solicitor general of the Commonwealth of Virginia and former general counsel for Christopher Newport University.

The justices "made it clear that the diversity that was approved [in *Grutter*] was a diversity that included much more than race. The clear message for colleges and universities is that if you continue to use race in admissions or in the allocation of financial aid to achieve diversity, that diversity needs to be far more than just race." Thro said he was concerned that in the wake of the 2003 ruling, "many schools were assuming that diversity meant racial diversity and not the broader diversity."

Thro also noted tough language in the decision about the justifications for promoting diversity, with at least four justices extremely skeptical of the justifications frequently put forth, and one justice moderately skeptical. "To the extent colleges and universities want to talk about diversity, diversity must be framed in terms other than race, and at many institutions you have diversity offices and task forces that are concentrated exclusively or almost exclusively on race and gender issues and not the total panoply of issues that might go into consideration," he said.

Civil rights groups were quick to condemn the Supreme Court's ruling impact in elementary and secondary education. "At a time when school segregation is increasing, in the half-century since the *Brown* decision, a plurality of the current court has condemned minority children to a back seat in the race for life's chances," said a statement from Julian Bond, board chair of the NAACP.

Not surprisingly, some of the groups that oppose affirmative action are now salivating at the prospect of more suits, and think many colleges are vulnerable. "People forget that the Michigan decisions were split," said Roger Clegg, president of the Center for Equal Opportunity, a group that opposes affirmative action. He noted that when the justices ruled in *Grutter*, they also ruled in [Gratz v. Bollinger](#), rejecting the way Michigan at one time considered race in undergraduate admissions. Clegg said that what the opinion Thursday did was integrate *Grutter* and *Gratz*, setting limits on affirmative

action that he believes colleges are violating.

He said that colleges are going to be “vulnerable any time that race appears to be not just a factor, but a determinative factor,” and he noted that research by his group — showing large gaps in the the average grades and test scores of various racial groups admitted to top colleges — are just the evidence that foes of affirmative action will need.

While many colleges officials stressed that Thursday’s ruling could help them, by giving them clear parameters on what they could and couldn’t do, even some strong supporters of affirmative action said that they were not confident that their view would prevail. Beverly Daniel Tatum, an expert on race relations among students and president of Spelman College, asked if she thought affirmative action would be around in a decade, said “unfortunately, No.” She added, “I really think we are in danger of moving backwards in our society.”

Experts on education law warn against assuming that rulings involving elementary and secondary issues can be neatly applied to the law of higher education, and Thursday’s rulings could illustrate why. In Seattle and Louisville, students’ race alone was used in some cases to assign them to specific schools and in some other cases to accept or reject requests to change schools. In the K-12 context, of course, most students are assigned schools, while in higher education, no one is forced to attend any specific college. Likewise, colleges consider a range of factors in admissions.

In addition, colleges are historically given more leeway than schools (and much of the rest of society) to set their own paths. Justice John G. Roberts Jr. noted in the court’s decision that the Supreme Court in *Grutter* “relied upon considerations unique to institutions of higher education, noting that in light of ‘the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.’”

The Roberts decision not only rejected the Seattle and Louisville systems’ desegregation plans, but generally barred school systems for making race-based assignments of schools. Three justices joined Roberts in affirming all aspects of his opinion: Samuel A. Alito Jr., Antonin Scalia, and Clarence Thomas.

Another justice — Anthony M. Kennedy — joined their conclusion that the Louisville and Seattle plans went too far, but suggested that the justices went too far in ruling out all use of race. The dissenting justices in the more liberal wing of the court said that the majority decision was effectively undoing numerous rulings — including *Grutter* and going back to *Brown v. Board of Education* — on which school districts have relied to promote desegregation.

But the majority repeatedly treated *Grutter* as established precedent, while distinguishing it from the school cases that were decided. “The entire gist of the analysis in *Grutter* was that the admissions program at issue there focused on each applicant as an individual, and not simply as a member of a particular racial group,” Roberts wrote. “The classification of applicants by race in *Grutter* was only as part of a ‘highly individualized, holistic review review,’” the decision continued. “In the present cases, by contrast, race is not considered as part of a broader effort to achieve ‘exposure to widely diverse people, cultures, ideas, and viewpoints.’”

In another part of the decision, Roberts questioned several justifications frequently given to justify affirmative action — justifications that were put forth by defenders of the Seattle and Louisville districts. For example, he said that the Supreme Court did not believe race-based distinctions could be made to remedy “societal” discrimination. And he rejected the idea of promoting diversity as a justification in itself. “The principle that racial balancing is not permitted is one of substance, not semantics. Racial balancing is not transformed from ‘patently unconstitutional’ to a compelling state interest simply by relabeling it ‘racial diversity.’”

Ada Meloy, general counsel for the American Council on Education, said that she believed colleges have been “trying carefully to do what is permissible” within the *Grutter* framework. She said that most colleges have realized that focusing programs “on race alone was extremely questionable” after the *Gratz* decision. (In the law school admissions plan that the justices favored in 2003, applicants were reviewed individually, but in the undergraduate program that they rejected, points were awarded for various factors, including race and ethnicity.) After a thorough review of the decision, Meloy said, the ACE would offer any additional guidance needed so “we can continue the very important pursuit of a diverse student body.”

Clegg of the Center for Equal Opportunity is no fan of the *Grutter* ruling, thinking that the Supreme Court shouldn’t have let colleges consider race at all. But he predicted that it would be easy to show that colleges aren’t using race just as one factor among many, but as a factor that trumps others — violating the principles that Thursday’s ruling set out. Clegg cited studies that his center did about the University of Michigan’s admissions in 2005 — after the *Gratz* and *Grutter* rulings.

The center used Freedom of Information Act requests to find that the SAT median for black students admitted to Michigan’s main undergraduate college was 1160 in 2005, compared to 1260 for Hispanics, 1350 for whites and 1400 for Asians. High school grade point averages were 3.4 for black applicants, 3.6 for Hispanics, 3.8 for Asians, and 3.9 for whites.

Further, black and Hispanic applicants in 2005 with a 1240 SAT and a 3.2 GPA had a 9 in 10 chance of getting in — while white and Asian applicants with the same scores had a 1 in 10 chance of getting in. “Race was more of a factor after [the 2003 rulings] than before,” he said, adding that it was hard to believe that other types of diversity — removed from race and gender, but of the sort the court endorsed in *Grutter* — were really having the same impact as race. (Michigan officials said that the numbers released by Clegg’s group distorted the realities of admissions by leaving out many factors beyond test scores and grades that go into admissions decisions.)

Sheldon E. Steinbach, a lawyer in the higher education practice at the Washington firm Dow Lohnes, said that a key question looking ahead may be exactly how colleges are using race and other factors in admissions. “The admissions process can be opaque,” he warned, especially in the absence of state FOIA laws such as those used to obtain the Michigan data.

Over all, he said, “the message is that *Grutter* lives, and that using race as a specific qualification is not going to pass muster, but that when it is part of the totality of things, there is latitude.”

Steinbach noted that many colleges changed policies in the wake of *Grutter*, but that he suspects many may be vulnerable for not changing sufficiently. “Some colleges are certainly vulnerable,” he said, even though many groups such as the ACE — where he was formally general counsel — provided plenty of post-*Grutter* advice. “One would hope word to the wise would be sufficient, but my experience is that it’s hard to ensure everyone gets the right message,” he said.

For Tatum, the Spelman president, the decision and the possibility of tougher scrutiny for college affirmative action have all sorts of implications. If she focuses on institutional interests, “this is a boon,” she said, because she thinks the trends the Supreme Court has set in place will make historically black colleges like hers more attractive to top black students. 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’s the kind of ignorance that leads to all kinds of insensitivities and incidents on college campuses.

Tatum, the author of [Can We Talk About Race, and Other Conversations in an Era of School Resegregation](#) and of [Why Are All the Black Kids Sitting Together in the Cafeteria?](#), 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. And she predicted that predominantly white institutions will become “less hospitable” to black students. While that may seem great for Spelman, she said that with 10 applicants for every spot in its freshman class, the college doesn’t need more applicants. And her fears relate to American society, not just her college.

At some level, she said, the decision and its impact should surprise no one. “The country elected George Bush,” she said, and the views expressed by the justices he has put on the Supreme Court are consistent with the president’s record. In fact, she noted that affirmative action may be vulnerable far more quickly to the referendums being organized (so far with success) by Ward Connerly to ban it on a state level than to federal court rulings, which tend to take years to work their way through courts.

“The Ward Connerly’s of the world need to be counteracted, and who is going to the states and telling them that they are shooting themselves in the foot when they ban affirmative action?” she said. One of Tatum’s sons is a Ph.D. student at the University of Michigan right now, she noted, asking why he or another minority professional would want to build a career in a state that had overwhelmingly rejected affirmative action. States that decide that it’s OK not to have a diverse, well educated work force, she said, will suffer.

So too, she said, will the low-income, minority students whose reality isn’t reflected by the Supreme Court’s talk of a race-neutral society. “It’s such an ahistorical perspective,” she said. “If you look at the history of education in the United States, we have never educated everyone, and for a good portion of the time, we made it illegal to educate everyone. There is so much at risk now to students of color in K-12 who are concentrated in low-income areas.” On the same day that the U.S. Senate rejected immigration reform legislation, Tatum asked: “What are we going to do? Import our talent?”

Tatum said that colleges may need to put more emphasis on class-based affirmative action or consider other approaches in the current legal and political environment. Even if she wasn’t shocked by Thursday’s ruling, she said it saddened her. “This is going to open the door to opponents of affirmative action in higher education to chip away at it,” she said. “For those of us who grew up in an era of increasing opportunity, of increasing cross-racial interaction, we could find ourselves going backwards.”

— [Scott Jaschik](#)