

**PARENTS INVOLVED IN COMMUNITY SCHOOLS v. SEATTLE SCHOOL  
DISTRICT (2006)**

**SEATTLE PUBLIC (HIGH) SCHOOL ASSIGNMENT PLAN (1998)**

1. Incoming ninth graders rank public high schools in order of preference.
2. For oversubscribed schools, a system of tiebreakers, applied in the following order:
  - a. Applicant has a sibling already at the school
  - b. Racial composition of the school and race of the applicant (see 3 below)
  - c. Distance between applicant's home and the school
3. How race plays a role in 2(b)

The school district classifies students as white or nonwhite. It calculates the percentage of enrolled students in the entire Seattle school district who are white (say,  $W\%$ ) and the percentage of enrolled students in the entire Seattle school district who are nonwhite ( $N\%=100-W\%$ ). It also calculates the percentage of students in the oversubscribed school who are white ( $OW\%$ ) and the percentage of students in the oversubscribed school who are nonwhite ( $ON\%=100-OW\%$ ). If  $OW > W + 10$ , then a nonwhite applicant will be given preference over a white applicant, in order to bring the oversubscribed school into greater racial balance. If  $ON > N + 10$ , then a white applicant will be given preference over a nonwhite applicant, again in order to bring the school into greater racial balance.

4. How the system works

In Seattle,  $W=41$  and  $N=59$ . So, for example, if  $OW > 51$  ( $=41+10$ ), then nonwhite applicants will be admitted and white applicants will be denied admission. And if  $OW < 31$  ( $=41-10$ ), then white applicants will be admitted and nonwhite applicants will be denied admission.

5. How the system would work in one particular hypothetical case

Under the plan, an oversubscribed school that is 50% white and 50% Asian-American would *not* trigger the racial tiebreaking mechanism. (This is because  $50 < 51$ .) But an oversubscribed school that is 30% Asian-American, 25% African-American, 25% Latino, and 20% White *would* trigger the racial tiebreaking mechanism, by admitting white applicants over nonwhite applicants. (This is because  $20 < 31$ .)

6. The Seattle School system has never been subject to court-ordered desegregation

## **LOUISVILLE PUBLIC SCHOOL ASSIGNMENT PLAN (2001)**

1. In the Louisville school district, 34% of students are classified as black and 66% are classified as white. Nonmagnet schools are required to keep a minimum black enrollment of 15% and a maximum black enrollment of 50%. In other words, the racial composition of any one school must not diverge from the overall racial composition of the district by more than 16 (or so) percentage points.
2. Each incoming kindergarten or first grade student is assigned a cluster of elementary schools to which he or she may apply. The cluster is determined by geographical proximity to the applicant's home and racial criteria (e.g., if there is a majority white housing development next to a majority black housing development, then the cluster for students in each housing development will include schools in both developments). Applicants are allowed to list a first and second choice of school within their assigned cluster. If a school is oversubscribed and the assignment of more white applicants to the school would push it under the 15% black minimum, then black applicants will be given preference over white applicants. But if a school is oversubscribed and the assignment of more black applicants to the school would push it over the 50% black maximum, then white applicants will be given preference over black applicants.
3. In 1975, a federal district court found that because Louisville had operated a *de jure* segregated public school system for many years, it would be forced to desegregate. The school system operated under the desegregation decree until 2000, when the district court dissolved the decree after having determined that Louisville had eliminated "to the greatest extent practicable" the vestiges of past *de jure* segregation. Thus, in 2001, when Louisville adopted its public school assignment plan, it was not under a court order to do so.

### **THE QUESTION**

Are the Seattle and Louisville school assignment plans consistent with the equal protection clause of the 14<sup>th</sup> Amendment?

### **THE DECISION**

The U.S. Supreme Court, in a deeply fractured 5-4 decision written by John Roberts (the Chief Justice), struck down both assignment plans.

The Standard: Strict Scrutiny

The Ruling: Neither assignment plan is narrowly tailored to achieve a compelling government interest. Therefore, both assignment plans fail the Strict Scrutiny test. Hence, both are unconstitutional.

## ROBERTS ON THE END

1. Prior cases suggest only two possible state interests in such a case that might count as compelling: (A) “remedying the effects of past intentional discrimination”, and (B) “student body diversity ‘in the context of higher education’” (p. 198).

- A. In the case of Seattle, there is no judicial finding of past *de jure* racial segregation of public schools. In the case of Louisville, although there had been a judicial finding of past *de jure* racial segregation, the relevant remedial desegregation decree had been voided *before* the assignment plan was adopted. So neither Seattle nor Louisville was under a court order to desegregate its public schools. *De facto* segregation (e.g., racial imbalance traceable to housing patterns), *by itself*, does not establish the existence of past or present *intentional* discrimination by the State. So the elimination of *de facto* segregation does not count as a compelling interest, and cannot be used to justify either assignment plan.
- B. Whether the interest in diversity in this case counts as compelling depends on whether it is relevantly similar or relevantly different from the interest in diversity found compelling in *Grutter*.

[Notice: Emphasis on precedent and analogical reasoning]

The present cases are relevantly different from *Grutter*:

- 1. Holistic review (race as one factor among many) vs. non-holistic review (race as *the* factor)
- 2. Expansive, fine-grained notion of racial diversity vs. limited, coarse-grained notion of racial diversity (e.g., white/black, or white/non-white)
- 3. *Grutter* relies on considerations that are unique to the context of *higher* education: the importance of “the expansive freedoms of speech and thought associated with the university environment”.

So: “The present cases are not governed by *Grutter*.” (p. 199)

2. Seattle and Louisville claim that their interest is in the *educational benefits* of student body diversity. But this claim is belied by the facts. What drives the numbers is not some determination that this or that proportion of white to nonwhite, or white to black, students will have such-and-such educational benefits, but rather the racial demographics of the school districts.

## ROBERTS ON THE MEANS

Even assuming that Seattle and Louisville's interest in the educational benefits of student body diversity is compelling, the assignment plans do not pass the test of Strict Scrutiny unless they are *narrowly tailored* to achieving this purpose. But recall the five *Paradise* factors that determine whether means are narrowly tailored to the end:

1. Necessity, and
2. Availability/Efficacy of Race-Neutral Alternatives

- a. "The extreme measure of relying on race in assignments is unnecessary to achieve the stated goals, even as defined by the districts...[At Franklin High School in Seattle], when the actual racial breakdown is considered, enrolling students without regard to their race yields a substantially diverse student body under any definition of diversity." (p. 201)

- b. The racial classifications in both plans have a minimal effect on student assignments, and this suggests that the plans are not *necessary* to achieving the end of true diversity. (p. 202-203)

- c. In Seattle, several race-neutral alternatives were rejected with little or no consideration. In Louisville, there is no evidence that the school district even considered race-neutral alternatives. (p. 203)

3. Flexibility/Duration

As long as housing patterns remain segregated, tying assignment plans to the racial demographics of the district will "effectively assure that race will always be relevant in American life, and that the ultimate goal of eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race will never be achieved." (p. 201)

4. Impact on the rights of third parties

There is a serious cost to subjecting hundreds of students to disparate treatment based solely upon the color of their skin. (p. 202)

5. Level of racial stereotyping

"To the extent the objective is sufficient diversity so that students see fellow students as individuals rather than solely as members of a racial group, using means that treat students solely as members of a racial group is fundamentally at cross-purposes with that end." (p. 202)

Roberts concluded that the assignment plans were not narrowly tailored to achieving the educational benefits of student body diversity, because (1) they were not necessary to achieving the end, (2) despite the availability of race-neutral alternatives, neither school district had shown that it had considered and rejected them for good reason, (3) the plans are rigid and potentially very long-lasting, (4) the plans have a negative impact on students who are denied admission to their preferred school merely on grounds of race, and (5) the plans are counterproductive inasmuch as taking race into account this directly conduces to continued racial stereotyping.

“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” (p. 207)

### KENNEDY’S CONCURRENCE

Kennedy agreed with most of Roberts’ opinion, but wrote to underline exactly why he thinks that both school assignment plans fail the Strict Scrutiny test.

The problem with the Louisville plan is that it is too broad and imprecise. It is unclear “who makes the [assignment] decisions; what if any oversight is employed; the precise circumstances in which an assignment decision will or will not be made on the basis of race; or how it is determined which of two similarly situated children will be subjected to a given race-based decision” (p. 216).

The problem with the Seattle plan is that the racial categories of “white” and “nonwhite” are too crude. (See above: Roberts on the End, B2)

But, interestingly, Kennedy went out of his way to insist that there may be circumstances in which a State is constitutionally permitted to make distinctions on the basis of race as a means to furthering a legitimate interest. The legitimate interest that Kennedy mentions is not diversity *per se* (or even its educational benefits), but rather “ensuring all people have equal opportunity regardless of their race” (p. 217).

[SR: Notice how Kennedy brings the central principle of *Brown* to bear on this case. This is exactly the right approach, as I see it.]

Kennedy described the sorts of programs that he himself would uphold as narrowly tailored means of achieving equal educational opportunity:

- a. Strategic site selection of new schools
- b. Drawing attendance zones in light of school district demographics
- c. Allocating resources for special programs
- d. Recruiting students and faculty in a targeted fashion
- e. Tracking enrollments, performance, and other statistics by race

Kennedy is drawn to these means because they have an insignificant negative impact on the rights of third parties and are very unlikely to lead to racial stereotyping. So in the absence of equally effective race-neutral alternative means to the achievement of equal educational opportunity, means (a)-(e) are presumptively constitutionally permissible, especially if they are limited in duration.

### BREYER'S DISSENT

Justice Breyer distinguished between discrimination that is designed to *exclude* (stigmatizing classification) and discrimination that is designed to *include* (benign classification). Stigmatizing classifications should be subjected to the test of Strict Scrutiny. Benign classifications should be subjected to a weaker test, namely that law should be *proportionate* to an *important* end (p. 234). Breyer reasoned that the constitutional difference between benign and malign classifications rests in the original intent of the framers of the 14<sup>th</sup> amendment, who intended the EP clause as a way of “forbidding practices that lead to racial exclusion,” and who probably did *not* intend it as a way of forbidding practices that lead to racial inclusion. (p. 231).

In this case, the racial classifications are benign, not malign. And they clearly pass this weaker test, and so should be held to be constitutionally permissible under the EP clause.

[SR: The appeal to original intent is dangerous, for reasons we have already discussed. Think *Dred Scott* and *Plessy*.]

But Breyer also argued, courageously, that the Seattle and Louisville assignment plans *pass* the Strict Scrutiny test!

The End (pp. 234-237)

1. An interest in setting right the consequences of prior conditions of *de jure* segregation
2. An interest in overcoming the adverse educational effects produced by and associated with highly segregated schools
3. An interest in producing an educational environment that reflects the pluralistic society in which our children will live

Breyer argued that any end that has these three elements is compelling. Is he right about this? [Look at Roberts' reply to Breyer's dissent at 203-207.]

The Means (pp. 237-240)

1. The race-conscious criteria only help set the outer bounds of *broad* ranges.
2. The plans depend on a number of non-racial elements, the most important one of which is school choice.
3. Most of the time, the race-conscious criteria have little negative effect on third parties.
4. The plans embody the results of local experience and community consultation, in a way that shows a significant diminution or race-based factors compared to the use of race in previous integration plans.
5. There is no reasonable way of achieving the compelling end at issue here by race-neutral means or other less restrictive race-conscious means. Here Breyer considered all five of Kennedy's suggestions (p. 239):

a. Strategic site selection of new schools

Not likely to have much of an impact. Seattle has built one new high school in the last 44 years.

b. Drawing attendance zones in light of school district demographics

Louisville tried this already. It worked only when conjoined with forced busing, which places a much greater burden on third parties than its current plan.

c. Allocating resources for special programs

Both Seattle and Louisville have tried this, through the creation of magnet schools. But the desegregation effect does not extend beyond the magnet schools themselves. So this is not likely to have much of an impact.

d. Recruiting students and faculty in a targeted fashion

Both Seattle and Louisville have tried this, but only in the context of a broader race-conscious program.

e. Tracking enrollments, performance, and other statistics by race

Tracking enrollment reveals the problem, but does not cure it.

## WHY EVERY JUSTICE IS RIGHT AND EVERY JUSTICE IS WRONG

Roberts and Kennedy are right about the proper standard of review: Strict Scrutiny. As Powell noted in *Bakke*, it is just too difficult to tell whether a classification is benign or malign. Once rooted in the law, it will be taken advantage of by government entities that will find clever ways of hiding their true intentions. They will be able to clothe a malign classification in the garb of a benign classification, thereby making it impossible to apply Breyer's double-barreled system of tests (strict scrutiny for malign classifications, a weaker level of scrutiny for benign classifications).

Roberts suggests that *precedent* determines that the only compelling ends are remedying past *de jure* segregation and realizing the educational benefits of student body diversity. But what ends count as compelling is not determined by *precedent*, but by *principle*.

So is there a compelling end here?

Roberts is right that remedying past *de jure* segregation, though compelling, does not apply in these cases.

We should reject *diversity* (or its educational benefits) as the compelling interest in these cases. Diversity and its educational benefits are *per se* desirable, but far from compelling. They are surely insufficient to justify infringing the right of equal opportunity belonging to white children.

Kennedy is right that the relevant interest here is achieving equal educational opportunity. He describes it as legitimate, but I would characterize it as compelling. Any government-run educational system that denies equality of opportunity for reasons entirely unrelated to merit is seriously unjust.

But Kennedy is wrong to suggest that the Seattle and Louisville plans are not narrowly tailored to the achievement of equal educational opportunity. Kennedy suggests less restrictive means that, as Breyer explains, would likely not work in these cases. Indeed, there is plenty of evidence to suggest that the Seattle and Louisville plans are needed to counter the adverse effects of segregated housing patterns on educational opportunity *without* constituting a serious imposition on parents or students (e.g., in the form of busing or significantly higher property taxes). So I would find both plans constitutionally permissible under the Strict Scrutiny test, by virtue of being narrowly tailored to achieving the compelling end of ensuring equality of educational opportunity.