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Parents Involved in Community Schools v. Seattle School District No. 1 : Dubious Prospects for Diversity as a Compelling Governmental Interest

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ABSTRACT

The Supreme Court applied strict scrutiny to diversification plans for public high school enrollment in *Parents Involved in Community Schools v. Seattle School District No. 1* (2007). Unlike the diversity plan upheld in *Grutter v. Bollinger* (2003), where law school applicants were potentially denied a benefit, all students in the Seattle plan were awarded a high school seat but perhaps not in their preferred school. Nevertheless, this plan was struck down by the Court as a violation of the Fourteenth Amendment, on the grounds that it was not sufficiently narrowly tailored. The question of whether diversity can withstand the other aspect of strict scrutiny, serving a compelling government interest, was not as definitively answered, although the prospects appear dim. A reasonable inference from *Parents Involved* for public human resource management is that race-conscious diversity plans are not likely to receive constitutional cover from the current Court.

Although academic and practical discussions about equal employment opportunity (EEO) have shifted recently from affirmative action to managing diversity, the constitutional framework for the latter is largely speculative. Indeed, the shifting sands of EEO constitutional law for public personnel management have most recently been shaped by cases stemming from public educational settings. Immediately recognized as a landmark case, the Supreme Court's decision in *Grutter v. Bollinger* (2003) relating to law school admissions boosted hopes that a range of efforts to further the diversification of public services and, by extension, public workplaces would be afforded constitutional cover. The Court revisited this diversity question by subjecting racial balancing plans in public high schools to the strict scrutiny test in *Parents Involved in Community Schools v. Seattle School District No. 1* (2007).

STRICT SCRUTINY

All governmental programs that use race or national origin as a classification for the distribution of benefits trigger the Fourteenth Amendment's Equal Protection Clause and are held to a heightened standard of judicial review. Formalized for all levels of government in *Adarand v. Peña* (1995), the Supreme Court held that "all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny" (p. 227). This test requires that such a plan serve a compelling governmental interest and be narrowly tailored to serve that interest. In the context of racial classifications, the notion of a compelling governmental interest is inherently defined on a case-by-case basis, but generally requires that individuals be treated as persons and not merely members of a group, and that the governmental action be designed to remedy prior discrimination by the government and not merely the effects of general societal discrimination. Narrow tailoring requires that "there must be no alternatives for achieving the government interest that are less restrictive on the interests or rights of parties who may be impacted by the classifications" (Kellough, 2006, p. 99).

Grutter v. Bollinger

The first type of racial classification scheme that has passed strict scrutiny review is that designed to remedy past intentional discrimination by the government. Such diversity plans are typically court-ordered and expire either on a particular date or when the discriminatory condition has been alleviated. In *Grutter v. Bollinger* (2003), the Supreme Court recognized admission to higher education as a second context in which race can be used as a criterion under the Fourteenth Amendment. Here the racial identity of law school applicants was legitimized as a means to achieve classroom diversity, largely because each applicant received a robust individualized review and race/ethnicity was but one nondefinitive component of social background consideration. Thus, the use of race in this scheme did not unduly harm nonminority applicants. Writing for a 5-4 majority, Justice O'Connor also relied heavily on the particular context of higher education, as the majority extended considerable deference to the evidence of the benefits of diversity forwarded by the defendants. Although the decision literally applied only to higher education admissions, the Court acknowledged that diversity can be a compelling

governmental interest and that strategies for achieving it can be so narrowly tailored as to pass constitutional muster under the strict scrutiny test. The practical extent to which the *Grutter* (2003) ruling provided constitutional cover for diversity efforts in public human resource management (HRM) was not explicitly addressed by the Court. Naylor and Rosenbloom (2004) explained, however, that “had the Court rejected diversity as a compelling governmental interest in the context of higher education, the justices probably would be less likely to consider it compelling in most aspects of public sector human resources management” (pp. 150-151). Citing Justice O’Connor’s connection between diversity and “the civic life of the nation” (*Grutter v. Bollinger*, 2003, pp. 19-20), Naylor and Rosenbloom (2004) contended that the decision appeared to be “broad enough to make diversity a constitutionally compelling public sector HRM interest” (p. 155). Sisneros (2004) advanced a similarly sanguine interpretation, based on a “university admissions/public employment nexus,” that public personnel managers ought to maintain and expand race-based diversification efforts (p. 178). Indeed, Sisneros concluded that members of the public human resource management profession ought to “sleep in under the warmth of *Grutter*’s constitutional cover” (p. 181).

To the contrary, Carcieri (2004b) argued that constitutional cover for public personnel programs from *Grutter* (2003) is unlikely because O’Connor’s majority opinion was “expressly limited to public university admissions” and the core contextual differences between public education and employment (p. 74). Due to the relatively volatile nature of constitutional law with regard to equal employment opportunity (see Kellough, 2006), Carcieri (2004a) concluded that the *Grutter* decision could soon be overturned due to a change in the Court’s view of diversity and/or by the replacing of the next retiring member of the *Grutter* majority (pp. 185-186). Indeed, Justice O’Connor retired from the Court in 2006 and was replaced by Justice Samuel Alito, who brought a solid record of conservative jurisprudence from the federal bench. It was in this context that diversity plans for public high school education were subjected to strict scrutiny review by the Court in 2007.

Parents Involved in Community Schools v. Seattle School District No. 1

The question of whether and when diversity can be a compelling governmental interest with a narrowly tailored plan was revisited in *Parents Involved in Community Schools v. Seattle School District No. 1* (2007).¹ The city of Seattle is relatively diverse, with a majority minority population, although certain areas of the city are dominated by one or another racial/ethnic group. Despite having never operated a segregated school system or been subject to court-ordered desegregation, School District No. 1 tried voluntarily to prevent the de facto segregation that would likely occur if students were assigned to high schools strictly on a geographical basis. Thus, students submitted a ranked preference among the 10 high schools in the district, but this preference was weighed against the goal of relative racial balance in all of the high schools. The race of students was classified as either White or non-White, the latter of which was a catchall category for African American, Latino, Native American, and Asian American students. These racial classifications were often the sole determinant for which school a student was enrolled in, especially when the diversity within a particular high school deviated substantially from the city’s demographics.

In order to satisfy strict scrutiny, the Seattle plan to create racially diverse high schools would have to both further a compelling governmental interest and be narrowly tailored to serve that purpose. In a split 5-4 ruling,² the Court ruled that the plan was not sufficiently narrowly tailored, but the question of a compelling government interest was not clearly settled. Writing for the majority, Chief Justice Roberts emphasized the absence of a court order to remedy past intentional discrimination and the distinction between the broad diversity effort upheld in *Grutter* (2003) and the Seattle scheme.³ Relying exclusively on a binary conception of race, Seattle's multigroup label of "non-White" was often the only factor used to determine school placement. The stated goal for Seattle high schools was racial parity, however awkwardly defined, as opposed to the individualized assessments and robust notion of diversity seen in *Grutter*. Thus, the Seattle plan was struck down for not being sufficiently narrowly tailored.

The Court also questioned whether diversity, in and of itself, constitutes a compelling governmental interest. Chief Justice Roberts emphasized that *Grutter* (2003) did not establish a broad precedent establishing diversity in all educational contexts, but was tied specifically to the particular importance of a diverse student body in a higher educational setting. Although the Seattle school district cited the goal of diversity, their plan was "directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate" (*Parents Involved*, 2007, p. 18). Chief Justice Roberts further opined that the use of race to remedy past racial discrimination means that race, as a decision-making factor, will never achieve the irrelevance intended under the Constitution (p. 22). Simply put, the Constitution is color-blind, and "remediating past societal discrimination does not justify raceconscious government action" (p. 23).

Interestingly, Justice Kennedy broke with the majority on precisely this point: the question of whether diversity can ever be a compelling governmental interest. Although joining the majority on the narrowly tailored question, Justice Kennedy (*Parents Involved*, concurring, 2007) wrote a consenting opinion arguing that it was possible for race-conscious strategies to be devised that would satisfy strict scrutiny review. Such strategic devices might include

strategic site selection for 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. (p. 8)

It is quite notable that this list contains no practical suggestions for the crafting of race-conscious admission plans that could withstand strict scrutiny review. Thus, Justice Kennedy supported the notion that diversity plans can be devised to further the compelling governmental interest of diversity, but such plans must still be narrowly tailored, and his notion of narrowly tailored is quite narrow indeed.

The four dissenters found the Seattle scheme to suffice as a narrowly tailored plan that served a compelling governmental interest. Writing for the dissent, Justice Breyer argued that the deference that was paid to the institution in *Grutter* (2003) with regard to the value of diversity in a higher educational setting ought to apply equally to the high school context in *Parents Involved* (2007, dissenting, p. 41). Furthermore, the dissent emphasized that no student was denied access or a benefit under the Seattle plan; rather,

some students were merely denied a preference for which school to attend. Although such a result is likely to be disappointing to the student, the denial of the first preference neither stigmatizes the student nor imparts judgment as to his or her intellectual or academic abilities (p. 35). In this way, the Seattle school board should have been given at least as much deference as was extended to the law school in *Grutter*, where students were literally extended or denied the benefit of attending a public law school. Under the Seattle plan, all students receive the benefit of attending a public school; it is simply a question of whether they are admitted to the school of their first preference. This line of reasoning would suggest that if a plan that denies a benefit or access survives strict scrutiny review, then a plan that merely denies a preference ought to as well, as the harm suffered is seemingly less severe.

DISCUSSION

If indeed the aforementioned line of cases contains a “university admissions/public employment nexus” (Sisneros, 2004), then *Parents Involved* (2007) is particularly noteworthy for public human resource professionals. Here, a race-conscious plan that denied preferences but still afforded access failed a strict scrutiny review. This is a notable deviation from the prevailing logic in the *Grutter* (2003) case, where a race-conscious plan that denied access outright was upheld. Importantly, both cases were decided on a 5-4 vote, with one member of the *Grutter* majority having been replaced with a more conservative justice in the *Parents Involved* decision. Reflecting on the impact and permanence of the *Grutter* decision on public personnel management, Kellough (2003) tellingly observed that such race-conscious programs will pass constitutional muster

provided there is no further action by the Supreme Court to tighten current Constitutional limitations imposed on preferential programs. Such a ruling by the Court could come, however, in the form of a very restrictive interpretation of the circumstances that would comprise a government interest sufficiently compelling to enable preferential affirmative action to survive strict scrutiny. (pp. 221-222)

Given the rationale expressed in the *Parents Involved* opinion regarding a plan that merely denied a preference, one can reasonably assume that the current Court will be highly suspicious of any race-conscious plan that denied access or a benefit outright and, therefore, wonder if *Grutter* would now be decided differently.

Those two cases clearly underscore the current volatility of the state of EEO law and have critical practical implications for public HRM. Despite Justice Kennedy’s apparent support for the *end* of diversity, his concurring opinion left a very small opening for which a narrowly tailored *means* could withstand strict scrutiny. Justice Kennedy neglected to thoroughly explain how a race-conscious program could be sufficiently narrowly tailored in practice. Such a pessimistic appraisal of his position is supported by the fact that Justice Kennedy dissented in *Grutter* (2003), suggesting that the application of even that robust a conception of diversity in a public HRM setting would not meet his approval.

Nevertheless, Justice Kennedy parted with the majority in *Parents Involved* (2007) on the central question of whether diversity can ever be a legitimate compelling governmental

interest. One is reminded of the post-*Grutter* (2003) analysis of Naylor and Rosenbloom (2004), who observed that a rejection of diversity as a compelling governmental interest in the context of higher education would likely spell defeat for such arguments in support of race-conscious programs in public sector HRM. The recognition of diversity as a compelling government interest, however, offers little comfort if the bar for achieving a sufficiently narrowly tailored plan is, practically speaking, set impossibly high. In light of the *Parents Involved* decision, the near-term prospects for the goal of diversity under strict scrutiny review seem to be very slim indeed in public education or public human resource management.

NOTES

1. A second case, *Meredith v. Jefferson County Board of Education* (2007), was considered and decided conjointly due to a similar fact pattern and constitutional issues. This legal brief focuses exclusively on the Seattle case for clarity of the discussion and analysis.
2. The five Justices who supported the majority opinion were Roberts, Alito, Scalia, Thomas, and Kennedy, whereas the four dissenters were Ginsberg, Stevens, Breyer, and Souter.
3. The change in context from higher education to high school meant that although *Grutter v. Bollinger* (2003) was not controlling precedent, it served as a useful juxtaposition for the authors of the majority, concurring, and dissenting opinions.

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