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NEWSLETTER

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Lessons Learned: *Parents Involved in Community Schools*, *Meredith*, and Race-Conscious Decision-Making in K–12 Education

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In June 2007, the United States Supreme Court issued two highly anticipated decisions addressing race-conscious decision-making in public K–12 education. In holding that voluntary desegregation plans in the Seattle and Louisville schools were not narrowly tailored, and therefore were unconstitutional, the Court moved to distinguish its higher education jurisprudence and reiterate fundamental concepts of Fourteenth Amendment caselaw. Although *Grutter v. Bollinger*, 539 U.S. 306 (2003), had upheld certain race-conscious measures in college and university admissions, the Court was not willing to extend its rationale to the school assignment schemes in Seattle and Louisville. This article reviews the Court's decisions in *Parents Involved in Community Schools v. Seattle School District No. 1*, No. 05-908, and *Meredith v. Jefferson County Board of Education*, No. 05-915, extracting the Court's analysis and offering some lessons for those involved or concerned with race-conscious decision-making in the educational context.

Facts

At issue in both the Seattle and Louisville cases were school assignment plans that were designed voluntarily by each district to achieve desegregation and a more racially balanced student population throughout its schools. In Seattle, the district implemented an "open choice" plan in 1998, which allowed ninth graders to rank the high schools they wanted to attend. Most students got their first-choice school, but if the high school was "oversubscribed," the school district would use a series of "tiebreakers" to place the student in a high school. First, the school district would consider whether the ninth grader had a sibling at the high school. Second, the district would use an "integration" tiebreaker, meaning that if the student was of a race outside the ranges established by the school district, the student would be assigned to a second-, third-, or fourth-choice high school. Third, Seattle had a home-distance-from-the-school tiebreaker. Fourth, and finally, the school district had a lottery tiebreaker. At issue in *Parents Involved in Community Schools v. Seattle School District No. 1* was the "integration tiebreaker," which explicitly considered the student's race.

In Louisville, to continue progress achieved under a court-ordered desegregation decree that was dissolved in 2001, the district adopted a voluntary school-choice plan that identified students as "black" or "other" and required that all nonmagnet schools have a black student population between 15% and 50%. Although the Louisville schools considered a variety of factors in assigning school placement, if the school population fell outside the prescribed range, the student could not be assigned to the school, even if it was his or her first choice.

The Michigan Cases

Before turning to the rationale of the recent K–12 decisions, it is important to offer a brief review of both of the University of Michigan cases, *Grutter v. Bollinger*, 539 U.S. 306, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003), and *Gratz v. Bollinger*, 539 U.S. 244, 123 S. Ct. 2411, 156 L. Ed. 2d 257 (2003). When the Court granted certiorari to the Seattle and Louisville cases, many commentators and scholars expressed concern because the Court had, in a close 5–4 decision authored by former Justice Sandra Day O'Connor, approved of the limited use of race in higher education decision-making only four years earlier. Because of this concern and because the Court, in the Seattle and Louisville cases, makes substantial reference to the Michigan cases, a review of those cases may prove instructive.

Although the Court handed down its landmark decisions in the Michigan cases over four years ago, the path to the 2003 cases was years in the making. Before *Grutter* and *Gratz*, the Court's last treatment of race-conscious decision-making in higher education had been in *The Regents*

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Supreme Court Update

Rachelle Hong Barton
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Decided

***Brendlin v. California*, No. 06-8120 (June 18, 2007)**

In a unanimous opinion, the United States Supreme Court held that the right to challenge the constitutionality of a traffic stop extends to a vehicle's passengers. In this case, officers stopped a vehicle to check its registration without reason to believe that the vehicle was being operated unlawfully. The officers apprehended Brendlin, the passenger, after verifying that he was in violation of his parole. The Court held that when officers make a traffic stop, a passenger is seized for Fourth Amendment purposes, because no reasonable passenger would believe that he is free to "terminate the encounter" with the officers.

***Davenport v. Washington Education Association*, No. 05-1589 (June 14, 2007)**
***Washington v. Washington Education Association*, No. 05-1657 (June 14, 2007)**

The Court ruled unanimously on these consolidated cases from the Washington Supreme Court, holding that labor unions do not have a First Amendment right to take the wages of employees who have chosen not to become union members and use them for political purposes. The Court upheld a state law requiring unions to obtain permission from nonunion members before using their fees for political purposes.

***Hein v. Freedom From Religion Foundation, Inc.*, No. 06-157 (June 25, 2007)**

The Supreme Court ruled that citizens do not have standing as taxpayers to bring establishment clause challenges against executive branch programs that are funded by appropriations for general administrative expenses. The plaintiffs had alleged that actions taken pursuant to an Executive Order violated the establishment clause by singling out faith-based organizations for eligibility for federal funds. The Court stated that for the plaintiffs to have taxpayer standing, they must not only challenge a policy on the basis of the establishment clause, but also bring the challenge against a congressional expenditure. There was no case or controversy because no such expenditure was implicated in this lawsuit.

***Meredith v. Jefferson County Board of Education*, No. 05-915 (June 28, 2007)**

In a 5–4 decision, the Court struck down a student assignment plan that mandated a black student population at each nonmagnet school of between 15% and 50%. The Court ruled that the plan violated the Fourteenth Amendment equal protection clause's requirement that racial classifications be narrowly tailored to achieve a compelling governmental interest. [Please see page 1.]

***Morse v. Frederick*, No. 06-278 (June 25, 2007)**

The Supreme Court held 6–3 that the First Amendment does not apply when students participate at school in expression that is adverse toward valid school policy. Here, a Juneau, Alaska, high school principal suspended a student who refused to take down a banner reading "Bong Hits 4 Jesus" at a school-sponsored event. The Court ruled that the principal reasonably interpreted the words on the banner to promote illegal drug use and this undermined the school's anti-drug policy.

***Panetti v. Quarterman*, No. 06-6407 (June 28, 2007)**

The Supreme Court reversed the Fifth Circuit, ruling in favor of petitioner Panetti, who was sentenced to death in a Texas state court for murdering his mother and father-in-law. The Supreme Court held that Panetti was

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Oregon 2007 Legislative Update

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The 74th Oregon Legislative Assembly adjourned *sine die* on June 28, 2007. As in past sessions, legislators introduced numerous bills affecting individual and civil rights. The 2007 session stands out, however, in that there were Democratic majorities in both the Oregon House and Senate, and many of the proposed bills passed and were signed into law by Governor Kulongoski.

This article provides a summary of the significant bills relating to civil rights that were passed by the Oregon legislature this year, as well as a listing of bills that did not pass but may resurface during the special session scheduled for February 2008 or during the 2009 legislative session. Except as noted below, the effective date of the new laws is January 1, 2008. The full text and history of the bills is available on the legislature's website and can be located by measure number at www.leg.state.or.us/searchmeas.html.

Bills That Passed

SB 2: Discrimination based on sexual orientation and gender identity

Titled "The Oregon Equality Act," this bill prohibits discrimination against persons in employment, housing, and public accommodations based on "sexual orientation," which is defined broadly to include "actual or perceived heterosexuality, homosexuality, bisexuality or gender identity, regardless of whether the individual's gender identity, appearance, expression or behavior differs from that traditionally associated with the individual's sex at birth."

The bill authorizes civil actions for actual and punitive damages and attorney fees. It includes an exception for bona fide church or sectarian religious institutions based on a bona fide religious belief about sexual orientation if employment, housing, or use of facilities is closely connected with or related to the primary purposes of the church or institution.

Titled "The Oregon Equality Act," this bill prohibits discrimination against persons in employment, housing, and public accommodations based on "sexual orientation."

Opponents of SB 2 submitted close to 60,000 signatures in an attempt to refer the bill to the Oregon voters in November 2008. However, on October 12, 2007, the secretary of state's office announced that fewer than the requisite 55,179 signatures were valid. As a result, the bill will take effect, as scheduled, on January 1, 2008.

Existing city and county ordinances in Ashland, Beaverton, Bend, Benton County, Eugene, Hillsboro, Lake Oswego, Lincoln City, Multnomah County, Portland, and Salem already prohibit discrimination based on sexual orientation and, in most cases, gender identity. Individuals may also have a private right of action based on sexual orientation under the 1998 Oregon Court of Appeals decision in *Tanner v. OHSU*, 157 Or. App. 502, 971 P.2d 435 (1998).

HB 2007: Domestic partnerships for same-sex partners

This bill, titled the "Oregon Family Fairness Act," creates legal recognition for same-sex couples by allowing for a "domestic partnership contract." It provides that any privilege, immunity, right, or benefit granted under Oregon law to married individuals is granted to individuals who are or were in a domestic partnership.

The bill does not alter the definition of marriage ("the union of one man and one woman") now in the Oregon Constitution, but it does provide parental rights to a same-sex partner with respect to the child of either partner. No "solemnization ceremony" is required to enter into a binding domestic partnership contract. As with SB 2, described above, opponents of this bill submitted approximately 60,000 signatures in an attempt to force a referendum. However, on October 8, 2007, the secretary of state's office announced that fewer than the required 55,179 signatures were valid, and thus this bill will take effect on January 1, 2008.

HB 2260: Expanding relief for victims of discrimination

Effective for actions commenced on or after January 1, 2008, this bill amends ORS 659A.885(3), allowing compensatory and punitive damages with no caps for unlawful discrimination in employment based on race, religion, color, sex, national origin, marital status, or age under ORS 659A.030.

ORS 659A.885(1) currently allows the court to order "injunctive relief and such other equitable relief as may be appropriate, including but not limited to reinstatement or the hiring of employees with or without back pay." A court may also order up to two years of back pay and may award the prevailing party costs and reasonable attorney fees at trial and on appeal.

SB 946: Leave related to domestic violence

This bill, which took effect on May 25, 2007, allows certain eligible employees to take unpaid leave to obtain services or treatment relating to domestic violence, sexual assault, or stalking. The new law applies to employers of six or more individuals in Oregon. An employee must have worked an average of 25 hours per week over the prior 180 days to be eligible. An eligible employee may take leave to seek law enforcement assistance or medical treatment for injuries, to obtain counseling for a minor child, or to relocate following domestic abuse.

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The employee is permitted to use any accrued paid vacation or paid time off during the domestic violence leave.

The employee is permitted to use any accrued paid vacation or paid time off during the domestic violence leave. There is no specific time limit on the amount of leave permitted, and the employer may limit leave only when it would create an undue hardship.

The employer does have the right to require certification, such as a copy of a police report or protective order; other documentary evidence that the employee appeared in or was preparing for a court proceeding related to domestic violence, sexual assault, or stalking; or documentary evidence that the employee or dependent was undergoing treatment or counseling. The documentation must be kept confidential.

HB 2372: Breast-feeding in the workplace

ORS 653.077, enacted during the 2005 legislative session, says that employers of 25 or more employees "may" provide unpaid rest periods to accommodate an employee who needs to express milk for her child. This bill amends the statute, making such breaks mandatory for covered employers effective January 1, 2008, except when an undue hardship would result.

The new law specifies that unless otherwise agreed to by the employer and the employee, the employer must provide a 30-minute rest period to express milk during each four-hour work period or major portion thereof, to be taken by the employee approximately in the middle of the work period. The employer must also make reasonable efforts to provide a private area (other than a restroom stall) where an employee can breast-feed or express milk for her child up to the age of 18 months.

SB 248: Increased limitations on arbitration and noncompetition agreements

ORS 36.620 makes arbitration agreements valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract. ORS 653.295 permits noncompetition agreements entered into upon the initial employment of the employee or upon subsequent bona fide advancement of the employee.

Effective for agreements entered into on or after January 1, 2008, this bill makes arbitration and noncompetition agreements voidable unless an employer informs the employee in a written employment offer at least two weeks before the first day of employment, or upon subsequent bona fide advancement of the employee, that such an agreement will be a condition of employment.

The new law also states that noncompetition agreements are valid only for administrative, executive, and professional employees (those exempt under Oregon wage laws) with respect to whom the employer has a "protectable interest" and whose annual gross salary and commissions exceed the median family income for a family of four—currently about $62,000. The law also restricts the noncompetition period to a maximum of two years following separation from employment. The requirements that the employee be exempt and earn at least the median family income do not apply if the employer provides continuing pay of 50% of gross earnings or the median family income (whichever is greater) for the noncompetition period.

HB 2259: Increased filing period for BOLI retaliation claims for opposing workplace safety violations

This bill was declared an emergency and became effective immediately upon passage on June 4, 2007. It amends ORS 654.062 to increase from 30 days to 90 days the period in which a retaliation complaint may be filed with the Oregon Bureau of Labor and Industries (BOLI) concerning opposition to or reporting of workplace safety violations or filing an OSHA complaint.

The employee or prospective employee wishing to file such a claim with BOLI must do so within 90 days of having reasonable cause to believe that a violation has occurred. BOLI must then conclude its investigation and notify the complainant of its determination within 90 days of the date the complaint was filed. A bill passed in 2005, SB 237, specified that an employee or prospective employee may instead file a civil action in any Oregon circuit court within one year of having reasonable cause to believe that a violation has occurred. That option remains in effect.

HB 2460: Exclusion of workers' compensation leave from OFLA leave period

This bill redefines "family leave" in the Oregon Family Leave Act (OFLA) to exclude leave for a compensable workers' compensation injury, thereby permitting additional protected leave time in some cases. Effective January 1, 2008, the definition at ORS 659A.150(3) is amended so that an employer may not reduce the OFLA 12-week leave entitlement by any period in which the employee is unable to work because of a disabling compensable injury. The bill also states that an injured worker's refusal to accept a light duty position immediately triggers an OFLA leave, even when the employee has not specifically requested it.

A federal regulation, 29 CFR § 825.207(d)(2), implementing the federal Family and Medical Leave Act (FMLA), explicitly states that a serious health condition may result from injury to the employee on or

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off the job, and provides that the employee's 12-week FMLA entitlement may run concurrently with a workers' compensation absence for a condition that qualifies as a serious health condition.

HB 2485: Use of paid sick leave during OFLA leave

Under ORS 659A.174, an employee using OFLA parental leave to bond with and care for a new child is currently entitled to access accrued paid sick leave, regardless of the employer's usual sick leave policy. During other types of OFLA leave, the employee's right to use accrued paid sick leave depends on the employer's policy. This new law amends ORS 659A.174 so that an employee using leave for any qualifying OFLA purpose, including serious health condition leave or sick child leave, may access accrued paid sick leave without regard to the employer's policy.

HB 2635: Expansion of OFLA "family member" definition, prohibition on retaliation

HB 2635 amends ORS 659A.150(4) to include grandparents and grandchildren within the definition of covered "family members" under OFLA, effective January 1, 2008. Family members currently covered under OFLA include the employee's spouse, parent, child, parent-in-law, same-sex domestic partner (and the parent and child of such a partner), and a person with whom the employee was or is in a relationship of *in loco parentis*.

During the legislative session, an additional provision was added to this bill, explicitly prohibiting the denial of OFLA leave or retaliation or discrimination for inquiring about leave. The bill declares an emergency and makes this anti-retaliation provision effective retroactively.

Although an existing OFLA regulation, OAR 839-009-0320, specifically prohibits retaliation, a federal district court decided in 2002 that the rule was beyond BOLI's authority. *Jeff Denny v. Union Pacific Railroad Company*, No. CV-00-1301-HU (U.S. Magistrate Judge Dennis James Hubel). In September 2004, the Oregon Court of Appeals upheld BOLI's retaliation rule in *Yeager v. Providence Health System Oregon*, 195 Or. App. 134, 96 P.3d 862, *rev. den.* 337 Or. 658 (2004), but more than one federal court had still refused to recognize a cause of action for OFLA retaliation. This bill resolves the split between the Oregon and federal courts.

HB 2700: Contraceptive coverage under health insurance plans

HB 2700 requires that any prescription drug benefit program, or prescription drug benefit offered under a health benefit plan or under a student health insurance policy, include coverage of contraception. It provides an exemption for certain religious employers. The bill applies to all benefit plans entered into, issued, or renewed after January 1, 2008. It requires hospitals to inform victims of sexual assault about emergency contraception and treatment options and to provide emergency contraception upon request by the victim. It also prohibits a public body from interfering with a consenting individual's access to contraception.

SB 583: Protection of personal data, notification of individuals following security breach

Titled the "Oregon Consumer Identity Theft Protection Act," SB 583 requires any person, including an employer, that "owns, maintains or possesses" individual personal information and data to implement a security program and to notify affected individuals after a security breach, in the most expeditious time possible. It prohibits the printing of a person's Social Security number on materials not requested by the person unless the number is redacted, with no more than the last four digits shown.

HB 2891: "Card check" sufficient to certify union

HB 2891 permits certification of a public employer labor union if the majority of employees in the unit have signed authorization cards designating the union as representative. An election to certify the union is no longer required.

HB 2255: Retaliation for wage claims

This bill amends ORS 652.355, ORS 653.060, and ORS 659A.855 to make discrimination or retaliation for making a wage claim an unlawful employment practice under ORS Chapter 659A, and authorizes the filing of a complaint under ORS 659A.820 with BOLI. It also expands available remedies, allowing for compensatory damages.

Bills That Did Not Pass

HB 2575: Wage replacement for employees taking OFLA leave

HB 2575 would have created the "Family Leave Benefits Insurance program" to provide pay for employees taking leave under OFLA. It would have required employees to pay premiums withheld from earnings into an account, to be administered by BOLI. This bill passed in the Oregon House by a 31–28 vote and narrowly failed in the Oregon Senate (13–16) at the very end of the session. Since 2004, California has provided a paid family leave program, and Washington recently became the second state to do so, passing a law that will allow for partial wage replacement during parental leave beginning in 2009.

SB 423: Prohibiting discrimination based on medical marijuana use outside of workplace

This bill would have made it an unlawful employment practice for an employer to discriminate against an individual with respect to hire, tenure, or any term or condition of employment because the individual engages in the medical use of marijuana outside of the workplace.

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SB 465: Expanding ability of employer to prohibit the use of medical marijuana in the workplace

The Oregon Medical Marijuana Act (OMMA) currently states that nothing in the law requires an employer to accommodate the medical use of marijuana in any workplace, but what constitutes use "in" the workplace remains an open question.

This bill would have amended the OMMA at ORS 475.340 to clarify that nothing in the law requires an employer to accommodate the medical use of marijuana in any workplace regardless of where the use occurs. It would have added that nothing in the law requires an employer to allow an employee or independent contractor to possess, consume, or be impaired by the use of marijuana during working hours, or to allow an impaired person to remain in the workplace. It also would have added that the OMMA does not preclude an employer from establishing or enforcing a drug-free workplace policy.

SB 465 passed in the Oregon Senate by a 23–5 vote but failed by one vote (30–30) in the Oregon House at the very end of the session.

SB 1035: Workplace bullying

This bill would have added "workplace bullying" as an unlawful employment practice within ORS Chapter 659A, covering "any persistent verbal or physical act of an employer or employee . . . that a reasonable person would find threatening, intimidating, humiliating, hostile or offensive."

SB 628: Discrimination based on arrest record

SB 628 would have amended ORS 659A.030 to explicitly prohibit discrimination against an individual because of the individual's arrest record. Although the bill did not pass, the federal Equal Employment Opportunity Commission's interpretation of the federal Civil Rights Act of 1964 is that the use of arrest records to make employment decisions is unlawful, based on adverse impact.

HB 2893: Mandatory workplace communications about employer's opinions

This bill would have prohibited an employer from requiring employee attendance at a meeting about the employer's opinion on religious or political matters.

HB 3539: Reasonable accommodation for religious observance

This bill would have required an employer to allow an employee to use vacation leave, or other leave available, for the purpose of engaging in religious observance or practices. It would have prohibited a policy restricting an employee's right to wear religious clothing, to take time off for a holy day, or to take time off to participate in a religious observance or practice, if not an undue hardship and if the employee's ability to perform essential functions of the job was only temporarily or tangentially affected.

SB 691: Job references—increasing burden of proof to rebut presumption of good faith

ORS 30.178 creates a presumption of good faith when an employer provides a job reference on a former employee to a prospective employer. This bill would have changed the burden of proof required to rebut the presumption from "preponderance of evidence" to "clear and convincing evidence," thus giving employers greater protection in providing references.

SB 486: Infertility treatment coverage under health insurance policies

This bill would have amended ORS Chapter 743 to require coverage under health insurance policies for treatment of infertility.

SB 250: Evidence in sex discrimination cases

SB 250 would have prohibited the introduction of reputation and opinion evidence of the plaintiff's past sexual behavior and manner of dress in civil actions claiming unlawful sex discrimination, except after a court order making specific findings. ✦

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Newsletter Articles Needed

Have you recently done some research or written a memo that you could easily transform into a newsletter article?

Do you need an incentive to brush up on a recent development in the law?

We need articles for upcoming issues of this newsletter. Many of your colleagues have already volunteered their time to write articles for prior issues. If you have not yet contributed, please consider doing so.

If you or someone in your office can contribute an article in the next few months, please contact our editor at elise.gautier@comcast.net. Thanks.

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of the University of California v. Bakke, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978). In striking down an affirmative action scheme of the University of California–Davis Medical School, the Court's fractured opinion served as the template to navigate race-conscious programs on campuses across the country.

From 1978 to the mid-1990s, however, the Court heard several cases addressing affirmative action and race-conscious decision-making in other venues, such as public contracting and FCC licensing.[1] Throughout this affirmative action jurisprudence, the Court appeared to tighten the scope of possible applications of race in the public sector, leaving many to wonder if the remnants of *Bakke* even survived. In fact, leading up to *Grutter* and *Gratz,* the stage was set for the Court to grant certiorari, as circuits across the country were split on whether university admission offices could, in fact, consider race when making decisions.

In upholding the limited use of race in college admission decisions, the Court distinguished between two processes at the University of Michigan. In *Grutter*, the University of Michigan Law School's holistic file-reading process was challenged. To attract a critical mass of diverse students, the law school considered race among many factors that it found attractive in potential candidates. While race was not singled out as a decisive factor, the law school did consider it when reading applications. In *Gratz*, on the other hand, the admission process at the undergraduate school of arts and sciences was challenged. In that process, applicants were ranked on a numerical scale of 150 points, 20 automatic points being granted to members of various racial groups.

In applying strict scrutiny—the standard the judiciary uses to evaluate race-based actions—the Court determined that the educational benefits of a diverse student body constituted a compelling state interest and, while the holistic file-reading process of the law school was narrowly tailored enough to avoid constitutional or statutory violation, the mechanical application of automatic points in the undergraduate process was not. At a fundamental level, the Court upheld the use of race-based decision-making to accomplish the educational benefits of diversity as long as the plan to accomplish that compelling state interest was narrowly tailored. With these decisions, many people, inside and outside the realm of higher education, thought the rationale could translate to different venues, including employment and K–12 education.

The Chief Justice's Plurality Opinion and Its Analytical Highlights

In arguing that attaining the educational benefits of a diverse student body and avoiding racial isolation were compelling state interests, the Seattle and Louisville districts defended their voluntary desegregation plans. Armed with *Grutter*, the Seattle and Louisville school systems believed that their voluntary desegregation plans would withstand constitutional and statutory scrutiny. The Supreme Court, however, disagreed. Chief Justice Roberts's majority opinion, established with Justice Kennedy's narrow fifth vote, rested on three primary points.

Strict Scrutiny

First, Roberts clearly stated that the race-based decision-making at issue in the voluntary desegregation plans, like all race-conscious decision-making, was subject to strict scrutiny. The universal applicability of this standard emerged in the affirmative action jurisprudence of the mid-1990s and was reiterated in both *Grutter* and *Gratz*. Under that standard, for a race-based decision to survive constitutional and statutory scrutiny, the decision must (1) serve a compelling state interest and (2) be narrowly tailored to achieve that compelling state interest.

Chief Justice Roberts's majority opinion, established with Justice Kennedy's narrow fifth vote, rested on three primary points.

In explaining this principle, Roberts took unusual care to illustrate that, up to this point in the Court's jurisprudence, there were only two interests identified as sufficiently compelling to survive strict scrutiny: remedying the effects of past intentional discrimination, and the interest in diversity in higher education. Roberts noted that the Seattle and Louisville systems could not appeal to either of these compelling interests because (1) there was no *intentional* discrimination in the Seattle schools and the decree governing the Louisville system was dissolved in 2001 and (2) the voluntary desegregation plans were implemented by the Seattle and Louisville public schools, not institutions of higher education, as in the *Grutter* and *Gratz* cases.

Compelling Interests

As observed by Arthur L. Coleman, Scott R. Palmer, and Steven Y. Winnick in their publication *Not Black and White: Making Sense of the United States Supreme Court Decisions Regarding Race-Conscious Student Assignment Plans*, written for the College Board and the National School Boards Association, "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 in postsecondary education—*were not the bases for the district plans*." (emphasis added).[2]

While the school districts included attaining the educational benefits of a diverse student body as a rationale justifying the desegregation plans, each district also observed that ac-

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complishing a racially balanced district was also sufficiently compelling. Although the extent to which Roberts disapproved of alternate compelling interests led to Justice Kennedy's careful concurrence, and his decision not to join Part III-B of the Roberts opinion, the majority of the Court agreed that the voluntary plans at issue in the two cases were not constructed appropriately to accomplish an acceptable compelling state interest.

Finally, a Court majority, including Justice Kennedy, determined that the plans were not narrowly tailored enough to survive strict scrutiny.

Narrowly Tailored

Finally, a Court majority, including Justice Kennedy, determined that the plans were not narrowly tailored enough to survive strict scrutiny. Unlike the *Grutter* admission process, which evaluated the race of an applicant amid many other factors, the desegregation plans, the Court argued, were almost exclusively focused on the student's race. As Coleman, Palmer, and Winnick observe, "The Court ruled that the student assignment policies were not narrowly tailored because the districts did not establish that (1) the use of race was necessary to achieve their diversity-related goals and (2) they had fully considered viable race-neutral alternatives to their race-conscious plans."

As Roberts stated in the majority opinion, "Classifying and assigning schoolchildren according to a binary conception of race is an extreme approach in light of our precedents and our Nation's history of using race in public schools, and requires more than such an amorphous end to justify it." Because the plans did not identify a compelling state interest and, more clearly, were not narrowly tailored to accomplish an acceptable compelling state interest, the Court held that the voluntary desegregation plans were unconstitutional.

Justice Kennedy's Concurrence

The scope of the chief justice's opinion, particularly regarding possible compelling state interests, led Justice Kennedy to offer a concurrence. He declined to join Part III-B of the Roberts opinion because, as Kennedy stated:

> Our Nation from the inception has sought to preserve and expand the promise of liberty and equality on which it was founded. 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. This is especially true when we seek assurance that opportunity is not denied on account of race. The enduring hope is that race should not matter; the reality is that too often it does. This is by way of preface to my respectful submission that parts 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.

He continues, offering:

> The plurality's opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling. I cannot endorse that conclusion. To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.

Thus, as Justice Kennedy agreed that the Seattle and Louisville plans were not narrowly tailored, he did not shut the door completely on race-conscious decision-making in the K–12 context. As Coleman, Palmer, and Winnick conclude:

> Specifically, while finding that the specific student assignment plans were not narrowly tailored, Justice Kennedy joined the four *dissenters* in stating that elementary and secondary public schools may have compelling interests that can be pursued through appropriate race-conscious means, including interests in promoting the benefits of diversity and in avoiding the harms associated with racially isolated schools.

(emphasis added).

Justice Breyer's Dissent

Interestingly, both the Roberts and Kennedy opinions spend much ink on outlining the problems with the primary dissent of Justice Steven Breyer. The dissent, joined by Justices Stevens, Souter, and Ginsburg, found that the voluntary desegregation plans survived strict scrutiny, identifying appropriate compelling state interests and narrowly tailored to accomplish those objectives.

The dissent . . . found that the voluntary desegregation plans survived strict scrutiny, identifying appropriate compelling state interests and narrowly tailored to accomplish those objectives.

Breyer disputed the majority's conclusion that strict scrutiny must be treated the same in all instances, observing that there was a difference between classifications that *included* or *excluded* racial minorities. Breyer took great care to challenge the Roberts conclusion that there was not *de jure* segregation in the Seattle and Louisville systems. Through the lens of deference to local school districts, the Breyer dissent identified three compelling state interests: (1) diversity, balancing, and preserving greater

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racial integration in public schools, (2) overcoming the adverse educational effects produced by and associated with segregated schools, and (3) producing an educational environment that reflects the "pluralistic society" in which children will live. The dissent found that the plans were narrowly tailored to achieve those objectives.

Lessons and Implications

With *Grutter* and *Gratz* as background and the analysis of *Parents Involved in Community Schools* and *Meredith* defining the terrain of race-conscious decision-making in education, the College Board, the National School Boards Association, and the American Council on Education each offer several important lessons, both for K–12 public school systems and institutions of higher education, in the wake of the voluntary school assignment cases.

John Przypyszny and Kate Tromble, in their article "Impact of *Parents Involved in Community Schools v. Seattle School District No. 1* and *Meredith v. Jefferson County Board of Education* on Affirmative Action in Higher Education,"[3] written for the American Council on Education, offer six critical lessons for institutions of higher education.

First, they state that **diversity is still a legitimate factor to consider in making admissions decisions**. While it is apparent that the Court will apply strict scrutiny to race-conscious decision-making, even the Roberts opinion acknowledged that diversity in higher education, upheld in *Grutter*, was a compelling state interest.

Second, they stress **the importance of individualized and holistic review of applications**. In overturning the school assignment plans, the majority opinion took substantial energy to distinguish the mechanical use of race by Seattle and Louisville in the current cases from the application process the Court upheld four years ago in *Grutter*.

Third, Przypyszny and Tromble note that **consideration of race must yield results**. If a race-conscious plan does not accomplish its objective, it is highly likely that the Court will determine that the institution did not adequately consider race-neutral alternatives to achieve the objective or the plan was not narrowly tailored enough to withstand constitutional scrutiny.

Fourth, they observe a **caution regarding "critical mass."** Even though *Grutter* found that the University of Michigan Law School's interest in a "critical mass" of racial minorities was not fatal to its admission process, the Court is highly skeptical of numerical goals or ranges. Because a "range of percentages" was a feature of the school reassignment plans, practitioners should use caution in using numerical indicators to govern race-conscious processes.

Fifth, **race-neutral alternatives must be considered**. All the opinions discussed in this article—the University of Michigan cases and both voluntary desegregation cases—stressed the significance of race-neutral alternatives. Remember: to survive strict scrutiny, the race-based action or decision must be narrowly tailored. In determining whether a plan is narrowly tailored, the Court will look at whether the college or the school district considered race-neutral alternatives to accomplish its compelling state interest.

Finally, Przypyszny and Tromble remind us to **have a sense of institution's mission**. For a college or university to justify race-conscious decision-making using as the compelling state interest the educational benefits of a diverse student body, it must demonstrate that this interest is integral to the institution's mission.

In addition to lessons for postsecondary education, Coleman, Palmer, and Winnick identify several lessons for K–12 public school systems. These lessons, which echo some of the advice provided by the American Council on Education, include the following:

- School districts can pursue goals regarding diversity through various means, including appropriately designed race-conscious policies aligned with evidence-based educational goals;
- To support race-conscious practices, district goals should be established based on mission-driven, educationally focused interests;
- If appropriately framed, two distinct, but related interests—achieving the educational benefits of diversity and avoiding the harms associated with racial isolation—*may* be sufficiently compelling to support race-conscious practices;
- The concept of critical mass should be carefully evaluated as a possible foundation for gauging success associated with diversity-related goals;
- Race-conscious policies must reflect a fundamental coherence between means and ends—they must be necessary for, and materially advance, diversity-related goals;
- Viable race-neutral plans (in lieu of race-conscious plans) must be considered and, when deemed appropriate, tried—with a record of such consideration and action maintained; and
- School districts must periodically review and evaluate their race-conscious programs to ensure that their consideration of race continues to serve compelling interests in appropriately calibrated, narrowly tailored ways.

Conclusion

Although it appears that *Grutter* has survived the K–12 school assignment decisions, the Court's future steps in race-conscious decision-making are unclear. In both *Parents Involved in Community Schools* and *Meredith*, the Court set clear expectations regarding strict scrutiny, focusing substantial attention on the narrowly tailored prong. Educational institutions, both K–12 schools and postsecondary

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BOLI Final Orders
March 2006–September 2007

Dan Grinfas
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The Oregon Bureau of Labor and Industries (BOLI) investigates complaints and conducts administrative hearings in civil rights and wage and hour cases. This article summarizes the final orders that BOLI issued in civil rights cases from March 2006 to September 2007. BOLI final orders issued since 1996 can be accessed through the BOLI website, www.oregon.gov/boli. The full text of all BOLI final orders is available for purchase in 28 volumes plus a digest with regular supplements. The set is also available at most local law libraries.

***Gordy's Truck Stop, LLC*, 28 BOLI 200 (2007)**

The complainant, who worked as a prep/line cook at the respondent's La Pine, Oregon, truck stop and restaurant, alleged that the respondent, through its owner, discriminated against her by directing unwelcome physical and verbal sexual advances toward her because of her gender. She alleged that the owner's actions created a hostile, intimidating work environment and compelled her to resign due to intolerable working conditions.

In particular, the complainant alleged that while she was standing on the sidewalk outside the restaurant during her break, the owner approached her, squeezed her left breast, and told her, "I'm feeling you up." The complainant reported the incident to the Deschutes County sheriff's office and made a complaint against the owner, who admitted he had touched her but denied any inappropriate contact or motivation.

The commissioner found that the owner's testimony on key issues was not credible, as he had provided conflicting accounts of the incident. Other witnesses testified that the owner made a lewd gesture toward a female employee, that he would squeeze a supervisor's arm and tell her he would "rape her if [she] didn't take his money for a meal," that he made an inappropriate reference to an employee's breasts, and that he made female employees uncomfortable by hugging them when they went on "garbage runs" with him.

The commissioner found that the respondent subjected the complainant to offensive and unwelcome sexual conduct that created a hostile and intimidating work environment.

The commissioner found that the respondent subjected the complainant to offensive and unwelcome sexual conduct that created a hostile and intimidating work environment, in violation of ORS 659A.030(1)(b); that the respondent's owner intentionally created intolerable working conditions because of the complainant's sex; and that her resignation was a constructive discharge, in violation of ORS 659A.030(1)(a). The commissioner concluded that the respondent was liable for the owner's unlawful conduct and awarded the complainant $10,200 in back wages and $20,000 in mental suffering damages.

Trees, Inc., 28 BOLI 218 (2007)

The complainant, a foreman for a tree trimmer bucket crew, alleged that he was the victim of the respondent's unlawful employment practices in that the respondent retaliated by demoting him from his management position shortly after he reported a workplace safety violation.

The complainant served as a union shop steward and received reports from two journeymen tree trimmers that another foreman had ordered a flagger, who was not certified or qualified, to climb and trim a tree that was within ten feet of a primary power line. The complainant contacted the union hall about these reports and also told his supervisor that he was conducting a safety investigation at the union's behest.

The supervisor was also the husband of the foreman who allegedly gave the order in violation of safety rules. He became defensive and told the complainant that his wife "was not that stupid" and that "everyone breaks the rules." A few days later, the supervisor approached the complainant and told him he was being demoted to tree trimmer but refused to tell him why he was being demoted.

The commissioner found that the complainant's testimony at the hearing was credible, but that the supervisor's testimony was internally inconsistent and not substantiated by credible evidence. For example, the supervisor had claimed that the complainant was demoted because of excessive unexcused absences, but later admitted that there were fewer absences than he had indicated.

The commissioner found that the respondent demoted the complainant because he reported and opposed a workplace safety hazard.

The commissioner found that the respondent demoted the complainant because he reported and opposed a workplace safety hazard, in violation of ORS 654.062(5), and awarded the complainant $3,007 in lost wages and $30,000 in mental suffering damages.

WinCo Foods, Inc., 28 BOLI 259 (2007)

The complainant, who worked as a product auditor at the respondent's

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BOLI FINAL ORDERS

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food distribution center in Woodburn, alleged that the respondent unlawfully denied her family leave in violation of ORS 659A.183, discriminated against her in terms and conditions of employment, and retaliated against her by terminating her for invoking or using family leave provisions, in violation of ORS 659A.183 and OAR 839-009-0230(2).

After she suffered a head injury in a motor vehicle accident, the complainant began having migraine headaches and sought treatment for symptoms including nausea and sensitivity to light and sound. Her symptoms were aggravated by loud noise and bright lights in the warehouse, and she began missing work intermittently and asked the respondent to designate her absences due to migraines as leave under the Oregon Family Leave Act (OFLA).

The complainant provided a medical certification confirming her need for intermittent leave, and the respondent designated her leave as qualifying under OFLA and the federal Family and Medical Leave Act (FMLA). In its designation letter, the respondent informed the complainant that she would be required to submit a doctor's note for each subsequent absence related to her condition, consistent with the respondent's sick leave policy.

The complainant was subsequently disciplined for tardiness and changing her shift start times without approval, unrelated to her migraine headaches. Each time the complainant missed work related to her migraine condition, the respondent required her to provide a new doctor's note confirming the need for leave. The complainant objected to these requests, contending that an employer may make requests for updated medical certification only once every 30 days. The commissioner found that the requests were permissible, in that OAR 839-009-0260(6) provides exceptions to the 30-day rule when circumstances have changed significantly or when the employer receives information that casts doubt on the employee's stated reason for the absence.

The complainant admitted to an assistant warehouse coordinator that she was at a ballgame while on sick leave and was worried that someone may have seen her there. Another employee reported seeing the complainant at the Oregon coast while she was on sick leave. The respondent counseled the complainant and reminded her that its policy required her to stay home while on sick leave. The respondent subsequently conducted video surveillance on various days the complainant called in sick and found that she was shopping, going to the bank, eating at fast food restaurants, and picking up her children from school. The complainant subsequently denied leaving her house on the days in question. The respondent terminated the complainant for her failure to follow the sick leave policy and dishonesty about her activities while on sick leave.

Accordingly, the commissioner dismissed the complainant's discrimination charge.

The commissioner found that the agency failed to establish that the complainant was terminated for invoking or using OFLA leave and that there was insufficient evidence to overcome the respondent's legitimate, nondiscriminatory reason for the termination. Accordingly, the commissioner dismissed the complainant's discrimination charge. ✦

Dan Grinfas, a member of the Labor and Employment Group at Stoel Rives LLP, previously served as program coordinator with BOLI's Technical Assistance Unit.

RACE-CONSCIOUS DECISION-MAKING

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institutions, need to be cognizant of their mission and the foundation justifying any plans that are designed to accomplish race-conscious objectives. Courts will require evidence, periodic review, and explicit plans that identify the *necessity* of a race-conscious program. While the door may remain ajar, as Justice Kennedy's concurrence would suggest, the Court will continue to review these plans, and plans like them, with an exacting and suspicious eye. ✦

Ryan J. Hagemann is the interim deputy chancellor for legal affairs of the Oregon University System. The opinions expressed here are his own and do not necessarily reflect the opinions of the Oregon University System. This is not legal advice.

Endnotes

1. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S. Ct. 1842, 90 L. Ed. 2d 260 (1986); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989); and *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 110 S. Ct. 2997, 111 L. Ed. 2d 445 (1990). *See also* Ryan James Hagemann, "Diversity as a Compelling State Interest in Higher Education: Does *Bakke* Survive Affirmative Action Jurisprudence?", *Oregon Law Review*, 79 Or. L. Rev. 493 (2000).

2. Arthur L. Coleman, Scott R. Palmer, and Steven Y. Winnick, *Not Black and White: Making Sense of the United States Supreme Court Decisions Regarding Race-Conscious Student Assignment Plans*, www.collegeboard.com/prod_downloads/prof/not-black-white-collegeboard.pdf (2007).

3. John Przypyszny and Kate Tromble, "Impact of *Parents Involved in Community Schools v. Seattle School District No. 1* and *Meredith v. Jefferson County Board of Education* on Affirmative Action in Higher Education," www.drinkerbiddle.com/files/Publication/0aaee6a3-2b6a-4e80-97a3-01c3dd32ba24/Presentation/PublicationAttachment/6f3795f1-fbd7-4e71-8fc8-04a43ee1eb35/ACE_diversity_paper.pdf (2007).

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improperly denied constitutionally guaranteed procedures under the Eighth and Fourteenth Amendments to prove his mental incompetence. Instead, he was found competent without a hearing or opportunity to present his own expert testimony, and the Fifth Circuit applied an improperly restrictive test to his claim of incompetence.

***Parents Involved in Community Schools v. Seattle School District No. 1*, No. 05-908 (June 28, 2007)**

In this case from the Ninth Circuit, the Supreme Court held 5–4 that the Seattle School District's use of racial categories to assign students to public schools violated the Fourteenth Amendment equal protection clause. The Court ruled that the school district did not have a compelling state interest to assign students in this manner since the schools were not under a desegregation decree. [Please see page 1.]

***Tennessee Secondary School Athletic Association v. Brentwood Academy*, No. 06-427 (June 21, 2007)**

The Court unanimously held that an athletic association's rule prohibiting high school coaches from recruiting middle school students does not violate the First Amendment and that the imposition of sanctions for breaking the rule was preceded by a fair hearing under Fourteenth Amendment due process law. The Court stated that the school's First Amendment rights were limited when it voluntarily became a member of the athletic association, and that the recruiting rule was legitimately aimed at protecting impressionable students.

Certiorari Granted

***Boumediene v. Bush*, No. 06-1195 (June 29, 2007)**
***Al Odah v. United States*, No. 06-1196 (June 29, 2007)**

The Court agreed to hear these consolidated cases from the D.C. Circuit regarding whether non-American detainees held as enemy combatants at Guantanamo Bay Naval Base in Cuba have a constitutional right to use the United States federal courts to challenge their confinement. The plaintiffs filed petitions for writs of habeas corpus, alleging violations of the Constitution, federal statutes, common law, foreign treaties, and other laws. The lower court ruled that under the Military Commissions Act of 2006, the federal courts had no jurisdiction over activities at Guantanamo Bay. The Court had twice before denied petitions for writs of certiori for these plaintiffs.

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***Mendelsohn v. Sprint*, No. 06-1221 (June 11, 2007)**

The Court agreed to hear a case from the Tenth Circuit regarding whether a plaintiff who has alleged company-wide age discrimination may introduce evidence of discriminatory acts directed against other employees, even though those employees had different supervisors. The company argued that such evidence is not relevant. The court of appeals held that excluding the evidence was reversible error and had remanded the case to the district court for a new trial. ✦

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