

THE NEW ERA OF EXECUTIVE ACTION

SUPPORTING VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY IN EDUCATION

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Background

In 1961, President John F. Kennedy issued Executive Order 1092, which coined the term “affirmative action” by mandating that projects financed with federal funds take affirmative action to ensure that hiring and employment practices are free of racial biases. The concept was taken up as part of an effort to provide improved opportunities to minorities for accessing the full spectrum of the public good, including our system of education.

To this day, however, racial minorities are still underrepresented in higher education—and our system is actually becoming increasingly stratified.

While the nation has attempted to improve access to quality public education and particularly address the underrepresentation of minorities in higher education, the U.S. Supreme Court, has actually placed increasing restrictions on the use of race-based affirmative action as a remedy. As seen in the following court cases, the application of affirmative action in primary, secondary, and higher education has recently become increasingly difficult.

- *Grutter v. Bollinger*: On June 23, 2003, the Supreme Court upheld University of Michigan Law School’s consideration of race in admissions because the school’s affirmative action policy was narrowly tailored and conducted highly individualized review of each applicant. However, in a companion case, *Gratz v. Bollinger*, the Court also ruled that University of Michigan’s undergraduate admissions system, which awarded a standard numerical boost to all black, Hispanic, and American-Indian applicants, was mechanical and thus, unconstitutional.

This brief is part of The Century Foundation initiative, The New Era of Executive Action, which is available online at <https://tcf.org/atavist.com/executive-action>.

- *Parents Involved in Community Schools (PICS) v. Seattle District No. 1*: On June 28, 2007, the Supreme Court found the Seattle School District’s plan, where race was used as the second most important tiebreaker to decide which students would be admitted to oversubscribed schools, to be unconstitutional.
- *Fisher v. University of Texas*: On June 24, 2013, the Supreme Court made clear that universities could use race as a factor in admissions, but only after they had proven that “available, workable race-neutral alternatives do not suffice,” to produce racial diversity. In addition, the Court held, for the first time, that universities would not receive deference on the question of whether the means employed to produce racial diversity are narrowly tailored.
- *Schuette v. Coalition to Defend Affirmative Action*: On April 22, 2014, the Supreme Court upheld a state constitutional amendment that bans public universities and colleges in Michigan from implementing a race-sensitive policy.

With increasingly tighter circles being drawn around the practice of race-based affirmative action in education, schools have required guidance on what they could and could not do in achieving diversity.

Following the 2007 *Parents Involved* decision, the George W. Bush administration issued guidance about how and when educational institutions could use race in their decision making. The Bush guidance, however, was criticized by civil rights groups as being overly restrictive.

Action

On December 2, 2011, the Obama administration’s Department of Justice and Department of Education replaced the Bush administration guidance with two documents detailing the options available to educational institutions seeking to promote diversity yet remain in compliance with the three Supreme Court decisions, *Grutter v. Bollinger*, *Gratz v. Bollinger*, and *PICS v. Seattle*:

- Guidance on the Voluntary Use of Race to Achieve Diversity in Postsecondary Education
- Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools

What It Does

By issuing the two guidances, the administration is showing its support for diversity in educational institutions and making the issue a priority in the face of court decisions restricting race-based affirmative action. The guidances lay out the legal standards of the Supreme Court decisions as interpreted by the administration, but do not shield institutions that follow them from legal disputes.

Postsecondary Education. The guidance on using race in primary and secondary education outlines key steps for implementing plans to achieve diversity, which include considering whether there

are race-neutral approaches—such as giving a leg up to economically disadvantaged students of all races—that will produce sufficient levels of racial and ethnic diversity. When there are no such alternatives available, institutions are permitted to take into account an individual student’s race among other factors to achieve diversity, but must evaluate each student as an individual, making sure that race is not the defining characteristic. An institution may only consider the race of individual students if it does so in a manner that is narrowly tailored to meet a compelling interest.

The guidance then goes on to outline various approaches to diversity, including the following:

- *Admissions.* An institution could consider race-neutral options, such as a student’s socioeconomic status, first-generation college status, or geographic residency.
- *Pipeline Programs.* An institution could partner with school districts or other programs to introduce potential applicants to the institution, such as high schools with school-wide socioeconomic characteristics, community colleges, or Historically Black Colleges and Universities (HBCU).
- *Recruitment and Outreach.* An institution’s recruitment and outreach procedures could target school districts that are underrepresented geographically or that have students that are predominantly from low-income households.
- *Mentoring, Tutoring, Retention, and Support Programs.* In order to not only enroll, but retain a diverse group of students, institutions could provide academic support to students who are at risk of not completing their programs.

Elementary and Secondary Education. The guidance on using race in postsecondary education admissions outlines key steps for implementing plans to achieve diversity, which fall in line with the sister guidance above. The guidance then goes on to outline various approaches to diversity, including the following:

- *School and Program Siting Decision.* A school district might site a new school at a location that would enroll a socioeconomically and racially diverse student population.
- *Decisions about Grade Realignment and Feeder Patterns.* A school district might choose to feed underperforming elementary schools into higher performing middle schools if this also helps to achieve racial diversity or avoid racial isolation.
- *School Zoning Decisions.* A school district could create attendance zones that consider the relative racial composition of areas in combination with the average household income and educational levels of parents in those areas.

- *Open and Choice Enrollment Decisions.* A school district in which students of different races are concentrated in different attendance zones could implement a district-wide lottery system that allows parents to identify and rank a certain number of schools and then randomly assigns students based on the parents' choices.
- *Admission to Competitive Schools and Programs.* A school district could identify race-neutral criteria for admission to a school (for example, minimum academic qualifications and talent in art) and then conduct a lottery for all qualified applicants rather than selecting only those students with the highest scores under the admission criteria, if doing so would help to achieve racial diversity or avoid racial isolation.
- *Inter- and Intra-District Transfers.* A school district might categorize neighborhoods based on average household income and allow a student from a geographic area with a lower than average household income to transfer out of his or her assigned school and into a school that draws from a geographic area with a higher than average household income.

Status

Following the 2013 U.S. Supreme Court decision in *Fisher v. University of Texas*, the Department of Education and the Department of Justice issued a joint letter suggesting that the earlier 2011 guidance remained in effect.

Likewise, on May 6, 2014, the administration released a letter stating that the *Schuetz v. Coalition to Defend Affirmative Action* still left the guidances intact.

Impact

The guidance to school districts and colleges replaced earlier Bush administration guidance, which was seen by critics as overly restrictive in its prohibition on the use of race to promote diversity. While the new guidance leans toward a more liberal application, in the end it is still simply a guidance, and schools that employ race-based affirmative action are not protected against legal action.

Response

The Poverty Race and Research Action Council (PRRAC), in their 2011–12 annual report, stated about the guidance on elementary and secondary schools:

“This document, which the Coalition had been demanding for over 2 years, instructs states and local school districts about how they can legally achieve school integration. The Guidance recognizes that racial diversity and reduction of racial isolation are compelling government interests, and endorses “race conscious” measures to promote school diversity . . . importantly, the Guidance also clarifies that race of individual students can still be taken into account to achieve diversity in situations where “race-neutral and generalized race-based approaches would be unworkable.”

Robert Clegg, the president of the Center for Equal Opportunity (CEO), stated in an article:

“The fact is that this guidance is designed not to help schools follow the law, but to push them to adopt dubious race-based policies that the Supreme Court has warned against, and that have prompted lawsuits in the past, but that the Obama administration and its political allies stubbornly support.”