

THE LEGACY OF *GRUTTER*: HOW THE *MEREDITH* AND
PICS COURTS WRONGLY EXTENDED THE
“EDUCATIONAL BENEFITS” EXCEPTION TO THE EQUAL
PROTECTION CLAUSE IN PUBLIC HIGHER EDUCATION

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*Racism claims that the content of a man's mind
(not his cognitive apparatus, but its content) is inherited;
that a man's convictions, values and character are determined
before he is born, by physical factors beyond his control.
This is the caveman's version of the doctrine of innate ideas—or
of inherited knowledge—which has been thoroughly
refuted by philosophy and science.
Racism is a doctrine of, by and for brutes.
It is a barnyard or stock-farm version of collectivism,
appropriate to a mentality that differentiates
between various breeds of animals,
but not between animals and men.¹*

I. INTRODUCTION

In 2003, the Supreme Court shook the Equal Protection landscape when it decided *Grutter v. Bollinger*.² In a 5–4 decision, the Supreme Court agreed with a public law school that the achievement of a diverse student body constituted a compelling state interest justifying its race-conscious admissions policy.³ The fallout from *Grutter* has been predictable.

In three separate cases challenging race-based assignment policies in K–12 public schools, the First,⁴ Sixth,⁵ and Ninth Circuit Courts of Appeals⁶ relied on *Grutter* to uphold those policies on the ground that school districts too have a compelling state interest in achieving racially balanced classrooms. The Supreme Court has accepted review of two of those cases for its 2006–2007 term.⁷ Legal scholarship has been

1. AYN RAND, *Racism*, in THE VIRTUE OF SELFISHNESS 172, 172 (1964).

2. 539 U.S. 306 (2003).

3. *Id.* at 343–44.

4. *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1 (1st Cir. 2005), *cert. denied sub nom. Comfort ex rel. Neumyer v. Lynn Sch. Comm.*, 126 S.Ct. 798 (2005).

5. *McFarland ex rel. McFarland v. Jefferson County Pub. Sch.*, 416 F.3d 513 (6th Cir. 2005) (per curiam), *cert. granted sub nom. Meredith ex rel. McDonald v. Jefferson County Bd. of Educ.*, 126 S.Ct. 2351 (2006). Note that although the citation is to *McFarland*, this Article—unless specifically referring to the lower court decisions—will refer to the case as *Meredith*.

6. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1 (PICS)*, 426 F.3d 1162 (9th Cir. 2005), *cert. granted*, 126 S.Ct. 2351 (2006).

7. To date, there have been only two other published decisions involving *Grutter's* application to government activity outside the realm of education in general. In *Petit v. City of Chicago*, 352 F.3d 1111 (7th Cir. 2003), *cert. denied*, 541 U.S. 1074 (2004), the

supportive of an extension of *Grutter* to K–12 public education.⁸ This Article explains why the federal circuit courts were wrong to rely on *Grutter* and extend it to school assignment policies in K–12 public education.

Part I recaps the Court’s decision in *Grutter*. Part II considers the three circuit court decisions that have used *Grutter* to uphold governmental race-based policies in K–12 public education, two of which have been accepted by the Supreme Court for review. Part III exposes the flaws in these decisions, addresses the principal arguments made in favor of *Grutter*’s extension to K–12 public education, and argues that *Grutter* in fact provides no justification for the race-based policies at issue in those cases. The Article concludes by urging the Supreme Court to reaffirm *Grutter*’s limited application and the continued vitality of the Equal Protection Clause’s ban on governmental race discrimination.

II. *GRUTTER V. BOLLINGER* CARVES OUT AN “EDUCATIONAL BENEFITS” EXCEPTION TO THE EQUAL PROTECTION CLAUSE

Until its 2003 decision in *Grutter v. Bollinger*, the Supreme Court recognized only two “pressing public necessity” or “compelling state interest” exceptions to the guarantee of racial equality under the Fourteenth Amendment. First, government

Seventh Circuit held that a policy that racially balanced the City of Chicago’s police department is constitutional under *Grutter*. More recently, however, the Third Circuit Court of Appeals held unconstitutional the City of Newark’s policy of racially balancing its fire departments and tours to achieve the alleged benefits of “diversity.” *Lomack v. City of Newark*, No. 05-4126, 2006 WL 2662848 (3d Cir. Sept. 18, 2006). While this Article focuses exclusively on *Grutter*’s application to K–12 public education, a Supreme Court decision in *Meredith* and in *PICS* that limits *Grutter* to public higher education would have an impact on race-balancing policies in all areas of government activity, including policing and firefighting.

8. See, e.g., Lia B. Epperson, *True Integration: Advancing Brown’s Goal of Educational Equity in the Wake of Grutter*, 67 U. PITT. L. REV. 175, 216 (2005) (“The Court [in *Grutter*] found that the use of race to further student body diversity served a compelling government interest. School districts’ voluntary use of race-conscious plans also serves this compelling interest.”); James Nial Robinson II, *Trying to Push a Square Peg Through a Round Hole: Why the Higher Education Style of Strict Scrutiny Review Does Not Fit When Courts Consider K–12 Admissions Programs*, 2004 BYU EDUC. & L.J. 51, 53 (2004) (arguing that “courts should employ a relaxed form of scrutiny when reviewing K–12 admissions programs that consider race as part of its assessment of candidates,” and that “courts should give broad deference to school districts and allow them to consider race as they seek to reduce de facto segregation and racial isolation, and further promote integration”); Lisa J. Holmes, Comment, *After Grutter: Ensuring Diversity in K–12 Schools*, 52 UCLA L. REV. 563 (2004) (arguing that extending *Grutter*’s diversity rationale to primary and secondary schools is justified based on documented academic and societal benefits of diversity).

could use racial classifications to respond to a public emergency or security issue.⁹ Second, government could use racial classifications to remedy identified past discrimination for which it was specifically responsible.¹⁰ In *Grutter*, the Court recognized a third pressing public necessity justifying governmental race classifications: the “educational benefits” flowing from a diverse student body in public higher education.¹¹

A. The District Court Holds That The University of Michigan Law School’s Race-Conscious Admissions Policy Violates the Equal Protection Clause

The University of Michigan Law School’s admissions policy aimed to achieve a diverse student body. While the Law School made most admissions offers to applicants with high LSAT scores and undergraduate grades, the policy allowed the admission of students with comparatively lower scores and grades in order to “help achieve that diversity which has the potential to enrich everyone’s education and thus make a law school class stronger than the sum of its parts.”¹² The policy professed a special “commitment” to one particular type of diversity: “Racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African Americans, Hispanics, and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers.”¹³

According to the Law School, these ethnic minorities are “particularly likely to have experiences and perspectives of special importance to [the school’s] mission.”¹⁴ As a result, the Law School’s goal with respect to racial diversity was to achieve a “critical mass” of African Americans, Hispanics, and Native Americans in order to ensure “their ability to make unique contributions to the character of the Law School.”¹⁵ There was no evidence presented that the Law School had a goal of

9. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

10. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 504 (1989).

11. *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003).

12. *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 827 (E.D. Mich. 2001), *rev’d*, 288 F.3d 732 (6th Cir. 2002), *aff’d*, 539 U.S. 306.

13. *Id.* at 827–28.

14. *Id.* at 852 n.41 (citing record).

15. *Id.* at 828.

obtaining a critical mass of any racial minority group other than African Americans, Hispanics, and Native Americans.

A white student who was denied admission to the Law School sued in federal court to challenge the admissions policy on the ground that it violated the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.¹⁶ The Law School defended its race-based admissions policy on the ground that it had a compelling state interest in obtaining the educational benefits of a racially diverse student body.¹⁷ For example, the Law School dean testified that racial diversity in the student body was “an important part of one’s education at the law school because exposure to students of various races and perspectives helps students to understand and be sympathetic to differing points of view.”¹⁸ The district court struck down the policy as unconstitutional.¹⁹

The district court held that the educational benefits of a diverse law school class were not a compelling state interest that could justify the Law School’s use of race in admissions.²⁰ Regardless, the Law School’s admissions policy was not narrowly tailored to serve the goal of diversity.²¹ The court declared that the Law School’s use of race in admissions violated the Equal Protection Clause of the Fourteenth Amendment and enjoined the Law School from considering race in admissions.²²

B. In an En Banc Decision Steeped in Rancor and Controversy, the Sixth Circuit Reverses

In a 5–4 en banc decision, the Sixth Circuit Court of Appeals reversed the district court’s decision.²³ The majority held that the Law School had a compelling state interest in achieving a diverse student body.²⁴ It further held that the Law School’s admissions policy was narrowly tailored to achieve that end.²⁵

16. *Id.* at 823–24.

17. *Id.* at 843.

18. *Id.* at 833–34.

19. *Id.* at 872.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Grutter v. Bollinger*, 288 F.3d 732, 752 (6th Cir. 2002), *aff’d*, 539 U.S. 306.

24. *Id.* at 742.

25. *Id.* at 744–52.

Thus, the policy was, in the majority's view, constitutional under the Equal Protection Clause.²⁶

The Sixth Circuit's decision was steeped in rancor and controversy. In his dissent, Circuit Judge Danny J. Boggs revealed the sordid details of how the panel's makeup had been manipulated in order to ensure a victory for the Law School.²⁷ According to Judge Boggs, Chief Judge Boyce Martin—the Democrat-appointed judge who authored the majority opinion—had placed himself on the panel to hear the case in violation of the circuit's rule requiring random assignment.²⁸ Judge Boggs also alleged that the chief judge had withheld from his fellow judges the plaintiff's petition seeking initial en banc review for five months—time enough for two Republican-appointed judges to go from active to senior status, thereby disqualifying them from participation in the case.²⁹

Some months after the decision issued, a judicial watchdog group filed a complaint in the Sixth Circuit, alleging judicial misconduct against the chief judge.³⁰ The court investigated the charges, found that the chief judge had in fact violated operating procedures, but concluded that it had taken steps to prevent abuse in the future.³¹ Evidence unearthed after the court's investigation revealed that the chief judge had not been acting alone: According to leaked internal memos, Senate Democratic staffers had collaborated with the chief judge “to ensure that a liberal majority sat on the federal appeals court that heard the Michigan affirmative action cases”³² There were calls for the chief judge's impeachment, and congressional investigations were initiated to probe the charges of judicial misconduct.³³ In the end, however, the chief judge retained his seat on the court and the decision upholding the Law School's admissions policy proceeded to the Supreme Court.

26. *Id.* at 752.

27. *Id.* at 810–14 (Boggs, J., dissenting).

28. *Id.*

29. *Id.*

30. See Michael I. Krauss, Commentary, *Loading the Dice for the Ruling?*, WASH. TIMES, June 17, 2003, at A17; Malia Rulon, *Appeals Court Under House Review*, CINCINNATI POST, Aug. 13, 2003, at A3.

31. *Id.*

32. Charles Hurt, *'The Case Was Fixed'; Democratic Staff Memos Show Efforts in Michigan Affirmative-Action Decisions*, WASH. TIMES, Nov. 18, 2003, at A1.

33. Krauss, *supra* note 30; Rulon, *supra* note 30.

C. The Supreme Court Upholds the Law School's Discriminatory Admissions Policy

The Court characterized the narrow question before it as follows: “[T]he law school asks us to recognize, in the context of higher education, a compelling state interest in student body diversity.”³⁴ The Court observed that, not since *Regents of University of California v. Bakke*,³⁵ had it “directly addressed the use of race in the context of public higher education.”³⁶ It further observed that “[s]ince *Bakke*, we have had no occasion to define the contours of the narrow-tailoring inquiry with respect to race-conscious university admissions programs. That inquiry must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education.”³⁷

In a 5–4 opinion authored by Justice Sandra Day O’Connor, the Court upheld the Law School’s race-based admissions policy.³⁸ It concluded that the Law School had a compelling state interest in procuring the educational benefits flowing from a diverse student body, and that the policy was narrowly tailored to serve that interest.³⁹ The Court expressly deferred to the Law School’s educational judgment that student body diversity was essential to its educational mission:

Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School’s proper institutional mission, and that “good faith” on the part of a university is “presumed” absent a “showing to the contrary.”⁴⁰

34. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

35. 438 U.S. 265 (1978) (striking down an admissions policy of racial quotas at the University of California Medical School at Davis as unconstitutional under the Equal Protection Clause).

36. *Grutter*, 539 U.S. at 328.

37. *Id.* at 333–34.

38. *Id.* at 343–44. The Supreme Court also decided *Gratz v. Bollinger*, 539 U.S. 244 (2003), at the same time as *Grutter*. *Gratz* also involved a constitutional challenge to the University of Michigan’s race-based admissions policy for the College of Literature, Science, and the Arts. *Id.* at 249–50. Applying the legal framework set out in *Grutter*, the Court held that the policy was not narrowly tailored to achieving the university’s interest in the educational benefits. *Id.* at 270.

39. *Grutter*, 539 U.S. at 343–44.

40. *Id.* (quoting *Bakke*, 438 U.S. at 318–19).

The Court agreed that the educational benefits of diversity include the promotion of “cross-racial understanding,” the reduction of “racial stereotypes,” and the enhancement of classroom discussions by making them “livelier, more spirited, and simply more enlightening and interesting”⁴¹

The Court’s deference to the Law School was based on First Amendment considerations and the “special niche” that public institutions of higher learning occupy.⁴² “[G]iven the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment,” public universities and colleges enjoy a First Amendment right to “educational autonomy,” including the freedom to select their own student bodies.⁴³ For the Court, obtaining the educational benefits flowing from a racially diverse student body was compelling because the University of Michigan Law School said so.⁴⁴ As the Court explained, “[t]he Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer.”⁴⁵

Having created a new compelling interest justifying race discrimination, the Court proceeded to consider whether the Law School’s admissions policy was narrowly tailored to achieve that end. The Court articulated a four-part narrow-tailoring analysis: First, a race-based policy cannot institutionalize a quota system or otherwise insulate one category of applicants from competition solely on the basis of race.⁴⁶ Second, the government entity must consider whether workable, race-neutral alternatives exist.⁴⁷ Third, the policy must not unduly harm

41. *Id.* at 330 (citations omitted).

42. *Id.* at 329.

43. *Id.*

44. *Id.*

45. *Id.* at 328. Despite the Court’s seemingly boundless deference to the Law School, it made an important qualification. The Court contrasted the Law School’s interest in obtaining the “educational benefits” of “exposure to widely diverse people, cultures, ideas, and viewpoints,” *id.* at 330, and an interest in simply assuring “within its student body some specified percentage of a particular group merely because of its race or ethnic origin,” *id.* at 329 (quoting *Bakke*, 438 U.S. at 307). A race-based policy justified on the latter interest would amount to nothing more than “racial balancing” and be “patently unconstitutional.” *Id.* at 330.

46. *Id.* at 334–39.

47. *Id.* at 339–40.

members of any racial group.⁴⁸ And fourth, the use of race must be limited in time.⁴⁹

The Court was no less deferential on the question of whether the Law School's policy was narrowly tailored to achieve the benefits of a diverse student body. The Court concluded with little analysis that the policy was "flexible" enough to allow for individual consideration of each applicant's file and to avoid making race a defining feature of admissions decisions.⁵⁰ The Court was satisfied that the Law School had considered and properly rejected race-neutral alternatives.⁵¹ It did not believe the policy unduly harmed minority applicants.⁵² And, in an ultimate show of deference to the Law School, it agreed to "take the Law School at its word that it would 'like nothing better than to find a race-neutral admissions formula' and will terminate its race-conscious admissions program as soon as practicable."⁵³

III. *GRUTTER'S* LEGACY: THREE FEDERAL COURTS OK NON-REMEDIAL RACIAL DISCRIMINATION IN K-12 PUBLIC SCHOOLS

Grutter's educational benefits exception to the Equal Protection Clause spawned a firestorm of praise and criticism. Some lauded the decision as the dawn of a new civil rights era.⁵⁴ A few criticized the decision.⁵⁵ One legal scholar argued that it may be morally permissible to "distort students' grades and reference letters based on race in order to offset the discrimination at UM and like institutions either by giving minority students less credit than they deserve, giving non-

48. *Id.* at 341.

49. *Id.* at 341-42.

50. *Id.* at 337.

51. *Id.* at 340.

52. *Id.* at 341.

53. *Id.* at 343 (quoting Brief for Respondents Bollinger et al. at 34, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241)).

54. See, e.g., Elizabeth Auster & Stephen Koff, *Divided Supreme Court Upholds Affirmative Action - With Limits Justices Issue a Mixed Verdict in Two U. of Michigan Cases*, CLEV. PLAIN DEALER, June 24, 2003, at A1 ("Civil-rights leaders and higher-education officials hailed the rulings as a major victory that will keep affirmative action alive in principle, even if its use is more limited in practice.").

55. See, e.g., Martin D. Carcieri, *Grutter v. Bollinger and Civil Disobedience*, 31 U. DAYTON L. REV. 345 (2006) (impugning the legitimacy of *Grutter*); Gail Heriot, *Thoughts on Grutter v. Bollinger and Gratz v. Bollinger as Law and as Practical Politics*, 36 LOY. U. CHI. L.J. 137, 138 (2004) (bemoaning the *Grutter* Court's failure to seize "an opportunity to ease the educational establishment out of a tragically misguided policy that just happened to be unconstitutional as well").

minority students more credit than they deserve, or both[.]”⁵⁶ Amidst the emotional reaction to *Grutter*, one commentary stoically (and perhaps correctly) observed that the decision was completely unsurprising, given that it “echoed the opinions of Congress, the states, big business, academics, newspapers, and, to a lesser extent, the Bush administration.”⁵⁷

Public reaction to the decision aside, the legal implications of *Grutter* outside the context of public higher education provoked much debate.⁵⁸ In particular, the lower federal courts have been faced with the question of whether *Grutter*’s educational benefits exception to equal treatment has broader application than in the university classroom. Relying on *Grutter*’s educational benefits exception to the Equal Protection Clause, the First, Sixth, and Ninth Circuits held that race-based student assignment policies in K–12 public education passed strict-scrutiny muster in *Comfort v. Lynn School Committee*,⁵⁹ *McFarland ex rel. McFarland v. Jefferson County Public Schools*,⁶⁰ and *Parents Involved in Community Schools v. Seattle School District No. 1 (PICS)*,⁶¹ respectively.

Each of these decisions made its way up to the Supreme Court through petitions for certiorari.⁶² Under the “rule of four,” at least four Justices must vote to grant the petition for the Court to grant review.⁶³ The Roberts Court denied the *Comfort* petition on December 5, 2005, at a time when Justice O’Connor (author of the *Grutter* decision) was still on the Court.⁶⁴ The petition likely mustered the support of only three justices—Chief Justice Roberts, and Justices Scalia and Thomas—which would have been insufficient to grant the petition. By the time the Court

56. Carcieri, *supra* note 55, at 365.

57. Neal Devins, Essay, *Explaining Grutter v. Bollinger*, 152 U. PA. L. REV. 347, 347 (2003).

58. See, e.g., Stephen Henderson, *Diversity Ruling Ripples Beyond Education: Supreme Court Decision on Michigan Affirmative Action Raises New Debates*, ST. PAUL PIONEER PRESS, Dec. 28, 2003, at A20.

59. 418 F.3d 1, 17 (1st Cir. 2005), *cert. denied sub nom. Comfort ex rel. Neumyer v. Lynn Sch. Comm.*, 126 S.Ct. 798 (2005).

60. 416 F.3d 513, 514 (6th Cir. 2005) (per curiam), *cert. granted sub nom. Meredith ex rel. McDonald v. Jefferson County Bd. of Educ.*, 126 S.Ct. 2351 (2006).

61. 426 F.3d 1162, 1166 (9th Cir. 2005), *cert. granted*, 126 S.Ct. 2351 (2006).

62. *Meredith*, 126 S.Ct. 2351; *PICS*, 126 S.Ct. 2351; *Comfort*, 126 S.Ct. 798.

63. Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657, 685 n.146 (2005) (“The ‘rule of four’ is not mandated by statute; it is merely the Supreme Court’s custom or practice.” (citations omitted)).

64. *Comfort*, 126 S.Ct. at 798.

reviewed and granted the *Meredith* and *PICS* petitions on June 5, 2006,⁶⁵ Justice Alito had replaced Justice O'Connor.⁶⁶ It is likely that Justice Alito supplied the required fourth vote to hear the controversial cases.

A. *Comfort ex rel. Neumyer v. Lynn School Committee*

Comfort involved an Equal Protection challenge to the student transfer plan of the public schools of Lynn, Massachusetts.⁶⁷ Under the plan, the school district assigned a student to his or her neighborhood school.⁶⁸ A student who wanted to go to another school could apply for a transfer, but school district approval depended on the student's race and whether the transfer would impermissibly upset the racial balance at the transferor and transferee schools.⁶⁹ The plan advanced the school district's alleged interest in "disarming racial stereotypes, increasing racial tolerance, and preparing students to live and work in an increasingly multi-racial society."⁷⁰ Parents of students who had been denied a transfer on the basis of race sued in federal court to enjoin the plan.⁷¹ The district court upheld the plan, but a panel of the First Circuit Court of Appeals reversed.⁷² The court then granted en banc review and affirmed the decision of the district court.⁷³

Like the majority in *Grutter*, the *Comfort* court deferred to the school district's judgment that racially diverse student bodies produced educational benefits—"disarming racial stereotypes, increasing racial tolerance, and preparing students to live and work in an increasingly multi-racial society"—and that such benefits were essential to its mission.⁷⁴ The court held that the school district's interests bore "a strong familial resemblance to those that the *Grutter* Court found compelling"; therefore, the

65. *Meredith*, 126 S.Ct. at 2351; *PICS*, 126 S.Ct. at 2351.

66. 152 CONG. REC. S385 (daily ed. Jan. 31, 2006).

67. *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 5–6 (1st Cir. 2005), *cert. denied sub nom. Comfort ex rel. Neumyer v. Lynn Sch. Comm.*, 126 S.Ct. 798 (2005).

68. *Id.* at 7.

69. *Id.* at 8.

70. *Id.* at 14.

71. *Id.* at 5–6.

72. *Id.* at 9–10.

73. *Id.* at 6.

74. *Id.* at 14–15.

court concluded, the school district's interests were themselves "compelling."⁷⁵

Next, the court concluded that the plan was narrowly tailored to the school district's stated interests.⁷⁶ However, the court jettisoned the narrow-tailoring analysis in *Grutter*. Unlike the policy in *Grutter*, the school district's transfer plan did not consider test scores, grades, letters of recommendation, or personal statements.⁷⁷ In other words, the plan provided for none of the individualized consideration that saved the Law School's admissions policy in *Grutter*. Instead, the plan was "designed to achieve racial diversity rather than viewpoint diversity," and therefore, "[t]he only relevant criterion . . . is a student's race."⁷⁸

Nevertheless, the court found the plan satisfied the narrow tailoring test.⁷⁹ The court observed that, since transfers under the plan were not based on merit, there was no risk that the use of race would impose the same risks of stigmatization and stereotyping.⁸⁰ The court also underscored the limited breadth of the school district's use of race, which affected only transfer decisions that could be appealed.⁸¹ Moreover, the court noted that, unlike an applicant to a selective law school, every child was guaranteed a spot at his or her local school.⁸² Because the school district periodically reviewed the transfer plan and had reasonably considered and rejected race-neutral alternatives, the court concluded that the plan was narrowly tailored and upheld the plan as constitutional.⁸³

The Supreme Court denied the plaintiffs' petition for certiorari on December 5, 2005⁸⁴—about three months following the death of Chief Justice Rehnquist and the ascension of John Roberts to that post.⁸⁵ It would be another two months before

75. *Id.* at 15–16.

76. *Id.* at 23.

77. *See id.* at 18.

78. *Id.*

79. *Id.* at 23.

80. *Id.* at 18.

81. *Id.* at 19–20.

82. *Id.* at 20.

83. *Id.* 22–23.

84. *Comfort ex rel. Neumyer v. Lynn Sch. Comm.*, 126 S.Ct. 798 (2005).

85. Chief Justice Rehnquist died on September 3, 2005. Linda Greenhouse, *Chief Justice Rehnquist Dies at 80*, N.Y. TIMES, Sept. 4, 2005, § 1, at 1. Chief Justice Roberts was confirmed by the Senate and took the oath of office on September 29, 2005. Sheryl Gay

Justice Alito would be sworn in and replace Justice O'Connor, the author of the majority opinion in *Grutter*.⁸⁶

B. Meredith v. Jefferson County Board of Education

Like *Comfort*, *Meredith* involved a challenge to a school district policy that used race to decide where children are assigned to school.⁸⁷ Under the plan, the Jefferson County, Kentucky, Public Schools sought to achieve racial balance in its primary and secondary schools by requiring that each school have an enrollment of black students of at least 15%, but no more than 50%.⁸⁸ Parents sued in federal court to challenge the constitutionality of the plan under the Equal Protection Clause.⁸⁹ The district court upheld the plan.⁹⁰

The district court held that the school district had shown it had a compelling state interest in achieving the benefits of racially diverse student bodies.⁹¹ The court underscored the need to show considerable deference to the school district as a democratic body entitled to formulate its educational policies.⁹² While recognizing that the judicial deference afforded to institutions of higher learning (as in *Grutter*) was “conceptually different,” the court characterized the judicial deference given to school districts as “[t]raditional[]” and “perhaps more accepted.”⁹³ The school district argued that racially diverse classrooms produced the same benefits articulated in *Grutter* and more: racial diversity caused black children to perform better and created “a perception, as well as the potential reality, of one community of roughly equal schools.”⁹⁴ While expressing some

Stolberg & Elisabeth Bumiller, *Senate Confirms Roberts as 17th Chief Justice*, N.Y. TIMES, Sept. 30, 2005, § A, at 1.

86. David D. Kirkpatrick, *Alito Sworn In As Justice After Senate Gives Approval*, N.Y. TIMES, Feb. 1, 2005, § A, at 21.

87. The school district had a different assignment process for regular schools (so-called “nontraditional schools”) and magnet schools (“traditional schools”). The plan at issue here governed assignment to the regular schools. *McFarland ex rel. McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834, 843 (W.D. Ky. 2004), *aff’d per curiam*, 416 F.3d 513 (6th Cir. 2005), *cert. granted sub nom. Meredith ex rel. McDonald v. Jefferson County Bd. of Educ.*, 126 S.Ct. 2351 (2006).

88. *McFarland*, 330 F. Supp. 2d at 842.

89. *Id.* at 836.

90. *Id.* at 863.

91. *Id.* at 850–51.

92. *Id.*

93. *Id.* at 850.

94. *Id.* at 853–54.

reservations about the reality of these benefits, the court deferentially accepted the school district's claims, because it had proven itself to be "sincere."⁹⁵

The district court also held that the plan was narrowly tailored to achieve the school district's end.⁹⁶ According to the court, the plan did not institute racial quotas.⁹⁷ In its view, the plan's numerical racial guidelines were nothing more than flexible targets.⁹⁸ The court observed that race "tipped" the balance in a relatively small percentage of assignment decisions and that other factors, like geography and choice, determined the vast majority of those decisions.⁹⁹ The use of these factors evidenced the school district's "serious, good faith consideration of workable race-neutral alternatives" to achieve its goals.¹⁰⁰ Moreover, the court found that the use of race in determining assignment imposed no burden or benefit on any group, because each student was entitled to a spot at a school that was qualitatively fungible with all other schools in the district.¹⁰¹

The Sixth Circuit Court of Appeals issued a per curiam decision adopting the reasoning of the district court and affirming its decision.¹⁰² The Supreme Court granted the plaintiffs' petition for certiorari on June 5, 2006.¹⁰³ A decision is expected sometime in the 2006–2007 term.

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

Parents Involved in Community Schools (PICS) involved a challenge to the Seattle School District's school assignment

95. *Id.* at 853–55 ("Opinions surely vary on this issue. The Court certainly need not resolve this ongoing debate. But, the Fourteenth Amendment does not enact any particular preference of educational policy. As a matter of evidence, however, this Court can find that the Board has valid reasons for believing that its student assignment policies *may* aid student performance." (emphasis added) (internal citations omitted)).

96. *Id.* at 862.

97. *Id.* at 857.

98. *Id.* at 856–58.

99. *Id.* at 859, 861.

100. *Id.* at 861 (internal citations and quotation marks omitted). The court does not explain why race should be used *at all*, given that race-neutral alternatives achieved the school district's goals in the vast majority of cases.

101. *Id.* at 858–61.

102. *McFarland ex rel. McFarland v. Jefferson County Pub. Sch.*, 416 F.3d 513, 513 (6th Cir. 2005) (per curiam), *cert. granted sub nom. Meredith ex rel. McDonald v. Jefferson County Bd. of Educ.*, 126 S.Ct. 2351 (2006).

103. *Meredith ex rel. McDonald v. Jefferson County Bd. of Educ.*, 126 S.Ct. 2351 (2006).

plan. Under that plan, students entering the ninth grade could select any public high school.¹⁰⁴ The district attempted to assign each student to his or her first-choice school. But if a school was oversubscribed, the district assigned students based on four tiebreakers, one of which was race.¹⁰⁵ If a school had a racially imbalanced student body (one that differed by more than 15% from the racial makeup of students in the district as a whole), the racial tiebreaker ensured that a student whose race helped to alleviate that imbalance would be preferred over students of other races.¹⁰⁶ In the 2000–2001 school year, about 10% of all students entering public high schools were assigned to an oversubscribed school based on the race-based tiebreaker.¹⁰⁷ Parents of children who were not assigned the school of their choice challenged the constitutionality of the plan.¹⁰⁸

After a circuitous path of litigation through federal and state courts, the Ninth Circuit Court of Appeals finally issued an en banc decision upholding the school district's use of a racial tiebreaker in school assignments.¹⁰⁹ Relying on *Grutter*, the court held that the school district “ha[d] a compelling interest in securing the educational and social benefits of racial (and ethnic) diversity, and in ameliorating racial isolation or concentration in its high schools by ensuring that its assignments do not simply replicate Seattle’s segregated housing patterns.”¹¹⁰

The Ninth Circuit also held that the use of a racial tiebreaker was narrowly tailored to achieve that end.¹¹¹ It concluded that the school district had made a good faith effort to consider feasible race-neutral alternatives and permissibly rejected them in favor of an assignment process involving factors including race.¹¹² The court concluded that the race-based tiebreaker imposed a minimal burden, which was shared equally by all the

104. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1 (PICS)*, 426 F.3d 1162, 1169 (9th Cir. 2005), *cert. granted*, 126 S.Ct. 2351 (2006).

105. *Id.* Race was the second tiebreaker. Under the first tiebreaker, students who had a sibling attending that school were admitted. The third tiebreaker was the student's proximity to the school. The fourth tiebreaker was a lottery. *Id.* at 1169–71.

106. *Id.* at 1170.

107. *Id.*

108. *Id.* at 1171.

109. *Id.* at 1171–72.

110. *Id.* at 1166.

111. *Id.*

112. *Id.* at 1191.

district's students and did not unduly harm members of any one racial group.¹¹³ Finally, it held that the plan included periodic reviews to determine whether racial preferences were still necessary to achieve the school district's stated interest in racial diversity.¹¹⁴

The Supreme Court granted the plaintiffs' petition for certiorari on the same day as it granted the *Meredith* plaintiffs' petition and set the cases for joint argument.¹¹⁵

IV. THE *MEREDITH* AND *PICS* COURTS MISINTERPRETED *GRUTTER* AND SHOULD BE REVERSED BY THE SUPREME COURT

Legal scholarship has been near-unanimous in its endorsement of the view that *Grutter* can be expanded beyond the scope of public higher education. Some legal commentators have argued that most of the Court's reasons for holding that diversity in higher education is a compelling interest are similarly applicable to primary and secondary schools.¹¹⁶ The reasons for extending *Grutter*, some say, apply with even greater force in the context of K–12 public education.¹¹⁷ Some point to the theory that the skin color of a student's classmate improves that student's academic performance.¹¹⁸ Others assert that

113. *Id.* at 1192.

114. *Id.* at 1192–93.

115. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (PICS)*, 126 S.Ct. 2351 (2006).

116. *See, e.g.*, Epperson, *supra* note 8, at 216 (“The Court [in *Grutter*] found that the use of race to further student body diversity served a compelling government interest. School districts' voluntary use of race-conscious plans also serves this compelling interest.”); James E. Ryan, *The Limited Influence of Social Science Evidence in Modern Desegregation Cases*, 81 N.C. L. REV. 1659, 1700–01 (2003) (“[R]acial integration is uniquely important at the grade-school level. . . . [L]awyers defending voluntary integration plans should argue that integration in grade schools is sufficiently important to satisfy whatever legal standard is ultimately applied.”); Holmes, *supra* note 8, at 563 (arguing that “an extension of *Grutter*'s diversity rationale is warranted based on the demonstrated academic and societal benefits of diversity in primary and secondary schools”).

117. *See, e.g.*, Epperson, *supra* note 8, at 216 (“[T]he context of K–12 education arguably presents an even more compelling case for racial inclusion and provides an arena in which courts have historically given great deference to the choices of local districts to effectuate educational policy.”).

118. *See, e.g.*, James E. Ryan, *Voluntary Integration: Asking the Right Questions*, 67 OHIO ST. L. J. 327, 334 (2006) (“But other goals and benefits diverge. Racially integrated schools, for example, can promote academic achievement among minority students, typically because racial integration and socioeconomic integration go hand in hand.”); Holmes, *supra* note 8, at 586–87 (“[E]xamining the nexus between diversity and academic achievement at the K–12 level. . . . [r]esearchers have document[ed] the positive impact of diverse classrooms on ‘learning experiences.’”).

primary and secondary schools “have the unique role of imparting civic values to students at a critical age,” making diversity even more important in K–12 than in colleges and universities.¹¹⁹

Grutter’s diversity rationale rests on shoddy social science and demeaning assumptions. The notion that a black child’s academic success bears some correlation to the skin color of the children in his or her class lacks solid evidentiary support, defies logic, and borders on the racist. Furthermore, whatever educational benefits might flow from racial balancing, the question remains as to whether such benefits can constitutionally—let alone logically—justify race-conscious assignment policies in K–12 public education. Contrary to the courts’ conclusions in *Meredith* and *PICS*, the answer cannot be found in *Grutter*. The Court must reverse *Meredith* and *PICS* and confirm that the diversity interest recognized as compelling in *Grutter* applies only in the context of public higher education.

A. *Grutter’s Diversity Rationale Is Based on Shaky Social Science and, for that Reason, Must Not Be Allowed to Spread to K–12 Public Education*

The Court in *Grutter* relied on the social science research of the Law School and of its supporting amici curiae claiming that diversity produces educational benefits.¹²⁰ The Court characterized those benefits as “substantial” and, as a consequence, held that the Law School had a compelling state interest in diversity.¹²¹ However, the Court failed to adequately scrutinize the “evidence” presented to it.

A strong case has been made that, in light of its flawed “theory and methodology,” the social science research presented on behalf of the Law School “fail[ed] to prove educational benefits.”¹²² Brian Lizotte has persuasively argued that the *Grutter*

119. Epperson, *supra* note 8, at 217. However, some scholars suggest that overemphasis on race, including government-compelled cross-racial interaction, does nothing to “impart[] civic values to students,” *id.*, but rather impedes “forward-looking political identities that a robust democratic spirit inspires and requires.” Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL’Y REV. 1, 92–93 (2002).

120. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

121. *Id.* at 330–33.

122. Brian N. Lizotte, Note, *The Diversity Rationale: Unprovable, Uncompelling*, 11 MICH. J. RACE & L. 625, 629 (2006).

Court erroneously “proclaimed a compelling interest in the benefits of student body diversity only by relying on evidence that it is *unlikely* diversity has no effect.”¹²³ According to Mr. Litzotte, “social science has not—indeed, cannot—prove that student body diversity produces [educational] benefits” or that the “diversity rationale” is “compelling” enough to create an exception to the Equal Protection Clause.¹²⁴

The *Grutter* Court’s mistaken reliance on shifty social science to carve out an exception to the Equal Protection Clause is nothing new in judicial decision-making.¹²⁵ Nonetheless, the use of social science research to persuade courts to adopt a legal principle has been criticized because such research is often litigation-driven. Social science research supporting one principle one day can be replaced easily with social science research supporting the opposite principle the next day. In the wake of the Court’s decision in *Brown v. Board of Education*, which relied in large part on social science evidence regarding the harmful effects of racial segregation on children,¹²⁶ one legal commentator remarked:

Today the social psychologists . . . are liberal and egalitarian in [their] basic approach. Suppose a generation hence, some of their successors were to revert to the ethnic mysticism of the very recent past; suppose they were to present us with a collection of racist notions and label them “science.” What then would be the state of our constitutional rights?¹²⁷

Courts should avoid the use of social science research in deciding legal questions, especially important constitutional questions such as those presented in *Meredith* and *PICS*. First, legal reasoning and social science are so fundamentally different as to be incompatible. While legal reasoning “is largely deductive” and based on “certainties and standards,” social science is “largely inductive” and “based on probabilities and

123. *Id.* at 630 (emphasis added).

124. *Id.* at 667.

125. See, e.g., Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 *IND. L.J.* 775, 775 (1997) (warning against the dangers of judicial reliance on social science research in family law decision-making).

126. 347 U.S. 483, 493–95 (1954).

127. Edmond Cahn, *Jurisprudence*, 30 *N.Y.U. L. REV.* 150, 167 (1955), quoted in Angelo N. Ancheta, *Civil Rights, Education Research, and the Courts*, *EDUC. RESEARCHER*, Jan.–Feb. 2006 at 26, 26.

levels of confidence.”¹²⁸ Second, courts lack the expertise necessary to interpret social science research or to analyze social science methodologies.¹²⁹ Third, given the lack of adequate screening of social science research, “weak or bad science” has been used to decide legal principles.¹³⁰

Grutter’s diversity rationale rests on social science research that is at best weak. Its extension outside the area of public higher education would only compound the Court’s mistaken reliance on social science to carve out an exception to the Equal Protection Clause. Any social scientist can produce research to support any claim about the benefits of “diversity.” Courts are not in the best position to critically analyze such research. The Court should make clear in *Meredith* and *PICS* that social science research cannot be used to justify race-based policies outside public higher education.

B. *The Supreme Court Has Never Suggested That There Is a Compelling State Interest in Racial Diversity in K–12 Public Schools*

1. The *Grutter* Court Carefully Limited Its “Educational Benefits” Exception to the Context of Higher Education

By its own terms, *Grutter’s* holding applies only in the context of public higher education. The Court granted certiorari in *Grutter* to resolve “[w]hether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to *public universities*.”¹³¹ The Court later characterized the legal question before it as whether “*in the context of higher education*, a compelling state interest in student

128. Ancheta, *supra* note 127, at 27. See also Lizotte, *supra* note 122, at 629–30 (“Social science is grounded in probability, not deductive logic. Social scientists provide evidence of an effect only by ruling out the possibility that there is no effect.”).

129. Ancheta, *supra* note 127, at 27. See also Lizotte, *supra* note 122, at 630–31 (“Many judges lack backgrounds in economics, sociology, and psychology, and may be unable to distinguish between methodologically sound and suspect research.”).

130. Ancheta, *supra* note 127, at 27. See also Robert Lerner & Althea K. Nagai, *A Critique of the Expert Report of Patricia Gurin in Gratz v. Bollinger* 4 (2001), available at <http://www.ceousa.org/pdfs/Gurin1.pdf> (criticizing the social science evidence presented in *Gratz v. Bollinger* for its “design, measurement, sampling, and statistical flaws”); Thomas E. Wood & Malcolm J. Sherman, *Race and Higher Education Must be Rejected* 79 (2001), available at <http://www.nas.org/rhe.pdf> (finding that the data used by Patricia Gurin “disconfirms” the claim that racial and ethnic diversity in school benefits students).

131. *Grutter v. Bollinger*, 539 U.S. 306, 322 (2003) (emphasis added).

body diversity” exists.¹³² In other parts of its decision, the Court iterated that its focus was “the use of race in the context of public *higher education*”¹³³ and “the use of race to achieve student body diversity in public *higher education*.”¹³⁴ The Court gave no hint of an intent to reach race-based policies outside public colleges and universities.¹³⁵

The dissenting justices similarly viewed the holding as limited to the area of public higher education. In his dissent, Justice Scalia bemoaned the fact that the majority’s opinion would spawn needless litigation.¹³⁶ The types of legal disputes he predicted would arise, however, involved only admissions policies in public colleges and universities.¹³⁷ Justice Thomas described the holding as one that upheld “the use of racial discrimination as a tool to advance the Law School’s interest in offering a marginally superior education *while maintaining an elite institution*.”¹³⁸ Justice Kennedy’s dissent referred to a “*university’s* compelling interest in a diverse student body” and the constitutionality of race classification in the “special context” of admissions to public colleges and universities.¹³⁹

In sum, there is no basis in the text of the various *Grutter* opinions for employing the holding outside the realm of public higher education. Had the Court wanted to create an “educational benefits” exception to the Equal Protection Clause applicable to *all* areas of government activity, it presumably

132. *Id.* at 328 (emphasis added).

133. *Id.* (emphasis added).

134. *Id.* at 334 (emphasis added).

135. Commentators on both sides of the issue have recognized that *Grutter* does not provide a direct answer because its holding is limited to the admissions policies of public colleges and universities. See, e.g., Angelo N. Ancheta, *Contextual Strict Scrutiny and Race-Conscious Policy Making*, 36 LOY. U. CHI. L.J. 21, 35–36 (2004) (noting that *Grutter* left unresolved the question of whether “elementary and secondary school districts that employ race-conscious diversity plans [should] be granted the same level of deference as institutions of higher education”); Paul Horwitz, *Grutter’s First Amendment*, 46 B.C. L. REV. 461, 464 (2005) (observing that the Court in *Grutter* “asked only whether there is a ‘compelling state interest in student body diversity’ in ‘the context of higher education’”); Jay P. Lechner, *Learning from Experience: Why Racial Diversity Cannot Be a Legally Compelling Interest in Elementary and Secondary Education*, 32 SW. U. L. REV. 201, 209 (2003) (“The Supreme Court has never considered whether educational diversity could be a compelling goal of public elementary or secondary education.”); Ryan, *supra* note 118, at 330 (“Neither *Grutter* nor *Gratz* provides any guideline to their application outside the setting of undergraduate or law school admissions.”).

136. *Grutter*, 539 U.S. at 348–49 (Scalia, J., dissenting).

137. *Id.*

138. *Id.* at 356 (Thomas, J., dissenting) (emphasis added).

139. *Id.* at 392, 395 (Kennedy, J., dissenting) (emphasis added).

would have said so, particularly given what the implications of such a broad, open-ended holding would have been.¹⁴⁰ The lower courts were not justified in relying on *Grutter* for their decisions.

2. Permitting K–12 Public Schools to Discriminate on the Basis of Race in School Assignments Is Not Sanctioned by Any Supreme Court Precedent Before or After *Grutter*

The Supreme Court has never held that K–12 public schools may discriminate against students on the basis of race to achieve racially diverse classrooms. The Court has articulated only two compelling state interests justifying race-based policies in public education. Neither interest can justify the assignment policies in *Meredith* and *PICS*.

First, in *Freeman v. Pitts*, the Supreme Court held that a school district had a compelling state interest in eliminating de jure segregation—i.e., in remedying past, identified racial discrimination by the school district itself.¹⁴¹ The *Freeman* Court emphasized, however, that “[r]acial balance is not to be achieved for its own sake.”¹⁴² There was never any argument made in *Meredith* or *PICS* that the school districts had enforced de jure segregation. Thus, *Freeman*’s only relevance to those cases is its prohibition against racial balancing. Second, the Court in *Grutter* recognized a compelling state interest in the educational benefits of diverse student bodies in public colleges and universities.¹⁴³ However, as explained above, *Grutter* by its own terms applies *only* to public colleges and universities.

By contrast, the Supreme Court has refused to recognize as “compelling” an interest in obtaining the alleged benefits of a racially diverse faculty in K–12 public schools. *Wygant v. Jackson Board of Education* involved a constitutional challenge to a collective bargaining agreement between a school board and the teachers’ union.¹⁴⁴ The agreement protected teachers who were of certain minority groups against layoffs.¹⁴⁵ The school board defended the race-based policy on the ground that it provided

140. See *infra* Part IV.D.

141. 503 U.S. 467, 494 (1992).

142. *Id.*

143. *Grutter*, 539 U.S. at 327–33.

144. 476 U.S. 267, 269–71 (1986) (plurality).

145. *Id.* at 270.

minority students with “role models” and helped to cure general societal discrimination by exposing all students to minority teachers.¹⁴⁶ The Court struck down the policy as unconstitutional and, in doing so, rejected the “role model” theory:

The role model theory allows the Board to engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose. . . . Carried to its logical extreme, the idea that black students are better off with black teachers could lead to the very system the Court rejected in *Brown v. Board of Education*, 347 U.S. 483 (1954).¹⁴⁷

Like the school board in *Wygant*, the school districts in *Meredith* and *PICS* sought to justify their race-based assignment policies on the ground that they had a compelling interest in the benefits of racial diversity: cross-racial socialization and understanding.¹⁴⁸ Like the “role model” theory, the “cross-racial socialization and understanding” theory focuses on the alleged educational benefits derived from racially balanced schools (whether in terms of faculty or in terms of students).¹⁴⁹ And like the “role model” theory, the “cross-racial socialization and understanding” theory fails to translate into a compelling state interest because it allows the school districts to racially discriminate long past the point required by any legitimate purpose and gives undue credence to the unproven (if not dispelled) notion that the skin color of a student’s classmates affects that student’s capacity to socialize and learn.¹⁵⁰

146. *Id.* at 275–76 (plurality), 295 (White, J., concurring in judgment).

147. *Id.* at 275–76 (plurality).

148. *McFarland ex rel. McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834, 837 (W.D. Ky. 2004), *aff’d per curiam*, 416 F.3d 513 (6th Cir. 2005), *cert. granted sub nom. Meredith ex rel. McDonald v. Jefferson County Bd. of Educ.*, 126 S.Ct. 2351 (2006); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1 (PICS)*, 426 F.3d 1162, 1174 (9th Cir. 2005), *cert. granted*, 126 S.Ct. 2351 (2006).

149. *PICS*, 426 F.3d at 1200.

150. Professor David Armor of George Mason University conducted extensive research into the question of whether a link exists between segregation and black student achievement. Professor Armor concluded, “[t]he evidence is compelling that neither school segregation nor differences in school resources are responsible for the current achievement gap that exists between African American and white children.” David J. Armor, *The End of School Desegregation and the Achievement Gap*, 28 HASTINGS CONST. L.Q. 629, 653 (2001); *see also Grutter v. Bollinger*, 539 U.S. 306, 364–65 (2003) (Thomas, J., dissenting) (identifying research that shows that black students perform better at historically black colleges than at racially balanced ones). Besides lacking credible evidence, the notion that black children can achieve only in the presence of white children smacks of racism. As Justice Thomas noted, “if separation itself is harm, and if integration therefore is the only way that blacks can receive a proper education, then there must be something inferior about blacks. Under this theory, segregation

The *Grutter* Court did not overrule *Wygant*.¹⁵¹ Nor did the Court overrule any of its other decisions in which it struck down race-based policies designed to cure general societal discrimination and other ills.¹⁵² And since its decision in *Grutter*, the Court has reaffirmed its commitment to “smoking out” all illegitimate uses of race, making it clear that *Grutter* does not supply government entities with a blanket exception to the Equal Protection Clause.¹⁵³ To accept the theory that *Grutter*’s “educational benefits” exception applies in all areas of government activity, including K–12 public education, is to ignore the Court’s precedents both before and after *Grutter*.

C. *Grutter*’s Rationale for Deferring to the Expertise of Law School Administrators Is Inapplicable to K–12 Public Schools

injures blacks because blacks, when left on their own, cannot achieve. To my way of thinking, that conclusion is the result of a jurisprudence based upon a theory of black inferiority.” *Missouri v. Jenkins*, 515 U.S. 70, 122 (1995) (Thomas, J., concurring).

151. See generally *Grutter*, 539 U.S. at 339.

152. See, e.g., *Shaw v. Hunt*, 517 U.S. 899 (1996) (striking down a government race-based policy created to “alleviate the effects of societal discrimination”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 511 (1989) (plurality) (striking down racial quotas in public contracting in the absence of findings of past discrimination); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 310–11 (1978) (rejecting an admissions policy that gave preferences to minority applicants to the medical school on the ground that an increase in the number of minority doctors would improve “the delivery of health-care services to communities currently underserved”).

153. *Johnson v. California*, 543 U.S. 499 (2005). *Johnson* involved a challenge to the unwritten policy of the California Department of Corrections (CDC) of placing new or transferred inmates with cellmates of the same race during initial evaluation. The CDC argued that the policy was “necessary to prevent violence caused by racial gangs.” *Id.* at 502. The CDC argued that, given the unique security concerns, regulations burdening prisoner’s rights triggered only rational-basis review. *Id.* at 512. The Court refused to create an exception to the categorical strict scrutiny rule applicable to *all* racial classifications:

We have insisted on strict scrutiny in every context, even for so-called “benign” racial classifications, such as race-conscious university admissions policies, . . . race-based preferences in government contracts, . . . and race-based districting intended to improve minority representation

The reasons for strict scrutiny are familiar. Racial classifications raise special fears that they are motivated by an invidious purpose. Thus, we have admonished time and again that, “[a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining . . . what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.” . . . We therefore apply strict scrutiny to *all* racial classifications to “smoke out” illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool.”

Id. at 505–06 (internal citations omitted).

1. A Diversity of Student Viewpoints Is Not Essential to the Core Objectives of K–12 Classroom Education

In *Grutter*, the Court endorsed the Law School’s stated interest in obtaining the benefits of *viewpoint* diversity—not *racial* diversity. The Court made clear that, while it endorsed the Law School’s interest in obtaining the “educational benefits” of “exposure to widely diverse people, cultures, ideas, and viewpoints,”¹⁵⁴ it did not endorse an interest in simply assuring “‘within its student body some specified percentage of a particular group merely because of its race or ethnic origin.’”¹⁵⁵ In the Court’s view, a race-based policy justified on the latter interest would amount to nothing more than “racial balancing” and be “patently unconstitutional.”¹⁵⁶ Persuading the Court that its goal was *viewpoint* diversity, and that race was only one contributing factor to that diversity, was in large part the key to the Law School’s victory in *Grutter*.

Viewpoint diversity is not essential to the educational mission of K–12 public schools. Unlike colleges and universities, the educational mission of K–12 public schools is to *teach*, not to foster the kind of “robust exchange of ideas”¹⁵⁷ discussed in *Grutter*.¹⁵⁸ The evidence of the focus of government educators in K–12 public schools bears this out. For example, the California State Legislature recently mandated that all graduating public high school students take the California High School Exit Examination.¹⁵⁹ The legislature’s intent was clear: The purpose of the exam is to “significantly improve pupil achievement in high school and to ensure that pupils who graduate from high school can demonstrate grade level competency in *reading, writing, and mathematics*.”¹⁶⁰

154. *Grutter*, 539 U.S. at 330.

155. *Id.* at 329–30 (quoting *Bakke*, 438 U.S. at 307).

156. *Id.* at 330.

157. *Id.* at 324.

158. See Kevin G. Welner, *Locking Up the Marketplace of Ideas and Locking Out School Reform: Courts’ Imprudent Treatment of Controversial Teaching in America’s Public Schools*, 50 UCLA L. REV. 959, 965 (2003) (arguing that public school education “is inculcation, not exposure”); Ancheta, *supra* note 135, at 48 (observing that “the free exchange of ideas and viewpoints is highly valued” in “higher education,” while “K–12 education is often highly standardized and regimented, particularly in the lower grade levels”).

159. CAL. EDUC. CODE § 60850 (2003).

160. *Id.* (emphasis added).

2. K–12 Public Schools Enjoy No First Amendment Right To Determine the Composition of Their Student Bodies

Some have argued that school districts are entitled to the same level of deference as the Law School in *Grutter* enjoyed.¹⁶¹ The *Grutter* Court accepted that diversity was a compelling state interest because, quite simply, the Law School said so.¹⁶² The Court's deference was based on the notion that institutions of higher learning have the freedom and educational autonomy—grounded in the First Amendment—to select their student bodies.¹⁶³ As the Court explained, “We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.”¹⁶⁴

The kind of deference displayed by the Court in *Grutter* is unique to public institutions of higher learning. With respect to all other government actors, the Court has made it clear that deference is “fundamentally at odds with [its] equal protection jurisprudence.”¹⁶⁵ School districts are no exception even if they, like public colleges and universities, are in the business of education. Notions of institutional “academic freedom” and “educational autonomy” as a basis for judicial deference have no

161. Epperson, *supra* note 8, at 216 (“Indeed, the context of K–12 education arguably presents an even more compelling case for racial inclusion and provides an arena in which courts have historically given great deference to the choices of local districts to effectuate educational policy.”); *see also* Crawford v. Bd. of Educ., 17 Cal. 3d 280, 294 (Cal. 1976) (“[S]chool boards possess plenary authority to determine school assignment policies”); Robinson, *supra* note 8, at 53 (arguing that “courts should employ a relaxed form of scrutiny when reviewing K–12 admissions programs that consider race as part of its assessment of candidates,” and “should give broad deference to school districts and allow them to consider race as they seek to reduce de facto segregation and racial isolation, and further promote integration”).

162. *Grutter*, 539 U.S. at 328–29 (“Our holding today is in keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.”).

163. *Id.* at 329 (“The freedom of a university to make its own judgments as to education includes the selection of its student body.” (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1978)) (internal quotations marks omitted)).

164. *Id.*

165. Johnson v. California, 543 U.S. 499, 506 n.1; *see also id.* at 512 (“[W]e have refused to defer to state officials’ judgments on race in other areas where those officials traditionally exercise substantial discretion.”); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 217–18 (1995) (rejecting the use of race in federal government contracts); Shaw v. Reno, 509 U.S. 630, 634 (1993) (overturning a state redistricting plan that would have diluted minority voting strength); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 470 (1989) (rejecting city’s argument that it had a compelling state interest that justified the use of racial preferences in the awarding of public contracts).

place in the context of K–12 public schools.¹⁶⁶ As one legal commentator has put it, *Grutter* deference “may be difficult to extend beyond academic decision making and outside of the higher education context because of the key element of academic freedom under the First Amendment.”¹⁶⁷ Whatever deference courts have shown school districts in the past, such deference “has not been rooted in academic freedoms typically ascribed to higher education, where the free exchange of ideas and viewpoints is highly valued; indeed, K–12 education is often highly standardized and regimented, particularly in the lower grade levels.”¹⁶⁸

The Court’s reliance on First Amendment principles to defer even to institutions of higher learning, like the Law School, rests on shaky precedent and should be reconsidered. The Court’s deference to the Law School was rooted in Justice Powell’s opinion in *Bakke*.¹⁶⁹ Justice Powell argued that the attainment of a diverse student body

is a constitutionally permissible goal for an institution of higher education. Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body.¹⁷⁰

Justice Powell in turn based his theory of institutional academic freedom on a concurrence in *Sweezy v. New Hampshire*¹⁷¹ and on the majority opinion in *Keyishian v. Board of Regents*.¹⁷² Yet both cases recognized only an *individual* right to academic freedom—not an institutional right to educational

166. See *United States v. Fordice*, 505 U.S. 717, 728–29 (1992) (“[A] state university system is quite different in very relevant respects from primary and secondary schools.”); see generally *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (rejecting the educational autonomy of a school district to decide on the basis of race the student-body composition of its schools). Jay Lechner explains that the Court has been “less deferential to the discretion of elementary or secondary school officials in Equal Protection cases, in part because the Court has viewed school desegregation as serving social rather than educational goals.” Lechner, *supra* note 135, at 215.

167. Ancheta, *supra* note 135, at 47.

168. *Id.* at 48.

169. *Grutter*, 539 U.S. at 329.

170. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311–12 (1978).

171. 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (One of “the four essential freedoms’ of a university [is] to determine for itself on academic grounds . . . who may be admitted to study.” (internal citation omitted)).

172. 385 U.S. 589 (1967).

autonomy.¹⁷³ Assuming the existence of such an institutional right, neither case addressed the question of whether the First Amendment insulates public colleges and universities from other equally important constitutional provisions, like the Equal Protection Clause.¹⁷⁴ In sum, the *Grutter* Court's deference to the Law School was based on flimsy precedent. Public colleges and universities charged with race discrimination should be subject to the same strict scrutiny as any other government actor.

*D. The "Educational Benefits" Rationale in Equal Protection Cases
Opens a Pandora's Box When Extended Beyond the Limited Context of
Higher Education*

If allowed to extend beyond the context of admissions policies in public colleges and universities, *Grutter's* educational benefits exception threatens to swallow up the Equal Protection Clause. As the school districts in *Meredith* and *PICS* demonstrated, it is not difficult to produce persuasive evidence of the educational benefits that flow from any type of cross-racial interaction in any context. Not surprisingly, then, school districts have not been the only government actors to use *Grutter* to defend their racial balancing schemes. Police and fire departments have successfully argued in the federal courts that *Grutter* justifies their "need" to racially balance their workforces.

In *Petit v. City of Chicago*, the Chicago Police Department administered an examination for promotions of patrol officers to the rank of sergeant.¹⁷⁵ The department's policy was to standardize the raw scores in a way that advantaged racial minorities in order to diversify the workforce.¹⁷⁶ Hundreds of non-minority police officers sued the department alleging that the promotions resulting from the examination violated their

173. See *Sweezy*, 354 U.S. at 266–67 (Frankfurter, J., concurring); *Keyishian*, 385 U.S. at 603–04.

174. See, e.g., John LaNear, *The Misreading of Sweezy: How Justice Powell Mistakenly Created Institutional Academic Freedom*, 207 WEST'S EDUC. L. REP. 501, 510 (May 18, 2006); see also Lechner, *supra* note 135, at 215 ("The Court has acknowledged that even the most important, delicate, and highly discretionary functions of state educators are subject to the limits of the Bill of Rights and subordinate to the Constitutional freedoms of the individual." (citing Jim Chen, *Affirmative Action: Diversity of Opinions: Embryonic Thoughts on Racial Identity as New Property*, 68 U. COLO. L. REV. 1123, 1143 (1997) (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943))) (internal quotation marks omitted)).

175. 352 F.3d 1111, 1112 (7th Cir. 2003), *cert. denied* 541 U.S. 1074 (2004).

176. *Id.*

Equal Protection rights. The department defended its race-based policy on the ground, *inter alia*, that racial balancing was “necessary to maintain the operational effectiveness” of the department.¹⁷⁷

The Seventh Circuit agreed with the department and upheld its policy. Citing the *Grutter* Court’s deference to the Law School, the court deferred to “the views of experts and Chicago police executives that affirmative action was warranted to enhance the operations” of the department.¹⁷⁸ It concluded that the department had a compelling interest “in a diverse population at the rank of sergeant in order to set the proper tone in the department and to earn the trust of the community, which in turn increases police effectiveness in protecting the city.”¹⁷⁹ Indeed, for the *Petit* court, the interest here was even more compelling than in *Grutter*.¹⁸⁰ The court also held that the department’s policy was narrowly tailored to serve the compelling state interest in racial diversity.¹⁸¹ The Supreme Court denied the petition for certiorari.¹⁸²

Lomack v. City of Newark involved facts similar to those presented in *Petit*, except in the context of fire department staffing.¹⁸³ In its effort to racially balance its fire department, the City of Newark created and enforced a policy of voluntary and involuntary transfers among the various firehouses on the basis of firefighters’ race.¹⁸⁴ Firefighters who were involuntarily transferred out of their companies or denied requests to transfer on the basis of race challenged the policy on Equal Protection grounds.¹⁸⁵

The federal district court held that Newark’s racial balancing policy was narrowly tailored to serve a compelling state

177. *Id.*

178. *Id.* at 1114.

179. *Id.* at 1115.

180. *Id.* at 1114 (“It seems to us that there is an even more compelling need for diversity in a large metropolitan police force charged with protecting a racially and ethnically divided major American city like Chicago.”).

181. *Id.* at 1115–18.

182. *Petit v. City of Chicago*, 541 U.S. 1074 (2004).

183. *Lomack v. City of Newark*, No. Civ.A.04-6085(JWB), 2005 WL 2077479 at *1–3 (D.N.J. Aug. 25, 2005) (unpublished op.), *rev’d* No. 05-4126, 2006 WL 2662848 (3d Cir. Sept. 18, 2006).

184. *Id.*

185. *Id.* at *1–4.

interest.¹⁸⁶ Relying on *Grutter*, the court concluded that Newark similarly had a compelling state interest in achieving the benefits of racial diversity in each of the firehouses of the department.¹⁸⁷ The district court accepted—with little scrutiny—Newark’s claims that racial diversity was necessary to the department’s operations:

[E]xposure to other firefighters of different backgrounds, vocabularies and cultures better prepares a firefighter to work effectively with his colleagues and to perform better on tests for promotional opportunities. Mentoring from senior firefighters on a tour (usually white) helps junior (usually minority) firefighters better learn and perform their tasks. Much of a firefighter’s time is spent at the firehouse in a setting of formal and informal training which is enhanced by a diverse, multi-generational environment. Racial stereotypes can be broken down in this setting as well as in a classroom. . . . [Racial diversity] leads to greater camaraderie between coworkers, acceptance and consideration for people of varying backgrounds, sharing of information and study support. It also promotes tolerance and mutual respect among colleagues.¹⁸⁸

The district court held that the policy was narrowly tailored to achieve these benefits of racial diversity. While it offered little explanation for that conclusion, the district court seemed to rely in large part on the “measured” and detailed way in which Newark crafted the policy.¹⁸⁹ The Third Circuit recently held unconstitutional the City of Newark’s policy of racially balancing its fire departments and tours to achieve the alleged benefits of “diversity.”¹⁹⁰ In reversing the district court’s decision upholding that policy, the Third Circuit held: “*Grutter* does not stand for the proposition that the educational benefits of diversity are *always* a compelling interest, regardless of the context. Rather, it stands for the narrow premise that the educational benefits of diversity can be a compelling interest to an institution whose mission is to educate.”¹⁹¹

186. *Id.* at *7.

187. *Id.* at *7–8.

188. *Id.* at *7.

189. *Id.* at *7–8.

190. *Lomack v. City of Newark*, No. 05-4126, 2006 WL 2662848 (3d Cir. Sept. 18, 2006).

191. *Id.* at *5.

As *Meredith*, *PICS*, *Petit*, and *Lomack* show, government entities can always provide proof of the benefits of racially diverse environments. And, as those same cases show, courts readily accept that proof as they blindly defer to social scientists and other experts, and blithely ignore the general prohibition against race classifications in the Equal Protection Clause. The Court should make clear that *Grutter* represents a narrow holding that has no impact outside the context of public colleges and universities.

E. Narrow Tailoring Demands That Race-Neutral Alternatives Be Explored Before Naked Racial Preferences Can Be Squared with the Equal Protection Clause's Mandate of Strict Scrutiny

1. Race Neutral Alternatives to Achieving Diverse Student Bodies Exist

Even in *Grutter*, the Court recognized the requirement of engaging in a “serious, good-faith consideration of workable race-neutral alternatives.”¹⁹² The lower court in *Meredith* noted that “the Board not only considered, but actually implemented, a variety of race-neutral strategies to achieve its goals” and that “[m]any aspects of the 2001 Plan have avoided using race at all.”¹⁹³ One is left wondering why the court permitted the use of race in *any* aspect of the plan if race-neutral alternatives worked so well. In *PICS*, the court failed to take the school district to task for not evaluating race-neutral alternatives.¹⁹⁴

There are numerous race-neutral alternatives available to school districts to achieve racially balanced schools. Some examples follow:

- Reform the public school system so that parents have

192. *Grutter v. Bollinger*, 539 U.S. 302, 339 (2003); *see also* *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989) (holding that city’s minority set-aside program was not narrowly tailored in part because it had not considered whether race-neutral alternatives would have achieved its stated interest); *Hunter ex rel. Brandt v. Regents of Univ. of Cal.*, 190 F.3d 1061, 1078 (9th Cir. 1999) (holding that government “neglected to undertake any consideration let alone serious, good faith consideration” of race-neutral alternatives).

193. *McFarland ex rel. McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834, 861 (W.D. Ky. 2004), *aff’d per curiam* 416 F.3d 513 (6th Cir. 2005), *cert. granted sub nom. Meredith ex rel. McDonald v. Jefferson County Bd. of Educ.*, 126 S.Ct. 2351 (2006).

194. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1 (PICS)*, 426 F.3d 1162, 1214 (9th Cir. 2005) (Bea, J., dissenting) (observing that the District “flatly admitted [it] did not engage in a serious, good-faith consideration of race-neutral alternatives”).

more choice as to where to send their children to school. For example, reform can take the form of charter schools or vouchers. “Increased choice creates a competitive environment that forces schools to compete for students. Thus, increased school choice should produce new and innovative schools, including those that are particularly effective at responding to the educational needs of low-income, urban, minority students.”¹⁹⁵

- Create magnet schools within the public school system that offer specialized programs that attract diverse groups of students. As a California appeals court has explained, “[M]agnet schools have the advantage of encouraging voluntary movement of students within a school district in a pattern that aids desegregation on a voluntary basis.”¹⁹⁶
- Assign students on the basis of socioeconomic status. While socioeconomic status does not necessarily correlate with race, class-based diversity may yield substantially similar benefits as racial diversity.¹⁹⁷
- Assign students on the basis of a random lottery system.¹⁹⁸

195. Kevin Brown, *The Supreme Court's Role in the Growing School Choice Movement*, 67 OHIO ST. L.J. 37, 41, 55 (2006) (“Given the continuing racial and ethnic achievement gaps, the resegregation of public schools, and the limitations on the use of racial classifications in forming educational policies and programs, politicians and educational strategists desiring to improve the performance of black and Latino school children are increasingly compelled to argue for race-neutral policies and programs. It is these realities that have contributed to the expansion of school choice as an important educational reform.”).

196. *Crawford v. Huntington Beach Union High Sch. Dist.*, 98 Cal. App. 4th 1275, 1286 (2002) (internal citation and quotation marks omitted); *see also Hernandez v. Bd. of Educ. of the Stockton Unified Sch. Dist.*, 126 Cal. App. 4th 1161, 1167–68 (2004) (describing a school district’s “race neutral” magnet program for achieving racial diversity).

197. Nick Lewin, *The No Child Left Behind Act of 2001: The Triumph of School Choice Over Racial Desegregation*, 12 GEO. J. ON POVERTY L. & POL’Y 95, 97 (2005) (“[R]esearch shows that socioeconomic integration of schools is a highly promising reform because it eliminates the harmful effects of concentrated poverty in schools. Poor schools—those schools populated disproportionately by students from poor families—universally fail to provide an adequate education to their students. While racial desegregation will result from socioeconomic integration, racial desegregation should not be the primary objective. In fact, the benefits of racial integration flow primarily from the effects of socioeconomic integration. The evidence is stark: all students, of all races, and at all socioeconomic levels, reach higher levels of academic achievement and are better socially adjusted in middle-class schools than in poor schools.”).

198. *Crawford*, 98 Cal. App. 4th at 1286 (“Another version of an ‘integration plan’ described is a program which would assign only a very small geographic area for a

A lottery can be tailored to fit a school district's particular diversity needs. For example, if an applicant pool for a given school is not representative, the school district might use "a weighted lottery, which gives added weight (i.e., an extra lottery number or two) to applicants who represent characteristics sought in the enrollment mix, such as students from low-income families."¹⁹⁹

The United States Department of Education, Office for Civil Rights, published a detailed report in 2004 entitled "Achieving Diversity: Race-Neutral Alternatives in American Education."²⁰⁰ The report identifies numerous "innovative 'race-neutral' alternatives" to achieve student body diversity, while avoiding the sort of blatantly race-conscious policies adopted in *Meredith* and *PICS*.²⁰¹

2. California: A Successful Experiment in Using Race-Neutral Programs to Enhance Academic Achievement for All Students in K-12 Schools

If the goal of race-based assignment policies in K-12 public schools is to improve the academic performance of minority children,²⁰² then California has proven that the goal can be achieved through race-neutral means. For the last ten years, California school districts have been required to provide equal educational opportunities to their K-12 public school students without using race-based assignment policies.²⁰³ This is because

student's home school, and fill remaining places in that school's class by an unweighted random lottery.").

199. OFFICE OF INNOVATION & IMPROVEMENT, U.S. DEP'T OF EDUC., INNOVATIONS IN EDUCATION: CREATING SUCCESSFUL MAGNET SCHOOLS PROGRAMS 4 (2004), available at <http://www.ed.gov/admins/comm/choice/magnet/report.pdf>.

200. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., ACHIEVING DIVERSITY: RACE-NEUTRAL ALTERNATIVES IN AMERICAN EDUCATION (2004), available at <http://www.ed.gov/about/offices/list/ocr/edlite-raceneutralreport2.html>.

201. *Id.*

202. *See, e.g.,* Maureen T. Hallinan, *Diversity Effects on Student Outcomes: Social Science Evidence*, 59 OHIO ST. L.J. 733, 741 (1998) (arguing that research provides "wide empirical support" for the educational benefits of diversity). *But see* Lizotte, *supra* note 122 at 633-34 (challenging Ms. Hallinan's methodology and conclusions).

203. *See Crawford*, 98 Cal. App. 4th at 1297 (striking down race-based assignment policy in public school used to achieve racial balance because it discriminated against or granted preferential treatment to students on the basis of race in violation of Article I, section 31 of the California Constitution).

the California Constitution *prohibits* the very kind of race-based assignment at issue in *Meredith* and *PICS*.²⁰⁴

On November 6, 1996, the people of the State of California approved the California Civil Rights Initiative (Proposition 209), which amended the California Constitution by adding article I, section 31.²⁰⁵ Section 31 provides: “The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”²⁰⁶

By its own terms, section 31 extends to school districts.²⁰⁷ Moreover, section 31 applies to race-based integration plans, like the ones employed in *Meredith* and *PICS*.²⁰⁸ In adopting Proposition 209, the voters made it clear that section 31 does not permit the use of race for any reason whatsoever.²⁰⁹

One of the goals of Proposition 209 was to “address inequality of opportunity . . . by making sure that *all* California children are provided with the tools to compete in our society.”²¹⁰ At the same time, voters understood that Proposition 209 would “eliminate, or cause fundamental changes to, voluntary desegregation programs run by school districts.”²¹¹ The Legislative Analyst estimated “that up to \$60 million of state and local funds spent each year on voluntary desegregation programs may be affected . . .”²¹² These were funds that could be spent on other public school programs, such as outreach programs for K–12 students considering colleges.

204. CAL. CONST. art. I, § 31(a).

205. 1996 Cal. Legis. Serv. Prop. 209 (West).

206. CAL. CONST. art. I, § 31(a).

207. *Id.* § 31(f) (“For the purposes of this section, ‘State’ shall include . . . any . . . school district . . .”).

208. *Crawford*, 98 Cal. App. 4th at 1283–85.

209. *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068, 1087 (Cal. 2000) (“Unlike the equal protection clause, section 31 categorically prohibits discrimination and preferential treatment. Its literal language admits no ‘compelling state interest’ exception; we find nothing to suggest the voters intended to include one sub silentio.”); *see also* *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 708 (9th Cir. 1997), *cert. denied*, 522 U.S. 963 (1997) (“That the [federal] Constitution *permits* the rare race-based or gender-based preference hardly implies that the state cannot ban them altogether. States are free to make or not make any constitutionally permissible legislative classification.”).

210. *Hi-Voltage Wire Works*, 12 P.3d at 1083.

211. *Id.* at 1098 (George, C.J., concurring in part and dissenting in part).

212. *Id.* app. at 1108.

In the wake of Proposition 209's passage, the League of California Cities made recommendations to school districts, "includ[ing] developing academic support programs and financial aid services for students from low-income backgrounds" ²¹³ For example, the UC Links program offered by the University of California prepares K–12 students from low-income families for college—regardless of their race. ²¹⁴ The UC Links program describes its goal as follows:

- UC Links serves students starting at the early stages of the academic pipeline. UC Links largely serves students at the elementary and middle school levels, and sets them early on a college-going path through engaging learning activities.
- UC Links is inclusive, supporting children who are struggling in school, as well as those who do well. While many educational programs serve students who are already doing well in school, UC Links programs are open to all children and youth in the host school or community. By giving youth from low-income or language-minority communities extra support early in their school careers, UC Links enables them to overcome obstacles they face to their academic development. ²¹⁵

According to UC Links, the program has been successful at improving the academic performance of participating students: "Evaluation results for students participating in UC Links programs indicate improved basic literacy, greater information literacy, improved collaborative behavior and attitudes, and increased aspirations for higher learning." ²¹⁶

The achievement of students in California K–12 schools has not suffered from the unavailability of race-based policies. Quite the contrary, academic achievement has improved since Proposition 209 banned the use of race-based policies. For example, as Eryn Hadley reports, "[t]he graduation rates of California's high school students steadily increased after the passage of Proposition 209" *in every ethnic group*. ²¹⁷ Citing

213. Eryn Hadley, Note, *Did the Sky Really Fall? Ten Years After California's Proposition 209*, 20 BYU J. PUB. L. 103, 131 (2005) (citation omitted).

214. *Id.*

215. UC Links, A Summary, http://www.uclinks.org/what/what_home.html (follow "summary" hyperlink) (last visited Oct. 14, 2006).

216. *Id.* (follow "overview" hyperlink) (last visited Oct. 14, 2006).

217. Hadley, *supra* note 213, at 132.

California Department of Education statistics, Ms. Hadley goes on to explain:

[T]he California High School completion rate reached a low point of 64% during the 1994–95 year (the year before Proposition 209 was adopted), after dropping from 68.6% in 1991–92. In the following years, the high school graduation rate crept back up to 69.6% in 2001–02. A report based on data from the California Department of Education shows that the graduation rate of all minority students increased in each ethnic group between the years 1995–96 and 2001–02. The low percentage of students that graduate with a high school diploma is discouraging, but it requires providing all students with the tools they need, regardless of race or sex.²¹⁸

Moreover, minority high school students in California have outperformed minority high schools students nationally. This is the case even though California is the only state with a constitutional provision banning school districts from using race to shuffle around students in the name of “diversity.” As Ms. Hadley reports:

The graduation rates of California’s minority students were above the national average in 2001. In California, 82.0% of Asian students graduated in 2001, compared to 76.8% of Asian students nationally. Fifty-seven percent of Hispanic students in California graduated in 2001, compared to 53.2% nationally. California’s black students beat the national graduation rate by 5.1% in 2001, with 55.3% of California’s black students graduating from high school.²¹⁹

The answer to increasing academic achievement among minority students in K–12 education—if that is indeed the question—is *not* to implement racial balancing policies, which cost school districts large sums of money in exchange for a very dubitable benefit.²²⁰ Instead, the answer is to reallocate those funds to race-neutral programs that work. It is the responsibility of elected local school boards to ensure that every child has a genuine opportunity to receive an excellent education no matter what school he or she attends, and no matter what his or her race happens to be.

218. *Id.*

219. *Id.* at 133.

220. Lizotte, *supra* note 122 at 653.

V. CONCLUSION

Grutter's "educational benefits" exception to the Equal Protection Clause has been misused by school districts and other government actors to justify their racial balancing policies. But with the granting of certiorari in two school assignment cases—*Meredith* and *PICS*—the Court has the opportunity to rein in these misguided attempts to extend *Grutter* beyond what the decision allows. If it fails to do so, the equal protection landscape may forever change as we witness the open-ended "educational benefits" exception become the rule.