



Journal of Educational Controversy

Volume 2

Number 1 *Jonathan Kozol's Nation of Shame Forty
Years Later*

Article 10

2007

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Recommended Citation

Jones, Sonya D. and Ramsey, Erin N. (2007) "Discrimination Veiled As Diversity: The Use Of Social Science To Undermine The Law," *Journal of Educational Controversy*: Vol. 2 : No. 1 , Article 10.
Available at: <https://cedar.wwu.edu/jec/vol2/iss1/10>

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ARTICLE

Discrimination Veiled As Diversity: The Use Of Social Science To Undermine The Law

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I. Jurisprudential Justification for Racial Discrimination

Fifty years after racially-based segregation was outlawed in *Brown v. Board of Education*, segregation continues to occur not as a result of legal mandates, but as a result of socioeconomic and racial composition of neighborhoods in which a school may be contained.^[1] Chief Justice Earl Warren, writing for a unanimous Court, declared “[t]o separate [minorities] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”^[2] Even though the Supreme Court was clear in holding that race cannot be a factor in primary and secondary school assignments, some school districts continue to defy that ruling.

Supreme Court decisions are historically based on sources of constitutional law; however, when it comes to justifying the use of racial discrimination, courts must step outside the bounds of constitutional authority and rely on nonconstitutional sources in order to justify such forbidden practices. In an attempt to remedy de facto segregation, many school districts across the nation have implemented plans to maintain a desired racial make-up at the expense of denying entry to an otherwise qualified student based on skin color alone. Some social scientists and legal scholars argue that the diversity created by a more racially balanced learning environment benefits those in traditional minority groups; however, other social scientists and legal scholars argue that regardless of the motivation, any determination of eligibility to compulsory primary and secondary education based on race or ethnicity is harmful to all students. Ultimately, such justified racial discrimination is unconstitutional.

II. *Grutter* and *Gratz*: Racial Preferences Justified in Higher Education

It is undisputed that under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, 42 U.S.C. § 2000d (Title VI), and 42 U.S.C. § 1981 (the Civil Rights Act), racial discrimination by public entities is unconstitutional. Yet, a line of cases in various courts reveal that courts continue to grapple with and even justify the use of racial preferences in public education.^[3] In 2003, for the first time in 25 years, the Supreme Court returned to the issue of race-based admission practices in public education in *Gratz v. Bollinger* (*Gratz*) and *Grutter v. Bollinger* (*Grutter*).^[4]

In *Gratz*, the University of Michigan employed a point system in the undergraduate admissions review process that automatically awarded twenty percent of the required points for automatic admission to any applicant from an underrepresented racial or ethnic minority group.^[5] The Supreme Court reiterated that “all racial classifications” are subject to strict scrutiny: that the classification must be narrowly tailored to achieve a compelling government interest.^[6] The Court ultimately held that “the University’s policy . . . [was] not narrowly tailored to achieve the interest in educational diversity”^[7] The Court reasoned that under Justice Powell’s opinion in *Bakke*, subjective, individualized consideration is necessary in order to achieve diversity, rather than objective systems of rewarding points based solely on race.^[8]

In *Grutter*, the University of Michigan Law School admissions policy, that favored historically discriminated against minorities, was challenged to determine if enhancing ethnic diversity in higher education was a compelling government interest triggering narrowly tailored policies to achieve that interest.^[9] The *Grutter* Court “endorsed the law school’s stated interest in obtaining the benefits of viewpoint diversity—not racial balance for its own sake.”^[10] Tellingly, the Court distinguished time and again that their decision applied to higher education, but never reached whether or not the same would hold true in K-12 education.^[11] Even in his dissent, Justice Scalia warned that the majority was creating litigation with their holding, but never alluded to the impact on cases of discrimination in K-12 education.^[12]

III. *PICS* and *Meredith*: Diversity as a Compelling Interest in K-12

In the Fall 2006 Term, the Supreme Court will return to the issue of using race as a determinative factor in public school assignments in compulsory education in the cases of *Parents Involved in Community Schools v. Seattle School District No. 1 (PICS)* and *Meredith v. Jefferson Co. Board of Education (Meredith)*.^[13] It is likely the Supreme Court will rely heavily on their recent opinions in both *Grutter* and *Gratz* to justify their decision, no matter how they decide.

A. *PICS*: Racial Discrimination as a Tiebreaker in School Choice Plans

In *PICS*, the City of Seattle schools (the District, or District) adopted a plan to assign children to public primary and secondary schools based on the existing racial makeup of those schools in an effort to remedy de facto segregation.^[14] The subject plan allows prospective ninth graders to select which Seattle high school they wish to attend.^[15] Once a particular school becomes oversubscribed (more applicants than open spaces), then a system of tiebreakers is used to determine admission into that school.^[16] The first tiebreaker is favors students who already have a sibling attending that school – they are automatically admitted.^[17] The second tiebreaker depends on the racial make-up of the school that is determined to be oversubscribed.^[18] If the student body of the oversubscribed school differs by more than fifteen percent from the racial make-up of the school district as a whole, then the applicant will not be admitted, because the school is considered to be racially imbalanced, unless the admission of the student brings the enrollment closer to the overall racial make-up of the school district.^[19] Quite simply, the District racially discriminates against high school students in assigning them to schools.

Parents of school children who were not, or might not be, assigned to their choice of schools as a result of the second tiebreaker brought this case under state and federal law.^[20] According to the District, their plan is compliant with *Grutter* because it addresses the compelling interests of (1) “educational and social benefits that flow from racial diversity, and (2) racial balance “avoids the harms resulting from racially concentrated or isolated schools.”^[21] After a complicated procedural history, the Ninth Circuit Court of Appeals affirmed the District Court and held “that the District’s interests in obtaining the educational and social benefits of racial diversity in secondary education and in avoiding racially concentrated or isolated schools resulting from Seattle’s segregated housing pattern [were] clearly compelling.”^[22] The Ninth Circuit further held that the subject plan was narrowly tailored to achieve diversity^[23] and condoned racial discrimination^[23] by the local school board in secondary education.

B. *Meredith*: Racial Discrimination to Remedy Prior Racial Discrimination

In *Meredith*, the Jefferson County schools adopted a plan to assign children to public primary and secondary schools based on the existing racial makeup of those schools, after being released from a desegregation order.^[24] The students were divided into two categories: black and white (including Latinos and Asians).^[25] According to the school district, the assignment was necessary to ensure that the black population of all public schools was between fifteen percent and fifty percent of total enrollment.^[26] When a particular school is situated at either edge of the range prescribed, race is the decisive factor in determining a child's admittance into that school.^[27]

When Crystal Meredith (mother of Joshua McDonald) attempted to transfer her son from one school to another, the application was denied because doing so would disrupt the racial balance at the preferred school.^[28] Consideration was given neither to Joshua McDonald's grades or interests nor the available space at the preferred school, merely the whiteness of Joshua McDonald.^[29] Using *Grutter* as justification, the district court in *Meredith* bought into the respondents' argument that maintaining integration was a compelling state interest in K-12 public education and that the district's policy was narrowly tailored to achieve that interest.^[30]

C. Proper Consideration for *PICS* and *Meredith*

The *Grutter* Court endorsed the law school's stated interest in bringing viewpoint diversity to the law school classroom by obtaining the "educational benefits" of "exposure to widely diverse people, cultures, ideas and viewpoints."^[31] Unlike universities, K-12 public schools are not protected as a special niche in American jurisprudence, and their educational purpose does not hinge on the "robust exchange of ideas."^[32] The educational purpose of K-12 public schools is to teach and inculcate, not to foster debate between diverse viewpoints.^[33] Furthermore, K-12 public schools prepare students for citizenship, which necessarily includes teaching of "equal protection" as enshrined in our Constitution; however, the continued, pervasive discrimination against a member of any race or ethnicity by local school boards is contradictory to that end.

Even if "diversity" is accepted as a compelling interest in K-12 schools, the methods used in Seattle and Louisville are not the best way to achieve that diversity. Reinforcing the ideas that (1) race is what matters most, (2) race will give one an advantage, and (3) that diversifying racial composition is the sole means of creating diversity in the classroom, all give children a disadvantage in real world application if the societal goal is to abrogate all racial discrimination.

IV. Improper Use of Social Science in American Jurisprudence

Supreme Court decisions are historically and rightfully based on sources of constitutional law; however, when it comes to justifying the use of racial discrimination, against any race (including whites), the Court chooses to step outside the bounds of constitutional authority and rely on nonconstitutional sources in order to justify such forbidden practices. The use of gender and race as a factor in implementing voluntary integration plans has triggered a renewed interest in the issue of racial integration in American public school systems.^[34]

Historically, courts have struggled to clarify permissible use of racial factors in considering a candidate's qualifications for admissions.^[35] In more recent decisions, courts are using social science literature and studies to justify the use of race and gender in admissions and student assignment

decisions.^[36] As support for its position in *Grutter*, the Court cited social science evidence that “diversity promotes learning outcomes and ‘better prepares students for an increasingly diverse workforce and society.’”^[37]

A. Social Science Studies Are Outside the Bounds of Constitutional Authority

In deciding cases, judges are bound by constitutional authority; however, they are permitted to use persuasive authority at their discretion. Persuasive authority, however, is generally limited to law review articles, American law reports, treatises, and practice materials. When judges step outside the recognized bounds of authority in deciding cases, they become the trier of facts rather than the trier of law.

Social science is a branch of science that deals with the institutions and functioning of human society and with the interpersonal relationships of individuals as members of society. The judiciary is not sufficiently capable of deciphering which social science studies are appropriate to use, because it is an academic area in which they themselves were not formally trained. As members of the judiciary, trained to analyze *legal* issues, judges are not social scientists trained to understand the empirical results of these studies. Social science emphasizes the use of the scientific method, including both qualitative and quantitative methods. There are many limitations in social science studies that judges are not trained to understand. Self-selection problems plague all long-term studies, but when this bias is controlled the results of the study indicate little or no benefit exists from integration.^[38]

The Supreme Court has recently reiterated the “elementary” requirement of due process that “the decision maker's conclusion... must rest solely on the legal rules and evidence adduced at the hearing.”^[39] Decisions on the basis of the trial court's personal opinions, no matter how well founded, would deny the litigant this right, as well as the right to cross-examination and to an impartial decision maker.^[40] The judge, of course, cannot be cross-examined, and no judge could be expected fairly to weigh what is in effect his own testimony against testimony of other witnesses.^[41] Judges study jurisprudence, the science or philosophy of law. Social scientists study the human aspects of the world; the judiciary studies the legal aspects. Judges should not attempt to analyze social science studies, nor should social scientists analyze the legal merits of a case.

B. Violation of the Court's Neutrality

Judges are not experts in education and are not particularly able to identify in detail those curricula best designed to ensure that a child receives a sound basic education.^[42] Yet, in both *PICS* and *Meredith*, the judiciary posited their idea of how a child receives an educational benefit through voluntary integration programs. Educational benefit thesis underlying the respondents' case theories in *PICS* and *Meredith* cite to social science studies for support, yet fail to mention any study critical of the evidence that a benefit exists for race-based factors.^[43]

It is not the role of the judiciary to cite to additional social science studies to support their opinion.^[44] A decision by an appellate court is limited only to the evidence presented to it during trial.^[45] Nowhere in the briefs submitted by appellant, respondent, or amici, were the same studies cited by the Ninth Circuit in their opinion cited to as authority to be considered by the court. Social scientists were used as experts at the trial court level, as well as social science studies as further evidence for the experts. Although the court is free to cite to legal authority in their judicial opinions, inclusion of authority

pertaining to social science evidence not cited to by counsel violates the neutrality of the court. If the content of these social science studies were so commonsense in nature, neither party would have required the use of experts to testify and explain the significance of the studies' findings.

The Court first hinted at the permissibility of voluntary integration in *Swann v. Charlotte-Mecklenburg Board of Education*.^[46] Even the best example of desegregation in the nation, Charlotte-Mecklenburg, showed no net reduction in the racial achievement gap over a fifteen year period.^[47] Desegregation only had a significant impact on achievement when it started at the very beginning of schooling.^[48] In addition, a recent study by Armor suggests no relationship exists between racial concentration and achievement after controlling for differences in socioeconomic status.^[49] These limitations and findings of insignificant correlations were not discussed by the court in either *PICS* or *Meredith*.

The Ninth Circuit in *PICS* rejected the race-neutral socioeconomic alternative to racial integration.^[50] “Although there was no formal study of the proposal by District staff, Board members’ testimony revealed two legitimate reasons” for rejecting the socioeconomic alternative: (1) “it is insulting to minorities and often inaccurate to assume that poverty correlates with minority status;” and (2) students would be reluctant to reveal their socioeconomic status to their peers.^[51] The dissent argued, “such analysis seems far from the ‘serious, good-faith consideration of workable race-neutral alternatives’ demanded by *Grutter*.”^[52] Judge Bea elaborated, “without formal studies (or indeed any earnest consideration of the alternatives), there is no way of knowing whether the District actually seriously considered, and rejected for valid reasons, less-restrictive race-neutral alternatives.”^[53] Such consideration is necessary in order to satisfy the “narrowly tailored” requirements set forth in *Gratz*.^[54] Judicial neutrality also requires consideration of alternatives that best exemplify the arguments being made by both parties.

V. Conclusion

Almost thirty years ago, Justice Powell warned that “[p]referring members of any one group for no other reason than race or ethnic origin is discrimination for its own sake.”^[55] The racial discrimination being challenged in the *PICS* and *Meredith* cases is clearly unconstitutional. Children are being assigned to schools, based on race, to achieve a racial balancing scheme: it is discrimination for its own sake.

Achieving diversity as an educational benefit may be a compelling government interest in higher education, but not in compulsory education and it should not be so.^[56] However, in determining what constitutes a compelling government interest, courts should not turn to social science research to find support for their conclusions. Judges are bound the constitutional authority granted to them: to step outside their bounds is to step outside the role of the judiciary and into the shoes of an advocate. For reasons discussed herein, the Supreme Court limited the holding in *Grutter* to higher education only; therefore its application to compulsory education is wrongful and both *PICS* and *Meredith* should be overturned.

References

[1] See *Brown v. Board of Education of Topeka*, 347 U.S. 483, 492 (1954) (holding that de jure segregation is unconstitutional, but de facto segregation is not).

[2] *Id.* at 494.

[3] *See Bakke*, 438 U.S. 265 (1978); *Wygant v. Jackson Bd. Of Educ.*, 476 U.S. (1986); *Gratz v. Bollinger (Gratz)*, 539 U.S. 244 (2003); *Grutter v. Bollinger (Grutter)*, 539 U.S. 306 (2003); *Hopwood v. State of Tex.*, 78 F.3d 932, (5th Cir. 1996), *reh'g en banc denied*, 84 F.3d 720 (1996), *cert. denied*, 518 U.S. 1033 (1996).

[4] *See Gratz*, 539 U.S. 244 (2003); *Grutter*, 539 U.S. 306 (2003).

[5] *Gratz*, 539 U.S. at 256, 270.

[6] *Id.* at 270 (citations omitted).

[7] *Id.* at 275.

[8] *Id.* at 270-71. If diversity was the goal of the university, the plan they were using allowed for no individualized consideration qualities and characteristics, other than race, that would contribute to a diversified educational environment. *Id.* at 271. *See also, Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 274, 289 (1978) (holding that the setting aside of 16 out of 100 seats for the first year class at the U.S. Davis medical school for applicants who were disadvantaged members of a minority amounted to a quota and was unconstitutional).

[9] *See Grutter* 539 U.S. at 322.

[10] Brief Amicus Curiae of Pacific Legal Foundation, et al., in Support of Petitioner, *Parents Involved in Community Schools v. Seattle School District No. 1*, (No. 05-908) (Aug. 18, 2006) at 12.

[11] *See id.* at 11.

[12] *Grutter*, 539 U.S. at 348-49 (Scalia, J., dissenting).

[13] *See Parents Involved in Community Schools v. Seattle School District No.1*, 426 F.3d 1162 (9th Cir. 2005) (*en banc*), *cert. granted*, 126 S.Ct. 2351 (2006) (*PICS*); *McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834, 840-42 (W.D. Ky. 2004), *aff'd* 416 F.3d 513 (6th Cir. 2005), *cert. granted sub nom. Meredith v. Jefferson Co. Bd. of Educ.*, 126 S.Ct. 2351 (2006) (*Meredith*). *PICS* and *Meredith* will be argued in tandem on Dec. 4, 2006.

[14] *See PICS*, 426 F.3d 1162, 1166-67 (9th Cir. 2005) (*en banc*).

[15] *Id.* at 1169.

[16] *Id.* at 1170.

[17] *Id.*

[18] *Id.*

[19] *Id.* at 1169-70. The racial make-up of the school district as a whole is approximately 60% non-white and 40% white; notable, these are the only two racial categories considered. *Id.*

[20] *Id.* at 1171.

[21] *Id.* at 1174.

[22] *Id.* at 1179.

[23] *Id.*

[24] *Meredith*, 330 F. Supp. 2d 834, 840-42 (W.D. Ky. 2004).

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.* at 838 n.3.

[29] *Id.* at ???.

[30] *See id.* at 849-55.

[31] *Grutter*, 539 U.S. 306, 330 (2003).

[32] *Id.* at 324.

[33] *See, e.g., Bethel Sch. Dis. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (observing that the purpose of American public schools is to teach fundamental values necessary to maintain a democratic society); *see also* 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").

[34] *See PICS*, 377 F.3d 949, 954-55 (9th Cir. 2004), *vacated and reh'g en banc granted*, 395 F.3d 1168 (9th Cir. 2005), *cert. granted*, 126 S. Ct. 2351 (2006); *Comfort ex rel. Neumyer v. Lynn School Committee (Comfort)*, 283 F. Supp. 2d 328 (2003), *aff'd* 418 F.3d 1 (1st Cir. 2005), *cert. denied*, 126 S. Ct. 798 (Dec. 5, 2005) (No. 05-348), *reh'g denied*, ___ S. Ct. ___, WL 2096448 (Jul. 31, 2006) (No. 05-348) With respect to intergroup contact, the number of students in a classroom of a racial minority matters. Abstract instruction about racial tolerance is insufficient without meaningful contact with students of a different race. Social science literature, including social and developmental psychology literature, cited by the defendants' experts instructs that racial isolation adversely impacts both minority attitudes and the attitudes of those in the majority. This impact becomes more pronounced as a racial minority within a group dwindles in size. *See Comfort*, 283 F. Supp. 2d at 356-58.

[35] *See Bakke*, 438 U.S. 265 (1978); *Wygant v. Jackson Bd. Of Educ.*, 476 U.S. (1986); *Gratz*, 539 U.S. 244 (2003); *Grutter*, 539 U.S. 306 (2003); *Hopwood v. State of Tex.*, 78 F.3d 932, (5th Cir. 1996), *reh'g en banc denied*, 84 F.3d 720 (1996), *cert. denied*, 518 U.S. 1033 (1996).

[36] *See Grutter*, 539 U.S. 306, 308 (2003) (The Law School's position was bolstered by numerous expert studies and reports showing that such diversity promotes learning outcomes and better prepares students for an increasingly diverse work force, for society, and for the legal profession); *see also PICS*, 377 F.3d 949 (9th Cir. 2004); *Meredith*, 330 F.Supp.2d 834 (W.D. KY. 2004).

[37] *Grutter*, 539 U.S. at 330 (alteration in original) (citation omitted) (quoting Brief of Amici Curiae

American Educational Research Association, et al., at 3, *Grutter* (No. 02-241)). Justices Scalia and Thomas disagreed with the majority on this point, asserting that any benefits derived from diversity are out place in the law school setting. *Id.* at 347-48 (Scalia, J., concurring in part and dissenting in part). Justice Scalia stated that diversity is "a lesson of life rather than law." *Id.* at 347 (Scalia, J., concurring in part and dissenting in part).

[38] Robert L. Crain and J. Strauss, *School Desegregation and Black Occupational Attainment: Results from a Long-term Experiment*, The Social Organization of Schools, Report No. 359 (1985).

[39] *Goldberg v. Kelly*, 397 U.S. 254, (1970); cf. *Cross v. Harris*, 135 U.S. App. D.C. 259, n.46 (1969).

[40] *Id.*

[41] *Id.*

[42] *Leandro v. State*, 346 N.C. 336, 354, 488 S.E.2d 249 (1997)

[43] See *Meredith*, 330 F.Supp.2d 834, 853 (2004) (expert Gary Orfield testified that racial integration benefits blacks substantially, however he also noted that he was not certain as to what extent the policy of an integrated school system contributed to these successes); William T. Trent, Ph.D., Expert Report, *PICS*, February 13, 2001.

[44] See *PICS*, 426 F.3d 1162 (2005) (citing three additional studies, two law review articles and one social science study to support the plurality opinion).

[45] See *U.S. v. Ameline*, 409 F.3d 1073, 1112-13 (9th Cir. 2005) (citing *Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1077 (9th Cir. 1988)).

[46] See *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 16 (1971) (School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities)

[47] See *Swann v. Charlotte-Mecklenburg*, 402 U.S. 1, 16 (1971); David J. Armor, Desegregation and Academic Achievement, *School Desegregation in the 21st Century* (C.H. Rossell et al., eds., Greenwood Publishing Group, 2002) p. 169-72; 174.

[48] Robert L. Crain and Rita E. Mahard, *The Effect of Research Methodology on Desegregation-Achievement Studies: A Meta-Analysis*, 88 Am. J. Soc. 839-854 (1983).

[49] David J. Armor, Statement to the U.S. Commission on Civil Rights: *The Outcomes of School Desegregation in the Public Schools* (July 28, 2006).

[50] See *PICS*, 426 F.3d at 1188.

[51] *Id.* at 1188-89.

[52] *Id.* at 1214, n.23 (Bea, J., dissenting).

[53] *Id.*

[54] *See Gratz*, 539 U.S. 244 (2003).

[55] *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (further explaining, however, that race may be considered as a *contribution* to diversity, but *not as a decisive factor*).

[56] *See Grutter*, 539 U.S. 306 (2003); *see also*, discussion *supra* Part III.