

Nos. 20-1199, 21-707

In the Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,
Respondent.

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

UNIVERSITY OF NORTH CAROLINA, ET AL.,
Respondents.

*ON WRITS OF CERTIORARI TO THE UNITED STATES
COURTS OF APPEALS FOR THE FIRST & FOURTH CIRCUITS*

**BRIEF FOR PARENTS DEFENDING
EDUCATION AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

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QUESTIONS PRESENTED

1. Should this Court overrule *Grutter v. Bollinger*, 539 U.S. 306 (2003), and hold that institutions of higher education cannot use race as a factor in admissions?
2. Title VI of the Civil Rights Act bans race-based admissions that, if done by a public university, would violate the Equal Protection Clause. *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003). Is Harvard violating Title VI by penalizing Asian-American applicants, engaging in racial balancing, overemphasizing race, and rejecting workable race-neutral alternatives?
3. Can a university reject a race-neutral alternative because it would change the composition of the student body, without proving that the alternative would cause a dramatic sacrifice in academic quality or the educational benefits of overall student-body diversity?

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INTEREST OF *AMICUS CURIAE*

Parents Defending Education is a national, nonprofit, grassroots association. Its members include many parents with school-aged children. Launched in 2021, it uses advocacy, disclosure, and litigation to combat the increasing politicization of K-12 education. It opposes schools' growing efforts to indoctrinate children—over the objections of their parents—with divisive ideologies about topics like race, gender, and sexuality.

Parents Defending Education has a substantial interest in this case. If school admissions, curriculum, teaching, and discipline decisions are made on grounds other than merit, its members believe that the quality of their children's current education and future opportunities will decline. Its members also believe that their children should be judged based on individual merit, not defined as members of a racial group.¹

¹ All parties consented to the filing of this brief. No counsel for a party authored this brief, and no counsel or party made a monetary contribution for this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution for this brief.

SUMMARY OF THE ARGUMENT

Grutter v. Bollinger made many promises. It promised that the Fourteenth Amendment “d[id] away with all governmentally imposed discrimination based on race.” 539 U.S. 306, 341 (2003). Yet it upheld “race-conscious admissions policies” that supposedly “d[id] not unduly harm” students discriminated against, promising that these policies would be “temporary.” *Id.* at 341–42. It promised that temporary race discrimination would promote “cross-racial understanding,” “break down racial stereotypes,” and “prepare[] students for an increasingly diverse workforce and society.” *Id.* at 330 (cleaned up). Most of all, it promised that after a couple of decades, race discrimination would “no longer be necessary” because education would be “race-neutral.” *Id.* at 343.

Instead, *Grutter* has spawned increasing racial discrimination and division that has reached beyond college admissions to infect K-12 schools nationwide. This Court tried to stem the tide of *Grutter*’s race discrimination by prohibiting racial balancing in K-12 schools. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007). But as long as *Grutter* remains the law, K-12 schools will face an inexorable pressure to discriminate based on skin color. These schools want to send their students to colleges like Harvard and UNC. And they know that elite colleges discriminate based on race, especially against Asian-Americans. So they will do whatever they can to mirror that discrimination, thereby increasing the chances that they will send students to these colleges.

In this way, *Grutter* leads to aggressive evasion of the Court’s ban on K-12 racial balancing in *Parents Involved*. Prominent school districts gerrymander high

school gifted-and-talented schools and programs, using any available proxy for race to keep out Asian (and sometimes white) students. Gifted-and-talented programs are both successful and essential, providing a top-notch education to high-achieving students whose families cannot afford private school. Yet districts obsessed with racial balance undermine or eliminate them, seemingly unaware that the existing imbalances can be traced to prior attacks on elementary and middle school gifted-and-talented programs. Some schools have even eliminated all honors courses, considering it better to dampen all students' learning rather than permit perceived racial imbalances. And too often, courts have refused to recognize the obvious motivation behind school districts' convoluted changes to gifted-and-talented criteria: discrimination based on race. *Grutter* leads to that discrimination. It must be overruled.

Not only has *Grutter* failed to deliver its race-neutral utopia, it has ushered in the opposite reality. *Grutter* elevates race above the individual, reasoning that discrimination against “nonminorit[ies]” is not an “undu[e] harm” because it helps “underrepresented minority applicants.” 539 U.S. at 341. That is not our Nation's view: “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.” *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). Equal protection has no “protected classes”; every citizen is created equal and must be treated as an individual, not as a member of a racial bloc.

Grutter's contrary view of racial primacy has metastasized throughout the K-12 educational system. K-12 schools are obsessed with race. This obsession might be called antiracism or critical race theory or

equity. It's all the same pernicious, racist nonsense. Starting in kindergarten, schools now teach that students are oppressors or oppressed based on skin color. They reject the notion of "colorblindness," labeling it a manifestation of white supremacy. They refuse to discipline students of color lest racial imbalances appear. They engage in outright segregation of classes, activities, and scholarships. They brook no dissent, tagging any questions as racist.

All this cements racial castes within schools, leading impressionable young students to resent each other because of the color of their skin. Rather than bring us closer to a race-neutral society, *Grutter* has created and exacerbated racial tensions and divisions. Our children and American society cannot withstand more of *Grutter's* odious racial discrimination. "[D]iscrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society." *Fullilove v. Klutznick*, 448 U.S. 448, 547 n.21 (1980) (Stevens, J., dissenting) (cleaned up). *Grutter* must be overruled.

ARGUMENT

I. *Grutter* encourages evasion of *Parents Involved*.

Though the Court in *Grutter* permitted institutions of higher education to consider race in admissions, it refused to extend that permission to K-12 schools in *Parents Involved*. But as long as *Grutter* remains the law, K-12 schools will face an inexorable pressure to defy this Court's prohibition on discriminatory student selection. That is because high schools want students who will be admitted to elite institutions like Harvard and UNC; middle and elementary schools, in turn, want students who will be admitted to those high

schools. If college admissions decisions are made based on race, this racial discrimination inevitably infects K-12 schools.

In *Grutter*, the Court held that a university's race conscious admissions policy was constitutional because of the "compelling interest in attaining a diverse student body." 539 U.S. at 328. "After *Grutter*," several courts "found that race-based assignments were permissible at the elementary and secondary level." *Parents Involved*, 551 U.S. at 724. In those courts' views, elementary and secondary schools' "interests in the educational and social benefits of diversity are similar to those of a law school as articulated in *Grutter*." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1175 (CA9 2005).

This Court disagreed. It distinguished *Grutter* as involving "considerations unique to institutions of higher education," including "the expansive freedoms of speech and thought associated with the university environment." *Parents Involved*, 551 U.S. at 724. Justice Kennedy noted that "in the context of college admissions," "students ha[ve] other choices" of schools. *Id.* at 792 (opinion concurring in part and in judgment). He also emphasized that the system in *Grutter* "considered race as only one factor among many." *Id.* at 793.

These distinctions were not without question. The "ostensibly flexible nature" of the program in *Grutter* "appear[ed] to be, in practice, a carefully managed program designed to ensure proportionate representation of applicants from selected minority groups." *Grutter*, 539 U.S. at 385–86 (Rehnquist, C.J., dissenting). And "promot[ing] cross-racial

understanding” and “break[ing] down racial stereotypes,” *id.* at 330 (majority opinion) (cleaned up), are interests that *could* apply in K-12 schools (or anywhere else). They are “lesson[s] of life,” the same given to “people three feet shorter and 20 years younger than the full-grown adults” at law school. *Id.* at 347 (Scalia, J., concurring in part and dissenting in part). For these reasons, persistent advocates of race discrimination believe “that *Grutter’s* expansive possibilities remain intact,” to be “rediscover[ed]” by “a more sympathetic Court” and applied to K-12 schools.²

In all events, *Grutter* is a present danger to K-12 schools even if *Parents Involved* bars them from engaging in overt racial balancing. Everybody follows Harvard and other elite universities. These schools have significant downstream effects: “where you went to high school will play a major role in whether or not you are admitted to Harvard.”³ K-12 schools brag about how many graduates go to Harvard.⁴ To maximize their chances at sending students to Harvard, high schools need to mirror Harvard’s own student population. And as long as Harvard is discriminating on race to tinker with its racial makeup, high schools will face the same pressure to distort their racial makeup. That effect trickles down to elementary and middle schools. Now, even “elite

² M. Adams, Stifling the Potential of *Grutter v. Bollinger*, 88 B.U. L. Rev. 937, 942 (2008).

³ G. Bradshaw, Where You Attend High School Can Affect College Admission Chances, Chi. Trib. (May 14, 2015), <https://www.chicagotribune.com/suburbs/post-tribune/ct-ptb-bradshaw-educated-advice-st-0515-20150514-story.html>.

⁴ BLS History, Bos. Latin Sch., https://bls.org/apps/pages/index.jsp?uREC_ID=206116&type=d (last visited Mar. 31, 2022) (highlighting “tradition of sending more students” “to Harvard College than any other institution”).

kindergartens” appear to engage in affirmative action.⁵

These admissions pressures are only worsened by K-12 schools’ “interest in classroom aesthetics and a hypersensitivity to elite sensibilities.” *Parents Involved*, 551 U.S. at 750 n.3 (Thomas, J., concurring). Those “elite sensibilities” will be well illustrated by the inevitable deluge of *amicus* briefs here supporting racial discrimination from major corporations, large law firms, and other elite slices of American society. *Grutter* contributed to those sensibilities by placing this Court’s stamp of approval on racial discrimination in the name of diversity. “For good or for ill,” the Court “teaches the whole people by its example.” *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

Yet *Parents Involved* invalidated “race-based assignments in elementary and secondary schools.” 551 U.S. at 725. So schools wishing to mimic Harvard’s race discrimination must “resort to camouflage.” *Gratz v. Bollinger*, 539 U.S. 244, 304 (2003) (Ginsburg, J., dissenting). The method that many are choosing is to eliminate or undermine gifted-and-talented or honors programs. These programs traditionally provide a challenging education for high-achieving students.⁶ They encourage excellence in education and prepare

⁵ See J. Anderson, Elite Schools Rethink Saving Seat for Little Sister, CNBC, <https://www.cnbc.com/2011/09/06/elite-schools-rethink-saving-seat-for-little-sister.html> (last updated Sept. 13, 2013) (claiming that “[d]iversity seems to be the biggest driver of the change” in admissions at elite kindergartens).

⁶ *E.g.*, T. Loveless, High-Achieving Students in the Era of No Child Left Behind, Thomas B. Fordham Inst. (June 18, 2008), <https://fordhaminstitute.org/national/research/high-achieving-students-era-no-child-left-behind>.

students to attend schools like Harvard, and eventually contribute to our society.

Modern society has perceived a flaw in these top-notch schools: they do not always reflect the population's racial composition. But "the aestheticists will never address the real problems facing 'underrepresented minorities,' instead continuing their social experiments on other people's children." *Grutter*, 539 U.S. at 372 (Thomas, J., concurring in part and dissenting in part). Here, that means either eliminating gifted-and-talented programs or manipulating them to take away opportunities where too many children are of the wrong race.

Take New York City, which plans to end its gifted-and-talented entrance test for four-year-olds after a task force "to help increase diversity in schools recommended that the city no longer track students deem[ed] gifted and talented into separate classes."⁷ The core complaint was that "[t]he classes are disproportionately Asian and white compared to the school system at large."⁸ The city's alternative was to "train all its kindergarten teachers . . . to accommodate students who need accelerated learning within their general education classrooms," even though "teaching children with a large range of abilities in one classroom" is "some of the hardest work" in education.⁹

⁷ J. Jorgensen, DOE Will End Gifted and Talented Test After This Year, *Spectrum News N.Y.C.* (Jan. 12, 2021), <https://www.ny1.com/nyc/all-boroughs/education/2021/01/13/doe-will-end-gifted-and-talented-test-after-this-year>.

⁸ *Ibid.*

⁹ E. Shapiro, De Blasio to Phase Out N.Y.C. Gifted and Talented Program, *N.Y. Times* (Oct. 8, 2021), <https://www.nytimes.com/2021/10/08/nyregion/gifted-talented-nyc-schools.html>.

But that was not enough for the aestheticists. The city also tried to get rid of entrance exams for the jewel of New York's public schools, its elite high schools.¹⁰ "They are among the most distinguished schools in the city, some on par with elite and expensive private schools, and they offer a real pathway out of the working class for many families."¹¹ But the city "argued that the only way to increase the number of black and Hispanic students in the schools is to eliminate the exam" and admit some students from every middle school.¹²

The city's school chancellor defended the plan as similar to Harvard's approach.¹³ Indeed, in this case, an assistant principal from Stuyvesant High School, one of New York's elite public schools, was deposed. Presented with statistics showing stark anti-Asian discrimination, she broke down crying: "[T]hese numbers make it seem like there's discrimination, and I love these kids and I know how hard they work. So these just look like numbers," "but I see their faces." Harvard D. Ct. Dkt. 414-3, at 150. This discrimination can lead to devastation: "In 2019, suicide was the

¹⁰ E. Shapiro & V. Wang, *Amid Racial Divisions, Mayor's Plan to Scrap Elite School Exam Fails*, N.Y. Times (June 24, 2019), <https://www.nytimes.com/2019/06/24/nyregion/specialized-schools-nyc-deblasio.html>.

¹¹ E. Harris & W. Hu, *Asian Groups See Bias in Plan to Diversify New York's Elite Schools*, N.Y. Times (June 5, 2018), <https://www.nytimes.com/2018/06/05/nyregion/carranza-specialized-schools-admission-asians.html>. "Fully 63 percent of Brooklyn Tech's students are classified as economically disadvantaged." M. Powell, *How It Feels to Be an Asian Student in an Elite Public School*, N.Y. Times (January 25, 2022), <https://www.nytimes.com/2022/01/25/us/selective-high-schools-brooklyn-tech.html>.

¹² Shapiro & Wang, *supra* note 10.

¹³ Harris & Hu, *supra* note 11.

number one cause of death among Asian Americans ages 15 to 24.”¹⁴ “[S]chool problems were 2.2 times as likely to have been identified as a contributing factor to suicide for [Asian Americans] than for White Americans.”¹⁵

Under New York City’s proposal, offers from its elite high schools to Asian students “would drop by about half,” “while offers to black students would increase fivefold.”¹⁶ The proposal failed, largely on the opposition of Asian parents who highlighted the pipeline between these high schools and elite universities.¹⁷

Stymied by the democratic process, equity groups have now sued New York City, alleging that there is a “racist caste system” and “apartheid state” in its public high schools because “predominately white and certain Asian students” test into gifted programs while “predominately Black and Latinx” students are enrolled in “general education.”¹⁸

But “the Constitution is not violated by racial imbalance in the schools.” *Parents Involved*, 551 U.S. at 721. It is violated by forced racial balancing. “Accepting racial balancing as a compelling state

¹⁴ R. Oh, Asian Americans and the Pursuit of Unhappiness, Wash. Monthly (Nov. 10, 2021), <https://washingtonmonthly.com/2021/11/10/asian-americans-and-the-pursuit-of-unhappiness/>.

¹⁵ *Ibid.*

¹⁶ E. Shapiro, Only 7 Black Students Got Into Stuyvesant, N.Y.’s Most Selective High School, Out of 895 Spots, N.Y. Times (Mar. 18, 2019), <https://www.nytimes.com/2019/03/18/nyregion/black-students-nyc-high-schools.html>.

¹⁷ See Harris & Hu, *supra* note 11.

¹⁸ Amended Complaint for Declaratory and Injunctive Relief ¶¶ 8–9, 19, 79, *IntegrateNYC, Inc. v. New York*, No. 152743/2021 (N.Y. filed June 25, 2021).

interest would justify the imposition of racial proportionality throughout American society, contrary to [this Court's] repeated recognition that '[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals.'" *Id.* at 730 (plurality opinion) (quoting *Miller v. Johnson*, 515 U.S. 900, 911 (1995)).

More, "antiracist" adherents, whether in New York, Cambridge, or Chapel Hill, "rely on the simplistic and often faulty assumption that 'some one particular factor is the key or dominant factor behind differences in outcomes' and that one should expect 'an even or random distribution of outcomes in the absence of such complicating causes as genes or discrimination.'" *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1787 n.4 (2019) (Thomas, J., concurring) (quoting T. Sowell, *Discrimination and Disparities* 25, 87 (rev. ed. 2019)). "Among other pitfalls, these assumptions tend to collapse the distinction between correlation and causation and shift the analytical focus away from flesh-and-blood human beings to impersonal statistical groups frozen in time." *Ibid.* (cleaned up).

This flaw is illustrated by the ultimate irony of these attacks on gifted-and-talented high schools: many current disparities can be traced to decades-long efforts to eliminate elementary and middle school advanced programs. As the *New York Times* explained, suggestions of "a biased entrance exam" "do[] not reckon with history."¹⁹ "Decades ago, when crime and socioeconomic conditions were far graver than they are today, Black and Latino teenagers passed the

¹⁹ Powell, *supra* note 11.

examination in great numbers.”²⁰ “In 1981, nearly two-thirds of Brooklyn Tech’s students were Black and Latino.”²¹ But city officials “rolled back accelerated and honors programs and tried to reform gifted programs, particularly in nonwhite districts.”²² According to “Black alumni of Brooklyn Tech,” this “movement handicapped precisely those Black and Latino students most likely to pass the test.”²³

In other words, that movement contributed to current disparities. And with fewer qualified black and Hispanic students in the high school pipeline, it is no surprise that schools like Harvard and UNC must resort to overt race discrimination—again, to resolve a perceived disparate impact caused by the very policies advocated by the elites. In Justice Thomas’s words, “if our history has taught us anything, it has taught us to beware of elites bearing racial theories.” *Parents Involved*, 551 U.S. at 780–81 (concurring opinion).

Unfortunately, those racial theories will continue to harm K-12 students if *Grutter* remains law. Take another example: Thomas Jefferson High School for Science and Technology, a magnet school in Virginia, eliminated standardized testing and replaced it with criteria that would lead to “more Black and Hispanic students, as well as white students—but fewer Asian students.”²⁴ After “Black Lives Matter protests swept the country,” school principal Ann Bonitatibus wrote

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ S. Saul, Conservatives Open New Front in Elite School Admission Wars, N.Y. Times (Feb. 16, 2022), <https://www.nytimes.com/2022/02/16/us/school-admissions-affirmative-action.html>.

families to ask why “did the school of about 1,800 students include only 32 Black students and 47 Hispanic students?”²⁵ One school board member said that “in looking at what has happened to George Floyd,” “we must recognize the unacceptable numbers of such things as the unacceptable numbers of African Americans that have been accepted to T.J.” *Coalition for TJ v. Fairfax Cnty. Sch. Bd.*, 2022 WL 579809, at *7 (E.D. Va. Feb. 25, 2022). Over 70% of Thomas Jefferson’s students were Asian. *Id.* at *1.

To remedy these supposed problems, Thomas Jefferson eliminated the academic testing prerequisites, guaranteed proportional seats for students at each public middle school, and focused admissions on “certain ‘Experience Factors,’” including “attendance at a middle school deemed historically underrepresented at TJ.” *Id.* at *2. In one year, the proportion of Asian students offered admission dropped by 20 percentage points. *Id.* at *6.

The Eastern District of Virginia found that the school board was “motivated by a racial purpose.” *Id.* at *10. “The discussion of TJ admissions changes was infected with talk of racial balancing from its inception.” *Id.* at *9. The board’s hope was to “engineer[] a particular racial outcome.” *Id.* at *11.

Of course it was: why else would a school district take an ax to a top-performing school? Here, Harvard rejected similar “place-based preferences” as “fundamentally incompatible” with its goal of “enroll[ing] the most extraordinary students.” App. 39. So why would K-12 schools adopt a scheme that Harvard thinks leads to less qualified students? Because K-12 schools don’t have the option that

²⁵ *Ibid.*

Grutter gives Harvard and UNC of openly discriminating based on race. They take the next best option, which happens to both harm students *and* discriminate based on race.

Again, *Grutter* encourages this evasion of *Parents Involved*. The Thomas Jefferson school district invoked *Grutter* and emphasized “the educational benefits of diversity.” Application to Vacate Stay Appendix 86, *Coalition for TJ v. Fairfax Cnty. Sch. Bd.*, U.S. No. 21A590 (Apr. 8, 2022); compare Harvard BIO 8 (“no workable alternatives” “would allow Harvard to achieve the educational benefits of diversity”). And the Fourth Circuit bought this argument, staying the district court’s judgment and finding it both “obvious” and “perfectly permissible” that the school “felt compelled to address TJ’s longstanding lack of diversity.” *Coalition for TJ v. Fairfax Cnty. Sch. Bd.*, 2022 WL 986994, at *5 (CA4 Mar. 31, 2022) (Heytens, J., concurring).

Many other K-12 schools have succumbed to *Grutter*’s pressure, all seeking indirect means of racial balancing. And unfortunately, courts—normally so careful to root out discriminatory intent—have often been unable to recognize the obvious racial motivations at work.

For example, Boston’s elite public schools used grades and test scores for admission until 2021, when they switched to a system that allocated 80% of seats based on zip code, with a priority for zip codes with lower median household incomes. *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm.*, 996 F.3d 37, 41–42 (CA1 2021). The school system used a Racial Equity Planning Tool, which calls for “a hard pivot away from a core value of equality—everyone receives the same—

to equity: those with the highest needs are prioritized.” *Id.* at 47 (cleaned up). “School Committee members made statements reflecting a goal of achieving for each racial group a percentage share of admissions comparable to that group’s percentage of Boston’s population.” *Ibid.* The “School Committee chair . . . resigned after being heard making fun of the names of several Asian Americans who spoke at a public meeting.” *Id.* at 49. And the plan reduces admission for Asians and whites. *Id.* at 46. Yet the First Circuit was unable to spot a discriminatory motivation, unblinkingly accepting the city’s reasons for its gerrymandered plan, including (what else?) “COVID-19.” *Id.* at 41.

After the First Circuit ruled, it was revealed that the school committee had failed to turn over incriminating texts, including “Wait [un]til the white racists start yelling [a]t us!” and “Sick of westie [West Roxbury] whites.” *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm.*, No. 21-cv-10330-WGY, 2021 WL 4489840, at *8 (D. Mass. Oct. 1, 2021). Withdrawing its prior opinion, the district court found it “clear” that “but for the increase in Black and Latinx students at the Exam Schools, the Plan’s race-neutral criteria would not have been chosen.” *Id.* at *15. But the court *still* upheld the plan because its “criteria are all facially race neutral.” *Ibid.*

As Judge Hilton explained in *Thomas Jefferson*, “Everybody knows the policy is not race-neutral and that it’s designed to affect the racial composition.”²⁶ Yet these apparent racial gerrymanders continue to

²⁶ Transcript of Motions Hearing at 27–28, *Coalition for TJ v. Fairfax Cnty. Sch. Bd.*, No. 1:21-cv-296 (E.D. Va. May 21, 2021) (cleaned up).

escape judicial notice. *E.g.*, *Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 555 (CA3 2011) (refusing to apply strict scrutiny even though “the racial composition of neighborhoods was considered in determining school assignments”); *Anderson ex rel. Dowd v. City of Boston*, 375 F.3d 71, 87 (CA1 2004) (“[T]he mere invocation of racial diversity as a goal is insufficient to subject the New Plan to strict scrutiny.”).

San Francisco’s Lowell High School has also tried to eliminate its selective admissions criteria. The school board’s resolution, entitled “In Response to Ongoing, Pervasive Systemic Racism at Lowell High School,”²⁷ explained that Lowell “does not reflect the diversity of SFUSD students and perpetuates segregation and exclusion” of “students of color.”²⁸ The board’s vice president had previously “accus[ed] Asian Americans of using ‘white supremacist thinking to assimilate and “get ahead,” and compar[ed] them to a ‘house n****r.’”²⁹ Citing COVID-19, the board already switched Lowell admissions to a *random* lottery and now seeks to make the change permanent. According

²⁷ A. Nomani, Going Woke at Mostly Minority Lowell High School, Parents Defending Education (Oct. 21, 2021), <https://defendinged.org/case-study/going-woke-at-mostly-minority-lowell-high-school/>.

²⁸ D. Li, Prominent San Francisco High School Could Drop Academic Achievement for Admission, NBC News (Feb. 2, 2021), <https://www.nbcnews.com/news/asian-america/prominent-san-francisco-high-school-could-drop-academic-achievement-admission-n1256488>.

²⁹ E. Ting, San Francisco School Board Member Alison Collins Used Slur to Describe Asian Americans in Tweets, SF Gate (Mar. 21, 2021), <https://www.sfgate.com/politics/article/Alison-Collins-San-Francisco-school-Asians-tweets-16038855.php>.

to the school's alumni association director, "there has to be more non-Asian minority students."³⁰

After the lottery, "[t]he share of Hispanic students grew by 10 percentage points and Black students by 2.9 percentage points," while "[t]he percentage of white students shrank by 6.5 percentage points" and "the share of students of Asian descent decreased by 4.4 percentage points."³¹ The alumni head found these numbers "tremendously surprising, but surprising in a very good way."³² (Why he was surprised that the board's policy had its intended effect is unclear.) High achieving Asian students who cannot afford private schools do not share his excitement at the destruction of their educational opportunities in the name of diversity.³³

Racial balancing in K-12 education will not stop with the elimination of magnet schools. San Diego's largest high school has started cutting honors courses "for equity reasons," as "White and Vietnamese students made up a disproportionately higher percentage of enrollment" in those courses.³⁴ One

³⁰ Li, *supra* note 28.

³¹ E. Talley, Lowell High School's Racial Demographics to Change Next Year, After Merit-Based Admissions Dropped, S.F. Chronicle (Mar. 25, 2021), <https://www.sfchronicle.com/education/article/Lowell-High-School-s-racial-demographics-to-16050648.php>.

³² *Ibid.*

³³ See *ibid.* (noting "the high school's reputation as a springboard for students—many of whom are low-income—to attend elite colleges"); see also Powell, *supra* note 11.

³⁴ K. Taketa, San Diego's Largest High School Quietly Eliminated Several Honors Courses, San Diego Union-Trib. (Apr. 10, 2022), <https://www.sandiegouniontribune.com/news/education/story/2022-04-10/san-diegos-largest-high-school-quietly-eliminated-several-honors-courses-parents-are-outraged>.

parent pointed out the obvious consequence: “Parents who have the means to send their kids to another school are going to do so because they’re losing faith that their kids will be prepared to be successful.”³⁵ Other families will see their children held back, learning at slower paces in the name of equity. The school “seeks only a facade—it is sufficient that the class looks right, even if it does not perform right.” *Grutter*, 539 U.S. at 372 (Thomas, J., concurring in part and dissenting in part).

Grutter’s existence “effectively assure[s] that race will always be relevant in American life, and that the ultimate goal of eliminating entirely from governmental decisionmaking such irrelevant factors as a human being’s race will never be achieved.” *Parents Involved*, 551 U.S. at 730 (plurality opinion) (cleaned up). This Court should overrule *Grutter* now.

II. *Grutter* subjects K-12 students to escalating racial divisions.

Beyond hurting students’ educational opportunities, *Grutter* also infects K-12 classrooms with racial division. America’s guiding ideal has always been clear: “We hold these truths to be self-evident, that all men are created equal.” Declaration of Independence ¶ 2. Ideal has not always been reality, especially not for our first century. Yet it is our ideal. At great cost, it was finally enshrined in the Constitution: “No State shall . . . deny to any person . . . the equal protection of the laws.” U.S. Const. amend. XIV. The Equal Protection Clause “protects *persons*, not *groups*.” *Parents Involved*, 551 U.S. at 743 (plurality opinion) (cleaned up). “We are a Nation not of black and white alone, but one teeming

³⁵ *Ibid.* (ellipses omitted).

with divergent communities knitted together by various traditions and carried forth, above all, by individuals.” *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 610 (1990) (O’Connor, J., dissenting). As Justice Harlan famously said, “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.” *Plessy*, 163 U.S. at 559.

Unfortunately, there is another view, one that runs from *Dred Scott* to *Plessy* to *Grutter* to many K-12 classrooms today. That view “reject[s] the philosophy of ‘colorblindness’” as inherently racist.³⁶ It “teaches the public that the apportionment of rewards and penalties can legitimately be made according to race—rather than according to merit or ability—and that people can, and [indeed] should, view themselves and others in terms of their racial characteristics.” *Fullilove*, 448 U.S. at 532 (Stewart, J., dissenting). It judges all individuals of certain races as oppressors and all individuals of other races as oppressed, and it seeks to eliminate “oppressive” systems like meritocracies and the nuclear family. In short, it elevates race above the individual. And it brooks no debate, as it labels all other views as expressions of racism and white supremacy.

The Court has recognized that this collective racial view “contrast[s]” with “the heart of the Constitution’s guarantee of equal protection”: that “all citizens are equal before the law.” *Parents Involved*, 551 U.S. at 730 & n.14 (plurality opinion). The Court “has consistently repudiated ‘distinctions between citizens solely because of their ancestry’ as being ‘odious to a

³⁶ J. Fortin, Critical Race Theory: A Brief History, N.Y. Times (Nov. 8, 2021), <https://www.nytimes.com/article/what-is-critical-race-theory.html>.

free people whose institutions are founded upon the doctrine of equality.” *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

Yet this “conception of a Nation divided into racial blocs” persists. *Metro Broad.*, 497 U.S. at 603 (O’Connor, J., dissenting). It undergirds *Grutter*, which sanctioned race discrimination so that the University of Michigan Law School could “enroll a ‘critical mass’ of minority students.” 539 U.S. at 329. *Grutter* adopted this view even as it acknowledged that the school’s race discrimination would inflict “an injury that falls squarely within the language and spirit of the Constitution’s guarantee of equal protection.” *Id.* at 327. Yet the Court believed that the law school’s “race-conscious admissions program” had “educational benefits,” and did not cause “nonminority applicants” “*undu[e]* harm.” *Id.* at 330, 341 (emphasis added). The harm to these applicants from being rejected based on their skin color was, according to this Court, *due*.

What follows are terrible examples of the classroom environment that results when *Grutter*’s view of collective racial primacy wins out. From segregated classrooms and extracurricular activities to forced self-identification as oppressors based on race, K-12 schools today are infected by *Grutter*’s pernicious racial view. This view goes by many names: In law schools, it has been known as “critical race theory” for 50 years. Others call it “antiracism,” or “diversity, equity, and inclusion.” But its label is unimportant, and whether schools call what they are doing “critical

race theory”³⁷ is beside the point. The point is that, in large part thanks to *Grutter*, “today’s faddish social theories”³⁸ of racial primacy and determinacy are being forced on our children.

The harms to our children and our society will be grave. “[T]he message conveyed” by this view “is that it is acceptable to harm” other children solely based on their skin color. *Metro Broad.*, 497 U.S. at 636 (Kennedy, J., dissenting). This “demeans the dignity and worth of” a child, who is “judged by ancestry instead of by his or her own merit and essential qualities.” *Parents Involved*, 551 U.S. at 746 (plurality opinion). Indeed, “it demeans us all.” *Grutter*, 539 U.S. at 353 (Thomas, J., concurring in part and dissenting in part). It “reinforce[s] the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin.” *Shaw v. Reno*, 509 U.S. 630, 657 (1993). It “engender[s] animosity and discontent,” “intolerance and antagonism.” *Fullilove*, 448 U.S. at 533, 547 (Stevens, J., dissenting). It “perpetuat[es] the very racial divisions the polity seeks to transcend.” *Schuette v. BAMN*, 572 U.S. 291, 308 (2014) (plurality opinion). It “stamp[s] minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are ‘entitled’ to preferences.” *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part and in judgment). And it plants “the seeds of

³⁷ L. Meckler & H. Natanson, As Schools Expand Racial Equity Work, Conservatives See a New Threat in Critical Race Theory, Wash. Post (May 3, 2021), <https://www.washingtonpost.com/education/2021/05/03/critical-race-theory-backlash/> (noting that schools, administrators, and teachers claim that “they aren’t pushing critical race theory”).

³⁸ *Parents Involved*, 551 U.S. at 780 (Thomas, J., concurring).

race hate” “under the sanction of law.” *Plessy*, 163 U.S. at 560 (Harlan, J., dissenting). This, and what follows, is what *Grutter* has wrought.

A. Racist instruction

Start with Evanston/Skokie School District 65 in Illinois. As part of its “racial equity” curriculum, teachers must be “antiracist” and “accept” that white people are “loud,” “authoritative,” and “controlling.”³⁹ Teachers must “acknowledge that ‘White identity is inherently racist,’” and “understand” that to “be less white is to be less racially oppressive.”⁴⁰

These lessons are then given to students, who are told that white children have the privilege of “mess[ing] endlessly with the lives of your friends, neighbors, loved ones, and all other fellow humans of color.”⁴¹ Students learn that white people get their “soul.”⁴² Starting in pre-kindergarten, students are assigned a book entitled *Not My Idea: A Book About Whiteness*, which includes the following page:

³⁹ Complaint for Declaratory and Injunctive Relief ¶¶ 2, 4, 8, *Deemar v. Bd. of Educ.*, No. 1:21-cv-03466, Dkt. 1 (N.D. Ill. filed June 29, 2021).

⁴⁰ *Id.* ¶ 8.

⁴¹ *Id.* ¶ 134 (cleaned up).

⁴² *Ibid.*

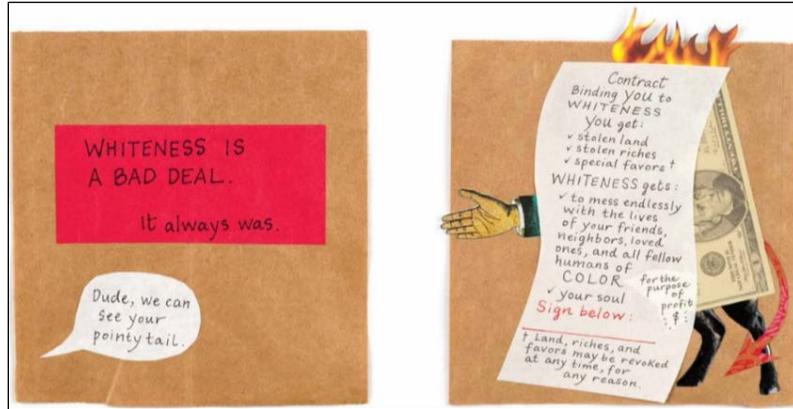


Figure 1⁴³

After reading the book, fifth graders are told to repeat out loud, “Pretending not to see color is called color blindness” and “Color blindness helps racism.”⁴⁴ They then learn that “the messages ‘treat everybody equally’ and ‘love conquers all’ are also colorblind and therefore racist.”⁴⁵

The school’s equity curriculum teaches elementary and middle school students that “White people have a very, very serious problem”: “White people play a big role in the problems of racism today and throughout world history.”⁴⁶ According to the curriculum, the remedies are to “sign a pledge to be anti-racist,” “participate in privilege walks,” and “disrupt the Western nuclear family dynamics as the best/proper way to have a family.”⁴⁷ The school teaches third graders that “black families and villages are the

⁴³ *Id.* ¶ 3.

⁴⁴ *Id.* ¶ 141.

⁴⁵ *Id.* ¶ 142.

⁴⁶ *Id.* ¶ 11.

⁴⁷ *Ibid.*

best/proper way to have a family” because it is a “family structure that takes care of each other.”⁴⁸

Next go to the Buffalo Public School System. According to a veteran public-school teacher there, its curriculum amounts to “a series of ‘scoldings, guilt-trips, and demands to demean oneself simply to make another feel empowered.’”⁴⁹ Buffalo schools teach that “America is built on racism and that all Americans are guilty of implicit racial bias.”⁵⁰ The curriculum’s lead architect informed teachers at a faculty training that “students must be trained to identify and eventually overthrow their oppressors.”⁵¹

As early as kindergarten, “teachers ask students to compare their skin color with an arrangement of crayons.”⁵² Students watch videos that “dramatize[] dead black children speaking to them from beyond the grave about the dangers of being killed by ‘racist police and state-sanctioned violence.’”⁵³ In fifth grade, Buffalo schools teach “that America has created a ‘school-to-grave pipeline’ for black children.”⁵⁴ By middle school, students learn that “American society was designed for the ‘impoverishment of the people of color and enrichment of white people.’”⁵⁵ And the schools identify the cause of the problem: “*all* white people play a part in perpetuating systemic racism.”⁵⁶

⁴⁸ *Id.* ¶ 13 (cleaned up).

⁴⁹ C. Rufo, Failure Factory, City J.: Eye on the News (Feb. 23, 2021), <https://www.city-journal.org/buffalo-public-schools-critical-race-theory-curriculum>.

⁵⁰ *Ibid.* (cleaned up).

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.* (emphasis added).

Because white people are the problem, the schools ask “white students to atone for their ‘white privilege.’”⁵⁷ Meanwhile, academically, “Buffalo public schools have been an abject failure,” particularly for black students.⁵⁸

In Missouri’s Springfield Public School System, all staff members must participate in equity training where they are asked to identify “where they fall” on an “Oppression Matrix”:

| TYPE OF OPPRESSION | PRIVILEGED SOCIAL GROUP | BORDER SOCIAL GROUPS | OPPRESSED SOCIAL GROUPS | SOCIAL IDENTITY CATEGORY |
|-------------------------------|-------------------------------------|------------------------------------|-------------------------------------------|--------------------------|
| RACISM | White People | Biracial People | Asian, Black, Latina/o, Native People | Race |
| SEXISM | Male assigned at birth | Intersex People | Female assigned at birth | Sex |
| TRANSGENDER OPPRESSION | Gender conforming cis-men and women | Gender ambiguous cis-men and women | Transgender, Genderqueer, Intersex People | Gender |
| HETEROSEXISM | Heterosexuals | Bisexuals | Lesbians, Gay men | Sexual Orientation |
| CLASSISM | Rich, Upper Class People | Middle Class People | Working Class, Poor People | Class |
| ABLEISM | Able-bodied People | People with Temporary Disabilities | Disabled People | Ability/Disability |
| RELIGIOUS OPPRESSION | Protestants | Roman Catholic (historically) | Jews, Muslims, Hindus, Sikhs | Religion |
| AGEISM/ADULTISM | Adults | Young Adults | Elders, Young People | Age |

Figure 2⁵⁹

After teacher indoctrination, the curriculum is next. The district evaluates prospective resources with a “Culturally Responsive Scorecard.”⁶⁰ According to the Scorecard, subjects like science and math cannot be “neutral, apolitical, objective and factual” because

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ Petition ¶¶ 12–18, *Schmitt v. Sch. Dist. of Springfield*, No. 2131-CC01266 (Cir. Ct. Greene Cnty. filed Nov. 16, 2021).

⁶⁰ *Id.* ¶ 41.

they “exclud[e] non-White knowledge systems.”⁶¹ Students should not be given “mathematics instruction that prioritizes individualism and competition versus cooperation and collectivism, which can promote a dominant society’s learning patterns.”⁶² The curriculum is judged based on whether it “centers the origins of science, technology, engineering, arts and/or math within BIPOC communities.”⁶³

In Portland, Grant High School established a “Race Forward” part of its curriculum.⁶⁴ Students first play “a ‘Privilege for Sale’ game.”⁶⁵ Then, they are given the below “Pyramid of White Supremacy.”⁶⁶ Phrases like “I want to remain apolitical” and “Prioritizing Intentions over Impact” render a child “indifferen[t]” to white supremacy.⁶⁷ Even saying “We all belong to the human race” or hoping for a “Post-Racial Society”—*Grutter’s* grand promise—amounts to minimizing white supremacy.⁶⁸

⁶¹ L. Peoples et al., *The Culturally Responsive-Sustaining Steam Curriculum Scorecard*, NYU Metro. Ctr. for Rsch. on Equity & the Transformation of Schs., at 4 (2021), https://steinhardt.nyu.edu/sites/default/files/2021-02/CRSE-STEAMScorecard_FIN_optimized%20%281%29.pdf.

⁶² *Id.* at 7.

⁶³ *Id.* at 12.

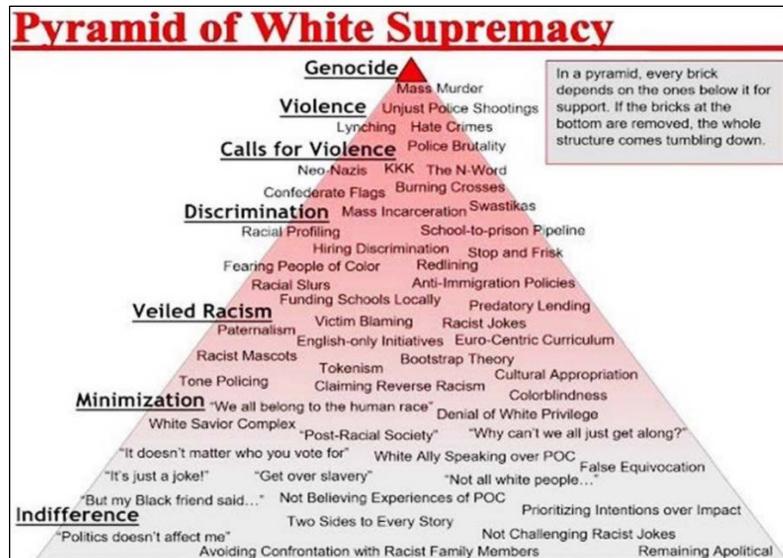
⁶⁴ Grant High School Gives Presentation Showing “Pyramid of White Supremacy,” Parents Defending Education (Jan. 13, 2022), <https://defendinged.org/incidents/grant-high-school-gives-presentation-showing-pyramid-of-white-supremacy-school-district-promotes-gender-transitioning-material-to-children/>.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

Figure 3⁶⁹

White Supremacy

- The most common mistake people make when talking about racism (white supremacy) is thinking of it as a problem of personal prejudices and individual discrimination
- It is systemic; embedded in all of our institutions; political, economic, social, cultural, legal, military, educational, and more

Figure 4: Slide from Grant High School "Race Forward" lesson⁷⁰

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

A Nevada charter high school, Democracy Prep Agassi Campus, required all seniors to take a year-long class, “Sociology of Change.”⁷¹ In a graded assignment, students must “label and identify their gender, racial, and religious identities.”⁷² Students then “determine if that part of [their] identity ha[s] privilege or oppression.”⁷³ The curriculum prescribes who by “virtue of their gender and race” “qualified as oppressors.”⁷⁴ Discussion groups were formed, and students “ask[ed] and answer[ed] accusatory personal questions, including ‘Were you surprised with the amount of privilege or oppression that you have attached to your identities?’”⁷⁵ Those who declined to participate were viewed as “oppressor[s] who harbored inherent privilege.”⁷⁶ As the District of Nevada later explained, students were thus “required to process beliefs and attach labels to [their] personal attributes”: “I am white, I am Christian,” “and that means I’m an oppressor.”⁷⁷ One black student—“the only light-skinned student in [the] class”—was forced to participate by the threat of withholding his diploma.⁷⁸ Lessons from the class included:

⁷¹ First Amended Complaint for Declaratory and Injunctive Relief ¶ 57, *Clark v. State Pub. Charter Sch. Auth.*, No. 2:20-cv-2324, Dkt. 106 (D. Nev. filed May 3, 2021).

⁷² *Id.* ¶ 58 (cleaned up).

⁷³ *Ibid.* (cleaned up).

⁷⁴ *Ibid.*

⁷⁵ *Id.* ¶ 63.

⁷⁶ *Ibid.* (cleaned up).

⁷⁷ Transcript at 46, *Clark v. State Pub. Charter Sch. Auth.*, No. 2:20-cv-2324, Dkt. 62 (D. Nev. filed Feb. 25, 2021).

⁷⁸ First Amended Complaint, *supra* note 71, ¶¶ 72–74.



Figure 5⁷⁹

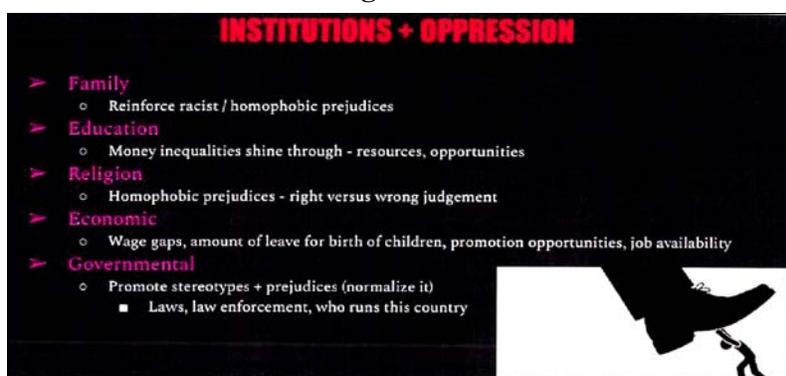


Figure 6⁸⁰

A few years ago, the Albemarle County (Virginia) School Board adopted an “Anti-Racism Policy” and remade its curriculum.⁸¹ It trained its teachers that they were “to move from a ‘colorblind’ view of race to a ‘color conscious’ scheme.”⁸² The training characterized some communication methods (“verbal,” “intellectual”) as “white talk” and other communication methods (“nonverbal,” “emotional”) as “color commentary.”⁸³

⁷⁹ Exhibit A at 24, *Clark v. State Pub. Charter Sch. Auth.*, No. 2:20-cv-2324, Dkt. 1-2 (D. Nev. filed Dec. 22, 2020).

⁸⁰ *Id.* at 36.

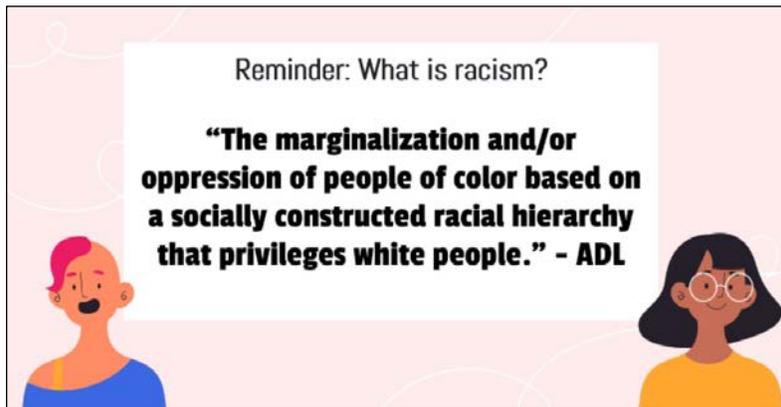
⁸¹ Complaint ¶ 6, *R.I. v. Albemarle Cnty. Sch. Bd.*, No. CL21001737-00 (Cir. Ct. Albemarle Cnty. filed Dec. 22, 2021).

⁸² *Id.* ¶ 114.

⁸³ *Id.* ¶ 116.

The training classifies as “passive racism” colorblindness, celebrating Columbus Day, and “over-familiarization with POC [people of color].”⁸⁴

These trained teachers are then sent into schools. At Henley Middle School, eighth graders were given the following redefinition of “racism”:



*Figure 7*⁸⁵

The lessons analogized the “dominant culture”—“people who are white, middle class, Christian, and cisgender”—“to a person [who] chose the game and the rules” so that the person “won the game.”⁸⁶ The “subordinate culture,” by contrast, includes “Black, brown, indigenous people of color of the global majority, queer, transgendered, non-binary folx [sic?],” and others.⁸⁷ Failing to make “anti-racist” choices, students are told, is to “uphold” “white supremacy” and “white-dominant culture.”⁸⁸

⁸⁴ *Id.* ¶ 123.

⁸⁵ *Id.* ¶ 134.

⁸⁶ *Id.* ¶ 142 (alteration in original).

⁸⁷ *Id.* ¶ 143.

⁸⁸ *Id.* ¶ 148.

In Cupertino, California, a public elementary school forced “third-graders to deconstruct their racial identities [and] then rank themselves according to their ‘power and privilege.’”⁸⁹ In math, students were asked to “create an ‘identity map,’ listing their race, class, gender, religion, family structure, and other characteristics.”⁹⁰ Then, the students learned that they live in a “dominant culture of white, middle class, cisgender, educated, able-bodied, Christian, English speakers” who “created and maintained this culture in order to hold power and stay in power.”⁹¹ Then, “students deconstruct[ed] their own intersectional identities.”⁹² Students were expected to produce “at least one full page of writing” that described “which aspects of their identities ‘hold power and privilege.’”⁹³

Which parts of your identity hold power and privilege?

- Circle the identities that hold power and privilege on your map:
 - White
 - Middle class
 - Cisgender (your gender identity matches with the sex you were assigned at birth)
 - Educated
 - Able bodied
 - Christian
 - English speaker
 - Cisgender male
 - U.S. citizen

*Figure 8*⁹⁴

⁸⁹ C. Rufo, Woke Elementary, City J.: Eye on the News (Jan. 13, 2021), <https://www.city-journal.org/identity-politics-in-cupertino-california-elementary-school>.

⁹⁰ *Ibid.*

⁹¹ *Ibid.* (cleaned up).

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*

Likewise, at Canyon Park Middle School, a public school in Washington, eighth graders watched a video on privilege during science class.⁹⁵ Students were asked “to select their own identities and privileges so that they can ‘figure out ways to dismantle systems of oppression.’”⁹⁶ Students completed “a worksheet called ‘Wheel of Power/Privilege.’”⁹⁷ “Some identities, like ‘white skin,’ are close to ‘power,’” while “‘dark skin’ or ‘undocumented’ are the farthest away from ‘power.’”⁹⁸

B. Racist (or no) discipline

A particularly destructive manifestation of “antiracism” comes in school discipline. Some data suggest that “students of color” are “disciplined more harshly and more frequently than their peers.”⁹⁹ And studies have purported to show that “[s]tudents of color as a whole, as well as by individual racial group, do not commit” more “disciplinable offenses than their white peers.”¹⁰⁰ These studies rely on dubious data and do not (and could not) control for all relevant variables. They contradict the reality that—for many and complex reasons—students *do* have different rates

⁹⁵ J. Rantz, Teacher Uses Science Class to Label White Middle Schoolers Privileged Oppressors, 770 KTTH (June 10, 2021), <https://mynorthwest.com/2937573/rantz-teacher-uses-science-class-to-call-white-middle-schoolers-privileged-oppressors/>.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ U.S. Comm’n on C.R., Beyond Suspensions: Examining School Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities 7 (2019), <https://www.usccr.gov/files/pubs/2019/07-23-Beyond-Suspensions.pdf>.

¹⁰⁰ *Id.* at 161.

of misbehavior.¹⁰¹ But the problem here is the antiracist remedies: no more punishments for students of color, or for anyone.

Take Denver, which launched a “restorative justice” approach to disparities in suspensions.¹⁰² Under that approach, rather than discipline, students and teachers “work together in ‘responsive circles’ to solve the problem.”¹⁰³ Suspensions of all students dropped—but “the color-blind approach worsened the racial suspension gap from a threefold difference between Black and white students to almost fivefold.”¹⁰⁴ Rather than address the root causes of differences in behavior, researchers suggested an easier solution to paper over the problem: “Interventions for reducing disparities in discipline cannot be race neutral.”¹⁰⁵

So that’s what Minneapolis tried. In an effort “to completely eliminat[e] the racial suspension gap,” the school superintendent implemented a new policy: teachers who suspended students of color got hauled in to have “a conversation” with her, after which she reviewed the suspensions.¹⁰⁶ Unsurprisingly, as one

¹⁰¹ *Id.* at 177–89 (dissenting statement of Commissioner Gail Heriot).

¹⁰² S. Gupta, How Schools Can Reduce Excessive Discipline of Black Students, *Science News* (Jan. 6, 2021), <https://www.sciencenews.org/article/school-discipline-gap-black-students-punishment-race-bias>.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.* (cleaned up).

¹⁰⁶ A. Matos, Minneapolis Schools to Make Suspending Children of Color More Difficult, *Minneapolis Star Trib.* (Nov. 9, 2014), <https://www.startribune.com/mpls-schools-to-makesuspending-children-of-color-more-difficult/281999171/?clmob=y&c=n>.

teacher later explained, the policy “threw the school into complete chaos.”¹⁰⁷ According to that teacher—who retired after being “labeled a racist”—“not expecting the same things from [African-American students] is actually disrespectful. That would actually be racist.”¹⁰⁸ Yet Minneapolis *still* had unwanted disparities, leading to an increasingly popular proposal: “a moratorium” on suspensions.¹⁰⁹

Under any of these approaches, learning is disrupted by students who know they can avoid all discipline. Sometimes the consequences are worse: the former student who murdered 17 people at Marjory Stoneman Douglas High School in Parkland, Florida, was “able to slide by for years without strict punishment” even for *criminal* conduct because of a “culture of leniency [that] allow[ed] children to engage in an endless loop of violations and second chances.”¹¹⁰ To eliminate “disproportionate” discipline rates, teachers are told that “students are untouchable.”¹¹¹ Many interest groups who will support racial discrimination in this case also support replacing school discipline with healing circles.¹¹² What matter

¹⁰⁷ E. Green, *Why Are Black Students Punished So Often?*, N.Y. Times (Mar. 18, 2018), <https://www.nytimes.com/2018/03/18/us/politics/school-discipline-disparities-white-black-students.html>.

¹⁰⁸ *Ibid.*

¹⁰⁹ Matos, *supra* note 106.

¹¹⁰ M. O'Matz & S. Travis, *Schools' Culture of Tolerance Lets Students Like Nikolas Cruz Slide*, S. Fla. Sun Sentinel (May 12, 2018), <http://www.sun-sentinel.com/local/broward/parkland/florida-school-shooting/fl-florida-school-shooting-discipline-20180510-story.html>. See generally A. Pollack & M. Eden, *Why Meadow Died: The People and Policies That Created the Parkland Shooter and Endanger America's Students* (2019).

¹¹¹ O'Matz & Travis, *supra* note 110.

¹¹² Pollack & Eden, *supra* note 110, at 164–66.

to these groups are appearances, not students. That is *Grutter's* world.

C. Outright segregation

Sometimes the obsession with racial division manifests itself in outright segregation of classrooms or school activities. Wellesley Public Schools in Massachusetts implemented a segregated “Racial Affinity Group Policy” as part of its efforts to “achieve racial equity.”¹¹³ After one public tragedy, the school offered a “Healing Space” that expressly excluded all white students.¹¹⁴ Another school that segregated affinity groups generously offered a separate group “for those uncomfortable with the [segregated group] format.”¹¹⁵ (Trying to avoid scrutiny by purporting to offer an opt-out—while simultaneously shaming those who opt-out as complicit in white supremacy—is a favored tactic.¹¹⁶)

Consider also Fieldston Lower School in the Bronx. Under a new equity plan, “children of all races” would “be separated into racial ‘affinity groups’” starting in third grade.¹¹⁷ Children would spend 45 minutes “discuss[ing] what they had in common with each

¹¹³ Motion for a Preliminary Injunction at 3, *Parents Defending Education v. Wellesley Pub. Schs.*, No. 1:21-cv-11709, Dkt. 7 (D. Mass. filed Oct. 22, 2021).

¹¹⁴ *Id.* at 4.

¹¹⁵ E. Rosner & S. Algar, *Manhattan School to Sort Kids by Race During Social Justice Discussions*, N.Y. Post (Nov. 18, 2021), <https://nypost.com/2021/11/18/manhattan-school-to-sort-kids-by-race-during-social-justice-discussions/>.

¹¹⁶ *E.g.*, Petition, *supra* note 59, Ex. 32 (quoting Elie Wiesel, “What hurts the victim most is not the cruelty of the oppressor but the silence of the bystander.”).

¹¹⁷ L. Miller, *Can Racism Be Stopped in the Third Grade?*, *The Cut* (May 19, 2015), <https://www.thecut.com/2015/05/can-fieldston-un-teach-racism.html>.

other and how they were different” than the children in the other groups.¹¹⁸ Some parents wondered whether the program would “backfire, creating tension between kids where none had existed before.”¹¹⁹ Illustrating these tensions, one Jewish parent did not want his children grouped with white children because the “Ku Klux Klan attempted to burn down his synagogue.”¹²⁰ A black parent responded: “When you walk in the room, I see you as white”; “Your child needs to go in the white group,” because “[y]ou have the privilege of hiding behind your whiteness.”¹²¹

Other examples abound. An Illinois high school held a “Black Lives Matter” assembly “for African American students only.”¹²² Another high school there hosted the following:

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² Letter from Dan Altschul, U.S. Dep’t of Educ., to Dr. Steven Isoye, Superintendent, Oak Park and River Forest High Sch. Dist. 200, at 3 (Sept. 29, 2015), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/05151180-a.pdf>.



*Figure 9*¹²³

Last, a public school in Denver had multiple “Families of Color Playground Nights”:



*Figure 10*¹²⁴

¹²³ Administrative Complaint about Downers Grove South from N. Neily, President, Parents Defending Education, to U.S. Dep’t of Educ., Off. for C.R., Ex. A (Dec. 17, 2021), https://defendinged.org/wp-content/uploads/2021/12/Downers-Grove-South_v3.pdf.

¹²⁴ Administrative Complaint about Centennial Elementary from N. Neily, President, Parents Defending Education, to U.S. Dep’t of Educ., Off. for C.R., Ex. A (Dec. 17, 2021), https://defendinged.org/wp-content/uploads/2021/12/Centennial-Elementary-School_v2.pdf.

CONCLUSION

“[U]nder our Constitution there can be no such thing as either a creditor or a debtor race.” *Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and in judgment). That “way of thinking” “produced race slavery, race privilege and race hatred.” *Ibid.* Instead, “[i]n the eyes of government, we are just one race here. It is American.” *Ibid.* “When we depart from this American principle we play with fire,” for official choices “to classify and judge men and women on the basis of their country of origin or the color of their skin” are “fatal to a Nation such as ours.” *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520, 527 (1989) (Scalia, J., concurring in judgment). Teaching students to be either ashamed or angry because of their skin color is “precisely the sort of government action that pits the races against one another, exacerbates racial tension, and provokes resentment.” *Parents Involved*, 551 U.S. at 759 (Thomas, J., concurring) (cleaned up).

Grutter’s promise of a race-neutral education system based on discrimination is a lie. More than anything, *Grutter* has spawned racial discrimination and division that hurts even our kindergarteners. *Grutter* must be overruled.

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