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DEATH OR TRANSFORMATION? EDUCATIONAL AUTONOMY IN THE ROBERTS COURT

Elizabeth Dale*

I. INTRODUCTION

In the aftermath of the Supreme Court's decisions in *Grutter*¹ and *Gratz*² a number of commentators argued that the Court had begun to embrace a new constitutional doctrine that required deference to the decisions of some institutions.³ Most notably they asserted that the Court would defer within the field of education.⁴ But even as they suggested that the Court was more willing to explore the doctrine, those two opinions left several large questions unanswered:⁵ Did the Court's embrace of institutional autonomy extend beyond higher education, into the K–12 realm? If so, what were its bounds? Was the doctrine only relevant to efforts to achieve a diverse student body or could it be extended further, to have an impact on claims of right under the First, or other, Amendments?⁶

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

2. *Gratz v. Bollinger*, 539 U.S. 244 (2003).

3. The doctrine of institutional autonomy was articulated most famously in Frederick Schauer, *Principles, Institutions and the First Amendment*, 112 Harv. L. Rev. 84 (1998). See also Symposium, *Constitutional "Niches": The Role of Institutional Context in Constitutional Law*, 54 UCLA L. Rev. 1463 (2007).

4. See e.g. Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. Rev. 1497 (2007); Neal Kumar Katyal, *The Promise and Precondition of Educational Autonomy*, 31 Hastings Const. L. Q. 557 (2003); but see Robert A. Caplan, *The "Fifth" Freedom: Freedom from Impermissible Expansion of Academic Freedom to University Admissions*, 36 Sw. L. Rev. 1 (2007) (arguing against educational autonomy in the area of admissions); Richard H. Hiers, *Institutional Academic Freedom or Autonomy Grounded on the First Amendment: A Jurisprudential Mirage*, 30 Hamlin L. Rev. 1 (2007) (expressing significant doubts about the doctrine in the First Amendment realm); Scott A. Moss, *Against "Academic Deference": How Recent Developments in Employment Discrimination Law Undercut an Already Dubious Doctrine*, 27 Berkeley J. Empl. & Lab. L. 1 (2006) (arguing that the doctrine of deference cannot protect employment decisions in the university).

5. Other significant questions that I do not address remained as well. To note just a few: Who should exercise educational autonomy in a university setting, the faculty or the administration? E.g. Katyal, *supra* n. 4, at 566–67 (arguing that it should be faculty). What were the core areas of the educational enterprise entitled to autonomy? E.g. Horwitz, *supra* n. 4, at 1535–37 (exploring different ways by which these core principles might be identified).

6. For example, one might read Justice Kennedy's decision in *Garcetti v. Ceballos*, with its emphasis on the fact that Ceballos was an assistant prosecutor, 547 U.S. 410, 421 (2006), as evidence that the Court was willing to defer to certain government institutions in the First Amendment area. And there are those who argue that deference to particular government agencies is appropriate in that realm. E.g. David Fagunder, *State Actors as First Amendment Speakers*, 100 Nw. U. L. Rev. 1637 (2003) (arguing for a theory of institutional rights as a way to analyze the speech of government employees and agency speakers).

Two cases from the Roberts Court's October 2006 Term, *Parents Involved v. Seattle School District*⁷ and *Morse v. Frederick*,⁸ answered those questions. But the answers they provided are obscure. At first glance, the cases seem to indicate that a clear majority of the Court rejects the idea that educational autonomy should be extended to elementary and secondary schools. But a closer look indicates a more complicated response: A narrow majority of the Court believes that the principle of educational autonomy articulated in *Grutter* may sometimes extend to cases involving K–12 schools.⁹ At the same time, a slightly different, but still narrow, majority believes that principles of educational autonomy cannot limit the First Amendment rights of K–12 students.¹⁰

II. INSTITUTIONAL AUTONOMY IN EDUCATION

A. *Gratz and Grutter*

At the end of its October 2002 Term the Supreme Court decided two cases involving affirmative action plans at the University of Michigan. In *Gratz v. Bollinger*¹¹ the Court struck down the assessment process that the University of Michigan used in undergraduate admissions on the ground that it applied a race-based quota in violation of the Equal Protection Clause of the Fourteenth Amendment.¹² In contrast, in *Grutter v. Bollinger*¹³ a majority of the Court upheld the admissions program at the University of Michigan Law School, notwithstanding the fact that it also took membership in an underrepresented racial or ethnic minority into account.¹⁴

The different outcomes largely rested on the Court's assessment of the methodology of the two plans: In *Gratz* a majority of the Court found that admissions decisions about applicants were not based on individualized assessments.¹⁵ Instead, the University assigned points to applicants according to an elaborate assessment scheme¹⁶ and the total of those points (which included an automatic twenty point award to applicants who were members of "underrepresented racial or ethnic minority group[s]")¹⁷ determined whether a candidate would be admitted or not.¹⁸ In *Grutter*, on the other hand, the Court found that the law school's admission process¹⁹ assessed candidates based on a number of "hard" and "soft" variables (including the fact that a candidate was a member of an "underrepresented" minority group),²⁰ but also required

7. 127 S. Ct. 2738 (2007).

8. 127 S. Ct. 2618 (2007).

9. See *infra* pt. IV.

10. See *infra* pt. IV.

11. 539 U.S. 244.

12. *Id.* at 250–51.

13. 539 U.S. 306.

14. *Id.* at 343.

15. 539 U.S. at 269.

16. *Id.* at 254–56 (describing the evaluation process in its various iterations).

17. *Id.* at 255.

18. *Id.* at 255–56.

19. 539 U.S. at 315–16 (describing process).

20. *Id.* (brackets omitted).

an individualized assessment of each candidate.²¹ That particularized review of the files distinguished *Grutter* from *Gratz* and meant the law school's program survived an Equal Protection challenge.²²

As that summary suggests, both cases turned on the question of whether a race-conscious admissions process violated the Fourteenth Amendment and the Court nominally applied the traditional strict scrutiny analysis in each case.²³ But the Court's treatment of strict scrutiny in the two cases differed. Writing for the majority in *Grutter* Justice O'Connor consciously adopted Justice Powell's opinion in *Regents of the University of California v. Bakke*,²⁴ specifically his assertion that Court precedent²⁵ indicated that there were times when the Court should defer to the judgment of university administrators.²⁶ In *Grutter*, as in *Bakke*, this meant that the majority modulated the demands of strict scrutiny in order to allow the university "to make its own judgments as to education . . ."²⁷

Justice Powell's ultimate conclusion, which was joined by four other justices,²⁸ that the admissions policy at issue in *Bakke* was unconstitutional made it clear that deference did not mean that a university received a free pass.²⁹ Instead it meant that in an Equal Protection case a university could survive a strict scrutiny challenge to a policy that took race into account by demonstrating that its narrowly tailored plan was a reasonable approach to an educational policy that it deemed significant.³⁰ Deference occurred with respect to the last clause of that statement³¹—in *Grutter* a majority of the Court accepted without question the law school's judgment that a diverse student body was a vital element of an elite legal education.³²

In contrast, in *Gratz* the majority opinion written by Chief Justice Rehnquist did not explicitly employ the principle of institutional autonomy. But while he did not cast his analysis in terms of deference, the Chief Justice's opinion could be squared with the logic of *Grutter*. In *Gratz* the majority did not question the University of Michigan's assertion that a diverse student body was vital to its educational mission,³³ rather it held

21. *Id.* at 315.

22. *Id.* at 334–35.

23. *Grutter*, 539 U.S. at 326; *Gratz*, 539 U.S. at 270; see generally Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 645 (2d ed., Aspen 2002) (outlining the standard for strict scrutiny in Equal Protection analysis); but see generally Jack M. Balkin, Plessy, Brown and *Grutter*: *A Play in Three Acts*, 26 *Cardozo L. Rev.* 1689 (2005) (arguing that *Grutter* reflected an unstated rejection of strict scrutiny analysis).

24. *Grutter*, 539 U.S. at 323–24.

25. *Regents of the U. of Cal. v. Bakke*, 438 U.S. 265, 311–12 (1977) (citing *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); *Sweezy v. N.H.*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)).

26. *Grutter*, 539 U.S. at 329; see also *Bakke*, 438 U.S. at 312.

27. *Grutter*, 539 U.S. at 329 (quoting *Bakke*, 438 U.S. at 312).

28. *Bakke*, 438 U.S. at 271 (This part of Justice Powell's opinion was joined by Chief Justice Burger and Justices Stewart, Rehnquist, and Stevens.).

29. See *Grutter*, 539 U.S. at 333–34 (to the same effect).

30. *Id.* at 334.

31. For purposes of this article, I use the definition of deference set out in Paul Horwitz, *Three Faces of Deference*, 83 *Notre Dame L. Rev.* ____ (forthcoming 2008).

32. 539 U.S. at 333.

33. 539 U.S. at 268 (rejecting petitioners' argument that "diversity as a basis for employing racial preferences is simply too open-ended, ill-defined, and indefinite to constitute a compelling interest capable of supporting narrowly-tailored means").

that the undergraduate admissions policy was not tailored narrowly enough to be a means of achieving that end.³⁴ In effect the *Gratz* majority deferred (implicitly) to the university's decision about the value of a diverse student body, but ultimately found the method the university adopted to advance that policy wanting.

B. Institutional Autonomy

Proponents of institutional autonomy celebrated *Grutter* as a victory for the doctrine³⁵ and in its aftermath scholars increasingly argued that a wide variety of organizations—from libraries³⁶ and news organizations³⁷ to churches³⁸ and corporations³⁹—were entitled to special deference under the Constitution.⁴⁰

Arguments for institutional autonomy rest on a particular theory of jurisprudence—one that embraces the idea that the legal system should recognize and respond to categories created outside the law by crafting legal standards that reflect institutional differences and defer to institutional needs.⁴¹ It is, as several proponents of the doctrine have noted, a jurisprudence that breaks radically with the more common theory that legal principles should be general in application, rather than particularized.⁴² But those who favor the theory of institutional autonomy note that for all the courts may declare they favor neutral rules of general application, the reality is different: Some members of the Supreme Court sometimes have been willing to defer to some judgments of some decision makers in some institutions.⁴³

Justice Powell's decision in *Bakke* was a case in point. He noted that prior decisions of the Court had carved out a special area of deference that respected the

34. *Id.* at 275.

35. See e.g. Katyal, *supra* n. 4, at 558–65.

36. See e.g. Marc Jonathan Blitz, *Constitutional Safeguards for Silent Experiments in Living: Libraries, the Right to Read, and a First Amendment Theory for an Unaccompanied Right to Receive Information*, 74 UMKC L. Rev. 799 (2006).

37. See e.g. C. Edwin Barker, *The Independent Significance of the Press Clause under Existing Law*, 35 Hofstra L. Rev. 955 (2007) (arguing that the press should receive special First Amendment rights by virtue of its institutional status); but see Lillian R. BeVier, *The Journalist's Privilege—A Skeptic's View*, 32 Ohio N.U. L. Rev. 467 (2006) (questioning the idea).

38. See e.g. Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?* 22 St. John's J. Leg. Comment. 515 (2007); Andrew Soukup, *Reformulating Church Autonomy: How Employment Division v. Smith Provides a Foundation for Fixing the Neutral Principles Approach*, 82 Notre Dame L. Rev. 1679 (2007).

39. See e.g. Michael R. Seibecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, 48 Wm. & Mary L. Rev. 613 (2006).

40. See generally Symposium, *supra* n. 3; but see Scott A. Moss, *Students and Workers and Prisoners—Oh, My! A Cautionary Note about Excessive Institutional Tailoring of First Amendment Doctrine*, 54 UCLA L. Rev. 1635 (2007) (questioning the doctrine).

41. Schauer, *supra* n. 3, at 84 (making this point specifically with respect to First Amendment doctrine).

42. Frederick Schauer, *Institutions as Legal and Constitutional Categories*, 54 UCLA L. Rev. 1747, 1758–60 (2007) (sketching the principle as it has typically been applied to constitutional law by thinkers like Holmes and Dworkin); see also Horwitz, *supra* n. 4, at 1504–05 (questioning the idea of neutral principles in higher education); Soukup, *supra* n. 38 (questioning the appropriateness of neutral principles in the area of First Amendment protection of religion).

43. See e.g. Schauer, *supra* n. 3, at 86–97 (citing the Supreme Court's opinions in *Ark. Educ. TV Commn. v. Forbes*, 523 U.S. 666 (1998) and *Natl. Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) as examples of an implicit institutional autonomy); see also Horwitz, *supra* n. 4, at 1516–23 (citing other cases that implicitly adopted a form of institutional autonomy).

educational decisions made by colleges and universities.⁴⁴ This deference, derived from the First Amendment, although frequently denominated Academic Freedom in Court opinions, extended, Justice Powell averred, to the realm of educational policy decisions more generally.⁴⁵ That meant the deference went beyond the debates over what to teach or research that were the usual stuff of academic freedom claims, to include the broader context in which those decisions were made and disseminated.⁴⁶ In his view, decisions about who to admit into a university were part of that larger dynamic because of the impact the student body had on the way classes would engage a variety of issues, and so they became part of the protected realm of educational policy.

In *Bakke*, Justice Powell created the doctrine of educational autonomy by bringing First Amendment principles in contact with the Equal Protection Clause of the Fourteenth Amendment. That connection remained, strengthened by Justice O'Connor's analysis in *Grutter*, which emphasized that Justice Powell's theory of deference gave law schools a way to exempt race-conscious admissions policies from the commands of the Equal Protection Clause.⁴⁷

C. *K-12 Education*

But even though the doctrine of educational autonomy appeared vitalized by Justice O'Connor's analysis in *Grutter*, issues of its scope remained. In *Bakke*, Justice Powell intimated that arguments for a diverse student body were strongest at the undergraduate level,⁴⁸ where the benefits of the "robust exchange of ideas"⁴⁹ that diversity was intended to assist were most pronounced. It was only because the Court had previously determined that diversity contributed to graduate education in law,⁵⁰ that he was willing to extend that principle to the graduate education of future physicians as well.⁵¹ Justice O'Connor's opinion, with its emphasis on the benefits to the legal profession and the nation derived from the law school's admissions policies, shifted that focus to graduate, specifically professional, education.⁵²

Her emphasis raised the question of whether the doctrine of educational autonomy should be extended to elementary and secondary schools, either as a general matter or with respect to school choice and desegregation plans. Some commentators who favored the doctrine suggested that it was best limited to colleges and universities.⁵³ But others

44. *Bakke*, 438 U.S. at 311–12 (citing *Keyishian*, 385 U.S. 589; *Sweezy*, 354 U.S. 234 (Frankfurter, J. concurring)).

45. *Id.* at 313–14; see also Katyal, *supra* n. 4, at 558–60 (the same); R. George Wright, *The Emergence of First Amendment Academic Freedom*, 85 Neb. L. Rev. 753, 805 (2002) (noting this shift); but see Caplan, *supra* n. 4 (questioning the analysis that supports this extension); Hiers, *supra* n. 4 (the same).

46. *Bakke*, 438 U.S. at 315.

47. 539 U.S. at 329–30; but see Balkin, *supra* n. 23, at 1724–25 (arguing that this analysis amounted to a rejection of the theory of strict scrutiny).

48. 438 U.S. at 313–14.

49. *Id.* at 313 (quoting petitioner's brief).

50. *Id.* at 314 (citing *Sweatt v. Painter*, 339 U.S. 629, 634 (1950)).

51. *Id.*

52. *Grutter*, 539 U.S. at 332–33.

53. Horwitz, *supra* n. 4, at 1538 (tying educational autonomy to the academic freedom rights of faculty members); Katyal, *supra* n. 4, at 562–63 (emphasizing the relationship between autonomy and academic freedom, which he characterized as a special privilege of higher education).

argued the principle had a place in elementary and secondary education,⁵⁴ demonstrating that case law already recognized some degree of deference with respect to the area of school desegregation plans.⁵⁵ And after *Grutter* the lower courts seemed willing to apply the principle of deference, whether they called it that or not, to a variety of decisions made in the K–12 setting, from decisions that upheld race-conscious student assignment plans⁵⁶ to cases restricting teacher’s speech.⁵⁷

III. INSTITUTIONAL AUTONOMY AT THE ROBERTS COURT, OCTOBER 2006 TERM

Two decisions from the October 2006 Term of the Roberts Court explored those issues. In *Parents Involved v. Seattle School District*⁵⁸ the Court considered the doctrine of educational autonomy in the context of ruling on the constitutionality of two voluntary school integration plans. And the Court considered whether it was proper to defer to school administrators in the context of a student’s First Amendment claim in *Morse v. Frederick*.⁵⁹

A. Parents Involved: *Educational Autonomy and the Equal Protection Clause*

The Court’s decision in *Parents Involved*, a consolidated opinion involving challenges to two voluntary desegregation plans (one for Seattle, Washington,⁶⁰ the other for Louisville, Kentucky⁶¹), is striking for several reasons: At the time the case was argued, the decision in *Grutter*, which reaffirmed the Court’s commitment to the idea that a diverse student body was “a compelling interest”⁶² and an important way to foster citizenship,⁶³ was less than five years old. Scholars had demonstrated that a persuasive case could be made that the federal courts had consistently deferred to the judgment of

54. Wendy Parker, *Connecting the Dots: Grutter, School Desegregation, and Federalism*, 45 Wm. & Mary L. Rev. 1691 (2004); see also Paul Horwitz, Prawfsblog, *Public Schools as First Amendment Institutions?* http://prawfsblawg.blogs.com/prawfsblawg/2007/03/public_schools_html (March 21, 2007) (blog posting arising from the oral argument in *Morse v. Frederick*, considering whether the doctrine of educational autonomy should include deference to various First Amendment decisions at the K–12 level).

55. See e.g. *Parents Involved v. Seattle Sch. Dist.*, 426 F.3d 1162, 1173–84 (9th Cir. 2005) (en banc); *McFarland v. Jefferson Co. Pub. Schs.*, 330 F. Supp. 2d 834, 851–52 (W.D. Ky. 2004), *aff’d without opinion*, 416 F.3d 513 (6th Cir. 2005); see also Parker, *supra* n. 54.

56. *Parents Involved*, 426 F.3d at 1173–84; *McFarland*, 330 F. Supp. 2d at 560–72.

57. See e.g. *Mayers v. Monroe Co.*, 474 F.3d 477, 480 (7th Cir. 2007) (particular circumstances of K–12 education means court should defer to school administration’s judgment about the appropriateness of a teacher’s classroom comments); Sheldon H. Nahmod, *Public Employee Speech, Categorical Bundling and §1983: A Critique of Garcetti v. Ceballos*, 42 U. Rich. L. Rev. 561, 582–86 (2008) (noting *Mayers* and arguing that *Garcetti* opens the door to that sort of analysis, particularly by inviting courts to distinguish higher education faculty from elementary and secondary school teachers); but see Horwitz, *supra* n. 4, at 1499 (arguing that the language in *Garcetti* made it clear that the Court intended to carve out an exception for teacher speech); Horwitz, *supra* n. 54 (expressing reservations about the idea that educational deference should apply in a student speech case).

58. 127 S. Ct. 2738 (2007).

59. 127 S. Ct. 2618 (2007).

60. *Parents Involved*, 426 F.3d 1162.

61. *McFarland*, 330 F. Supp. 2d 834.

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

63. *Id.* at 331 (citing *Plyer v. Doe*, 457 U.S. 202, 221 (1982); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

local school boards in implementing voluntary and court ordered desegregation plans.⁶⁴ The voluntary admission programs adopted in the two school districts seemed tailored and flexible enough to avoid *Bakke*'s rejection of quotas, since race was not the sole, or even the first, criterion either district used to make assignments in the few⁶⁵ cases where a student could not be matched to a school of his or her choice.⁶⁶ And finally, the lower courts in each case emphasized that the plans represented the best judgment of the elected officials charged with determining educational policy;⁶⁷ as the trial court noted in *McFarland v. Jefferson County School Board*, "[t]he historical importance of the deference accorded to local school boards goes to the very heart of our democratic form of government."⁶⁸ The court added that this deference was "conceptually different—though perhaps more accepted—than the deference discussed in *Grutter* and *Bakke*."⁶⁹

Yet in *Parents Involved* a majority of the Court held that both plans violated the Equal Protection Clause. And in reaching that result, the Court seemed to dismiss the doctrine of educational autonomy. Writing the opinion of the Court, the Chief Justice gave no weight to the fact that the school boards that adopted the policies at issue in the cases before it were elected.⁷⁰ He rejected the school boards' argument that they believed that integrated education was in the best interests of all students and the larger community that they served.⁷¹ And he refused to credit the school boards' claims that they had concluded that assignment plans that combined elements of choice with other factors that included, but was not limited to, race was the best way to achieve that goal.⁷²

64. Parker, *supra* n. 54.

65. *Parents Involved*, 127 S. Ct. at 2760 (noting the minimal effect of the various plans on student choice in either district); *id.* at 2792 (Kennedy, J., concurring) ("In the case before us it is noteworthy that the number of students whose assignment depends on express racial classifications is limited."). For estimates of how often the tie-breaker criteria (which included a race-based component) had to be used, see *Parents Involved*, 426 F.3d at 1170 (in 2001–2002, seven out of ten high school districts in Seattle did not need to make enrollment decisions using the tie-breaker plan at issue in the case; in 2000–2001 roughly 300 of Seattle's 3000 incoming high school students were assigned using the tie-breaker plan); *McFarland*, 330 F. Supp. 2d at 843 (transfer and open enrollment applications, the types of applications covered by the plan, amounted to about 7.6% in the preceding two years, but the number is actually probably less than 5%, since many students apply for a transfer and open enrollment at the same time).

66. *Parents Involved*, 426 F.3d at 1184–87 (distinguishing the choice mechanisms employed in Seattle from the race-based quotas condemned in *Bakke* and *Gratz*); *McFarland*, 330 F. Supp. 2d at 841–48, 856–62 (setting out the criteria for making assignments in Louisville and distinguishing them from the methods that were rejected in *Gratz* and *Bakke*).

67. *Parents Involved*, 426 F.3d at 1173–84 (noting that *Grutter* involved educational deference and exploring the reasons for deference in this case); *McFarland*, 330 F. Supp. 2d at 850–52, 854 (explicitly recognizing the democratically elected school board was entitled to some deference with regard to how it chose to organize the Louisville school system and concluding its aims are "important and valid").

68. 330 F. Supp. 2d 834, 850 (W.D. Ky. 2004).

69. *Id.*

70. *Parents Involved*, 127 S. Ct. at 2766 (rejecting the argument that there is some reason to defer to the judgment of the local school districts).

71. *Id.* at 2756 ("The districts offer no evidence that the level of racial diversity necessary to achieve the asserted educational benefits happens to coincide with the racial demographics of the respective school districts—or rather the white/nonwhite or black/'other' balance of the districts, since that is the only diversity addressed by the plans.").

72. *Id.* at 2753 ("In the present cases, by contrast [to *Grutter*], race is not considered as part of a broader effort to achieve 'exposure to widely diverse people, cultures, ideas and viewpoints,' . . . race, for some students, is determinative standing alone.").

Instead, the Chief Justice employed a strict scrutiny analysis⁷³ that equated using race as a factor to achieve integration with the use of race as a factor to achieve segregation⁷⁴ and rejected the plans as insufficiently tailored to survive that scrutiny.

A concurring opinion by Justice Kennedy,⁷⁵ read in conjunction with the dissents,⁷⁶ left open the possibility that some school board plans that took race into account might garner a majority of the Court.⁷⁷ But while that kept alive the possibility that some race-conscious acts might survive a future constitutional challenge, the rout of educational autonomy in *Parents Involved* seemed complete. Justice Breyer, joined by three other justices,⁷⁸ relied on the doctrine in his dissent, arguing that the case law established that some degree of deference was appropriate in cases involving educational decisions made by elected officials.⁷⁹ But that argument was sharply condemned in the opinion of the Court⁸⁰ and in a concurring opinion by Justice Thomas.⁸¹ Explicitly rejecting the idea that educational autonomy trumped an Equal Protection claim, the Chief Justice asserted that “[s]uch deference ‘is fundamentally at odds with our equal protection jurisprudence. We put the burden on state actors to demonstrate that their race-based policies are justified.’”⁸²

Justice Thomas agreed, noting caustically that the idea of giving a democratically elected government the autonomy to determine the extent of a constitutional right was precisely the approach adopted in *Plessy v. Ferguson* and discredited by *Brown v. Board of Education*.⁸³ Justice Thomas conceded that the Court had “deferred to state authorities only once, in *Grutter*.”⁸⁴ But he added that that deference was “prompted by factors uniquely relevant to higher education,”⁸⁵ factors such as selected, and selective, admission and the importance of the free exchange of thought.⁸⁶ Because he concluded that those factors had no relevance to the type of learning that went on in elementary and secondary education,⁸⁷ he refused to extend the principles of *Grutter* to the facts before the Court.

73. *Id.* at 2764; *see also id.* at 2770–71 (Thomas, J., concurring).

74. *Parents Involved*, 127 S. Ct. at 2767–68; *see also id.* at 2786 (Thomas, J., concurring); *but see id.* at 2798 (Stevens, J., dissenting) (questioning the use of strict scrutiny when applied to race-conscious attempts to achieve integration); *id.* at 2816–17 (Breyer, Stevens, Souter & Ginsburg, JJ., dissenting) (making a similar point).

75. *Id.* at 2788 (Kennedy, J., concurring in part and concurring in judgment).

76. *Parents Involved*, 127 S. Ct. at 2797 (Stevens, J., dissenting); *id.* at 2800 (Breyer, Stevens, Souter & Ginsburg, JJ., dissenting).

77. *Id.* at 2791 (Kennedy, J., concurring in part and concurring in judgment) (criticizing the majority opinion for taking “an all-too-unyielding insistence that race cannot be a factor” in school assignment decisions).

78. *Id.* at 2800 (Breyer, Stevens, Souter & Ginsburg, JJ., dissenting).

79. *Id.* at 2824.

80. *Parents Involved*, 127 S. Ct. at 2766 (quoting *W. Va. v. Barnette*, 319 U.S. 624, 637 (1943) (“The Fourteenth Amendment . . . protects the citizen against the State itself and all of its creatures—Boards of Education not excepted.”)).

81. *Id.* at 2778 (Thomas, J., concurring).

82. *Id.* at 2766 (majority).

83. *Id.* at 2783 (Thomas, J., concurring).

84. *Id.* at 2778.

85. *Parents Involved*, 127 S. Ct. at 2778.

86. *Id.* at 2781 (Thomas, J., concurring).

87. *Id.* at 2781–82.

B. “BONG HiTS 4 JESUS:” Educational Autonomy and Student Speech

In *Morse v. Frederick*⁸⁸ the Court considered whether deference to an educational institution extended into First Amendment law. A majority of the Court held that Frederick, a high school senior who displayed a sign reading “BONG HiTS 4 JESUS” at a school event, was not protected by the First Amendment.

Once again, the opinion of the Court⁸⁹ was written by the Chief Justice. His opinion modified the famous formulation of *Tinker v. Des Moines School District*—“students . . . [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate”⁹⁰—declaring that the case law after *Tinker* established that high school students lost most First Amendment rights while in school.⁹¹ He added that it was reasonable to conclude that Frederick’s banner advocated drug use, and in light of the well-established interest in protecting youth from illegal drugs, it was reasonable to discipline Frederick for displaying the banner.⁹²

In dissent, Justice Stevens argued that that ruling was “deaf to the constitutional imperative to permit unfettered debate, even among high-school students,”⁹³ complaining that to the extent it rationalized its outcome on the grounds that it was legitimate to silence any discussion of drugs the Court allowed viewpoint discrimination, in violation of settled law.⁹⁴ Justice Stevens also criticized the Chief Justice’s opinion for a fundamental ambiguity, noting that at times it seemed to defer to the judgment of the high school principal about the content of, and threat posed by, Frederick’s banner,⁹⁵ while at other times it asserted that the Court had an obligation to independently determine the banner’s meaning.⁹⁶

Justice Stevens did not imagine that ambivalence. The Chief Justice conceded that the case law, which sometimes appeared to endorse educational autonomy, suggesting that school administrators had “the authority to determine ‘what manner of speech in the classroom or in school assembly is inappropriate,’”⁹⁷ and at other times denied such deference was appropriate,⁹⁸ was ambiguous. But because he found that precedent clearly “demonstrates that ‘the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings,’”⁹⁹ the Chief Justice chose not to resolve the tension between the cases that deferred to the institutional judgment of school administrators and those that refused to do so.¹⁰⁰

The two concurring opinions reflected that unresolved tension: In an opinion

88. 127 S. Ct. 2618 (2007).

89. *Id.* at 2622.

90. 393 U.S. 503, 506 (1969).

91. *Morse*, 127 S. Ct. at 2629.

92. *Id.*

93. *Id.* at 2649 (Stevens, Souter & Ginsburg, JJ., dissenting).

94. *Id.* at 2650.

95. *Id.* at 2647.

96. *Morse*, 127 S. Ct. at 2647 (Stevens, Souter & Ginsburg, JJ., dissenting).

97. *Id.* at 2626 (majority) (quoting *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683 (1986)).

98. *Id.* (asserting that *Fraser* was ambiguous on this point).

99. *Id.* (quoting *Fraser*, 478 U.S. at 682).

100. *Id.* (“We need not resolve this debate to decide this case.”).

joined by Justice Kennedy, Justice Alito concurred with the outcome of the case on the grounds that high school administrators had a particular duty to protect students entrusted to their care from harm.¹⁰¹ Given the threat posed by drug use, he held that suppression of Frederick's banner was permissible.¹⁰² But Justice Alito declared in no uncertain terms that no notion of deference could allow a school administration to decide to restrict or sanction student speech on political or social topics.¹⁰³

Surprisingly given his categorical rejection of the doctrine in *Parents Involved*,¹⁰⁴ Justice Thomas took the opposite tack. He strongly endorsed the idea of educational autonomy as a limit on student speech in his concurring opinion.¹⁰⁵ He argued that *Tinker* should be overruled,¹⁰⁶ since it misstated the law and ignored the fact that historically public school students had no First Amendment rights.¹⁰⁷ He added that before *Tinker* "the judiciary was reluctant to interfere with the routine business of school administration, allowing schools and teachers to set and enforce rules and to maintain order."¹⁰⁸ Sounding much like Justice Powell in his defense of educational autonomy, Justice Thomas quoted a late nineteenth-century case:

To accomplish th[e] desirable ends [of teaching self-restraint, obedience, and other civic virtues], the master of a school is necessarily invested with much discretionary power He must govern these pupils, quicken the slothful, spur the indolent, restrain the impetuous, and control the stubborn. He must make rules, give commands, and punish disobedience. What rules, what commands, and what punishment shall be imposed, are necessarily largely within the discretion of the master, where none are defined by the school board.¹⁰⁹

Interestingly, Justice Thomas' strong argument for deference points to a problem with applying the doctrine to the facts of *Morse*. As he notes, in the context of elementary and secondary schools, the doctrine of educational autonomy rests on the idea that local, elected school officials, administrators, and teachers should be deferred to when they make judgments about what is best for their school.¹¹⁰

But that is not what happened here.¹¹¹ Principal Morse did not punish Frederick for unfurling his "BONG HiTS 4 JESUS" banner because it violated a policy that the

101. *Morse*, 127 S. Ct. at 2638 (Alito & Kennedy, JJ., concurring).

102. *Id.*

103. *Id.* ("[A]ny argument for altering the usual free speech rules in the public schools cannot rest on a theory of delegation [to school administrators]"). In this, Justice Alito's concurring opinion comes close to the sentiment expressed in *Tinker*. See 393 U.S. at 511 ("[S]tate-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students.").

104. *Supra* nn. 83–87.

105. *Morse*, 127 S. Ct. at 2630 (Thomas, J., concurring).

106. *Id.* at 2636.

107. *Id.* at 2630–31.

108. *Id.* at 2632 (citing *Sheehan v. Sturges*, 2 A. 841, 842 (Conn. 1885)).

109. *Id.* (Thomas, J., concurring) (quoting *Patterson v. Nutter*, 7 A. 273, 274 (Me. 1886) (brackets in original)).

110. *Morse*, 127 S. Ct. at 2633 (Thomas, J., concurring) ("The doctrine of *in loco parentis* limited the ability of schools to set rules and control their classrooms in almost no way."); see also *id.* at 2635 ("If parents do not like the rules imposed by these schools, they can seek redress in school boards or legislatures; they can send their children to private schools or home school them; or they can simply move. Whatever rules apply to student speech in public schools, those rules can be challenged by parents in the political process.").

111. *But see id.* at 2624–25 (majority) (making this claim).

Juneau School Board adopted after considering the educational needs of the students in their schools or the values of their community.¹¹² Instead, the anti-drug policy was adopted in response to a federal mandate, specifically the provisions of the Safe and Drug-Free Schools and Communities Act of 1994, which required all school districts that accepted federal money certify that they had strong anti-drug policies.¹¹³ That mandate may have reflected the considered opinion of the members of Congress and the President, it may be a good indication of the national consensus about drug use, but it undermined, rather than strengthened the ability of local school boards “to determine ‘what manner of speech in the classroom or in school assembly is inappropriate.’”¹¹⁴

IV. INSTITUTIONAL AUTONOMY AFTER *PARENTS INVOLVED* AND *MORSE*

There are many reasons to criticize the outcomes and the opinions in *Morse* and *Parents Involved* and many commentators did so.¹¹⁵ Perhaps most problematically, the Court seemed intent to turn settled law on its head: Declaring the First Amendment protections for K–12 students must be the exception, not the rule, in *Morse*¹¹⁶ and explaining, in *Parents Involved*, that the need for diversity in a graduate program does not extend to the different circumstances of elementary or secondary education.¹¹⁷

Considered as applications of the doctrine of educational autonomy, the two cases tell a confused and complicated story. Initially, they seem to represent an outright rejection of the doctrine: In the various opinions that made up the two cases every member of the Court except Justice Breyer¹¹⁸ rejected the doctrine once.¹¹⁹ But the

112. Indeed, as the dissent noted, the policy appeared to be at odds with local mores. *Id.* at 2650 n. 8 (Stevens, Souter & Ginsburg, JJ., dissenting).

113. *Id.* at 2628 (majority) (citing 20 U.S.C. § 7114(d)(6) (Supp. 2000)).

114. *Morse*, 127 S. Ct. at 2626 (quoting *Fraser*, 478 U.S. at 683).

115. See e.g. Lyle Denniston, SCOTUSblog, *Commentary: Beyond the Schoolhouse Gate*, <http://www.scotusblog.com/wp/uncategorized/commentary-beyond-the-schoolhouse-gate/#more-5645> (June 25, 2007) (criticizing *Morse* for failing to follow *Tinker*); Pamela S. Karlan, ACSBlog, *Law, or Politics, on the Roberts Court?* <http://www.acsblog.org/guest-bloggers-guest-blogger-law-or-politics-on-the-roberts-court.html> (July 1, 2007) (discussing *Parents Involved* and arguing that it “illustrates why the entire enterprise of strict judicial scrutiny for racial classifications has turned out badly”); Dahlia Lithwick, Slate, *A Supreme Court Conversation*, <http://www.slate.com/id/2168856/entry/2169029> (June 25, 2007) (discussing *Morse* and arguing it was inconsistent with the Court’s decision in *FEC v. Wisconsin Right to Life*, decided the same day); Eugene Volokh, *What Did Morse v. Frederick Do to the Free Speech Rights of Students Enrolled in K–12 Schools?* <http://volokh.com/posts/1182830987.shtml> (June 26, 2007) (questioning the underlying logic of the Court’s holding on a variety of grounds).

116. Compare *Morse*, 127 S. Ct. at 2629 (using language from *Tinker* to emphasize the constitutional limits imposed by the “special characteristics of the school environment”) with *Tinker*, 393 U.S. at 506 (“students . . . [do not] shed their constitutional rights,” even in the special environment of a school).

117. Compare *Parents Involved*, 127 S. Ct. at 2754 (“In upholding the admissions plan in *Grutter*, though, this Court relied upon considerations unique to institutions of higher education, noting that in light of ‘the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.’”) with *Brown*, 347 U.S. at 493–94 (“In *McLarin v. Oklahoma State Regents* . . . the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: ‘. . . his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.’” Such considerations apply with added force to children in grade and high schools.”).

118. Justice Breyer relied on the theory of educational autonomy in his dissent in *Parents Involved*, 127 S. Ct. at 2811–12 (Breyer, Stevens, Souter & Ginsburg, JJ., dissenting), and did not reach the issue in his concurring opinion in *Morse*, because he would have found for the school administration on grounds of qualified immunity. *Morse*, 127 S. Ct. at 2638 (Breyer, J., concurring in part and dissenting in part).

opposite is also true. Across the two cases everyone but Justice Alito¹²⁰ endorsed the doctrine once.¹²¹

A close reading of the opinions of the Court explains that anomaly, but adds another layer of confusion. With respect to *Morse* the rule is clear. Notwithstanding Justice Thomas' strong support for the doctrine, and the Chief Justice's more lukewarm endorsement of the principle, a majority of the Court rejected the argument that courts should routinely defer to the judgment of school administrators in student speech cases. Justice Stevens explicitly rejected the doctrine in his dissent, which was joined by Justices Souter and Ginsburg.¹²² At the same time, Justice Alito, joined by Justice Kennedy in a concurring opinion, refused to apply the doctrine because it would have allowed school administrators to silence student speech on political or social issues.¹²³ While they disagreed about where to draw the line in that particular case, the five Justices clearly refused to apply the doctrine to student speech cases precisely because to do so "strikes at the very heart of the First Amendment."¹²⁴

The picture is murkier in *Parents Involved*. The four dissenting justices unequivocally embraced the idea that educational autonomy required deference to school boards on the issue of student assignment.¹²⁵ Four of the justices who signed the Chief Justice's opinion for the Court unequivocally did not.¹²⁶ But Justice Kennedy did not join that part of the plurality opinion. Instead he agreed with the dissenters that there was a "compelling interest . . . in avoiding racial isolation, an interest that a school district, in its discretion and expertise [might] chose to pursue."¹²⁷ But while he accepted the principle of educational autonomy, Justice Kennedy did not vote to uphold the plans before the Court, because he found that they were not tailored enough to achieve their goals.¹²⁸ Specifically, he objected to the fact that while both school boards rationalized their plans in terms of diversity, both emphasized race.¹²⁹

119. *Morse*, 127 S. Ct. at 2637 (Alito & Kennedy, JJ., concurring); *id.* at 2647 (Stevens, Souter & Ginsburg, JJ., dissenting); *Parents Involved*, 127 S. Ct. at 2766 (Scalia, Thomas, and Alito joined Roberts on this point); *id.* at 2778 (Thomas, J., concurring).

120. Alito signed on to the Chief Justice's opinion rejecting the doctrine in *Parents Involved*, 127 S. Ct. at 2766, and rejected the doctrine in his concurring opinion in *Morse*, 127 S. Ct. at 2636–38 (Alito & Kennedy, JJ., concurring).

121. *Morse*, 127 S. Ct. at 2626; *id.* at 2630 (Thomas, J., concurring); *Parents Involved*, 127 S. Ct. at 2824 (Breyer, Stevens, Souter, & Ginsburg, JJ., dissenting).

122. *Morse*, 127 S. Ct. at 2647–48 (Stevens, Souter & Ginsburg, JJ., dissenting) ("The beliefs of third parties, reasonable or otherwise, have never dictated which messages amount to proscribable advocacy. Indeed, it would be a strange constitutional doctrine that would allow the prohibition of only the narrowest category of speech advocating unlawful conduct . . . yet would permit a listener's perceptions to determine which speech deserved protection.")

123. *Id.* at 2637 (Alito & Kennedy, JJ., concurring) ("The 'educational mission' argument would give public school authorities a license to suppress speech on political and social issues based on the viewpoint expressed. The argument, therefore, strikes at the very heart of the First Amendment.")

124. *Id.* (Alito & Kennedy, JJ., concurring); *id.* at 2645 (Stevens, Souter & Ginsburg, JJ., dissenting) (the same).

125. *Parents Involved*, 127 S. Ct. at 2824 (Breyer, Stevens, Souter & Ginsburg, JJ., dissenting).

126. *Id.* at 2766 (Scalia, Thomas, and Alito joined Roberts on this point) (majority); *see also id.* at 2778 (Thomas, J., concurring).

127. *Id.* at 2797 (Kennedy, J., concurring in part and concurring in judgment).

128. *Id.* at 2790 (Kennedy, J., concurring in part and concurring in judgment).

129. *Parents Involved*, 127 S. Ct. at 2790. Justice Kennedy suggests that he would have accepted the plans' emphasis on race if the school boards had indicated that their interest was in ending racial isolation, and that he

While that explains the first anomaly, it suggests another: The justices who rejected the application of the doctrine in *Parents Involved* supported their analysis by asserting that educational autonomy undermined the Court's commitment to subject race-conscious distinctions to strict scrutiny.¹³⁰ And of course the principle that the Equal Protection Clause requires strict scrutiny in such cases is well established.¹³¹ But the presumption against constitutionality upon which strict scrutiny depends is not limited to race-based violations of the Equal Protection Clause; the Court has long held that any law that infringes on the protections of the First Amendment must be subject to heightened scrutiny.¹³² It is, therefore, unclear why any justice who rejected educational autonomy because it diminished the protections guaranteed by the First Amendment would not make a similar argument when faced with the claim that educational autonomy permitted diminution of the protections guaranteed by the Equal Protection Clause, or vice versa.

Justice Kennedy's concurring opinion in *Parents Involved* suggests the answer, reformulating the principle of educational autonomy in the process. He argued that the Equal Protection Clause did not simply prohibit discrimination based on race, but also imposed an affirmative duty to assure equal opportunity by avoiding racial isolation.¹³³ And he asserted that a school board that created a properly tailored, race-conscious school admission plan in order to achieve that second obligation would not run afoul of the Fourteenth Amendment.¹³⁴ While he did not make the point explicitly, that suggests a plausible way to explain why educational autonomy was rejected in *Morse* and accepted (in the abstract) in *Parents Involved*. In the former case, recognizing educational autonomy would have made the school administration the sole judge of a First Amendment claim against it. The majority of the Court refused to defer in that situation. In the latter, where the school board was not acting as judge of a constitutional claim made against it, but instead was trying to balance competing constitutional claims, the majority was willing to defer subject only to the requirement that their resolution of the problem otherwise met the requirements of the Constitution.

would have accepted a rationale framed in terms of increasing diversity if the plans had taken more factors into account.

A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may chose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population. Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered.

Id. at 2797. This suggests his sticking point was that he could not accept plans justified in terms of diversity that looked only to race.

130. *Id.* at 2766 (majority); *Id.* at 2783 (Thomas, J., concurring).

131. Chemerinsky, *supra* n. 23; *but see* Balkin, *supra* n. 23 (arguing that the Court had retreated from strict scrutiny).

132. *U.S. v. Carolene Products*, 304 U.S. 144, 152–53 n. 4 (1938) (distinguishing the heightened scrutiny applied to laws that set limits on the rights enumerated in the Bill of Rights and in the Fourteenth Amendment from the more limited scrutiny employed in reviewing legislation that regulates economic interests); *see also Palko v. Conn.*, 302 U.S. 319, 324–25 (1937) (noting that the protections of the First Amendment are incorporated into the Fourteenth because they are “implicit in the concept of ordered liberty”).

133. *Parents Involved*, 127 S. Ct. at 2797 (Kennedy, J., concurring in part and concurring in judgment).

134. *Id.*

V. CONCLUSION

Parents Involved v. Seattle School District and *Morse v. Frederick* offer a glimpse at the Roberts Court's understanding of the doctrine of educational autonomy. A majority of the Court (Justices Stevens, Kennedy, Souter, Breyer, and Ginsburg) held that the principle of educational autonomy articulated in *Grutter* would extend to some elementary and secondary school districts that crafted race conscious school assignment plans. A slightly different majority (Justices Stevens, Kennedy, Souter, Ginsburg, and Alito) believes that the doctrine cannot protect elementary and secondary school administrators who seek to discipline students for speech on matters of political or social concern. But more importantly it suggests that the Court is modifying the doctrine, by limiting it to cases in which a government institution is balancing competing constitutional claims.