Golden Gate University Law Review

Volume 35
Issue 1 *Ninth Circuit Survey*

Article 5

January 2005

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Recommended Citation

Katie York, *What Does Diversity Mean in Seattle?: Parents Involved In Community Schools v. Seattle School District Number 1 Strikes Down the Use of a Racial Tiebreaker*, 35 Golden Gate U. L. Rev. (2005).
http://digitalcommons.law.ggu.edu/ggulrev/vol35/iss1/5

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NOTE

WHAT DOES DIVERSITY MEAN IN SEATTLE?: *PARENTS INVOLVED IN COMMUNITY SCHOOLS V. SEATTLE SCHOOL DISTRICT NUMBER 1* STRIKES DOWN THE USE OF A RACIAL TIEBREAKER

INTRODUCTION

Prior to the 1954 Supreme Court decision in *Brown v. Board of Education*, public school districts were constitutionally permitted to segregate based on race.[1] Under the "separate but equal" doctrine, substantially equal facilities, although separate, were considered equal treatment.[2] In *Brown*, the disputed Kansas statute permitted, but did not require, separate school facilities for black and white students.[3] The Court considered the impact of public education on American life and found it to be one of the most important functions of state and local governments.[4] Accordingly, it described education as "the very foundation of good citizenship."[5] As a result, the Court held that the doctrine of "separate but equal" had no place in

[1] Brown v. Bd. of Educ., 347 U.S. 483, 488 (1954).
[2] *Id.* at 488 (citing Plessy v. Ferguson, 163 U.S. 537 (1896)).
[3] *Id.* at 486.
[4] *Id.* at 492-93.
[5] *Id.* at 493.

Published by GGU Law Digital Commons, 2005

the field of public education because students would be deprived equal protection of the laws under the Fourteenth Amendment.[6]

Despite *Brown's* groundbreaking decision, schools did not become integrated simultaneously with the ruling.[7] The decision in *Brown* illustrated a desire to change, but when combating many years of racial discrimination, a mere desire to change was not enough.[8] The courts attempted to remedy the problem with court ordered desegregation through injunctions.[9] Today, educational and professional institutions have evolved beyond equitable injunctions by establishing affirmative action polices.[10]

However, over fifty years later, our educational system still displays significant remnants of past discrimination.[11] The standard of living for blacks in the United States still resembles the pre-1970 levels.[12] Although there were immediate gains in education as a direct result of *Brown*, many of those gains have since been lost.[13] Children of color, particularly African Americans and Latinos, often attend substantially segregated and poorly funded primary and secondary schools.[14] Although many African Americans' access to better education has improved since *Brown*, the desire for an integrated society continues to be an aspiration rather than a reality.[15]

The Seattle School District (hereinafter "School District") is an illustration of a racially segregated school system in the United States today.[16] Seattle's housing patterns create

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[6] *Id.* at 495 (reasoning that if one race was inferior socially, then the Constitution could not put the two races on the same plane).

[7] Brown v. Bd. of Educ., 349 U.S. 294 (1955) (setting forth broad guidelines to desegregate).

[8] *See generally* Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1 (1971) (permitting school district to rearrange student busses to desegregate the school system).

[9] *Id.*

[10] *See infra* notes 120-121 and accompanying text.

[11] Linda Carty & Paula C. Johnson, *The Impact of Brown; Fifty Years Later, Still More Rhetoric Than Commitment*, THE POST STANDARD/HERALD-JOURNAL, Apr. 15, 2004 at A13.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 137 F. Supp. 2d 1224, 1225 (W.D. Wash. 2001), *rev'd*, 377, F.3d 949 (9th Cir. 2004), *reh'g granted*, 395 F.3d 1168 (9th Cir. Feb. 1, 2005) [hereinafter *Parents Involved I*].

neighborhoods that are noticeably segregated by race.[17] Most of the city's white residents live in the northern, more affluent end of the city,[18] whereas, "a majority of African American, Asian American, Hispanic American, and Native American residents live in the south."[19] Thus, a public school's districting program based on a student's geographic proximity to the school would mirror the racial isolation evident in Seattle's neighborhoods.[20]

After *Brown*, courts around the country ordered school districts to desegregate while Seattle's school board voluntarily explored options to ensure that students had access to diverse schools with equal opportunities.[21] For example, in 1998, the School District employed an "open choice" policy to assign students to its ten public high schools.[22] This policy gave students and their parents the opportunity to choose their preferred high schools.[23] However, as expected, when students ranked their top choices, a disproportionate number of students chose the more prestigious schools.[24] The school board decided that in order to allow all students access to the more popular schools, they would employ a tiebreaker system, which elevated race over a student's geographic proximity, and a lottery to determine which students were assigned to the more prestigious schools.[25]

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[17] *Id.* at 1225.

[18] *Id.*

[19] *Id.* "74.2 percent of the [School District's] Asian students, 83.6 percent of its black students, 65.0 percent of its Hispanic students, and 51.1 percent of its Native American students live in the southern half of the city. By contrast, 66.8 percent of the [School District's] white student population lives in the northern half of the city." Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 377 F.3d 949, 955 (9th Cir. 2004), *reh'g granted*, 395 F.3d 1168 (9th Cir. Feb. 1, 2005), [hereinafter *Parents Involved II*].

[20] *Parents Involved I*, 137 F. Supp. 2d at 1225.

[21] *Id.*

[22] *Id.* at 1226.

[23] *Id.*

[24] *Id.* "Approximately 82 percent of students selected one of the oversubscribed high schools as their first choice, while only about 18 percent picked one of the undersubscribed high schools as their first choice." *Parents Involved II*, 377 F.3d at 955. The variation in schools was measured by factors such as "standardized test scores, numbers of college preparatory and Advanced Placement (AP) courses offered and the availability of an Internal Baccalaureate (IB) program, percentages of students taking AP courses and SATs, percentages of graduates who attend college, *Seattle Times* college-preparedness rankings, University of Washington rankings, and disciplinary statistics." *Id.* at 954 (footnote omitted).

[25] *Parents Involved I*, 137 F. Supp. 2d at 1226.

The first tiebreaker admitted students whose siblings already attended the oversubscribed school.[26] This tiebreaker accounted for roughly "15 percent to 20 percent of high school assignments."[27] If the school was still oversubscribed, the policy allowed for the second tiebreaker, which elevated race over proximity.[28] The School District adopted this controversial tiebreaker to diversify schools that were deemed to be racially isolated.[29] The School District determined that a school was racially "out of balance" if it "deviates by more than fifteen percent from the overall racial breakdown" of the students attending Seattle's public schools.[30] At the time, white students accounted for forty percent of the city's schools.[31] The student's race was specified on the registration form which was filled out by a parent in person.[32] If the parent chose not to identify a racial category, the School District would assign a category based on the parent's appearance.[33]

Next, if the school was still oversubscribed after using the racial tiebreaker, then the School District applied a third tiebreaker.[34] This tiebreaker determined admittance based on geographic proximity to the school.[35] If the first three tiebreakers continued to keep the school over-subscribed, then the School District employed a random lottery as the final tiebreaker.[36]

A non-profit corporation, Parents Involved in Community Schools, filed suit over the School District's "open choice" policy. The non-profit corporation was "formed by parents whose children have been or may be denied admission to the high schools of their choosing solely because of race."[37] It alleged that the School District's use of race engaged in illegal racial discrimination prohibited by the Washington Civil Rights Act,

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[26] *Parents Involved II*, 377 F.3d at 955.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Parents Involved I*, 137 F. Supp. 2d at 1226.
[31] *Id.*
[32] *Parents Involved II*, 377 F.3d at 955.
[33] *Id.*
[34] *Id.* at 956.
[35] *Id.*
[36] *Id.* The lottery "rarely [was] invoked because distances [were] calculated to one hundredth of a mile for purposes of the [third] tiebreaker." *Id.*
[37] *Id.*

the Equal Protection Clause of the Fourteenth Amendment, and Title VI of the Civil Rights Act of 1964.[38]

This Note examines the Ninth Circuit decision in *Parents Involved in Community Schools v. Seattle School District Number 1*.[39] The introduction provides an overview of the evolution of race-based jurisprudence.[40] In addition, the introduction describes the "open choice" policy established by the School District.[41] Part I explains the progression to strict scrutiny as the applicable standard of review for race-conscious admissions policies.[42] Part II analyzes the procedural history of the *Parents Involved* cases.[43] Part III compares the admissions policies between public high schools and universities.[44] Part IV proposes a constitutionally permissible race-conscious placement policy for secondary education.[45] Part V concludes that although the Ninth Circuit correctly held that the School District's "open choice" policy was a violation of the Equal Protection Clause of the Fourteenth Amendment, future cases may require a more extensive examination of the differences between high school and university admissions, especially under the latest policies outlined in *Grutter v. Bollinger* and *Gratz v. Bollinger*.[46]

I. BACKGROUND

Historically, discrimination based on race involved "discrete and insular" minorities.[47] For this reason, the applicable authority and standard of review for discrimination against the white majority entailed many years of debate.[48]

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[38] *Id.*
[39] *See infra* notes 172-254 and accompanying text.
[40] *See supra* notes 1-6 and accompanying text.
[41] *See supra* notes 16-38 and accompanying text.
[42] *See infra* notes 47-171 and accompanying text.
[43] *See infra* notes 172-254 and accompanying text.
[44] *See infra* notes 255-285 and accompanying text.
[45] *See infra* notes 286-316 and accompanying text.
[46] *See infra* notes 317-320 and accompanying text.
[47] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).
[48] *See infra* notes 70-171 and accompanying text.

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A. THE HISTORY OF EQUAL PROTECTION CLAIMS

Racial discrimination claims are often brought under Title VI of the Civil Rights Act of 1964.[49] One purpose of Title VI was to permit the Executive Branch to terminate federal funding of private programs that unlawfully used race-based discrimination.[50] In pertinent part, it provides that, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[51] It was meant to "assure the existing right to equal treatment" when utilizing federal funds.[52]

In addition, racial discrimination claims are brought under the Equal Protection Clause of the Fourteenth Amendment.[53] Initially, the Supreme Court's position on the Fourteenth Amendment was that it had "one pervading purpose."[54] That purpose was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised dominion over him."[55] While the Due Process Clause of the Fourteenth Amendment was frequently used by the Supreme Court to defend property and the liberty of contract, the Equal Protection Clause remained dormant.[56] During this period, "the United States became a Nation of minorities."[57] As a result, the guarantees of the Fourteenth Amendment no longer attached to equality rights for only one racial minority.[58] Accordingly, the Court has instated three

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[49] *See id*, 438 U.S. at 328-42.

[50] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 328-29 (1978) (plurality opinion) [hereinafter *Bakke*].

[51] *Id.* at 328 n.7 (citing 42 U.S.C. § 2000(d)).

[52] *Id.* at 330.

[53] *Id.* at 291 (citing *Slaughter-House Cases*, 16 Wall. 36, 71 (1873)). The Fourteenth Amendment commands, "No State shall...deny to any person within its jurisdiction the equal protections of the laws." *Id.* at 289 (quoting U.S. Const. amend. XIV, § 1) (alteration in original).

[54] *Id.*

[55] *Id.*

[56] *Id.* at 291-92.

[57] *Id.* at 292.

[58] *Id.*

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standards of review to analyze claims under the Equal Protection Clause.[59]

B. STANDARDS OF REVIEW FOR VARIOUS EQUAL PROTECTION CLAIMS

The three standards of review recognized by the Supreme Court to test alleged equal protection violations are rational basis, intermediate scrutiny, and strict scrutiny.[60] Rational basis is the least demanding level of scrutiny used to analyze equal protection violations.[61] Courts utilize this level of review when the classification being discriminated against has not been elevated to a "suspect class."[62] To satisfy rational basis, the legislation must serve a legitimate government purpose.[63] The next level of review is intermediate scrutiny.[64] Discrimination based on gender is scrutinized under this standard of review.[65] In order to satisfy intermediate scrutiny, legislation must serve an important governmental purpose that is substantially related to the goal.[66] Traditionally, laws that classify people differently based on race are examined under the most exacting level: strict scrutiny.[67] To satisfy strict scrutiny, the legislation must serve a compelling governmental interest that

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[59] *See infra* notes 60-68 and accompanying text.

[60] *Id.*

[61] *See generally* Goesaert v. Cleary, 74 F. Supp. 735 (E.D. Mich. 1947) (involving a 1948 law that prohibited women from being bartenders, unless the bar was operated by her husband or father), *aff'd*, 335 U.S. 464 (1948), overruled by Craig v. Boren, 429 U.S. 190 (1976). The Court used rational basis for gender discrimination at this time. *Id.* at 738.

[62] *See generally* Reed v. Reed, 404 U.S. 71, 75 (1971) (declining to make gender a "suspect class").

[63] *See supra* note 61 and accompanying text.

[64] *See generally Craig*, 429 U.S. 190 (raising the level of scrutiny from rational basis to intermediate scrutiny for discrimination against either gender).

[65] *Id.*

[66] *Id.*

[67] *See* Korematsu v. United States, 323 U.S. 214, 216-17 (1944) (involving a conviction under the Fifth Amendment Equal Protection Clause for violating a military order during World War II that excluded all persons of Japanese ancestry from designated West Coast areas), *superseded by statute*, Pub. L. No. 100-383, § 2a, 102 Stat. 903 (1988); Strauder v. West Va., 100 U.S. 303, 304, 306 (1880) (concerning a black defendant convicted of murder by a jury from which blacks had been excluded); Yick Wo v. Hopkins, 118 U.S. 356, 356, 369 (1886) (involving a law that prohibited the operation of a laundry in wooden buildings without a permit that in application discriminated against Chinese applicants).

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is narrowly tailored to achieve that interest.[68] Although strict scrutiny is now the applicable standard of review for race-conscious affirmative action policies, the debate ensued for many years.[69]

C. CASE HISTORY

1. Regents of the University of California v. Bakke

The first affirmative action case before the Supreme Court was *Regents of the University of California v. Bakke*.[70] The suit challenged the admissions program at the University of California at Davis Medical School (hereinafter "U.C. Davis"), which was designed to admit a fixed number of minority applicants.[71] A majority of justices could not agree on the applicable standard of review.[72] As a result, the decision was published with six separate opinions.[73] The Court was split, with Justice Lewis Powell in the middle.[74] Four justices, including Chief Justice Burger, concluded that Title VI of the Civil Rights Act of 1964 prohibited U.C. Davis's program.[75] This view avoided addressing the constitutional issue altogether.[76] Justice Powell concurred in the judgment that the U.C. Davis program should be prohibited.[77] However, he reached his conclusion through a constitutional analysis.[78] The remaining four justices dissented.[79] These dissenting justices agreed with Justice Powell

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[68] *Id.*

[69] *See infra* notes 70-171 and accompanying text.

[70] *See Bakke*, 438 U.S. 265 (1978) (plurality opinion).

[71] *Id.* at 269-70 (Powell, J. plurality opinion).

[72] *Id.* at 271-72 (Powell, J. plurality opinion).

[73] *Id.* Justice Brennan, Justice White, Justice Marshall, and Justice Blackmun filed an opinion concurring in the judgment in part and dissenting in part. *Id.* at 324. Justice White, Justice Marshall, and Justice Blackmun each filed separate opinions. *Id.* 380-421. Justice Stevens concurred in judgment and dissented in part and filed an opinion that Chief Justice Burger, Justice Stewart and Justice Rehnquist joined. *Id.* at 325-379.

[74] *Id.* (Powell, J. plurality opinion).

[75] *Id.* at 325 (Brennan, J. dissenting). Chief Justice Burger, Justice Stewart, Justice Rehnquist, and Justice Stevens concluded that Title VI prohibited U.C. Davis's program. *Id.*

[76] *Id.* (Brennan, J. dissenting).

[77] *Id.* at 325-26 (Brennan, J. dissenting).

[78] *Id.*

[79] *Id.* at 325 (Brennan, J. dissenting). Justice Brennan, Justice White, Justice Marshall, and Justice Blackmun agreed with Justice Powell that a constitutional analysis was appropriate. *Id.* at 324.

that "Title VI goes no further in prohibiting the use of race than the Equal Protection Clause of the Fourteenth Amendment."[80] However, unlike Powell, the dissent analyzed the U.C. Davis program under intermediate scrutiny and upheld it as a constitutional use of race.[81] Justice Powell's opinion provided crucial guidelines in the affirmative action arena because his vote was necessary to obtain a majority.[82]

Nevertheless, U.C. Davis undeniably used a race-based classification in its admissions program.[83] The Court previously decided racial and ethnic minorities of any sort were inherently suspect and therefore called for the "most exacting judicial examination."[84] Allen Bakke was a white male applicant who was denied admission both in 1973 and 1974.[85] U.C. Davis argued strict scrutiny was not the applicable standard of review because white males are not a "discrete and insular minority."[86] In spite of this, Justice Powell concluded that the Court had never required such a distinction before subjecting racial preferences to strict scrutiny.[87] Accordingly, Justice Powell determined Allen Bakke was entitled to a judicial determination of whether U.C. Davis's policy was "precisely tailored to serve a compelling governmental interest."[88]

Using strict scrutiny review, Justice Powell first determined what interests were involved and which interests were substantial enough to support the use of a suspect classification.[89] He found that the "special admissions program [at U.C.

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[80] *Id.* at 325. A majority of the Court after this point views Title VI as coextensive with the guarantees of the Equal Protection Clause of the Fourteenth Amendment and the equal protection component of the Fifth Amendment. *Id.* at 352-53.

[81] *Id.* at 325-26 (Brennan, J. dissenting).

[82] *See id.*, 438 U.S. 265 (plurality opinion).

[83] *Id.* at 289 (Powell, J.). The program at the U.C. Davis Medical School set up a committee to evaluate students who wished to be considered "economically and /or educationally disadvantaged" applicants. *Id.* at 273 n.1. No formal definition of "disadvantaged" was given. *Id.* A specified number of positions were reserved for disadvantaged applicants (16 out of 100). *Id.* at 289. The committee would present its "top choices to the general admissions committee." *Id.* at 275. In 1973, the "total number of special applicants was 297, of whom 73 were white," while. "[i]n 1974, 628 persons applied to the special committee, of whom and 172 were white." *Id.* at 274-75 n.5.

[84] *Id.* at 291 (Powell, J.) (citing Hirabayashi v. United States, 320 U.S. 81, 100 (1943), *Korematsu*, 323 U.S. at 323 (1944)).

[85] *Id.* at 276 (Powell, J.).

[86] *Id.* at 288 (Powell, J.).

[87] *Id.* at 290 (Powell, J.) (citing *Carolene Prods. Co,.* 304 U.S. at 152-53 n.4).

[88] *Id.* at 299 (Powell, J.).

[89] *Id.* at 305-06 (Powell, J.).

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Davis] purports to serve the purposes of: (i) reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession; (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body."[90]

Justice Powell concluded that *Brown* and the subsequent desegregation cases demonstrated that remedying specific acts of racial discrimination was a judicial and state commitment.[91] However, remedying specific acts of past discrimination is "far more focused" than remedying past societal discrimination, because societal discrimination involves reparations for society as a whole.[92] Justice Powell determined that the Court has never allowed a preferential classification that assists members of one group while harming individuals of another without "judicial, legislative, or administrative findings of constitutional or statutory violations."[93] Thus, without such findings there is no "compelling justification" to discriminate based on race.[94] As a result, Justice Powell concluded that if an institution's motivating purpose was to remedy past specific acts, as opposed to broad societal discrimination, such a purpose could be found compelling.[95]

The third stated purpose was to improve health care services in communities where they were underserved.[96] Powell concluded that in some situations this purpose would be "sufficiently compelling."[97] Even so, *Bakke's* record failed to show that U.C. Davis's special admissions program was designed to promote that goal.[98]

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[90] *Id.* at 306 (Powell, J.).

[91] *Id.* at 307 (Powell, J.).

[92] *Id.* (Powell, J.). Remedying past societal discrimination involves a goal of "reparation by the 'majority' to a victimized group as a whole." *Id.* at 306 n.43 (Powell, J.).

[93] *Id.* at 307 (Powell, J.) (citing Teamsters v. United States, 431 U.S. 324, 367-76 (1977); United Jewish Orgs. v. Carey, 430 U.S. 144, 155-56 (1977); S. Carolina v. Katzenbach, 383 U.S. 301, 308 (1966)).

[94] *Id.* at 309 (Powell, J.).

[95] *See id.* at 307-10 (Powell, J.).

[96] *Id.* at 310 (Powell, J.).

[97] *Id.* (Powell, J.).

[98] *Id.* (Powell, J.).

The last purpose asserted by U.C. Davis was to establish a diverse student body.[99] Justice Powell concluded that although achieving a diverse student body was sufficiently compelling to consider race in admissions decisions under certain circumstances, the particular special admissions program at U.C. Davis did not pass strict scrutiny review because it did not employ the least restrictive means.[100] Therefore, he invalidated the U.C. Davis program under the Equal Protection Clause.[101]

In summary, Justice Powell found racial diversity to be a compelling aspect of educational admissions decisions.[102] However, race is only one element in a range of factors a university may consider in attaining its goals of a diverse student body.[103] Nonetheless, because of the division among the Court, the only holding from *Bakke* was that a "[s]tate has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin."[104] Despite Powell's constitutional analysis, the majority authorized the use of affirmative action in *Bakke*, but they did not permit the quota program that U.C. Davis established.[105] As a result, the applicable standard of review for affirmative action programs remained a debate for more than a decade.[106]

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[99] *Id.* at 311 (Powell, J.).

[100] *Id.* at 319-20 (Powell, J.).

[101] *Id.* (Powell, J.).

[102] *Id.* at 314 (Powell, J.)

[103] *Id.* Powell held that Harvard College's admissions policy was an adequate program. *Id.* at 316-24. "Harvard College expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups." *Id.* at 316. The admissions policy at Harvard used race as a factor, but did not allow "target quotas." *Id.*

[104] *Id.* at 320 (Powell, J.).

[105] *Id.* at 271 (Powell, J.).

[106] *See generally* United States v. Paradise, 480 U.S. 149 (1987) (holding a negotiated consent decree including numerical hiring in promotional goals for minority employees was permissible); Local 28 of Sheet Metal Workers' Int'l Assoc. v. EEOC, 478 U.S. 421 (1986) (finding minority hiring goals permissible after defendants were found guilty of engaging in discriminatory practices); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (holding that a collective bargaining agreement that required the retention of probationary minority teachers when nonminority teachers were laid off was not permissible); Fullilove v. Klutznick, 448 U.S. 448 (1980) (upholding a federal program reserving a specified percentage of government contracts for minority contractors), *overruled in part by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

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2. Richmond v. J.A. Croson Co.

The Supreme Court also analyzed race-conscious hiring procedures.[107] A majority of the Supreme Court in *Richmond v. J.A. Croson Company* determined that the applicable standard of review for state law was strict scrutiny.[108] The questionable plan in *Croson* required the city's prime contractors to "subcontract at least 30% of the [contract's] dollar amount to one or more Minority Business Enterprises (MBEs)."[109] The Court held that "the Richmond Plan denies certain citizens the opportunity to compete for a [specified] percentage of public contracts based solely upon their race."[110] The Court agreed with the plurality view in *Wygant v. Jackson Board of Education* that "the standard of review under the Equal Protection Clause was not [determined] by the race of those burdened or benefited by the particular classification."[111]

In addition, the Court decided strict scrutiny was used to "smoke out illegitimate uses of race" by ensuring the legislation was necessary, therefore justifying the use of a "highly suspect tool."[112] Thus, they chose to use strict scrutiny as the applicable standard of review.[113] Accordingly, the Court in *Croson* held that the city failed to demonstrate a compelling interest in apportioning their contracts based on race.[114]

3. Adarand Constructors, Inc. v. Pena

The Supreme Court also addressed the applicable standard of review for federal equal protection violations.[115] *Adarand*

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[107] *See* Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

[108] *Id.* at 493-95.

[109] *Id.* at 477. The Richmond Plan considered a business an MBE if at least fifty-one percent of the business was owned or controlled by minority group members. *Id.* at 478. The Richmond Plan defined "minority group members" as United States citizens "who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." *Id.* The dispute arose because the J.A. Croson Co. alleged that it was denied work on a city project because it was not an MBE. *Id.* at 483.

[110] *Id.* at 493.

[111] *Id.* at 494 (citing *Wygant*, 476 U.S. 267, 285-86 (1986) (O'Connor, J., concurring). In *Wygant*, four members of the Court applied heightened scrutiny to a race-based system of employee layoffs. *Wygant*, 476 U.S. at 270. ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy").

[112] *Croson* at 493.

[113] *Id.*

[114] *Id.* at 505.

[115] *See generally Adarand*, 515 U.S. 200.

Constructors, Inc. v. Pena involved the "Federal Government's practice of giving general contractors on Government projects a financial incentive to hire subcontractors controlled by 'socially and economically disadvantaged individuals.'"[116] "Race-based presumptions" were used to determine who was socially or economically disadvantaged.[117] The Court in *Adarand* made it clear that federal racial classifications, like those of a state, must serve a compelling governmental interest, and must be narrowly tailored to further that interest.[118] Consequently, the Court determined that all government-imposed racial classifications "must be analyzed by a reviewing court under strict scrutiny."[119]

D. THE COURT ANNOUNCES THE STANDARD

During its 2003 term the Supreme Court decided two cases which upheld the constitutionality of affirmative action programs.[120] *Grutter v. Bollinger* and *Gratz v. Bollinger* are significant because their rulings set up constitutional parameters for affirmative action programs at colleges and universities all over the country.[121]

1. Grutter v. Bollinger

In *Grutter*, the University of Michigan School of Law (hereinafter "Law School") sought a "mix of students with varying backgrounds and experiences who will respect and learn from

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[116] *Id.* at 204. The clause addressing the financial incentive stated that "'the contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged....'" *Id.* at 205 (quoting 15 U.S.C. §§ 687(d)(2), (3)).

[117] *Adarand* at 204. Adarand was a Colorado-based highway construction company who submitted the low bid for a federal contract. *Id.* at 205. The Central Federal Lands Highway Division (CFLHD), a part of the United States Department of Transportation (DOT), was the prime contractor. *Id.* Adarand alleged that the race-based presumptions used in compensating contractors violated of the Equal Protection Clause. *Id.* at 210.

[118] *Id.* at 227.

[119] *Id.*

[120] Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding University of Michigan School of Law's admissions policy), *reh'g denied*, 539 U.S. 982 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003) (finding University of Michigan's College of Literature, Science, and Arts undergraduate admissions program was unconstitutional).

[121] *See infra* notes 122-171 and accompanying text.

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each other."[122] Consequently, the Law School wanted to comply with the Supreme Court's only ruling involving race in university admissions, which was articulated in *Bakke*.[123] Barbara Grutter was a white Michigan resident who applied to the Law School in 1996.[124] She alleged that the Law School discriminated against her on the basis of race in violation of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.[125]

The Law School considered several factors when admitting students.[126] Among those factors were each applicant's undergraduate grade point average (GPA) and Law School Admissions Test (LSAT) score.[127] However, the admissions officials also considered a series of "soft variables."[128] These variables included, "enthusiasm of recommenders, the quality of the undergraduate institution, the quality of the applicant's essay, and the areas and difficulty of undergraduate course selection."[129] The purpose of the "soft variables" was to help evaluate the applicant's "likely contributions to both the intellectual and social life of the institution."[130] As a result, the admissions policy confirmed the Law School's longstanding commitment to racial diversity, without defining diversity solely in terms of race.[131]

According to the Director of Admissions, the Law School tried to achieve a "critical mass" of underrepresented minority students.[132] He further testified that there was not a specified percentage of minority students that the school was seeking to admit.[133] However, he did "frequently consult the 'daily reports'" which monitored the racial and ethnic composition of selected students to "ensure that the 'critical mass' of underrepresented minority students would be reached."[134] "Critical

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[122] *Grutter*. 539 U.S. at 314.
[123] *Id.* (citing *Bakke*, 438 U.S. 265).
[124] *Id.* at 316.
[125] *Id.* at 317.
[126] *Id.* at 315.
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.* at 315.
[132] *Id.* at 318.
[133] *Id.*
[134] *Id.*

mass" was not a specified number, but rather a number that was large enough to encourage underrepresented minority students to participate without feeling isolated.[135]

The Supreme Court granted certiorari to resolve the disagreement among the Courts of Appeal.[136] First, the Court decided whether there was a compelling governmental interest underlying the policy behind the Law School's admissions program.[137] The Court deferred to the Law School in assessing whether diversity was essential to its educational mission.[138] Accordingly, it found the benefits of the admissions policy promoted a "'cross-racial understanding'," which broke down stereotypes, and allowed students a greater understanding of people of different races.[139] These benefits created a "livelier, more spirited" class discussion as well as "better prepare[d] students for an increasingly diverse workforce and society."[140] As a result, the Court held that admitting a "'critical mass' of underrepresented minorities [was] necessary to further [the Law School's] compelling interest in securing the educational benefits of a diverse student body."[141]

Next, the Court examined whether the policy was narrowly tailored to achieve its compelling interest.[142] In doing so, it followed the narrow tailoring principles laid out in Powell's *Bakke* opinion.[143] In *Bakke*, the Court struck down the use of a quota system to achieve racial diversity, because it would "insulate each category of applicants with certain desired qualifications from competition with all other applicants."[144] Instead, the Court articulated that the admissions program must be flexi-

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[135] *Id.* at 319.

[136] *Id.* at 321-22. (finding that the District Court applied strict scrutiny and determined the admissions policy was unlawful). The court determined that the Law School's interest in compiling a diverse student body was not compelling, because *Bakke* did not authorize the promotion of a diverse classroom as a permissible interest. *Id.* at 321. The Court of Appeals reversed the District Court's judgment and held that Justice Powell's opinion with respect to diversity was the controlling rationale. *Id.* at 321.

[137] *Id.* at 327. The issue was "[w]hether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities." *Id.* at 322.

[138] *Id.* at 328.

[139] *Id.* at 330.

[140] *Id.*

[141] *Id.* at 333.

[142] *Id.*

[143] *Id.* at 334 (citing *Bakke*, 438 U.S. at 315 (Powell, J.)).

[144] *Id.* (quoting *Bakke*, 438 U.S. at 315 (Powell, J.)).

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ble, possibly using race as a "plus" factor, but the elements of diversity should be considered in light of all of the qualifications of each applicant.[145]

Under the reasons set forth in Justice Powell's opinion in *Bakke*, the Court in *Grutter* concluded that the Law School did not operate the "critical mass" policy as a quota.[146] It reasoned that "some attention to numbers," will not convert an already "flexible admissions [policy] into a rigid quota."[147] Again, the Court emphasized that a race-conscious admissions policy must be flexible enough to ensure that race will not be the determining factor in the application.[148]

Based on the above analysis, the Court determined that the Law School's admissions policy did not automatically admit students according to any one of the "soft variables."[149] In addition, the Court found that the policy did not provide any predetermined or mechanical "bonuses" merely on the basis of an applicant's race.[150] In fact, the Court found that the Law School's program was sufficiently similar to the Harvard Plan described by Powell in *Bakke*.[151] As such, the Court determined that the policy was "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant to place them on the same footing for consideration, although not necessarily according them the same weight."[152]

The Court also decided that the Law School earnestly considered race-neutral alternatives to its program.[153] The District Court had criticized the Law School for failing to consider alternatives such as a random lottery or decreasing the weight of undergraduate grades and admission test scores.[154] Nonetheless, the Supreme Court found these alternatives required a "dramatic sacrifice of diversity" and the academic quality of all admitted students.[155] In addition, the Court trusted the Law

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[145] *Id.* (citing *Bakke*, 438 U.S. at 317 (Powell, J.)).
[146] *Id.* at 335.
[147] *Id.* at 336 (citing *Bakke*, 438 U.S. at 323 (Powell, J.)).
[148] *Id.* at 337.
[149] *Id.*
[150] *Id.*
[151] *Id.*; *see infra* note 103 and accompanying text.
[152] *Id.* (quoting *Bakke*, 438 U.S. at 317 (Powell, J.)).
[153] *Id.* at 340.
[154] *Id.*
[155] *Id.*

School to terminate its race-conscious admissions policy upon developing a satisfactory race-neutral alternative.[156] The Court, therefore, held that "the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining education benefits that flow from a diverse student body."[157]

2. Gratz v. Bollinger

In the same term that the Supreme Court decided *Grutter*, it granted certiorari in *Gratz v. Bollinger* to determine whether racial preferences in the University of Michigan's admissions policy violated the Equal Protection Clause of the Fourteenth Amendment or Title VI of the Civil Rights Act of 1964.[158] The Court, upon the same type of objections to the admissions policy as in *Grutter*, decided that the University of Michigan's College of Literature, Science, and the Arts's (hereinafter "LSA") admissions program violated constitutional and statutory provisions against race-based decision-making.[159] LSA's admissions policy and the Law School's admissions policy differed significantly.[160]

A critical distinction between the two admissions policies was the numeric guideline for admitting students based on racial preferences.[161] LSA's program automatically awarded "underrepresented" applicants twenty points.[162] Its sole consideration for determining whether students were underrepresented was a review of the application to determine whether the applicant belonged to a minority.[163] In addition, distributing twenty points accounted for one-fifth of the total points necessary for admission.[164]

Moreover, the twenty points awarded to underrepresented applicants represented a racial classification.[165] The Court,

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[156] *Id.* at 343.
[157] *Id.*
[158] *Gratz*, 539 U.S. at 249.
[159] *Id.* at 250.
[160] *Id.*
[161] *Id.* at 270.
[162] *Id.* at 271-72.
[163] *Id.*
[164] *Id.* at 270.
[165] *See id.*

therefore, applied strict scrutiny.[166] Once more, the Court looked to Justice Powell's opinion in *Bakke* for guidance.[167] *Bakke* emphasized that an admissions program involving race or ethnic backgrounds is permissible when race is considered a "plus" in the applicant's file.[168] The system also should be flexible enough to consider "all pertinent elements of diversity in light of the particular qualifications of each applicant."[169] LSA's program did not offer applicants the individualized selection process described in Powell's *Bakke* opinion.[170] Thus, the Court in *Gratz* held that because LSA's use of race in its admissions policy was not narrowly tailored to achieve diversity, its asserted interest, the admissions policy, would not survive strict scrutiny.[171]

II. APPLICATION IN THE NINTH CIRCUIT

The Supreme Court's analysis in both *Grutter* and *Gratz* created the parameters the Ninth Circuit utilized when it decided *Parents Involved in Community Schools v. Seattle School District Number 1*.[172]

A. DISTRICT COURT

First, the United States District Court for the Western District of Washington had to determine the standard of review for analyzing alleged equal protection violations.[173] The court decided that because the School District's "open choice" policy relied on racial classifications, it had to use strict scrutiny to determine its constitutionality.[174] The school board considered the benefits of a more diverse student body to establish its purpose.[175] It determined the benefits from diversity included in-

[166] *Id.* Under a strict scrutiny standard, LSA's admissions program could only use race to further a compelling governmental interest by narrowly tailored means. *Id.*

[167] *Id.*

[168] *Id.* at 270-71 (quoting *Bakke*, 438 U.S. at 317 (Powell, J.)).

[169] *Id.* at 271.

[170] *Id.* (citing *Bakke*, 438 U.S. at 317 (Powell, J.)).

[171] *Id.* at 275.

[172] *See infra* notes 188-254 and accompanying text.

[173] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 137 F. Supp. 2d 1224, 1232 (W.D. Wash. 2001) (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 225-26 (1995)).

[174] *Id.*

[175] *Id.*

creasing classroom discussion of racial and ethnic issues, "teaching students to become citizens of a multi-racial/multi-ethnic world," and allowing for different perspectives absent from a diverse classroom atmosphere.[176]

Consequently, the District Court found that the School District's interests were not only to promote diversity, but also, to ameliorate the de facto effects of residential segregation in Seattle.[177] Without such a policy, the court felt the school system would revert back to highly segregated schools due to the disproportionate distribution of race throughout Seattle's neighborhoods.[178] As such, the court decided that preventing re-segregation was a compelling interest.[179] Accordingly, when the District Court analyzed *Bakke*, it found that Justice Powell's opinion was not as forceful when considering racial preferences earlier in a child's education.[180] The court, therefore, held that the School District met their burden in establishing that the "open choice" policy furthered a compelling governmental interest.[181]

Next, the District Court considered whether the program was narrowly tailored to achieve the goal of reducing racial isolation resulting from de facto segregation.[182] It decided the plan did not mandate a specific quota, because it allowed for a fifteen percent deviation from the sixty/forty nonwhite to white ratio before race was taken into account.[183] The court also found the School District limited the racial tiebreaker by only applying it to ninth graders.[184] Moreover, the racial tiebreaker terminated once an entering class was racially "in balance."[185] The court, therefore, concluded that the "open choice" policy was narrowly tailored to further compelling interests and granted

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[176] *Id.* (quoting and citing School District's Mins. of Exec. Sess. of Bd. of Directors, Nov. 17, 1999).

[177] *Id.* at 1236.

[178] *Id.* at 1235.

[179] *Id.* at 1237.

[180] *Id.* at 1235 (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) (finding that "[s]chool authorities are traditionally charged with broad power to formulate and implement educational policy", even possibly prescribing a racial proportion within a school that reflects society).

[181] *Id.* at 1236.

[182] *Id.*

[183] *Id.* at 1239.

[184] *Id.*

[185] *Id.*

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the defendants' motion for partial summary judgment on the state and federal law claims.[186] Subsequently, the non-profit corporation Parents Involved In Community Schools appealed.[187]

B. THE NINTH CIRCUIT'S APPLICATION OF STRICT SCRUTINY

Parents Involved II was then reviewed by the Ninth Circuit to determine whether the School District's "open choice" policy violated of the Equal Protection Clause of the Fourteenth Amendment.[188] The Ninth Circuit agreed with the District Court that strict scrutiny was the appropriate standard of review.[189] In addition, the Ninth Circuit agreed that the School District satisfied its burden articulating a compelling interest for the use of a racial classification.[190]

In doing so, it relied heavily on *Grutter* and *Gratz* to analyze whether the School District's diversity interest was compelling.[191] The School District wanted to achieve several objectives with the implementation of its "open choice" policy.[192] It emphasized that diversity in schools better prepares students for a multi-racial world by increasing racial and ethnic discussions involving diverse perspectives.[193] Consequently, the Ninth Circuit determined that although *Grutter* examined the diversity interests of a university environment, the decision was also applicable to high schools.[194] The court found no substantial difference in the government's interest in providing diverse interactions among eighteen year-old high school seniors and

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[186] *Id.* at 1240.

[187] *Parents Involved II*, 377 F.3d at 953.

[188] *Id.*

[189] *Id.* at 960.

[190] *Id.* at 964.

[191] *Id.* at 961-64.

[192] *Id.* at 961. The School District desired to achieve: "the educational benefits of attending a racially and ethnically diverse school; integration of schools which, as a result of housing patterns and the tendency of many parents to choose schools close to home, would otherwise tend to become racially isolated; ensuring that public institutions are open and available to all segments of American society; alleviating de facto segregation; increasing racial and cultural understanding; avoiding racial isolation; fostering cross-racial friendships; and reducing prejudice and increasing understanding of cultural differences." *Id.* (internal quotation marks omitted).

[193] *Id.* at 961.

[194] *Parents Involved II*, 377 F.3d at 964 (emphasis added) (quoting *Grutter*, 539 U.S. at 330).

eighteen year-old college freshmen.[195] Accordingly, it decided the benefits of a diverse classroom were "as compelling in the high school context as they are in higher education."[196] Thus, the Ninth Circuit majority concluded that the School District's diversity interest was a constitutionally accepted compelling interest.[197]

Nevertheless, the Ninth Circuit did not consider the remedying of de facto segregation from Seattle's housing patterns a compelling interest.[198] However, the Ninth Circuit noted that the Supreme Court has never held remedying past discrimination as the only use of racial preferences that could withstand strict scrutiny.[199] As a result, the court concluded the compelling interest was the benefit created from the presence of racial and ethnic diversity in educational institutions.[200] Thus, the School District could employ a race-conscious placement policy if its means to diversify were narrowly tailored.[201]

The Ninth Circuit used several governing constraints to determine whether the School District's "open choice" policy utilized the least restrictive means.[202] First, the court prohibited mechanical racial quotas for non-remedial purposes.[203] Accordingly, the policy had to be flexible enough to evaluate each applicant's potential diversity contributions individually.[204]

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[195] *Id.* (citing *Grutter*, 539 U.S. at 347 (Scalia, J., dissenting) ("The 'educational benefit' that the University seeks to achieve by racial discrimination consists, according to the Court, of 'cross-racial understanding' and 'better preparation of students for an increasingly diverse workforce and society,' all of which is necessary not only for work, but also for good 'citizenship.' This is not, of course, an 'educational benefit' but the same lesson taught to people three feet shorter and twenty years younger in institutions ranging from Boy Scout troops to public-school kindergartens." (alterations omitted) (quoting *Grutter*, 539 U.S. at 331)).

[196] *Id.*

[197] *Id.* at 964.

[198] *Id.* at 961.

[199] *Id.* at 962 (quoting *Grutter*, 539 U.S. at 328 (O'Connor, J.)).

[200] *Id.* at 964.

[201] *Id.*

[202] *Id.* at 968-69 (taking the six constraints from "*Grutter* and *Gratz*" and "well-established narrow tailoring principles") (citing *Grutter*, 539 U.S. 306; *Gratz*, 539 U.S. 244).

[203] *Id.* at 968 (citing *Gratz*, 539 U.S. at 293 (Souter & Ginsburg, JJ., dissenting) ("Justice Powell's opinion in *Bakke* rules out a racial quota or set-aside, in which race is the sole factor of eligibility for certain places in a class"); *Grutter*, 539 U.S. at 334).

[204] *Parents Involved II*, 377 F.3d at 968 (citing *Gratz*, 539 U.S. at 271-74; *Grutter*, 539 U.S. at 337-39; *Bakke*, 438 U.S. at 315 & 317-18; Belk v. Charlotte-Mecklenburg Bd. of Educ., 269 F.3d 305, 345 (4th Cir. 2001); Wessmann v. Gittens, 160 F.3d 790, 798, 800 (1st Cir. 1998); Eisenberg v. Montgomery County Pub. Schs., 197 F.3d 123,

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Next, the court examined whether the School District earnestly considered race-neutral alternatives.[205] Then, even assuming the School District passed the first constraints, the court had to determine whether they minimized the adverse impact on third parties.[206] Finally, the court determined whether the policy was time-limited.[207]

In the present case, the Ninth Circuit concluded that the open choice policy failed nearly every test.[208] As a result, it reversed and enjoined the School District from using the racial tiebreaker.[209]

1. Racial Quotas and a Flexible Nonmechanical Use of Race

If an affirmative action policy is not seeking to remedy past discrimination, racial quotas are not permitted.[210] According to *Grutter*, a racial quota is a program with a certain fixed number or proportion of opportunities that separates applicants disallowing a comparison for all available seats.[211] Prohibition of strict racial quotas will ensure that applicants are evaluated individually and that race is not a "defining feature" in their application.[212]

The dissent in the Ninth Circuit opinion viewed quotas as irrelevant when assigning students to secondary schools.[213] Two reasons were cited to illustrate why cases involving higher learning did not provide a proper narrow tailoring model for secondary education.[214] First, based on a particular applicant's

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132-33 (4th Cir. 1999); Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 707 (4th Cir. 1999)).

[205] *Id.* at 969 (emphasis omitted) (citing *Grutter*, 539 U.S. at 337; Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 n.6 (1985); *Tuttle*, 195 F.3d at 706; Podbersky v. Kirwan, 38 F.3d 147, 160-61 (4th Cir. 1994)).

[206] *Id.* (emphasis omitted) (citing *Grutter*, 539 U.S. at 341; *Wygant*, 476 U.S. at 287 (O'Connor, J., concurring in part and dissenting in part); *Bakke*, 438 U.S. at 308, 311, 314-15 (Powell, J., concurring); *Wessmann*, 160 F.3d at 798).

[207] *Id.* (emphasis omitted) (citing *Grutter*, 539 U.S. at 342; Richmond v. J. A. Croson Co., 488 U.S. 469, 510 (1989); Hayes v. N. State Law Enforcement Ass'n, 10 F.3d 207, 216 (4th Cir. 1993)).

[208] *Id.* at 969.

[209] *Id.* at 976 n.32, 988-89.

[210] *Id.* at 968 (emphasis omitted) (citing *Gratz*, 539 U.S. at 293 (Souter & Ginsburg, JJ., dissenting); *Grutter*, 539 U.S. at 334).

[211] *Id.* at 969 (citing *Grutter*, 539 U.S. at 335 (citations and quotations omitted)).

[212] *Id.* (quoting *Grutter*, 539 U.S. at 337).

[213] *Id.* at 999 (Graber, J., dissenting).

[214] *Id.* at 998 (Graber, J., dissenting).

merit, a higher learning institution grants or denies access to that limited government benefit.[215] However, when racial preferences are used, race is a substitute for merit.[216] Second, higher education seeks "true diversity" for an advanced academic atmosphere, whereas public high schools seek different educational benefits that are more suitably accomplished with an explicit determination based on race.[217] Nevertheless, the Ninth Circuit majority determined that the School District's racial tiebreaker was "virtually indistinguishable from a pure racial quota."[218]

Similarly, the Ninth Circuit determined the policy was not flexible.[219] According to the court, racial preferences for purposes of diversity must meaningfully be evaluated in "light of all pertinent factors."[220] "Automatically awarding a fixed racial preference" based solely on race disallows the "far broader array of diversity characteristics" from influencing the state's diversity goals.[221] Thus, the Ninth Circuit concluded the School District's racial tiebreaker could not be narrowly tailored to any purpose other than outright racial balancing.[222]

2. *Consideration of Race-Neutral Alternatives*

The Ninth Circuit also concluded the School District did not earnestly consider race-neutral alternatives.[223] Although the School District was presented with such alternatives, the Ninth Circuit majority decided the school board did not adequately weigh its options.[224]

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[215] *Id.* at 999 (Graber, J., dissenting).

[216] *Id.* at 999 (Graber, J., dissenting).

[217] *Id.* (Graber, J., dissenting).

[218] *Id.*

[219] *Id.*

[220] *Id.* at 968 (citing *Gratz*, 539 U.S. at 271-74, 279 (O'Connor, J., concurring); *Grutter*, 539 U.S. at 337-39; *Bakke*, 438 U.S. at 315, 317-18 (Powell, J.); Belk v. Charlotte-Mecklenburg Bd. of Educ., 269 F.3d 305, 345 (4th Cir. 2001) (Traxler, J., concurring); Wessmann v. Gittens, 160 F.3d 790, 798, 800 (1st Cir. 1998); Eisenberg v. Montgomery County Pub. Schs., 197 F.3d 123, 132-33 (4th Cir. 1999); Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 707 (4th Cir. 1999)).

[221] *Id.* (citing *Bakke*, 438 U.S. at 317 (Powell, J.)). The School District used a "computer algorithm designed to implement the ceilings and floors framing its racial tiebreaker." *Id.* at 969.

[222] *Id.* at 970.

[223] *Id.*

[224] *Id.* at 970.

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The first proposed alternative was a citywide lottery.[225] A lottery system would require a "dramatic sacrifice" in student choice, geographic convenience and program specialization.[226] In *Grutter*, the Court rejected a demand that the Law School had to consider a lottery because the Law School might not achieve its diversity goal due to an underrepresentation of various types of diversity.[227] Consequently, such a program would "necessarily diminish the quality of its admitted students."[228] Nonetheless, the Ninth Circuit majority distinguished the School District's policy because it was compulsory to place all students in a Seattle public high school.[229] The applicant pool, therefore, would not be subject to the same type of "demographic skew" that could occur with the Law School.[230] In addition, the quality of students in the School District would not be diminished because merit is not a consideration in student placement.[231] As a result, the majority determined that the reasons the Law School in *Grutter* was permitted to eliminate the use of a lottery did not exist for the School District.[232] Thus, the School District should have given greater consideration to a citywide lottery.[233]

The second proposed race-neutral alternative focused on factors, other than race, known to the School District.[234] One specific example looked at the student's socioeconomic status.[235] Using this type of criterion instead of race would foster cross-class as well as cross-racial integration.[236] The Ninth Circuit

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[225] *Id.* at 970.

[226] McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 861 (2004) (citing *Grutter*, 539 U.S. at 340). Jefferson County Public Schools "maintained an integrated school system under a 1975 federal court decree. After release from the decree . . . the [district] elected to . . . [use] a managed choice plan [with] broad guidelines" to continue integration. *Id.* at 836. This case arose because students and parents felt the 2001 Plan violated the Equal Protection Clause. *Id.*

[227] *Id.* (citing *Grutter*, 539 U.S. at 340).

[228] *Id.*

[229] *Id.* at 971 (emphasis omitted).

[230] *Id.*

[231] *Id.*

[232] *Id.*

[233] *Id.*

[234] *Id.* at 971 (stating that possible usable data included: "whether a child lives at home or in 'an agency'; if she lives at home, with whom; whether the child's home and most proficient languages are English or some other language; and the child's eligibility for free or reduced price lunch").

[235] *Id.* at 972.

[236] *Id.*

determined a diversity-oriented policy that did not rely solely on race was a viable option that should have been considered more extensively.[237]

The third alternative considered by the Ninth Circuit majority was to enhance the quality of all schools.[238] Such a plan would potentially attract a more diverse "cross-section" of students to less popular schools.[239] The court determined the School District was presented with an especially thoughtful proposal addressing the dilemma in Seattle.[240] Consequently, it determined the School District did not give the proposal adequate consideration.[241] As a result, the Ninth Circuit concluded the School District did not adequately consider race-neutral alternatives.[242]

3. *The Adverse Impact on Third Parties*

The School District also had to make serious efforts to minimize the adverse impacts on third parties stemming from its racial tiebreaker in order to satisfy the second prong of the strict scrutiny analysis.[243] The Ninth Circuit majority found the School District was not minimizing the impact of the non-preferred students because the fifteen-percent deviation from Seattle's racial construction could have been larger.[244] It decided that an expansion of the band to plus or minus twenty

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[237] *Id.* at 971-72.

[238] *Id.* at 973.

[239] *Id.* Such a plan would focus on "educational organization, teacher quality, parent-teacher interaction, raising curricular standards, substantially broadening the availability of specialized and magnet programs, ... and supporting extra-curricular development." *Id.*

[240] *Id.* at 973-74. The School District was presented with a proposal from the Urban League. *Id.* at 973. The "Urban League convened a working group" to develop a proposal for the School District in response to Parent's filing the lawsuit. *Id.* at 973. The group included, among others, "a representative from the NAACP, one of the Parents, a former member of the School Board, a retired high school principal, the then-current President of the Seattle Council Parent Teacher Student Association (PTSA), and a former PTSA President." *Id.*

[241] *Id.* at 973-74.

[242] *Id.* at 970.

[243] *Id.* at 969 (citing *Grutter*, 539 U.S. at 341; Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 287 (1986) (O'Connor, J., concurring in part and dissenting in part); *Bakke*, 438 U.S. at 311, 314-15 (Powell, J.); Wessmann v. Gittens, 160 F.3d 798 (1st Cir. 1998)).

[244] *Id.* at 975.

percent would not make a significant difference in achieving its goals.[245]

However, the extent of the impact on third parties is premised on the fact that every student denied his or her choice suffers a significant constitutional burden.[246] All the students are equally subject to denial of their first choice school; therefore all students are on equal footing.[247] Accordingly, each student is allowed to attend one of the district's ten public high schools, regardless of race.[248] Nevertheless, the Ninth Circuit determined the racial tiebreaker did not minimize the adverse impacts on third parties.[249]

4. *The Policy is Time-Limited*

Finally, the Ninth Circuit concluded the use of the racial tiebreaker was time-limited.[250] A termination point assures all citizens that preferential treatment based on race is temporary and only used to assist the goal of equality.[251] When a school in the Seattle School District became "racially balanced" according to the aforementioned deviation percentages, the racial tiebreaker was automatically terminated.[252] In *Grutter*, the Supreme Court decided merely to take the Law School at its word that the race-conscious program would be terminated as soon as practicable.[253] Under that standard, the Ninth Circuit concluded the time-limit was the only criterion that the School District satisfied.[254]

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[245] *Id.*

[246] *Id.* at 1012 (Graber, J., dissenting).

[247] *Id.* (Graber, J., dissenting). "There is no right under Washington law to attend a local school or the school of the student's choice." *Id.* at 1012-13 (Graber, J., dissenting).

[248] *Id.* (Graber, J., dissenting).

[249] *Id.* at 975.

[250] *Id.* at 969 (citing *Grutter*, 539 U.S. at 342; Richmond v. J.A. Croson Co., 488 U.S. 469, 510 (1989); Hayes v. N. State Law Enforcement Ass'n, 10 F.3d 207, 216 (4th Cir. 1993)).

[251] *Grutter*, 539 U.S. at 342 (quoting *Croson*, 488 U.S. at 510 (plurality opinion)).

[252] *Id.*

[253] *Grutter*, 539 U.S. at 343.

[254] *Parents Involved II*, 377 F.3d at 976 n.32.

III. COMPARISON BETWEEN HIGH SCHOOL AND UNIVERSITY ADMISSIONS

The Supreme Court's analysis in *Grutter* and *Gratz* implies that diversity may be a "'constitutional predicate' for race-conscious affirmative action programs in areas outside of higher education."[255] When deciding *Parents Involved II*, the Ninth Circuit applied the *Grutter* and *Gratz* analysis to high schools in the same manner the Supreme Court did with higher education.[256] However, high schools and universities do not have the same policies and interests.[257] Consequently, reliance on *Grutter* and *Gratz* is necessary, but application of the law must be adapted to account for differences between high school and university admissions.[258]

A. INTERESTS IN A DIVERSE STUDENT BODY

The diversity interest for high schools is arguably different from that of higher education.[259] For example, high schools share the university's diversity goals to some extent, such as "diversity of viewpoint and background."[260] However, those goals are not the sole or primary interests for a public high school.[261] Nonetheless, they may be for a university.[262] High schools have a simpler objective: teaching children to interact with peers of different races.[263] Accordingly, diversity in earlier education is essential to enable students to be racially tolerant through "cross-racial relationships."[264]

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[255] Joint Statement of Constitutional Law Scholars, *Reaffirming Diversity: A Legal Analysis of the University of Michigan Affirmative Action Cases*, THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., 1, 3 (2003) [hereinafter *Reaffirming Diversity*] (referring to the Court's statements in *Grutter* such as "benefits of affirmative action are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints").

[256] *Parents Involved II*, 377 F.3d at 964.

[257] *Reaffirming Diversity*, *supra* note 255, at 23.

[258] *Id.*

[259] *Id.*

[260] *Parents Involved II*, 377 F.3d at 991 (Graber, J., dissenting) (citing Comfort v. Lynn Sch. Comm., 283 F. Supp. 2d 328, 381 n.90 (D. Mass. 2003)).

[261] *Id.*

[262] *Id.*

[263] *Id.* at 1001 (Graber, J., dissenting).

[264] *Id.* at 991 (Graber, J., dissenting) (quoting *Comfort*, 283 F. Supp. 2d at 381 n.90).

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Although both the Law School and the School District wanted to promote "tolerant, productive, and well-adapted members of this racially diverse society," the Law School also sought to enhance the academic environment so its students would become accomplished, well-rounded lawyers.[265] Both the Supreme Court in *Grutter* and the Ninth Circuit in *Parents Involved II* decided that diversity was a compelling interest for educators.[266] Nevertheless, exactly what that interest is may determine what the proper analysis should entail. It is uncertain whether a compelling interest for secondary education should be examined in the same manner as a compelling interest for higher education. As a result, the analysis relies heavily on both the stated interest and the level of education to which it is applied.

B. DETERMINATION BASED ON MERIT

The use of merit in admissions is a major distinction between high schools and universities. A university admits applicants largely based on their merit.[267] Such an institution strives to create an elite and a highly selective educational environment.[268] Alternatively, public high schools do not evaluate a student's merit during placement.[269] If a school's admissions program is based on merit, then it is sensible to disallow automatic admittance based on race because race can simply be weighed with the merit evaluation. However, when analyzing a non-merit based public high school's race-conscious admissions policy, it is more difficult to establish a program not determined by race.[270] Even when diversity is found to be a compelling governmental interest in high schools, "choice-based programs will have greater difficulty falling within the example of the Law School because of the absence of merit based admissions."[271] As a result, this distinction should not be over-

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[265] *Id.* at 993 (Graber. J., dissenting).
[266] *See supra* notes 157, 197 and accompanying text.
[267] *Parents Involved II*, 377 F.3d at 998-99 (Graber, J., dissenting).
[268] *See supra* notes 127-129 and accompanying text.
[269] *Parents Involved II*, 377 F.3d at 998-99 (Graber, J., dissenting).
[270] *Id.* at 999 (Graber, J., dissenting).
[271] Wendy Parker, *The Legal Cost of the "Split Double Header" of Gratz and Grutter*, 31 HASTINGS CONST. L.Q. 587, 603 (2003).

looked when determining whether a race-conscious admissions policy violates the Equal Protection Clause.

C. IMPACT OF RACE-CONSCIOUS ADMISSIONS POLICIES

Higher academic achievement is an important goal at every level of education. Breaking down stereotypes and prejudices is also important at each stage in life; however, facilitating interracial interactions at a younger age enables students to enter higher education having already combated such problems.[272] Therefore, the exchange of ideas that are so important in higher education will have already been facilitated by interracial interactions during earlier education.[273]

Many other benefits also arise when a secondary educator attempts to diversify a school.[274] For example, the scholastic achievement of minority students will be higher in integrated schools.[275] In addition, minority students "develop higher educational and occupational aspirations that can translate into greater effort and achievement."[276] Conversely, university students are already striving to increase their educational aspirations. Furthermore, interracial interactions among peers will increase the likelihood that interracial friendships will form.[277] These friendships will reduce prejudice and stereotypes.[278] Recent research shows that "only a desegregated and diverse school can offer such opportunities" to form "early school experiences in breaking down racial and cultural stereo-types."[279] Moreover, these interactions also have been shown to "improve citizenship, increase political participation, and foster volunteering."[280]

Nevertheless, negative impacts also stem from the use of race in admissions. In *Bakke*, Justice Powell reasoned that the "use of racial classifications to desegregate schools was funda-

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[272] *Id.* at 853.

[273] *Id.*

[274] Derek Black, *The Case for the New Compelling Governmental Interest: Improving Educational Outcomes*, 80 N.C.L. REV. 923, 950 (2002).

[275] *Id.*

[276] *Id.* at 951.

[277] *Id.*

[278] *Id.*

[279] *Parents Involved II*, 377 F.3d at 992 n.9 (Graber, J., dissenting) (emphasis omitted).

[280] Black, *supra*, note 274, at 952.

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mentally different from the selective admissions context because, in the school assignment context, 'white students were not deprived of an equal opportunity for education.'"[281] In addition, he noted that the situation was very different from bussing students to comparable schools in different neighborhoods in compliance with court ordered desegregation.[282] The Medical School in *Bakke* did not arrange for applicants to attend a different university in order to desegregate; without admission to U.C. Davis, the applicant may have been denied a medical education altogether.[283] Alternatively, educational opportunities at public high schools are interchangeable.[284] Thus, if students are not placed in the school of their choice, they will still be placed in another public high school.[285] For that reason, the negative impact on a third party from a race-conscious admissions policy in higher learning is potentially more severe than an "open choice" policy at a public high school.

IV. PROPOSED RACE-CONSCIOUS ADMISSIONS POLICY

Every race-conscious admissions policy in education is governed by the law set out in the *Grutter* and *Gratz* opinions.[286] Nevertheless, strict adherence to their standards should be adapted according to the proposed policy.[287] For example, the "open choice" policy that Seattle's School District devised was not narrowly tailored to achieve its compelling interests; therefore it was not constitutionally permissible.[288] However, some changes to the School District's policy may satisfy the parameters set forth in *Grutter* and *Gratz*.[289]

A. INDIVIDUALIZED ANALYSIS

First, recognition of the Supreme Court's previous decisions regarding the use of race in admissions will provide help-

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[281] *Bakke*, 438 U.S. at 301 n.39.

[282] *Parents Involved II*, 377 F.3d at 1001 n.25 (Graber, J., dissenting) (quoting *Bakke*, 438 U.S. at 301 n.39).

[283] *Id.* (Graber, J., dissenting) (citing *Bakke*, 438 U.S. at 301 n.39).

[284] *Reaffirming Diversity*, *supra* note 255, at 23.

[285] *Id.*

[286] *See supra* notes 255-258 and accompanying text.

[287] *Id.*

[288] *Parents Involved II*, 377 F.3d at 988.

[289] *See supra* notes 120-171 and accompanying text.

ful guidelines.[290] The admissions program in *Bakke* set aside sixteen out of one hundred seats for minority students.[291] LSA's program in *Gratz* awarded twenty points to every underrepresented minority.[292] Both are rigid numeric standards that do not allow for any individual examination regarding race.[293] Conversely, in *Grutter*, the Law School admitted a "critical mass" of minority applicants, which was found constitutionally permissible.[294] "Critical mass" was not quantified in terms of numbers or percentages.[295] Instead, the Law School simply sought to prevent underrepresented students from feeling isolated.[296] In all three cases, the Court emphasized the importance of selecting students based on their individual qualifications.[297]

Merit, however, is a large part of an individualized selection process for higher education, as illustrated in the constitutionally sound policies used by U.C. Davis, the Law School, and LSA.[298] Consequently, the opportunity to evaluate students individually is diminished when merit is not a consideration for admittance.[299] Nonetheless, an individualized examination for high school student placement cannot be eliminated.[300]

As a result, the School District must evaluate more than one factor, disallowing for any one of these factors to be determinative.[301] The first three tiebreakers should not be utilized individually.[302] Instead, each factor – sibling attendance, race, and geographic proximity – should be used as a "plus" factor.[303] Under these circumstances, placement will not be based solely on race.[304]

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[290] *See supra* notes 70-171 and accompanying text.
[291] *Bakke*, 438 U.S. at 275.
[292] *Gratz*, 539 U.S. at 270.
[293] *See supra* notes 291-292 and accompanying text.
[294] *Grutter*, 539 U.S. at 318.
[295] *Id.* at 318-19.
[296] *Id.*
[297] *See supra* notes 143-145 and accompanying text.
[298] *See supra* notes 71, 127-130, 167-170 and accompanying text.
[299] *Parents Involved II* at 999 (Graber, J., dissenting).
[300] *See supra* notes 167-170 and accompanying text.
[301] *Parents Involved II* at 968 (citing *Gratz*, 539 U.S. at 293 (Souter & Ginsburg, JJ., dissenting)).
[302] *See supra* notes 167-170 and accompanying text.
[303] *Id.*
[304] *Id.*

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B. CONSIDERATION OF VARIOUS RACES INDEPENDENTLY

Also, the race-conscious policy must consider each race independently. Acknowledging the wide range of diversity characteristics attributed to different races is essential. Otherwise, the program will not maximize diversity benefits and will not minimize adverse impacts on third parties.[305] For example, the School District failed to acknowledge the diversity differences among each "nonwhite" race.[306] The racial tiebreaker was implemented when the school's racial makeup deviated by fifteen percent from the white versus nonwhite ratio.[307] The School District did not distinguish beyond Blacks, Asians, Latinos, Native Americans, or any other demographic to determine if a school was out of balance.[308] It, therefore, disregarded the various contributions students of different minorities would bring to the classroom. As a result, a school district cannot maximize diversity without considering potential diverse contributions from different ethnic groups.

C. SOCIOECONOMIC STATUS AS A FACTOR

Factors other than race can also contribute to a diverse educational atmosphere.[309] Socioeconomic status is one such factor.[310] Using socioeconomic status as a factor in admissions would encourage interactions among financially diverse students.[311] A student's perspective develops from his lifestyle, which is influenced by income, as well as by racial and ethnic background.[312] Thus, an evaluation of both criteria would allow a more individualized examination of each student's likely contributions to the intellectual and social life of the school.[313]

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[305] *See supra* note 206 and accompanying text.
[306] *See Parents Involved II*, 377 F.3d at 955.
[307] *Id.*
[308] *Id.* at 985-86.
[309] *See supra* note 234-237 and accompanying text.
[310] *Id.*
[311] *Id.*
[312] *Id.*
[313] *Id.*

D. QUALITY OF ALL SCHOOLS

Increasing the quality of all the schools within a school district is important. The problem with oversubscription stems from the reality that public high schools are not equal.[314] Eliminating the gross disparities in the quality of education among the schools will reduce the dependence on the need for a racial tiebreaker.[315] Improving organization, teacher quality, and broadening special programs are a few examples of changes that will increase the quality of education at each school.[316] In spite of this, these improvements involve time and capital. As a result, improving the quality of education is a long term goal and will not immediately satisfy the need for a race-conscious admissions policy.

V. CONCLUSION

The Ninth Circuit's decision in *Parents Involved II* understandably relied on the Supreme Court's most recent decisions involving affirmative action in education, *Grutter* and *Gratz*.[317] Although the outcome was correct under the circumstances, the majority failed to acknowledge the various distinctions between public high school placements and university admissions. Diversifying an academic environment is a compelling interest for all education.[318] Nevertheless, the specific interest and the least restrictive means to achieve that interest may differ according to the level of education.

The Supreme Court has emphasized the need to examine each applicant individually when using racial preferences as part of any evaluation.[319] However, without a merit-based admissions policy, public high schools have less opportunity to focus on individual characteristics. Regardless, a public high school can still weigh other factors simultaneously with race, encouraging a more individualized examination of students. Although the Ninth Circuit should have considered the disparities between university admissions and high school place-

[314] *See Parents Involved II*, 377 F.3d at 1008 (Graber, J., dissenting).
[315] *See id.*
[316] *Id.* at 973.
[317] *See supra* notes 255-258 and accompanying text.
[318] *See supra* notes 157, 197 and accompanying text.
[319] *See supra* notes 167-170 and accompanying text.

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ments, Seattle's "open choice" policy did not utilize the least restrictive means to achieve its compelling interest, thus making the policy unconstitutional.[320] Nevertheless, the next challenged policy before the Ninth Circuit may pose additional issues regarding race-conscious admissions.

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[320] *See supra* notes 208-209 and accompanying text.

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