

2009

The Role of Parents Involved in the College Admissions Process Note

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Pohorylo, Michael P., "The Role of Parents Involved in the College Admissions Process Note" (2009).
Connecticut Law Review. 56.
https://opencommons.uconn.edu/law_review/56

CONNECTICUT LAW REVIEW

VOLUME 42

DECEMBER 2009

NUMBER 2

Note

THE ROLE OF *PARENTS INVOLVED* IN THE COLLEGE ADMISSIONS PROCESS

MICHAEL P. POHORYLO

After the U.S. Supreme Court decided the 2003 University of Michigan affirmative action cases, the law concerning the use of race-based affirmative action programs in the college admissions process seemed to be settled for the next few decades. However, in 2007, the Supreme Court once again revisited the use of race-based affirmative action, this time at the K–12 level, and subtly, yet significantly, altered how the law will treat challenges to affirmative action programs in higher education. The purpose of this Note is to examine the likely impact the holding of this 2007 U.S. Supreme Court case, Parents Involved in Community Schools v. Seattle School District No. 1, will have on both the current case law surrounding the use of race-based affirmative action policies in the college admissions process and the development and implementation of future institutional affirmative action policies. In addition, this Note explores the public policy effect resulting from restrictions on the freedom of institutions to create their own admissions policies.

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THE ROLE OF *PARENTS INVOLVED* IN THE
COLLEGE ADMISSIONS PROCESS

MICHAEL P. POHORYLO*

I. INTRODUCTION

After the United States Supreme Court decided the 2003 University of Michigan affirmative action cases,¹ college administrators rejoiced in what many saw as a victory over the opponents of race-based affirmative action policies in the college admissions process.² While these decisions did not go so far as to ensure that the use of race-based affirmative action policies would be a valid practice forever,³ administrators knew that for the foreseeable future they could consider the race of an applicant during the admissions process. Specifically, in affirming the precedent set in *Regents of the University of California v. Bakke*,⁴ the Supreme Court held that achieving a diverse student body within the realm of higher education was a compelling government interest, and, as a result, race-based affirmative action policies could withstand strict scrutiny if they were narrowly tailored.⁵ Although these policies had to be narrowly tailored to survive judicial review, colleges and universities were still provided with sufficient autonomy to adopt admissions standards that were consistent with their educational mission and the needs of their communities.

By 2006, however, this period of celebration had already come to an abrupt end when the U.S. Supreme Court decided that it would address the issue of whether race could be used as a factor in assigning K–12 students

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¹ These cases were published as *Grutter v. Bollinger*, 539 U.S. 306 (2003) and *Gratz v. Bollinger*, 539 U.S. 244 (2003).

² See, e.g., *Narrow Use of Affirmative Action Preserved in College Admissions*, CNN, Dec. 25, 2003, <http://www.cnn.com/2003/LAW/06/23/scotus.affirmative.action> (“[T]his is a wonderful, wonderful day—a victory for all of higher education, because what it means at its core is that affirmative action may still be used and the court’s given us a road map to get there” (quoting University of Michigan President Mary Sue Coleman)).

³ See *Grutter*, 539 U.S. at 343 (“We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”).

⁴ See 438 U.S. 265, 311–12, 315–17 (1978) (holding that achieving a diverse student body was a constitutionally permissible goal for colleges and universities but that race could not be the deciding factor in determining whether an applicant was admitted).

⁵ See *infra* notes 111–13 and accompanying text.

to public schools.⁶ Although the Court would be addressing this issue within the K–12 education system alone, many experts debated whether the University of Michigan affirmative action cases would still be good law after a decision was rendered.⁷ While some experts in higher education law believed that the holding would have no effect on the Michigan rulings, others believed that the Court would suggest that it was “open” to revisiting the 2003 holdings and possibly revising the precedent set at that time.⁸ Many of the fears among the supporters of race-based affirmative action were later alleviated when the Court decided *Parents Involved in Community Schools v. Seattle School District No. 1*⁹ and left the 2003 affirmative action cases seemingly intact. In reaching the holding of *Parents Involved*, the majority relied heavily on the Court’s earlier views on affirmative action as described in *Grutter v. Bollinger*,¹⁰ and found that the use of race as a factor in the college admissions process was still permitted.¹¹

But, the Court’s decision was not so simple. While *Parents Involved* did not overturn the Michigan cases, it did not leave the higher education community with the same freedom to administer affirmative action policies as the 2003 cases did. Specifically, *Parents Involved* subtly set new requirements on the use of affirmative action within the college admissions

⁶ See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 547 U.S. 1177 (2006); *Meredith v. Jefferson County Bd. of Educ.*, 547 U.S. 1178 (2006); see also Jeffrey Selingo, *Supreme Court Will Hear Affirmative-Action Cases with Potentially Broad Meaning for Higher Education*, CHRON. HIGHER EDUC. (Wash., D.C.), June 16, 2006, at A26 (claiming that the effect of the U.S. Supreme Court’s decision to decide the legality of using race as a factor in assigning students to public schools on the University of Michigan affirmative action cases was “unclear” and “the subject of much debate”).

⁷ After the Court granted certiorari to decide the constitutionality of assigning K–12 students to schools based on race, higher-education lawyers created three scenarios that could result for colleges from the forthcoming decisions:

Scenario 1. The decisions would contain language that provided colleges with guidance on how to apply the Michigan rulings. The court did not endorse a single admissions method in its mixed decisions in 2003. In one case, the court upheld the race-conscious admissions policies used by Michigan’s law school because the school considered each applicant individually. In the other case, the justices struck down the admissions policy at Michigan’s main undergraduate college because it awarded each black, Hispanic, and American Indian applicant a 20-point bonus on a 150-point scale.

Scenario 2. The rulings would suggest that the court was open to revisiting the Michigan decisions through another case involving race-conscious admissions at colleges.

Scenario 3. The decisions would be narrowly tailored and would apply only to public school districts.

Selingo, *supra* note 6.

⁸ *Id.*

⁹ 127 S. Ct. 2738 (2007). At the time of publication, this case had not been published in the U.S. Reporter. For that reason, all citations to *Parents Involved* reference the Supreme Court Reporter.

¹⁰ 539 U.S. 306 (2003).

¹¹ Peter Schmidt, *High Court Leaves Michigan Cases Intact*, CHRON. HIGHER EDUC. (Wash., D.C.), July 6, 2007, at A1.

process and, perhaps, began a trend towards restricting the holdings of the University of Michigan cases. The purpose of this Note is to examine these new requirements by focusing on the impact the holding of *Parents Involved* will have on the past affirmative action cases, as well as the future use of affirmative action within the college admissions process. This Note also argues that the judicial branch should refrain from any further restriction on affirmative action policies due to the beneficial effect diverse student bodies have on the learning experiences and personal development of all college students, as well as societal growth in general.

Part II of this Note examines the history of affirmative action programs in the United States and maps its current impact on college enrollment. It specifically looks at the development of affirmative action programs as they moved from the realm of employment law into the college admissions process. It also examines how the federal government served as a catalyst for institutions to create their own internal affirmative action policies. Part III summarizes the leading federal affirmative action cases of the U.S. Supreme Court and the circuit courts and looks at one important case at the state level. Although this list is by no means exhaustive of the case law in this area, it looks specifically at those cases which have had the greatest impact on this area of the law. In Part IV, this Note analyzes the Supreme Court's decision in *Parents Involved* and the impact it will have on the use of affirmative action policies in college admissions programs. Finally, Part V argues that the Supreme Court should not look to alter the holdings of the University of Michigan affirmative action cases in future decisions until the "playing field" for college admissions is level for students of all backgrounds.¹² This final section of the Note shows that researchers have found that while minority students immediately benefit from affirmative action programs by receiving an "edge" in the application process, all students, and even all of society, will eventually benefit from the existence of racially diverse colleges and universities. Additionally, this Note argues that the level of diversity required to achieve these benefits cannot be achieved through alternative admissions policies. As a result, this Note concludes by arguing that race-based affirmative action policies are currently needed to ensure that colleges maintain diverse and, consequently, beneficial learning environments.

¹² Another threat to affirmative action, which this Note does not address but affirmative action advocates should be aware of, can come from ballot initiatives. Voters in Washington, Michigan, and Nebraska have all passed bans on race-based affirmative action policies with about fifty-eight percent of the vote, while California voters approved a ban with fifty-four percent of the vote. Colorado voters very narrowly rejected a ballot measure banning preferences based on race in the 2008 elections by one percentage point to become the first state to vote against such a ban. However, it is argued that the ballot was defeated only because of the popularity of Barack Obama at the time of the election. Reeves Wiedeman, *Analysis: How Colorado Became the First State to Reject a Ban on Affirmative Action*, CHRON. HIGHER EDUC. (Wash., D.C.), Nov. 10, 2008, <http://chronicle.com/article/Analysis-Why-Colorado-Fail/1317>.

II. AFFIRMATIVE ACTION IN AMERICAN SOCIETY

For the purpose of this Note, it will be beneficial to understand affirmative action as “a policy of favoring qualified women and minority candidates over qualified men or nonminority candidates with the immediate goals of outreach, remedying discrimination, or achieving diversity, and the ultimate goals of attaining a color-blind (racially just) and a gender-free (sexually just) society.”¹³ While it is important to understand the role affirmative action plays in attaining gender equality, this Note focuses primarily on the goals of attaining what the above definition refers to as a racially just society.

Although the use of race-based affirmative action has been the subject of much debate recently and has been litigated over numerous times in state and federal courts, the actual practice and recognition of affirmative action is fairly new to the United States. President John F. Kennedy adopted the term “affirmative action” in 1961, marking the first time it was publicly used in American society.¹⁴ When President Kennedy created the Equal Employment Opportunity Commission, he required that projects receiving federal funds take “*affirmative action* to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.”¹⁵ The affirmative action which was called on by President Kennedy to ensure equal treatment of employees was intended to apply to the areas of “employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.”¹⁶ The term “affirmative action” was later repeated by President Lyndon Johnson in 1965 when he revisited Kennedy’s Executive Order No. 10,925.¹⁷

Other legislation during the mid-1900s which adopted the term

¹³ James P. Sterba, *Completing Thomas Sowell’s Study of Affirmative Action and Then Drawing Different Conclusions*, 57 STAN. L. REV. 657, 659 (2004) (book review). Sterba goes on to further categorize affirmative action programs. He claims that “all forms of affirmative action can be understood, in terms of their immediate goals, as being either outreach, remedial, or diversity affirmative action,” and “remedial affirmative action further divides into two subtypes, with one subtype simply seeking to end present discrimination and create an equal playing field, and the other subtype attempting to compensate for past discrimination and its effects.” *Id.* at 661.

¹⁴ Angela Onwuachi-Willig, *Using the Master’s “Tool” to Dismantle His House: Why Justice Clarence Thomas Makes the Case for Affirmative Action*, 47 ARIZ. L. REV. 113, 124–25 (2005).

¹⁵ Exec. Order No. 10,925, 26 Fed. Reg. 44, 1977 (Mar. 8, 1961) (emphasis added).

¹⁶ *Id.*

¹⁷ See Exec. Order No. 11,246, 30 Fed. Reg. 187, 12,319 (Sept. 28, 1965). Using the same wording as Kennedy’s Executive Order No. 10,925, Johnson mandated that “[t]he contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take *affirmative action* to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.” *Id.* (emphasis added).

“affirmative action” included Title VII of the Civil Rights Act of 1964,¹⁸ also a product of the Johnson administration. Concerning employers that had intentionally engaged in an unlawful employment practice, section 706(g) of the Act provided courts with the authority to

enjoin the [employer] from engaging in such unlawful employment practice, and order such *affirmative action* as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice).¹⁹

Similar to the other non-discrimination statutes of this era, this section of the Civil Rights Act was designed specifically to remedy intentional acts of discrimination.

Five years later, President Richard Nixon adopted the “Philadelphia Plan” which went one step further in the government’s quest to increase minority presence in the American workforce. Rather than providing a remedy to minority workers for discriminatory practices by their employers, the “Philadelphia Plan” called for preemptive measures to prevent discriminatory behavior. The plan required specific percentage targets of minority employees in construction-related trades to be set forth in Philadelphia and incorporated in bids for all government contracts issued in that area.²⁰ President Nixon’s 1969 plan was a “revised” version of the original “Philadelphia Plan” created by the U.S. Department of Labor’s Office of Federal Contract Compliance Programs (“OFCCP”).²¹ The original plan, which was created in 1967, was declared illegal because it did not contain ““definite minimum standards on which approval or disapproval of an affirmative action program would be based.””²² The revised plan by the Nixon administration avoided this shortcoming by implementing the above mentioned targets.²³ While the “Philadelphia Plan,” along with the Civil Rights Act and the executive orders of Presidents Kennedy and Johnson, were major steps toward eliminating overt discrimination in American society, in order to address discrete and unintentional forms of discrimination, affirmative action policies were

¹⁸ Pub. L. 88-352, 78 Stat. 241, 253–66 (codified as 42 U.S.C. §§ 2000e–2000e-17 (2006)).

¹⁹ *Id.* at 261 (codified at 42 U.S.C. § 2000e-5) (emphasis added). Congress later added “or any other equitable relief as the court deems appropriate” as part of a court’s authority to order affirmative action measures. 42 U.S.C. § 2000e-5(g).

²⁰ Mitchell J. Chang et al., *Race in Higher Education: Making Meaning of an Elusive Moving Target*, in *AMERICAN HIGHER EDUCATION IN THE TWENTY-FIRST CENTURY* 517, 529 (Philip G. Altbach et al. eds., 2005).

²¹ JOHN D. SKRENTNY, *THE IRONIES OF AFFIRMATIVE ACTION* 136, 193 (1996).

²² *Id.* at 138.

²³ *Id.* at 195.

necessary at the institutional level, and colleges and universities were the right place for this change.²⁴

As a result of these early affirmative action programs created by the federal government, the adoption of affirmative action policies at colleges and universities came in several different forms. Some institutions reacted to the legislation of the mid-1900s described above by actively recruiting minority students as a part of their educational mission.²⁵ Consequently, in order to increase minority enrollment, many of these same institutions began to initiate admissions policies that took race into consideration.²⁶ However, not every institution followed this trend and many affirmative action programs were the result of coercion by the government. After the passage of the Civil Rights Act, the federal government sought to implement the goals of the statute by “demanding that colleges and universities institute ‘Affirmative Action’ programs which would end all forms of racial discrimination in the hiring of staff, admission of students, granting of financial aid, and allocation of dormitory space.”²⁷ Threats were made to institutions such as Columbia, Harvard, Cornell, and Michigan, to withhold federal funds if implementation of affirmative action policies were too slow.²⁸ A 1974 report published for the Carnegie Commission in Higher Education also stated that many colleges and universities were being forced to lower their overall academic standards in order to meet the demands of affirmative action policies.²⁹

Regardless of the reasons an institution chose to institute affirmative action policies, it became clear that the demands from both the government and the institutions themselves for the creation of such policies during the 1960s were the result of three challenges facing society.³⁰ First, African Americans were intentionally excluded from participation in certain

²⁴ See BRIAN PUSSEY, BURNING DOWN THE HOUSE 26 (2004) (stating that aggressive forms of affirmative action were needed to remedy discrimination that could not be addressed by the Civil Rights Act).

²⁵ See Dorothy Garrison-Wade & Chance W. Lewis, *Affirmative Action: History and Analysis*, J. COLL. ADMISSIONS, Summer 2004, at 24 (noting that colleges reacted to President Johnson’s Executive Order by actively recruiting minority students).

²⁶ *Id.*

²⁷ JOHN S. BRUBACHER & WILLIS RUDY, HIGHER EDUCATION IN TRANSITION 79 (4th ed. 2004).

²⁸ *Id.*

²⁹ *Id.* In addition to affirmative action policies, there was also some pressure during this time to implement “open-admissions” policies at colleges and universities. In 1970, political pressure forced the City University of New York’s Board of Higher Education to adopt a policy guaranteeing entrance into some branch of the city’s higher education to all high school graduates. This policy granted admission to graduates regardless of their academic standing. While there was much controversy over this plan, it did prove successful as minority enrollment increased from 18.8% in 1969, which was the year before the policy was implemented, to 35.6% in 1974. *Id.*

³⁰ See John R. Howard, *Affirmative Action in Historical Perspective*, in AFFIRMATIVE ACTION’S TESTAMENT OF HOPE 19, 30 (Mildred Garcia ed., 1997) (stating that “[t]he new social and intellectual realities crystallized in three propositions which came to serve as the basis for new social policy”).

aspects of society.³¹ “Second, it [became] necessary to act affirmatively to eliminate institutional barriers to equal participation.”³² Finally, in order to eliminate these barriers to equal participation, new standards were needed to ensure access to education for groups suffering from the effects of discrimination.³³

Unfortunately, while affirmative action policies have the aim of addressing these challenges, the aftermath of the proliferation of race-based affirmative action policies in colleges and universities during the 1960s and 1970s has had mixed results. Between 1954 and 1970, African American enrollment in colleges in the North and West increased from 45,000 to 95,000, and in 1970 African American students made up seven percent of all full time undergraduates in the United States.³⁴ Despite these gains, the percentage of college admissions of African American males declined between 1976 and 1986,³⁵ and there was little increase in African American enrollment after 1976.³⁶

The last two decades have seen a general trend of a growth in college enrollment of underrepresented groups but the numbers are still low despite the presence of race-based affirmative action policies. The number of racial minority students in all four year institutions in 1995 stood at 1,866,600, which was approximately 21.5% of the total student population.³⁷ This figure was up from an enrollment of 931,000 minority students in 1976.³⁸ In 2000, African Americans constituted 11.3% of overall college enrollment, while Latino students constituted 9.5% and American Indians constituted 1%.³⁹ Slight increases carried into 2007, as the percentage of African American students was at 13.1% at the time and the percentage of Latino students stood at 11.4%.⁴⁰ Sadly, American Indian enrollment remained at 1% of the student population.⁴¹ Again, while these numbers are still too low given the growth in affirmative action policies, it is important to note that without affirmative action policies

³¹ *Id.*

³² PUSSEY, *supra* note 24, at 26 (citing Howard, *supra* note 30, at 30).

³³ See Howard, *supra* note 30, at 30 (“Breaking down institutional barriers entailed reexamining some of the criteria conventionally used to mediate access to schools, colleges, universities, and the work place.”).

³⁴ BRUBACHER & RUDY, *supra* note 27, at 80–81.

³⁵ See *id.* at 400 (citing findings by the American Council on Education).

³⁶ See *id.* (citing statistics derived from the U.S. Department of Education).

³⁷ Chang et al., *supra* note 20, at 520.

³⁸ *Id.*

³⁹ *Id.* at 520 tbl.18.1.

⁴⁰ NAT’L CTR. FOR EDUC. STATISTICS, TOTAL FALL ENROLLMENT IN DEGREE-GRANTING INSTITUTIONS, BY RACE/ETHNICITY, SEX, ATTENDANCE STATUS, AND LEVEL OF STUDENT: SELECTED YEARS, 1976 THROUGH 2007 (2008), available at http://nces.ed.gov/programs/digest/d08/tables/dt08_227.asp.

⁴¹ *Id.*

enrollment of racial minority students would be even lower.⁴²

III. AFFIRMATIVE ACTION IN THE COURTS

A. *Pretext to Bakke*

Although *Regents of the University of California v. Bakke*⁴³ marked the first time the U.S. Supreme Court addressed the legality of affirmative action policies in the college admissions process, there were several cases prior to *Bakke* which prepared the way for the Court's 1978 decision. Among the first was *Griggs v. Duke Power Co.*⁴⁴ Alleging a violation of the Civil Rights Act of 1964, the plaintiffs in *Griggs* claimed that their employer instituted a policy that made it nearly impossible for minority applicants to gain employment in some of the divisions of the company. According to their complaint, the employer had instituted a requirement that all applicants possess a high school diploma and achieve a satisfactory score on two professionally prepared aptitude tests before they could be considered for employment within certain divisions.⁴⁵ In finding for the plaintiffs, the U.S. Supreme Court held that neither of these requirements had a demonstrable relationship to successful performance of the jobs for which they were used and were thus invalid.⁴⁶ The Court also found that Title VII prohibited unnecessary hiring and employment policies that had a disparate racial impact.⁴⁷ This holding by the Court "set the stage for [*Bakke* and] race conscious affirmative action in two ways."⁴⁸ First, the holding hinted that a race conscious remedy is sometimes justified for the removal of arbitrary obstacles to members of a minority group.⁴⁹ Second, "in holding that policies with disparate racial impact were actionable, *Griggs* articulated a race-conscious standard for a prima facie violation of Title VII."⁵⁰

Another case that served as a precursor to *Bakke* was *Defunis v. Odegaard*.⁵¹ The plaintiff in *Defunis* brought suit claiming that preferences were given to non-resident minority students in the admissions

⁴² See Chang et al., *supra* note 20, at 529 ("[I]f colleges and universities were forced to admit students based solely on grades and test scores, [African American student] enrollment at the nation's most selective colleges would likely plummet from about 6 percent to less than 2 percent.").

⁴³ 438 U.S. 265 (1978).

⁴⁴ 401 U.S. 424 (1971).

⁴⁵ *Id.* at 427-28.

⁴⁶ *Id.* at 431.

⁴⁷ *Id.* at 430-31.

⁴⁸ Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1209 (2002).

⁴⁹ *Id.* Anderson suggests that such a remedy to these obstacles could be actively recruiting prospective employees from other racial groups. *Id.*

⁵⁰ *Id.*

⁵¹ 507 P.2d 1169 (Wash. 1973), *dismissed as moot*, 416 U.S. 312, 319-20 (1974).

process for the University of Washington School of Law, yet no preference was given to residents of the state of Washington.⁵² As a result of this structure, the plaintiff was able to show that minority applicants were being admitted to the school with lesser academic qualifications than those of the plaintiff and other resident applicants.⁵³ The Supreme Court of Washington upheld the university's affirmative action program, after the trial court had found against the institution,⁵⁴ holding that the program was permissible under the Equal Protection Clause. Using language that foreshadowed the majority opinion in *Bakke*, the court found that there was a compelling state interest in promoting integration in public education and producing a racially balanced student body.⁵⁵ The court also found a compelling interest in the state responding to the "shortage of minority attorneys."⁵⁶ Unfortunately, this case was never decided by the U.S. Supreme Court, despite the fact that it granted certiorari, because the Court later found that the issue was moot.⁵⁷

B. Bakke

Five years after *DeFunis*, the U.S. Supreme Court had another opportunity to address the legality of race-based affirmative action policies in *Regents of the University of California v. Bakke*.⁵⁸ The plaintiff in *Bakke* was a white male who had been rejected twice from the medical school at the University of California at Davis.⁵⁹ He brought suit claiming that the school's policy of reserving sixteen spots in the incoming class for minority students was unconstitutional.⁶⁰ The plaintiff also challenged the school's policy of evaluating minority candidates under a special admissions program,⁶¹ which allowed them to remain separate from their peers in the regular admissions program.⁶²

⁵² *Id.* at 1171–72, 1176.

⁵³ *Id.* at 1176–77.

⁵⁴ *Id.* at 1188.

⁵⁵ *Id.* at 1182.

⁵⁶ *Id.* at 1184.

⁵⁷ See *Defunis v. Odegaard*, 416 U.S. 312, 319–20 (1974) ("Because the petitioner will complete his law school studies at the end of the term for which he has now registered regardless of any decision this Court might reach on the merits of this litigation, we conclude that the Court cannot, consistently with the limitations of Art. III of the Constitution, consider the substantive constitutional issues tendered by the parties.").

⁵⁸ 438 U.S. 265 (1978).

⁵⁹ *Id.* at 276–77.

⁶⁰ *Id.* at 275, 277–78.

⁶¹ Applicants under the special admissions program performed significantly worse at their undergraduate institutions than Bakke did. Bakke's grade point average as an undergraduate was 3.46. For the class entering the medical school in 1973, the average grade point average of special admittees was 2.88 and the average for the class entering in 1974 was 2.62. *Id.* at 277–78 n.7.

⁶² *Id.* at 274.

When the case reached the U.S. Supreme Court,⁶³ Justice Powell articulated the test that would apply to future reviews of challenges to race-conscious affirmative action policies. In his “opinion of one,”⁶⁴ Justice Powell held that an admissions decision that is based on race would be constitutional under the Equal Protection Clause only if it could withstand the “most exacting judicial examination.”⁶⁵ Furthermore, Justice Powell found that the university’s policies could only withstand such an examination if it was “precisely tailored to serve a compelling governmental interest.”⁶⁶ In determining which test to apply to a violation of Title VI claim, Justice Powell held that the same standard would be applied as under the Equal Protection Clause.⁶⁷

Affirming the state court’s decision, Justice Powell found that while there was a compelling governmental interest in remedying the effects of past discrimination, there was no evidence that the current admissions policies were intended to do just that.⁶⁸ However, concerning what the Court saw as the university’s primary purpose in implementing the admissions policies at issue—ensuring a diverse student body—Powell held that the attainment of a diverse student body “clearly is a constitutionally permissible goal for an institution of higher education.”⁶⁹ Justice Powell relied on the four essential freedoms of colleges and universities articulated by Justice Frankfurter in *Sweezy v. New Hampshire*⁷⁰ to argue that the freedom of a university to make its own

⁶³ Finding that the university violated the Equal Protection Clause, the Supreme Court of California held the school’s affirmative action policies to be unconstitutional and ordered the plaintiff’s admission to the medical school. *Id.* at 279–81. The court specifically stated that “[a]lthough [it] agreed that the goals of integrating the medical profession and increasing the number of physicians willing to serve members of minority groups were compelling state interests, it concluded that the special admissions program was not the least intrusive means of achieving those goals.” *Id.* at 279.

⁶⁴ Leslie Yalof Garfield, *The Glass Half Full: Envisioning the Future of Race Preference Policies*, 63 N.Y.U. ANN. SURV. AM. L. 385, 387 (2008). Justice Powell wrote a majority opinion in which four Justices concurred with his conclusion but did not join in his reasoning. *Id.* at 386. Justices Brennan, Marshall, White, and Blackmun disagreed that the university’s admissions program was unconstitutional. *Bakke*, 438 U.S. at 325–26 (Brennan, J., concurring in part and dissenting in part). Justice Stevens, who was joined by Chief Justice Burger and Justices Stewart and Rehnquist, concurred in the judgment in part and dissented in part because he found that since the university’s admissions program violated Title VI, the Court did not need to consider the constitutional issue. *Id.* at 412–13 (Stevens, J., concurring with the judgment in part and dissenting in part).

⁶⁵ *Bakke*, 438 U.S. at 291.

⁶⁶ *Id.* at 299.

⁶⁷ *Id.* at 287. This was an important aspect of the holding because it meant that all private schools which received federal funding were subject to this decision even though they were not subject to the Equal Protection Clause.

⁶⁸ *Id.* at 307, 309.

⁶⁹ *Id.* at 311–12.

⁷⁰ 354 U.S. 234, 263 (1957). Concerning the four freedoms of a university, Justice Frankfurter stated:

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail “the four essential freedoms” of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may

judgments as to education includes the selection of its student body.⁷¹ Despite this endorsement of university autonomy, in analyzing the policies at the University of California, Justice Powell held that the “diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”⁷² Therefore, while the Court held that diversity was a compelling governmental interest, it stated that race and ethnicity could not be the only aspects considered when attempting to achieve a diverse student body. Justice Powell also held that “admissions programs, which take race into account in achieving the educational diversity valued by the First Amendment,”⁷³ can only deem race or ethnic background as a “plus” in an applicant’s file.⁷⁴ Stated another way, race could not be a decisive factor in determining whether an applicant would be admitted.⁷⁵

C. Hopwood

Before the U.S. Supreme Court decided the University of Michigan affirmative action cases, the state and federal courts had several opportunities to address the precedent set in *Bakke*.⁷⁶ Some jurisdictions at this time were not persuaded by Powell’s decision and began to move away from this precedent set by the Supreme Court. The most prominent case which signaled this trend was *Hopwood v. Texas*.⁷⁷

The plaintiffs here challenged the affirmative action programs at the University of Texas School of Law under the Equal Protection Clause and Title VI.⁷⁸ Under the university’s admissions system, preference was given to African American and Mexican American applicants by altering

be admitted to study.

Id. (citation omitted).

⁷¹ *Bakke*, 438 U.S. at 312 (citation omitted).

⁷² *Id.* at 315.

⁷³ *Id.* at 316.

⁷⁴ *Id.* at 317.

⁷⁵ Although Justice Powell received just one vote for his opinion, as mentioned earlier, four other Justices—Brennan, White, Marshall, and Blackmun—supported the inclusion of race in the college admissions process and actually argued that the university’s use of race here was reasonable and thus constitutional. *Id.* at 325–26, 376 (Brennan, J., concurring in part and dissenting in part). Perhaps this is why the holding was so influential despite not carrying any other judges.

⁷⁶ See, e.g., *Davis v. Halpern*, 768 F. Supp. 968, 975 (E.D.N.Y. 1991) (citing *Bakke* to discuss the acceptable uses of race-based affirmative action plans); *DeRonde v. Regents of Univ. of Cal.*, 625 P.2d 220, 225 (Cal. 1981) (following the standards articulated by Powell to uphold the University of California’s admissions policies); *McDonald v. Hogness*, 598 P.2d 707, 711–13 (Wash. 1979) (using the holding in *Bakke* to find that the University of Washington’s affirmative action program did not violate the Equal Protection Clause).

⁷⁷ See 78 F.3d 932, 941–46 (5th Cir. 1996) (discussing the court’s departure from *Bakke*).

⁷⁸ *Id.* at 938.

their admissions score.⁷⁹ In addition to maintaining different admissions levels for minorities and whites, the law school established a segregated application evaluation process as well.⁸⁰

At the district court level, the University of Texas argued that there were several justifications for their affirmative action policies, including the need to achieve a diverse student body and the need to remedy the present effects of past discrimination.⁸¹ In its examination of the affirmative action policies, the district court found that these justifications met “constitutional muster.”⁸² The court found against the University of Texas, though, because its admissions program allowed for separate review of minority applications and was not narrowly tailored.⁸³

On appeal, the Fifth Circuit reversed and remanded the district court’s holding and departed from the precedent established in *Bakke*. Concerning the need to maintain a diverse student body, the court held that since Justice Powell’s opinion in *Bakke* received only his own vote,⁸⁴ it was not binding precedent. As a result, the court found that it had the authority to hold that the need to maintain a diverse student body was not a compelling interest which could withstand strict scrutiny because “classification of persons on the basis of race for the purpose of diversity frustrates . . . the goals of equal protection.”⁸⁵

The court was also not persuaded by the university’s claim that the policies were needed to remedy past discrimination. In order to pass constitutional review, the court held that the state of Texas would have to find that past segregation had present effects, it would have to determine the magnitude of those present effects, and it would need to limit the advantage provided to applicants to remedy that harm.⁸⁶ Since these elements were not present, the court found that the justification of remedying past discrimination was not a viable defense for the university.⁸⁷

The *Hopwood* decision severely restricted how colleges could decide which students would be admitted to their student bodies. Although it did

⁷⁹ *Id.* at 936 (“In March 1992, for example, the presumptive TI admission score for resident whites and non-preferred minorities was 199. Mexican Americans and blacks needed a TI of only 189 to be presumptively admitted. The difference in the presumptive-deny ranges is even more striking. The presumptive denial score for ‘nonminorities’ was 192; the same score for blacks and Mexican Americans was 179.”). Consequently, minority students with lower grade point averages and LSAT scores were being admitted over students from majority groups with higher grade point averages and LSAT scores. *Id.*

⁸⁰ *Id.* at 937.

⁸¹ *Id.* at 938.

⁸² *Id.*

⁸³ *Id.* at 939.

⁸⁴ *Id.* at 944 (“Justice Powell’s argument in *Bakke* garnered only his own vote and has never represented the view of a majority of the Court in *Bakke* or any other case.”).

⁸⁵ *Id.*

⁸⁶ *Id.* at 951.

⁸⁷ *Id.*

not create mandatory law at the national level, *Hopwood* served to produce a significant effect on the educational institutions within the Fifth Circuit by diminishing minority representation on their campuses.⁸⁸ Institutions were able to mitigate this effect of the decision over time,⁸⁹ and the U.S. Supreme Court had the opportunity nearly ten years later to revisit *Bakke* and clarify its position on race-based affirmative action policies before other circuits felt compelled to follow the precedent of *Hopwood*.⁹⁰

D. *The University of Michigan Affirmative Action Cases*

The University of Michigan affirmative action cases were two distinct cases decided by the U.S. Supreme Court in 2003 which constituted the most anticipated civil rights decisions in a long period.⁹¹ Although the Court only upheld the affirmative action policies of the University of Michigan in one of these cases, both decisions looked to *Bakke* for guidance and upheld Justice Powell's majority opinion. Furthermore, and perhaps more importantly, both decisions clearly established a path colleges could take to ensure diversity within their campuses.⁹²

In *Gratz v. Bollinger*,⁹³ the plaintiffs sued the University of Michigan claiming that its affirmative action program for the undergraduate school

⁸⁸ After the *Hopwood* decision was rendered, there was a decline in African American and Mexican American enrollment at the University of Texas School of Law. Since 1947, Texas had enrolled and graduated more African American and Mexican American lawyers than any non-minority law school in America. At one point, one out of every eleven Mexican American lawyers was a graduate of the University of Texas School of Law. However, the year after *Hopwood*, African American enrollment dropped to 0.9% of the incoming class and Mexican American enrollment fell to 5.6%. This was the lowest level for both groups since affirmative action was adopted at the university in 1983. Gerald Torres, *Grutter v. Bollinger/Gratz v. Bollinger: View from a Limestone Ledge*, 103 COLUM. L. REV. 1596, 1597 (2003).

⁸⁹ See *id.* at 1600 (finding that in 1997, the Texas Legislature enacted H.B. 588, which granted high school seniors graduating in the top ten percent of their class automatic admission to their choice of state university and the University of Texas has almost returned to its pre-*Hopwood* numbers concerning minority enrollment).

⁹⁰ Although the U.S. Supreme Court did not revisit this issue until 2003, the circuit courts had several opportunities to produce their own opinions on the subject. See, e.g., *Johnson v. Bd. of Regents of Univ. of Ga.*, 263 F.3d 1234, 1245 (11th Cir. 2001) (finding that Powell's decision in *Bakke* was not binding on this issue before the court); *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1201 (9th Cir. 2000) (holding that student body diversity could be a compelling interest which justified the use of race-based preferences in admissions policies).

⁹¹ See David Schimmel, Commentary, *Affirming Affirmative Action: Supreme Court Holds Diversity to Be a Compelling Interest in University Admissions*, 180 EDUC. L. REP. 401, 401 (2003) ("The two University of Michigan admissions cases were the most controversial and eagerly awaited civil rights decisions in years.").

⁹² See *supra* note 2. But see Barbara Lauriat, Note, *Trump Card or Trouble? The Diversity Rationale in Law and Education*, 83 B.U. L. REV. 1171, 1191 (2003) ("The ambiguity of Justice O'Connor's durational requirement for the use of race-conscious admissions to achieve diversity is extremely troubling."); Garrick B. Pursley, Note, *Thinking Diversity, Rethinking Race: Toward a Transformative Concept of Diversity in Higher Education*, 82 TEX. L. REV. 153, 154 (2003) (arguing that *Grutter* has left uncertainty regarding the concept of diversity).

⁹³ 539 U.S. 244 (2003).

violated the Equal Protection Clause and Title VI.⁹⁴ The district court found that the university's admissions office "consider[ed] a number of factors in making admissions decisions, including high school grades, standardized test scores, high school quality, curriculum strength, geography, alumni relationships, and leadership."⁹⁵ The university used these factors to assign each candidate a score as part of a selection index.⁹⁶ Under the affirmative action program, a student who was a member of an underrepresented group was entitled to an automatic twenty points.⁹⁷ These additional points alone could move an applicant from the "rejection" category to the "postpone or admit" category under the selection index. Minority students could also be flagged by an admissions counselor and receive additional review that was not available to students from majority groups.⁹⁸

Writing for the Court, Chief Justice Rehnquist used the district court's findings to invalidate the university's affirmative action program. Applying the strict scrutiny standard,⁹⁹ the Court found that the policy of awarding minority applicants an automatic twenty points made race a decisive factor for admissions and was a violation of *Bakke*.¹⁰⁰ The Court also found that the awarding of points to minority applicants did not provide individualized consideration of each student's qualifications.¹⁰¹ As a result, the undergraduate admissions policy could not survive the strict scrutiny test because it was not narrowly tailored to achieve the university's compelling interest in achieving a diverse student body.¹⁰²

Although decided at the same time as *Grutter v. Bollinger*,¹⁰³ Chief Justice Rehnquist relied somewhat on the majority opinion from *Grutter* in writing the majority opinion for *Gratz*.¹⁰⁴ Similar to *Gratz*, the plaintiff in *Grutter* sued the University of Michigan, claiming that its law school admissions policies violated the Equal Protection Clause and Title VI. However, the affirmative action policies adopted by the law school's admissions department were significantly different than the policies used at

⁹⁴ *Id.* at 252.

⁹⁵ *Id.* at 253.

⁹⁶ *Id.* at 255 ("This index was divided linearly into ranges generally calling for admissions dispositions as follows: 100–50 (admit); 95–99 (admit or postpone); 90–94 (postpone or admit); 75–89 (delay or postpone); 74 and below (delay or reject).").

⁹⁷ *Id.*

⁹⁸ *Id.* at 274.

⁹⁹ *Id.* at 270 ("It is by now well established that 'all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized.'" (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995))).

¹⁰⁰ *See id.* at 272 (noting that Justice Powell allowed an applicant's race to be considered without being decisive in the decision making process).

¹⁰¹ *Id.* at 277.

¹⁰² *Id.* at 275.

¹⁰³ 539 U.S. 306 (2003).

¹⁰⁴ *Gratz*, 539 U.S. at 277.

the undergraduate level. The law school ranked each applicant according to their performance as undergraduate students and on the LSAT, but high achievement in these areas did not guarantee admission.¹⁰⁵ Admissions officers would also consider “soft variables” such as the quality of the applicant’s undergraduate institution, the quality of the applicant’s essay, and the applicant’s likely contributions to the intellectual and social life of the law school.¹⁰⁶ The goal of this policy was to achieve diversity at the school by enrolling a “critical mass” of underrepresented minority students,¹⁰⁷ and, while the administration had a commitment to achieving racial and ethnic diversity, it did not give that factor substantial weight over all other factors nor did it define diversity only in terms of race.¹⁰⁸

Using the strict scrutiny test,¹⁰⁹ Justice O’Connor, writing for the majority, adopted the precedent set in *Bakke* and found in favor of the university.¹¹⁰ The Court agreed with *Bakke* that student body diversity is a compelling governmental interest,¹¹¹ and found that the university’s admissions policy was narrowly tailored to achieve that interest.¹¹² Specifically, the Court noted that the holistic review of applicants adopted by the admissions policy was flexible enough to ensure individual treatment of each student.¹¹³ The Court also found that there was no policy of automatic acceptance or rejection based on any single “soft” variable, such as race,¹¹⁴ and the desire to enroll a “critical mass” of underrepresented students did not alter this flexibility.¹¹⁵ These several findings by the Court were, in its own words, consistent with the “tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.”¹¹⁶ However, it is important to note that

¹⁰⁵ *Grutter*, 539 U.S. at 315.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 316.

¹⁰⁸ *Id.* at 315–16.

¹⁰⁹ *Id.* at 326.

¹¹⁰ *See id.* at 323 (“Justice Powell’s opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies.”).

¹¹¹ *Id.* at 325. In addition to relying on the precedent in *Bakke*, the Court gave several of its own reasons why it believed that diversity in the student body was a compelling interest. First, it found that education was the foundation of good citizenship and therefore the “diffusion of knowledge” must be accessible to all individuals. Second, the Court found that law schools in particular are training grounds for the nation’s leaders and that in order to cultivate a legitimate set of leaders, it is necessary that this path to leadership (i.e., higher education) be visibly open to individuals of every race and ethnicity. *Id.* at 331–32.

¹¹² *Id.* at 334. The Court did clearly articulate that to be narrowly tailored, a race-conscious admissions program cannot use a quota system. *Id.*

¹¹³ *Id.* at 337.

¹¹⁴ *Id.* Justice O’Connor noted additionally that all applicants have the opportunity to highlight their own potential diversity contributions through the submission of a personal statement, letters of recommendation, and an essay, and that the school gives substantial weight to diversity factors besides race. *Id.* at 338.

¹¹⁵ *Id.* at 340.

¹¹⁶ *Id.* at 328.

while the Court upheld the use of the university's affirmative action policies, it indicated that the justifications which it relied on were not fixed in time.¹¹⁷

In sum, *Grutter* stands for the rule that diversity is a compelling state interest that will justify the use of race in the admissions process so long as each applicant is evaluated on an individual basis and race serves as only one factor among many that are considered.¹¹⁸ In combination with *Gratz* and *Bakke*, universities also understood that *Grutter* prohibited the use of quotas and the adoption of separate review processes for minority students.¹¹⁹ Nor could universities use race-based affirmative action policies as a permanent means of achieving a racial diverse student body.¹²⁰ Finally, *Grutter* also required that universities should actively and in good faith consider race neutral alternatives for achieving diverse student bodies.¹²¹

While the ruling of *Grutter* was heralded by many as a victory for affirmative action and as a clear map for universities to implement their own affirmative action policies,¹²² it was just as quickly condemned by members of the legal community as well.¹²³ Regardless of criticism toward the decision, the Michigan affirmative action cases represented the law of the land for several years. As the next section of this Note indicates, this law changed somewhat for universities in 2007 when the U.S. Supreme Court decided *Parents Involved in Community Schools v. Seattle School District No. 1*.¹²⁴

¹¹⁷ See *id.* at 341–42 (noting that solidifying a permanent justification for racial preferences would offend the fundamental equal protection principle of doing away with all government-imposed discrimination based on race). But see Peter Schmidt, *Researchers Bemoan Lack of Progress in Closing Education Gaps Between the Races*, CHRON. HIGHER EDUC. (Wash., D.C.), Mar. 26, 2008, <http://chronicle.com/article/Researchers-Bemoan-Lack-of/624/> (noting the findings of a group of affirmative-action advocates and researchers: “Justice Sandra Day O’Connor was far too optimistic in projecting, in the [Supreme Court’s] 2003 *Grutter v. Bollinger* decision upholding colleges’ use of race-conscious admissions policies, that within 25 years selective colleges would be able to enroll sufficiently diverse student bodies without the use of such policies.”).

¹¹⁸ See *supra* notes 113–14 and accompanying text.

¹¹⁹ See *supra* notes 114–15 and accompanying text.

¹²⁰ See *supra* note 117 and accompanying text.

¹²¹ *Grutter*, 539 U.S. at 339.

¹²² See *supra* note 2.

¹²³ See, e.g., Lauriat, *supra* note 92, at 1173. Lauriat argues that the Court was wrong in *Grutter* and the opinion is “flawed in its analysis and conclusion that student-body diversity can serve as a compelling government interest to justify the use of race-based preferences in higher education admissions policies.” *Id.* She also claims there are strong public policy reasons against the use of racial diversity as a criterion for giving advantages in admissions, such as the fact that these programs foster racial stereotyping. *Id.* at 1197.

¹²⁴ 127 S. Ct. 2738 (2007).

IV. THE LEGACY OF *PARENTS INVOLVED* IN HIGHER EDUCATION

A. Parents Involved

When the U.S. Supreme Court decided to hear *Parents Involved* in 2006, there had already been several changes to the makeup of the Court.¹²⁵ Since the authors of the two University of Michigan affirmative action cases were no longer on the bench, many spectators were unsure how the “new” Court would decide this issue.¹²⁶

Parents Involved was decided by the U.S. Supreme Court with a companion case, *McFarland v. Jefferson County Public Schools*.¹²⁷ The plaintiffs in *Jefferson County*, parents of students enrolled at the Jefferson County Public Schools system, sued the county claiming that its school assignment plan violated the Equal Protection Clause.¹²⁸ Under the assignment plan, if a traditional public school in the county became over-subscribed, the school board would decide where a student would enroll based on factors such as place of residence, school capacity, and program popularity.¹²⁹ If a school remained over-subscribed after consideration of these factors, applicants were separated and randomly sorted into four lists at each grade level: Black Male, Black Female, White Male, and White Female.¹³⁰ Students were then selected by the principals in a manner that would keep the schools within the racial guidelines of the assignment plan.¹³¹

Concerning the magnet schools, students were normally assigned to the school closest to where he or she resided unless that school exceeded its capacity or “hover[ed]” at the extreme ends of the racial guidelines.¹³² Other factors that were considered besides race included student essays, recommendations, a work sample or audition, attendance data, and standardized test scores.¹³³ Therefore, in assigning students to the magnet schools, “race [wa]s simply one possible factor among many, acting only

¹²⁵ Justice O’Connor, the author of *Grutter*, had retired and been replaced by Justice Alito, while Chief Justice Rehnquist, the author of *Gratz*, had passed away and was succeeded by Chief Justice Roberts. See Supreme Court Nominations Research Guide, http://www.ll.georgetown.edu/guides/supreme_court_nominations.cfm (last visited July 21, 2009) (indicating that Justice Alito was confirmed on January 31, 2006, to replace Justice O’Connor, and Chief Justice Roberts was confirmed on September 29, 2005, to replace Chief Justice Rehnquist).

¹²⁶ See, e.g., Selingo, *supra* note 6.

¹²⁷ 330 F. Supp. 2d 834 (W.D. Ky. 2004), *aff’d*, 416 F.3d 513 (6th Cir. 2005), *cert granted sub nom.* Meredith v. Jefferson County Bd. of Educ., 126 S. Ct 2351 (2006), *rev’d sub nom.* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007).

¹²⁸ *Jefferson County*, 330 F. Supp. 2d at 836.

¹²⁹ *Id.* at 842.

¹³⁰ *Id.* at 847.

¹³¹ *Id.* The assignment plan required schools in the county to seek a black student enrollment of at least fifteen percent and no more than fifty percent. *Id.* at 842.

¹³² *Id.* at 844.

¹³³ *Id.* at 845.

occasionally as a permissible ‘tipping’ factor in most of the [school] assignment process.”¹³⁴

The district court first found that the assignment plan for non-traditional magnet schools in the district was permissible under the Constitution.¹³⁵ In doing so, the court held that the school district “met its burden of establishing a compelling interest in maintaining racially integrated schools.”¹³⁶ The court went on to find that the assignment plan was narrowly tailored because it did not operate as a quota,¹³⁷ it allowed for individualized review,¹³⁸ it did not unduly harm any member of a racial group,¹³⁹ and it gave serious, good faith consideration of race-neutral alternatives to achieve its goals.¹⁴⁰

However, the court did find that the plan’s assignment of students to traditional high schools was a violation of the Equal Protection Clause.¹⁴¹ Specifically, the portion of the assignment plan that placed applicants in schools based on race was unconstitutional because it was not narrowly tailored to meet the objective of achieving diversity in the student body.¹⁴² The court found that the plan made race the defining feature of a student’s application,¹⁴³ which was in violation of *Grutter*. The court also found that the plan was not narrowly tailored because the assignment process put applicants on separate assignment tracks based on race and the plan’s use of the separate lists was completely unnecessary to accomplish the Board’s goal.¹⁴⁴ This decision of the district court was affirmed by the Sixth Circuit in a unanimous decision with no written opinion.¹⁴⁵

The claim in *Parents Involved in Community Schools v. Seattle School District No. 1*¹⁴⁶ was similar to that of *Jefferson County*. Here, a group of

¹³⁴ *Id.* at 859.

¹³⁵ *Id.* at 837.

¹³⁶ *Id.* at 855. The court was compelled by the arguments in *Grutter* which found that there was a compelling interest in maintaining a racially integrated university. It held that “[l]ike institutions of higher education, elementary and secondary schools are ‘pivotal to ‘sustaining our political and cultural heritage’ with a fundamental role in maintaining the fabric of society.” *Id.* at 852–53 (citation omitted).

¹³⁷ *Id.* at 858.

¹³⁸ *Id.* at 859.

¹³⁹ *Id.* at 861.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 837.

¹⁴² *Id.* at 864.

¹⁴³ *Id.* at 863.

¹⁴⁴ *Id.* at 862. Concerning the claim that the plan was not necessary to accomplish the Board’s goal, the court argued that “[u]nder the general law of probabilities, if applicants were selected off of one random draw list, the ratio of Black to White students in the applicant pool at a particular school would be reflected in the ratio of Black to White students in the pool of admitted students and, consequently, in the school’s student population at large.” *Id.* at 863.

¹⁴⁵ See *McFarland ex rel. McFarland v. Jefferson County Pub. Sch.*, 416 F.3d 513, 514 (6th Cir. 2005) (“Because the reasoning which supports judgment for defendants has been articulated in the well-reasoned opinion of the district court, the issuance of a detailed written opinion by this court would serve no useful purpose.”).

¹⁴⁶ 426 F.3d 1162 (9th Cir. 2005), *rev’d*, 127 S. Ct. 2738 (2007).

parents sued their school district claiming that the district's use of a race-based tiebreaker in determining which high schools students could enroll violated state law, the Equal Protection Clause, and Title VI of the Civil Rights Act.¹⁴⁷ Under this tiebreaker system, when a school had become oversubscribed, the school board chose who could attend a school based on four tiebreakers.¹⁴⁸ The plaintiffs' suit was based on the second tiebreaker which looked at a student's race if "the racial make up of [the school's] student body differ[ed] by more than 15 percent from the racial make up of the students of the Seattle public schools as a whole—and if the sibling preference [did] not bring the oversubscribed high school within plus or minus 15 percent of the District's demographics"¹⁴⁹

The district court here found in favor of the school district,¹⁵⁰ and the Ninth Circuit affirmed, finding a compelling governmental interest in promoting diversity in the classrooms and in "ameliorating real, identifiable de facto racial segregation."¹⁵¹ The court also found that the district's use of a race-based tiebreaker was narrowly tailored because it did not constitute a quota system,¹⁵² and it did not unduly harm any student.¹⁵³ The court did place a limit on its ruling, however, indicating that the plans would not be permitted indefinitely.¹⁵⁴

Finding that both *Parents Involved* and *Jefferson County* presented the same underlying legal question,¹⁵⁵ the U.S. Supreme Court decided to hear

¹⁴⁷ *Parents Involved*, 426 F.3d at 1171.

¹⁴⁸ *Id.* at 1169. The tiebreakers were as follows: first, students who have a sibling attending that school are admitted; second, if an oversubscribed high school is racially imbalanced the race of the applying student is considered; third, students are admitted according to distance from the student's home to the high school; fourth, a lottery is used to allocate the remaining seats. *Id.* at 1169–71.

¹⁴⁹ *Id.* at 1169. If this situation is present, then the school is considered racially imbalanced. The court provides an example of this imbalance:

[I]f a school has more than 75 percent nonwhite students (i.e., more than 15 percent above the overall 60 percent nonwhite student population) and less than 25 percent white students, or when it has less than 45 percent nonwhite students (i.e., more than 15 percent below the overall 60 percent nonwhite student population) and more than 55 percent white students, the school is considered racially imbalanced.

Id. at 1170.

¹⁵⁰ *Id.* at 1192–93.

¹⁵¹ *Id.* at 1178.

¹⁵² *See id.* at 1186 ("[T]he District's 15 percent plus or minus trigger point tied to the demographics of the Seattle school population is not a quota. It is a context-specific, flexible measurement of racial diversity designed to attain and maintain a critical mass of white and nonwhite students in Seattle's public high schools.").

¹⁵³ *Id.* at 1192. The court gave three reasons why students were not unduly harmed. "[First,] the District is entitled to assign all students to any of its schools. [Second,] no student is entitled to attend any specific school. [And finally, third,] the tiebreaker does not uniformly benefit any race or group of individuals to the detriment of another" *Id.*

¹⁵⁴ Quoting *Grutter*, the court expected that the district would review its plan annually so that in twenty-five years the use of racial preferences would not be necessary. *Id.*

¹⁵⁵ This question was whether a public school that had not operated legally segregated schools or has been found to be unitary may choose to classify students by race and rely upon that classification in making school assignments. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2746 (2007).

both appeals jointly¹⁵⁶ and, subsequently, found that both assignment programs were unconstitutional. Consistent with *Bakke* and the University of Michigan cases, the Court applied the strict scrutiny test to both claims¹⁵⁷ and articulated only two acceptable compelling interests for the use of racial classifications: remedying the effects of past intentional discrimination and, as articulated in *Grutter*, ensuring diversity in higher education.¹⁵⁸ Concerning the first compelling interest, the Court held that neither school system could maintain its current assignment program based on the interest of remedying the effect of past intentional discrimination.¹⁵⁹ Regarding the second interest, the Court found that *Grutter* was limited to universities only and “[t]he districts offer[ed] 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.”¹⁶⁰

The Court went on to hold that even if the assignment plans were used to achieve a compelling government interest, they could not pass the narrowly tailored prong of the strict scrutiny test.¹⁶¹ Here, the Court found that the two reassignment plans had only a marginal impact in the assignment of students for achieving diverse student bodies and doubted the necessity of using racial classifications.¹⁶² The Court also turned to *Grutter*, which held that colleges must give good faith consideration to race neutral alternatives before relying on race-based affirmative action

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 2751–52.

¹⁵⁸ *Id.* at 2752–53.

¹⁵⁹ *Id.* at 2752. The Court found that the Seattle public schools had not shown that they were ever segregated by law and were not subject to court-ordered desegregation decrees. Also, while the Jefferson County schools were once previously segregated by law and were once subject to a court-ordered desegregation decree, in 2000 the same court that ordered that decree dissolved it because it found that the district had “eliminated the vestiges” connected with its former policy of segregation and the “pernicious effects” of the decree had already been achieved. *Id.*

¹⁶⁰ *Id.* at 2754, 2756. The Court refused to extend *Grutter* to this context despite the fact that two circuit courts in these cases, *Parents Involved in Community Schools v. Seattle School District No. 1*, 426 F.3d 1162, 1166 (9th Cir. 2005) and *McFarland ex rel. McFarland v. Jefferson County Public Schools*, 416 F.3d 513, 514 (6th Cir. 2005), and one other circuit court, *Comfort v. Lynn School Community*, 418 F.3d 1, 13 (1st Cir. 2005), found that it did. *Id.* at 2754.

¹⁶¹ *See id.* at 2755 (noting that they did not have to respond to the amici dispute over whether the diversity in these schools was a benefit because it was clear that the racial classifications were not narrowly tailored).

¹⁶² *Id.* at 2759–60. In Seattle, the court found that “[e]ighty-four students were assigned to schools that they did not list as a choice, but 29 of those students would have been assigned to their respective school without the racial tiebreaker, and 3 were able to attend one of the oversubscribed schools due to waitlist and capacity adjustments.” *Id.* at 2759. In Jefferson County, “[e]lementary school students are assigned to their first- or second-choice school 95 percent of the time, and transfers, which account for roughly 5 percent of assignments, are only denied 35 percent of the time—and presumably an even smaller percentage are denied on the basis of the racial guidelines, given that other factors may lead to a denial.” The county estimated that the racial guidelines account for only three percent of assignments. *Id.* at 2760.

programs,¹⁶³ and found no evidence that either district considered non-explicit racial classification.¹⁶⁴ Finally, the Court noted that the use of race in these two programs was used as a decisive factor that did not allow for individualized review of each applicant.¹⁶⁵

Justice Kennedy's concurrence in this decision was highly influential because he provided the "swing vote" in favor of invalidating the two student assignment plans.¹⁶⁶ While Kennedy agreed that the assignment plans at issue were unconstitutional, he was unable to join the Court because they were "too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race."¹⁶⁷ Also finding that "[t]he plurality opinion [wa]s at least open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling,"¹⁶⁸ Justice Kennedy wrote separately to voice his objection to the Chief Justice's reasoning.

Justice Kennedy was also troubled by the argument that courts should prohibit the use of race in school assignment plans unless it is used to remedy the effects of *de jure* segregation.¹⁶⁹ This was a mistake, according to Kennedy, because limiting the Court's power to remedying only *de jure* segregation confines "the nature, extent, and duration of governmental reliance on individual racial classifications."¹⁷⁰ Therefore, Justice Kennedy supported the use of race to remedy both *de jure* and *de facto* segregation.

B. Impact on Higher Education

Although *Parents Involved* is concerned with state action at the K–12 level, higher education administrators must still factor this holding into the structure of their school's affirmative action policies. There is a tradition in the American judicial system of courts either applying or following holdings involving K–12 schools in cases where one of the parties is a university or college. Therefore, it is likely that courts will look to *Parents Involved* when deciding future disputes involving affirmative action policies at the university level. An example of this trend can be seen in the

¹⁶³ *Id.* at 2760.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 2753–54.

¹⁶⁶ Garfield, *supra* note 64, at 411. Some have argued that because Justice Kennedy's concurrence was so influential as the deciding vote, it will likely emerge as the foundation for future race-based preference cases. *See, e.g., id.* at 416.

¹⁶⁷ *Parents Involved*, 127 S. Ct. at 2791 (Kennedy, J., concurring in part and concurring in the judgment); *see also id.* at 2797 ("A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue.").

¹⁶⁸ *Id.* at 2791.

¹⁶⁹ *Id.* at 2796.

¹⁷⁰ *Id.*

holding of *Healy v. James*.¹⁷¹ In *Healy*, the Supreme Court applied its ruling from *Tinker v. Des Moines Independent Community School District*,¹⁷² concerning student speech, to the university setting.¹⁷³ Quoting the often-cited precedent from *Tinker*, the *Healy* Court stated that “[a]t the outset we note that state colleges and universities are not enclaves immune from the sweep of the First Amendment. ‘It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.’”¹⁷⁴

Turning back to the impact of *Parents Involved* on higher education, it is important to understand from the beginning that *Grutter* is still good law and that the holding of *Parents Involved* has not been incorporated into higher education and will not be part of higher education law until a case is before the courts which warrants its application. In addition, both the *Parents Involved* Court and Justice Kennedy in his concurrence upheld *Grutter*. Therefore, there is little doubt that the precedent of *Grutter* is controlling law for race-based affirmative action cases. Specifically, *Parents Involved* found that “what was upheld in *Grutter* was consideration of ‘a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.’”¹⁷⁵ With this statement, the Court acknowledged that race could still be considered in the admissions process for colleges and universities. As a result, college administrators should continue to design their affirmative action programs concerning the assignment of weight to the applicant’s race and ethnicity within the guidelines established by *Grutter*. However, while *Grutter* remains good law, it is highly likely that in future lawsuits, courts will turn to *Parents Involved* along with *Grutter*. Therefore, the holding of *Parents Involved* cannot be ignored by college administrators despite the fact that *Grutter* has yet to be overruled. Even for colleges and universities that do not violate the requirements set in *Grutter*, courts may still find such policies unconstitutional due to the underlying goals of the policies or the methods in which the policies were created. By following both the holdings of *Parents Involved* and *Grutter*, colleges and universities will avoid an unfavorable holding if faced with a lawsuit.

1. *Schools Must Exhibit Significant Success Rates*

Under the first restriction articulated by the *Parents Involved* opinion, the Court implied that minor gains in generating a diverse student body will not survive the strict scrutiny test. The *Parents Involved* Court

¹⁷¹ 408 U.S. 169 (1972).

¹⁷² 393 U.S. 503 (1969).

¹⁷³ *Healy*, 408 U.S. at 180.

¹⁷⁴ *Id.* (citing *Tinker*, 393 U.S. at 506).

¹⁷⁵ *Parents Involved*, 127 S. Ct. at 2753.

highlighted that the major argument of the two school districts in support of their assignment plans was that the use of individual race classifications for the assignment of students was necessary to achieve the goals of maintaining diverse student bodies.¹⁷⁶ The Court was not persuaded by this argument because of the minimal effect the racial classifications had on student assignments overall.¹⁷⁷ Specifically, the Court surmised that because race had such a minimal effect on student assignments, other means that did not use race as a factor would have been more effective.¹⁷⁸

The Court then pointed out that, unlike in Seattle and Louisville, the use of race in the admissions policies at the University of Michigan was “indispensable” because it had more than tripled the minority representation at the law school.¹⁷⁹ Therefore, the Court hinted that, in the future, schools that implement race-based affirmative action programs will need to show significant success rates in enrolling minority students. While this “new” rule is not dispositive in determining the legality of affirmative action policies since it was not a rule articulated in *Grutter*, it will likely be a persuasive measure on a court in the future. Also, although there is not a bright-line rule for what courts will consider a suitable impact on minority enrollment for upholding race-based affirmative action policies, it is important to note that in *Parents Involved* the Court was not persuaded by programs that yielded an effect on only three percent of school assignments or in situations where the use of race had no effect on over one-third of the students subject to the plan.¹⁸⁰

2. *Alternatives to Race-Based Affirmative Action Must Be Seriously Considered*

This first way *Parents Involved* will impact college admissions serves as a good transition into the second impact the decision will have on the use of race-based affirmative action programs. As mentioned above, the fact that the assignment plans at issue in *Parents Involved* had a minimal impact on the actual assignment of students brought the Court to the conclusion that other effective alternatives must have existed. If favorable race-neutral alternatives exist, then a plan that employs the consideration

¹⁷⁶ *Id.* at 2759.

¹⁷⁷ *Id.*

¹⁷⁸ See *supra* note 162 and accompanying text.

¹⁷⁹ *Parents Involved*, 127 S. Ct. at 2760.

¹⁸⁰ A research consortium known as Project Seaphe, with members who include sociologists, economists, and law professors, intend to perform at least eighteen different studies using the information they obtained from higher education institutions, with the intention of finding out the effects of race-based affirmative action. Among the areas this group will examine include “whether minority students granted admissions preferences are disproportionately likely to drop out of undergraduate science programs, whether or how various admissions preferences affect undergraduate retention rates, and how the use of preferences affects social interactions on campuses.” Peter Schmidt, *Scholars Mount Sweeping Effort to Measure Effects of Affirmative Action in Higher Education*, CHRON. HIGHER EDUC. (Wash., D.C.), Jan. 18, 2008, at A19.

of race will not be considered narrowly tailored.¹⁸¹ The *Parents Involved* Court found that the Seattle district rejected several race-neutral alternatives with little or no consideration while Jefferson County did not show any evidence that it considered any alternatives.¹⁸² Although the *Grutter* Court articulated the need to consider race-neutral alternatives, *Parents Involved* strengthened this requirement¹⁸³ by clearly articulating that it was one of several controlling factors in its decision to strike down the assignment plans.¹⁸⁴

In addition to considering race-neutral alternatives, it is apparent from *Parents Involved* that colleges and universities must clearly document their consideration of these alternatives as well to provide evidence to courts of this step in their decision making process. Justice Kennedy provided a list of alternatives to the assignment plans used by the school districts in his concurrence which gives some insight into what future courts will look for universities to have considered. Kennedy argued:

School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.¹⁸⁵

While not all of these alternatives are available to colleges and universities,

¹⁸¹ *Parents Involved*, 127 S. Ct. at 2760 (emphasizing that “[n]arrow tailoring requires ‘serious, good faith consideration of workable race-neutral alternatives’” (quoting *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003))).

¹⁸² *Id.*

¹⁸³ While *Grutter* held that colleges and universities must consider race-neutral alternatives, the Court provided the University of Michigan significant latitude in deciding which alternatives they were going to consider. See *Grutter*, 539 U.S. at 340 (holding that the district court erred in finding that the law school was at fault for failing to consider the use of a lottery system or placing less emphasis on GPA and LSAT scores because such alternatives would require too many sacrifices in terms of academic quality or diversity).

¹⁸⁴ See *Parents Involved*, 127 S. Ct. at 2760 (“The districts have also failed to show that they considered methods other than explicit racial classifications to achieve their stated goals. Narrow tailoring requires ‘serious, good faith consideration of workable race-neutral alternatives.’” (citation omitted)). While the *Grutter* Court first articulated the need for “serious, good faith consideration of workable race-neutral alternatives,” the Court failed to dictate what steps a university must take to fulfill this requirement. *Grutter*, 539 U.S. at 339–40. *Parents Involved* provides a much stricter requirement and more detailed map of what universities must do. *Parents Involved*, 127 S. Ct. at 2760.

¹⁸⁵ *Parents Involved*, 127 S. Ct. at 2792.

such as drawing attendance zones, the Court provides some guidance to colleges and universities for achieving this requirement.

For advice on race neutral alternatives geared toward higher education, colleges and universities can turn to a 2004 report by the U.S. Department of Education (“DOE”) which lists several alternatives to race-based affirmative action policies.¹⁸⁶ In formulating these alternatives, the DOE analyzed current alternatives used by colleges and universities across the country and listed those that have been successful in enrolling a significant number of minority students.¹⁸⁷ For example, the DOE noted:

Many colleges and universities around the country are partnering with elementary and secondary schools, recognizing that these partnerships expand their educational mission by giving them an opportunity to put into practice education theory. Moreover, institutions recognize that helping to better educate young people who attend traditionally low-performing schools will broaden the pool of students who can qualify for admission to college.¹⁸⁸

The report also pointed out that several colleges have partnered with secondary schools to assist with teacher shortages.¹⁸⁹ This effort by colleges and universities will also help prepare K–12 students for college.

Concerning financial aid, the DOE noted that institutions would use scholarships to target specific populations such as low-income students or students attending high schools which were underrepresented at that specific institution.¹⁹⁰ At the University of North Carolina at Chapel Hill, the school created an initiative to give the children of low-income families an opportunity to attend college without borrowing the funds to do so. Entitled the “Carolina Covenant,” the scholarship program “will enable low-income students to graduate debt-free if they work on campus [ten] to [twelve] hours weekly in a federal work-study job.”¹⁹¹

There are also alternatives available for race-based affirmative action policies in graduate school admissions as well. The DOE listed the efforts by the University of California which implemented a program that enrolls disadvantaged or underserved undergraduates and brings them to either the Irvine or Santa Cruz campuses to work with faculty mentors in order to

¹⁸⁶ U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, *ACHIEVING DIVERSITY: RACE-NEUTRAL ALTERNATIVES IN AMERICAN EDUCATION* 13–79 (2004).

¹⁸⁷ *See id.* at 23 (stating that the University of Florida increased race neutral outreach, created new recruitment materials that emphasized diversity, and provided scholarships to disadvantaged students).

¹⁸⁸ *Id.* at 24.

¹⁸⁹ *See id.* at 21 (noting that Texas A&M University “pledged to increase annual graduation rates of mathematics, science, technology and foreign language teachers by more than 250 percent in each category, as well as the number of bilingual and special education teachers by over 170 percent”).

¹⁹⁰ *Id.* at 41.

¹⁹¹ *Id.* at 43.

prepare them to apply to graduate school.¹⁹²

Aside from the alternatives suggested by the DOE report, another possible race neutral alternative that can be imposed by colleges and universities includes establishing top percentage plans similar to that of the State of Texas after the *Hopwood* decision.

Top percentage plans work for blacks (and Hispanics as well) where there is, ironically, rigid separation in residential areas and schools. Where there are many all or nearly all black high schools, a college that desires diversity but is prohibited from using affirmative action could switch to a system based on class standing.¹⁹³

However, this plan will not work where high schools are integrated.¹⁹⁴ Also, this plan has been criticized, as used in Texas and Florida, by the United States Commission on Civil Rights because the programs do not admit to college the same proportion of minority students as are admitted under race-based affirmative action plans.¹⁹⁵ Percentage plans and their inability to replace affirmative action programs will be discussed further in Part V.

3. *Goals to Enroll a Predetermined Range Should Be Eliminated*

The third impact *Parents Involved* will have on higher education concerns the target ranges of students schools adopt as part of their admissions policies. The Court in *Parents Involved* found that for both Seattle and Louisville, “the school district relie[d] upon an individual student’s race in assigning that student to a particular school, so that the racial balance at the school falls within a *predetermined range* based on the racial composition of the school district as a whole.”¹⁹⁶ This range was “set solely by reference to the demographics of the respective school districts.”¹⁹⁷ Looking back at *Grutter*, the Court noted that the number of minority students the school wanted to admit was an undefined “meaningful number” that the school felt was “necessary to achieve a genuinely diverse student body.”¹⁹⁸ Although the use of quotas is barred from affirmative action policies, the *Grutter* Court did allow the university

¹⁹² See *id.* at 54 (noting that the program is entitled the Summer Undergraduate Research Fellowship (“SURF”) program).

¹⁹³ Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521, 546 (2002).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 547.

¹⁹⁶ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2746 (emphasis added). Seattle’s expert stated that the sufficient number of students under this range is the amount which will allow students to avoid “feeling any kind of specter of exceptionality.” *Id.* at 2756 (citation omitted).

¹⁹⁷ *Id.* at 2757.

¹⁹⁸ *Id.* (citing *Grutter v. Bollinger*, 539 U.S. 306, 316 (2003)).

to apply a less rigid number scheme for admitting minority students. The “predetermined range” adopted by the school districts in *Parents Involved* seems to be in line with the “meaningful number” goal in *Grutter*, yet the *Parents Involved* Court has made it clear that the use of such arbitrary numbers will not be permissible even if they are not considered quotas.¹⁹⁹ Therefore, while *Grutter* allowed the use of ranges for enrollment goals, it is evident that the Court today would not permit it. Specifically, *Parents Involved* held that “[t]his working backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits, is a fatal flaw under our existing precedent.”²⁰⁰ Although *Grutter* is still good law, the Court clearly articulated its displeasure with the precedent on this issue, so colleges and universities will likely need to follow the holding of *Parents Involved* on this matter. If schools do promote a “meaningful number” or seek to enroll a “critical mass,” then *Parents Involved* suggests that that number should be based on well-researched gains the school will receive from admitting that range of students.²⁰¹ However, it may be best for colleges to eliminate ranges or numeric goals since it is disfavored by the Court, or, as the Court suggests, colleges should base their numeric goals through forward looking processes rather than looking backward to establish the range.

4. Themes of Overall Impact

As this section indicates, the impact of *Parents Involved* on the higher education setting is subtle. However, this does not mean admissions offices are free to design their affirmative action policies solely in accordance with the 2003 University of Michigan cases. The several types of impact *Parents Involved* will have on higher education can be summed up in three different themes. One theme that emerges is that colleges and universities should clearly document their affirmative action policies and the decision making processes that led to their implementation. In particular, institutions should document all alternatives to race-based affirmative action programs attempted and considered. If a suit is ever brought against a school, this documentation will be extremely beneficial. A second theme derived from the impact of the case is that schools must do their homework. Courts will want to see that institutions have come up with plausible and effective alternatives to race-based affirmative action

¹⁹⁹ See *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.”).

²⁰⁰ *Id.* at 2757.

²⁰¹ See *id.* at 2755 (criticizing the two assignment plans because the number of minority students sought were not connected to any need for a certain level of diversity).

programs and they will want to see why current affirmative action policies have been deemed most beneficial for meeting the goals of the school. Schools that articulate that they are seeking to enroll a “meaningful number” of minority students will also need to show the beneficial effect that number will have on their student body and the overall goals of the institution. Finally, the *Parents Involved* holding suggests that courts will want affirmative action policies to be as efficient as possible. The Court expressed this theme through its distaste for arbitrary student ranges. Also, the Court established this theme by mandating that schools be able to show that their affirmative action policies produce significant results. Again, while *Bakke* remains good law, college administrations must be cognizant of the impact of *Parents Involved* and the themes listed above. If colleges and universities adhere to these themes and follow the precedent of both *Parents Involved* and *Grutter*, the longevity of their affirmative action programs is likely assured.

5. Evidence of Parents Involved’s Impact

Recently, the Western District of Texas had the opportunity to address “one of the first legal attempts to roll back”²⁰² the 2003 University of Michigan cases in *Fisher v. University of Texas at Austin*.²⁰³ Here, the plaintiffs, who were Caucasian, had applied to and were both rejected from the University of Texas at Austin.²⁰⁴ They sued several defendants claiming that the university’s admissions policies discriminated against them on the basis of their race in violation of the Equal Protection Clause and Civil Rights Acts.²⁰⁵ In finding that the University of Texas’s affirmative action policies were constitutional, the court relied heavily on *Grutter* and the standard established within that case.²⁰⁶ However, the plaintiffs turned to the holding of *Parents Involved*, albeit unsuccessfully, to support their argument that the university’s policies were in violation of federal law.²⁰⁷

In supporting the argument of this Note that *Parents Involved* will have an influence on future affirmative action disputes concerning the college admissions process, the court did not dismiss the plaintiff’s reliance on *Parents Involved* due to the fact that it was a K–12 case. Instead, the court performed a detailed analysis of *Parents Involved*, implying that the case was relevant in this situation.²⁰⁸ Specifically, the court found that the

²⁰² Scott Jaschik, *Court Win for Affirmative Action*, INSIDE HIGHER ED, Aug. 18, 2009, <http://www.insidehighered.com/news/2009/08/18/texas>.

²⁰³ No. A-08-CA-263-SS, 2009 WL 2513291 (W.D. Tex. Aug. 17, 2009).

²⁰⁴ *Id.* at *1.

²⁰⁵ *Id.*

²⁰⁶ *See id.* at *11–14 (analyzing *Fisher* using the *Grutter* standards).

²⁰⁷ *See id.* at *20 (using *Parents Involved* to measure the effect of a “narrowly tailored” plan).

²⁰⁸ *See id.* at *20–21 (examining *Parents Involved* and comparing it to *Fisher*).

university's affirmative action policies were not unconstitutional because, unlike the school districts in *Parents Involved*, "UT's admissions policy does not make race 'the' factor nor rely on racial classifications in a 'nonindividualized mechanical' way. UT has not only considered but continues to use race-neutral alternatives in addition to its consideration of race."²⁰⁹

While the court did reject the plaintiffs' argument that the university's affirmative action policies were not narrowly tailored because it produced minimal gains in admitting under-represented students,²¹⁰ it is still important to note that this argument was raised and analyzed by the court. Therefore, although the Western District of Texas rejected this argument, this Note contends that it is likely that another district or federal circuit will be persuaded by it.

The impact of *Fisher* on higher education law cannot be overlooked. Although only a district court case, it stands for the proposition that *Parents Involved* is not restricted to fact patterns involving K-12 schools. It also establishes that *Parents Involved* will have a significant effect on affirmative action cases involving colleges and universities. This case legitimizes arguments that focus on a university's use of race-neutral alternatives and the success of a university's affirmative action policies which are generally based on the standards articulated in *Parents Involved*. Given the effect *Parents Involved* will have on future affirmative action cases, the next Part of this Note argues that the line should be drawn here concerning restrictions on the autonomy of a university to select its own student body.

V. THE BENEFITS OF DIVERSITY IN HIGHER EDUCATION FOR STUDENTS AND SOCIETY

While the precedent concerning race-based affirmative action policies post-*Parents Involved* does allow significant autonomy for colleges and universities to recruit and admit minority applicants, the courts should not look to place any additional restrictions or requirements on how admissions departments operate. Research indicates that college students who are part of a racially diverse educational community will benefit in terms of their development, both as students and as young adults, and society too will benefit from the presence of fully developed college graduates.²¹¹ In order to achieve the optimal levels of diversity needed to ensure these benefits, race-based affirmative actions policies must be used,

²⁰⁹ *Id.* at *21.

²¹⁰ *See id.* ("Thus, the mere fact that UT's consideration of race does not have a large effect on diversity, due largely to the overwhelming presence of the Top Ten Percent law, does not mean the policy fails to further UT's compelling interest or is in some way not narrowly tailored for that goal.")

²¹¹ *See infra* Part V.A.

and any additional restraints placed on college admissions departments could lead to the elimination of these beneficial environments.

A. *Specific Benefits to Society and Individuals*

The benefits to American society and businesses of having students who have graduated from diverse colleges and universities are thoroughly articulated by Derek Bok, former president of Harvard University. Bok claims that “[a] successful democracy demands tolerance and mutual respect from different groups within its citizenry in order to contain the religious and ethnic tensions that have riven so many countries around the world.”²¹² College students who are educated in racially diverse environments learn this required tolerance and respect.²¹³ Bok also found that some scholars have reported that those students who interact across racial lines become more civically active, more inclined to help others, and more committed to improving their communities than their classmates who do not experience the same cross-racial contacts.²¹⁴ Finally, Bok has found that employers look for students who can work effectively with a diverse group of employees and clients because of the growing number of minorities and immigrants.²¹⁵ Another benefit to businesses from diversity in higher education, which Bok does not argue but is nonetheless apparent, is that “diversity promotes creativity and innovation, fosters problem solving skills, and adds to organizational flexibility.”²¹⁶

Aside from the benefits to society, research has also shown that the cognitive and identity development of students is one major benefit of a diverse educational environment. Patricia Gurin argues that “undergraduates are at a critical stage in their human growth and development in which diversity, broadly defined, can facilitate greater awareness of the learning process, better critical thinking skills, and better preparation for the many challenges they will face as involved citizens in an increasingly pluralistic and democratic society.”²¹⁷ Gurin’s argument is supported not only by her own work with student data from the University of Michigan,²¹⁸ but is also supported by the work of other social scientists.

²¹² DEREK BOK, OUR UNDERACHIEVING COLLEGES: A CANDID LOOK AT HOW MUCH STUDENTS LEARN AND WHY THEY SHOULD BE LEARNING MORE 195 (2006).

²¹³ See *id.* (stating that society has “much to gain from having students from diverse backgrounds learn to live and work together on campus”).

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ Benjamin Baez, *Diversity and Its Contradictions*, in RACIAL AND ETHNIC DIVERSITY IN HIGHER EDUCATION 383, 385 (Caroline S. Turner et al. eds., 2002).

²¹⁷ Jeffrey F. Milem & Kenji Hakuta, *The Benefits of Racial and Ethnic Diversity in Higher Education*, in RACIAL AND ETHNIC DIVERSITY IN HIGHER EDUCATION 389, 392 (Caroline S. Turner et al. eds., 2002).

²¹⁸ Data was collected for use as evidence in *Grutter* and *Gratz*. The analyses were conducted to document the educational outcomes for students across the nation and within the University of

For example, one group of social scientists found that the level of classroom diversity was related to small, yet significant, levels of students reporting gains in their problem solving and group skills.²¹⁹ This group found that even medium levels of diversity—approximately thirty to forty percent—“are positively, if not always significantly, related to a students’ reports of learning gains.”²²⁰ Research also shows that students who engage in a diverse environment in college will show greater intellectual engagement and academic motivation, higher satisfaction in their college experience, and the ability to understand and appreciate the perspectives of groups other than their own.²²¹ Several of these personal developments will lead directly to increased retention rates for students.²²² Finally, it has been found that diversity in higher education disrupts the cycle of segregation between the majority and minority groups.²²³

While the above studies identify the benefits of a diverse student body, it is also important to note the effects on individual students of having a racially homogenous college environment. It has been found that “[c]ampuses with high proportions of White students provide limited opportunities for interaction across race/ethnicity barriers and limit student learning experiences with socially and culturally diverse groups.”²²⁴ In addition, on campuses with little racial diversity, members of underrepresented groups are traditionally viewed as “tokens” by students in the majority.²²⁵ “Tokenism contributes to the heightened visibility of the underrepresented group, exaggeration of group differences, and the

Michigan. The analyses found that students who reported high levels of contact with diverse ideas, information, and people were more likely to show growth in their active thinking process, show higher levels of intellectual engagement, and were more likely to have higher post graduate aspirations. *Id.* at 394–95.

²¹⁹ Patrick T. Terenzini et al., *Racial and Ethnic Diversity in the Classroom: Does It Promote Student Learning?*, in RACIAL AND ETHNIC DIVERSITY IN HIGHER EDUCATION 411, 422 (Caroline S. Turner et al. eds., 2002).

²²⁰ *Id.*

²²¹ See Milem & Hakuta, *supra* note 217, at 397. A study of fifty-eight students at Amherst College found that because they were learning within a diverse environment,

[t]hirty percent of the students reported changes in the way they saw people of both different races and classes, and an additional 32 percent reported having learned something about people of either other races or other classes. Of the remaining 38 percent, just over half felt that they had gained something from the classroom comments of peers who differed from them in race and class.

Elizabeth Aries, *At an Elite College, Race Influences Views of Diversity*, CHRONICLE OF HIGHER EDUC. (Wash., D.C.), Sep. 26, 2006, at B47. While these numbers were “encouraging,” it was also noted that “much potential went unrealized.” *Id.*

²²² Milem & Hakuta, *supra* note 217, at 397.

²²³ See *id.* at 395 (“As an institution becomes more structurally diverse, students are more likely to have opportunities to socialize across racial groups and to discuss racial issues.”).

²²⁴ Sylvia Hurtado et al., *Enhancing Campus Climates for Racial/Ethnic Diversity: Education Policy and Practice*, in RACIAL AND ETHNIC DIVERSITY IN HIGHER EDUCATION 671, 675 (Caroline S. Turner et al. eds., 2002).

²²⁵ *Id.*

distortion of images to fit existing stereotypes.”²²⁶ Minority students can also feel alienated by a predominately homogeneous environment;²²⁷ therefore, one could assume this could lead to high dropout rates.

Although producing a diverse student body is the first step to achieving the benefits mentioned in this section, it is important that college administrators do not stop there. Colleges must also sustain an environment that ensures students of different races and backgrounds interact with each other. “[P]ositive learning outcomes, including increased GPA and likelihood of persistence, are related to the quality of interactions a student has with diverse others, as well as the institutional support for diversity that a student perceives.”²²⁸ Multicultural educational programming, through academic courses that deal directly with multicultural issues, is one way to produce these beneficial interactions.²²⁹ One group of social scientists suggests that for these types of courses to be most effective, they “should involve students in experiential learning using methods such as role-playing, values clarification, and brainstorming.”²³⁰ However, it must be noted that even without efforts by college administrators to promote interaction between racial groups, campuses that are diverse will result in the higher likelihood that students will befriend and interact with members of different racial groups.²³¹

B. *Alternatives to Race-Based Affirmative Action Are Not a Suitable Replacement*

Some critics of race-based affirmative action policies argue that a diverse student body, along with all the benefits that it provides, can be achieved through admissions policies that do not consider race. One popular argument, which has been researched extensively by sociologist Thomas Kane, has favored the replacement of race-based affirmative

²²⁶ *Id.*

²²⁷ *See id.* at 677–78 (finding that students’ perceptions of discrimination, stemming from a non-diverse student body, have a significant and negative effect on African American students’ grades, leading these students to drop out).

²²⁸ Susan R. Rankin & Robert D. Reason, *Differing Perceptions: How Students of Color and White Students Perceive Campus Climate for Underrepresented Groups*, 46 J. C. STUDENT DEV. 43, 45 (2005).

²²⁹ *See id.* (noting that “[c]ompletion of an academic course that addresses issues of diversity was related to decreases in racial bias”). The authors also found that the completion of a diversity course was linked to “increased ‘quality of students’ experiences with diverse peers [and] commitment to social action.” *Id.* (alteration in original).

²³⁰ Ambika Bhargava et al., *An Investigation of Students’ Perceptions of Multicultural Education Experiences in a School of Education*, MULTICULTURAL EDUC., Summer 2004, at 22 (citing E.C. Globetti et al., *Social Interaction and Multiculturalism*, 30 NASPA J. 209 (1993)).

²³¹ *See* Cindy Weiss, *Racial Diversity on College Campuses Benefits Students, Says Sociologist*, ADVANCE (Univ. of Conn., Storrs, Conn.), Nov. 3, 2008, at 8 (citing a study by sociologist Mary Fischer, which found that “in the schools with greater diversity, students from all racial and ethnic groups came to have more diverse friendship networks,” and that “[t]his effect was particularly strong for white students”).

action policies with income or class-based affirmative action programs. In studying this alternative, Kane found several factors which led to the conclusion that income cannot be a substitute for race in affirmative action.²³² Kane first found, using data from the high school class of 1992, that African Americans and Hispanics were about three times as likely to have incomes under \$20,000 when compared to white students; however, African Americans and Hispanics represented less than half of the entire low income population.²³³ As a result, while African Americans and Hispanics were more likely to have low incomes, “their absolute numbers still represented a minority of the total low-income population.”²³⁴ Kane also found that among all low-income, high scoring youth, African Americans and Hispanics made up only seventeen percent of the population and even a smaller number, less than seven percent, made up high school graduates with high test scores.²³⁵ Kane concluded that a “college drawing from the general population would have to admit two low-income students from the overall pool of high school graduates to yield one black or Hispanic student.”²³⁶ This number increases when looking at selective colleges. These colleges, which select students only

²³² See Roland G. Freyer et al., *An Economic Analysis of Color-Blind Affirmative Action*, 24 J.L. ECON. & ORG. 319, 321–22 (2008).

There are two distinct ways in which color-blind affirmative action is inherently inefficient. First, in the short-run, when the distribution of traits in the applicant pool may be taken as given, all affirmative action policies yield lower expected performance among the selected than does laissez-faire. . . .

Second, color-blind affirmative action is likely to be inefficient over the longer run as well, when one considers how the distribution of traits presented by applicants will shift in response to the incentives created by colleges’ admissions policies. . . . [C]olor-blind policies necessarily create a situation where the relative importance of traits for enhancing an applicant’s prospects of being admitted diverges from the relative significance of those traits for enhancing an applicant’s postadmissions performance. . . . [T]his is never the case under optimal color-sighted policy. Thus, to the extent that color-blind preferential policies distort applicants’ decisions to acquire performance-enhancing traits prior to entering the selection competition, additional inefficiencies will emerge.

Id. But see John P. Cronan, *The Diversity Justification in Higher Education: Evaluating Disadvantaged Status in School Admissions*, 34 SUFFOLK U. L. REV. 305, 308 (2001) (arguing that using a comprehensive system of affirmative action that “considers both racial and non-racial factors [to] indicate whether an applicant faced a disadvantaged past and would contribute to the diversity of the institution” will incorporate the strengths of a class-based system while eliminating its weaknesses).

²³³ Thomas J. Kane, *Misconceptions in the Debate Over Affirmative Action in College Admissions*, in RACIAL AND ETHNIC DIVERSITY IN HIGHER EDUCATION 750, 754 (Caroline S. Turner et al. eds., 2002).

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.* Kane’s statistics show that if schools tried to maintain racial diversity by relying on family income, then schools would have to reduce the likelihood of admissions of those with incomes between \$25,000 and \$39,000 by 16.9 percentage points relative to students from families with incomes less than \$15,000. Schools would also have to give a disadvantage to students who had a parent with a college degree and they would have to disfavor applicants from public schools and from urban areas. Lastly, schools would have to place negative weight on SAT scores and the differential in GPA. *Id.* at 755–56.

from the pool of high scoring students, would need to admit six students under an income-based affirmative action policy to admit one African American or Hispanic student.²³⁷

This trend articulated by Kane has been noted by legal scholars as well. It has been argued by these scholars that income-based affirmative action is unable to remedy the shortcomings of race-based affirmative action policies.²³⁸ Specifically, it has been stated that income-based affirmative action will not succeed in aiding the minority poor for two reasons.²³⁹ “First, one must remember that minorities are *minorities*: there are more white poor people than black and Latino poor people, even though white poverty *rates* are lower than black and Latino poverty rates,” and, as a result, affirmative action “slots” will go to white students based on numbers alone.²⁴⁰ The second reason is that “the basic principles of affirmative action weigh against the use of poverty-based affirmative action as a tool for aiding the minority poor.”²⁴¹ Since poor minority students are “the *bottom* of the bottom” they are going to be “*underrepresented* as beneficiaries of poverty-based affirmative action in comparison with their proportion among the poor.”²⁴²

Evidence that income-based affirmative action cannot achieve the same racial diversity as race-based affirmative action can be seen in the effects California’s Proposition 209 has had on the state’s higher education enrollment patterns.²⁴³ Proposition 209, which amended the state’s constitution, holds that the state shall not “grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or

²³⁷ *Id.* at 754.

²³⁸ See, e.g., Deborah C. Malamud, *Assessing Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 452, 465 (1997) (noting that it is a dangerous misconception to think that income-based affirmative action can succeed where race-based affirmative action failed).

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.* Malamud offers some statistics from a study performed by Maria Cancian at the LaFollette Institute of Public Affairs at the University of Wisconsin to support her claims. Cancian’s data was derived from the National Longitudinal Survey of Youth. She found that the students who would lack the basic skills to attend and complete college were four times more likely to be a minority. *Id.* at 465–66. Cancian also found:

[I]f income is the criterion on which poverty determinations will be made, a school can define poverty inclusively (as having been poor for at least one year between the ages of 15 and 17) or exclusively (as having been *always* poor between the ages of 15 and 17). The inclusive definition will generate an eligible cohort that includes candidates whose lives have been far less marred by poverty than will the exclusive definition. In Cancian’s simulations, the exclusive definition of poverty produces an eligible cohort that is 52 percent minority; the minority cohort under the inclusive definition is 29 percent. The top of the bottom, in Cancian’s simulations, is markedly whiter than the bottom of the bottom.

Id. at 466.

²⁴³ Specific evidence can also be seen in the University of Texas system after *Hopwood*. For more on that effect, see *supra* note 88.

public contracting.”²⁴⁴ This proposition went into effect in 1997,²⁴⁵ and by comparing the enrollment patterns of students from the year before the proposition with the patterns from the year after it went into effect, it is clear that the new law had an immediate impact on diversity in California’s institutions of higher education. At the undergraduate level for the entire University of California system, “920 African-Americans enrolled as college freshmen in 1997” and “that number fell to 739 in 1998,” and to 728 in 2000.²⁴⁶ At the most selective of California’s public universities, Berkeley, freshman African American enrollment fell from 252 in 1997 to 122 in 1998.²⁴⁷ The year that the proposition went into effect, the University of California at Berkeley School of Law only enrolled one African American student out of a total of 270 students and he was accepted a year earlier but had deferred his enrollment.²⁴⁸ In the fall of 2006, things had not improved much as only thirteen African American students enrolled at the law school.²⁴⁹

Another popular argument against race-based affirmative action focuses on the use of ten percent plans as a viable substitute for policies that rely heavily on a student’s race. As mentioned earlier, the state of Texas was able to mitigate the effects of the *Hopwood* decision by implementing a ten percent plan which granted high school seniors graduating in the top ten percent of their class automatic admission to their choice of state university and the University of Texas.²⁵⁰ This plan had some initial success in increasing minority enrollment after a sharp drop off due to the *Hopwood* ruling.²⁵¹ But, like income-based affirmative action, this program also proved to be an insufficient alternative to race-based affirmative action. In a study released in 2003, Princeton University sociologist Marta Tienda found that graduates in the top ten percent of their class in Texas high schools were admitted with “near certainty” to Texas public universities before *Hopwood* and before the ten percent plan was created.²⁵² Therefore, the state’s new ten percent plan did not assist students in the second and third deciles of their high school classes and the elimination of race-based affirmative action proved to be a huge detriment

²⁴⁴ Jennifer M. Chacón, *Race as a Diagnostic Tool: Latinas/os and Higher Education in California, Post-209*, 96 CAL. L. REV. 1215, 1216 (2008) (citing CAL. CONST. art. I, § 31(a)).

²⁴⁵ Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CAL. L. REV. 1139, 1139 n.1 (2008).

²⁴⁶ Greenberg, *supra* note 193, at 543.

²⁴⁷ *Id.* (citation omitted).

²⁴⁸ *Id.* at 544 (citation omitted).

²⁴⁹ Michelle Locke, *Blacks, Hispanics Rebound from Death of Preferences; Enrollment Back Up- With a Catch*, CHI. SUN TIMES, May 7, 2007, at 36.

²⁵⁰ See *supra* note 89 and accompanying text.

²⁵¹ *Id.*

²⁵² Press Release, Princeton University, Study: Texas ‘10 Percent Plan’ Fails to Sustain Diversity at Flagship Universities (Jan. 23, 2003), available at <http://www.princeton.edu/pr/news/03/q1/0123-tienda.htm>.

to these students seeking admission to the state's flagship universities.²⁵³ Tienda found that after *Hopwood*, the admission probability of students ranked in the second decile of their senior class fell from 85.3% to 71.7% for African Americans and from 86.9% to 75.9% for Hispanics at Texas A&M.²⁵⁴ At the University of Texas at Austin, there was a drop in admission probability from 78.7% to 73.8% for African Americans and from 81.8% to 79.5% for Hispanics.²⁵⁵ During this same period, the admission probability of similarly ranked white students rose from 80.2% to 83.9% at Texas A&M.²⁵⁶ At the University of Texas at Austin, the admission probability of white students ranked in the 80th to 89th percentile of their class increased from 80.4% to 91.1% post-*Hopwood*.²⁵⁷ The University of Texas at Austin saw these declines in minority enrollment despite combining the ten percent plan with an aggressive outreach plan, named the UT Longhorn Scholars program, "which recruited students from high schools with relatively large economically disadvantaged and minority student bodies."²⁵⁸

In a study looking at the percentage plan in Texas along with plans in California and Florida, research found that the plans in those states had "the least impact on the most competitive campuses, which [had] persisting losses in spite of many levels of efforts to make up for affirmative action."²⁵⁹ The study also found that the plans only "serve as a kind of shorthand for what university officials know are actually systems of openly or loosely veiled race-attentive outreach, recruitment, support programs, and financial aid that enhance the likelihood of application, admission, and enrollment for some students,"²⁶⁰ and without such supports, "the plans are more like empty shells, appearing to promise eligibility, admission, and enrollment for previously excluded groups but actually doing very little."²⁶¹

As the 2004 DOE report referenced in Part IV indicates, there are many alternatives to race-based affirmative action programs.²⁶² While this is not the proper forum to discuss the success rates of each of those alternatives, it is clear that two of the more popular alternatives, income-based affirmative action and percentage plans, which have been utilized by states with very successful public university systems, Texas, California,

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ CATHERINE L. HORN & STELLA M. FLORES, PERCENT PLANS IN COLLEGE ADMISSIONS: A COMPARATIVE ANALYSIS OF THREE STATES' EXPERIENCES 58 (2003).

²⁶⁰ *Id.*

²⁶¹ *Id.* at 59.

²⁶² See *supra* notes 186–92 and accompanying text.

and Florida, are not adequate replacements for race-based affirmative action programs. Therefore, at this point in time, race-based affirmative action programs are needed to ensure diverse student bodies in higher education.

VI. CONCLUSION

This Note has argued that the holding of *Parents Involved* will have a subtle, yet possibly significant effect on how college and university admissions departments use and develop race-based affirmative action policies. Although *Grutter* is still good law, the additional requirements suggested by the *Parents Involved* Court are not in conflict with the 2003 affirmative action cases. Therefore, while the Supreme Court has not adopted these requirements into the higher education setting, it is likely that, should a case come before the Court in the future, it will look to both *Grutter* and *Parents Involved* for guidance. In order to preempt a challenge to its affirmative action policies, admissions departments should structure their admissions criteria to the guidelines set by the Court in *Grutter* and *Parents Involved*.

The college admissions process should determine “which set of applicants, *considered individually and collectively*, will take fullest advantage of what the college has to offer, contribute most to the educational process in college, and be most successful in using what they have learned for the benefit of the larger society.”²⁶³ This goal of the admissions process is consistent with the U.S. Supreme Court’s view of diversity as a compelling governmental interest in higher education and the educational and developmental benefits of learning in a diverse environment. As a result, even if colleges and universities were to follow the requirements subtly mandated by *Parents Involved*, the current law on the use of affirmative action still allows for the admission of students who will “contribute most to the educational process in college”²⁶⁴ Since this optimal level has been achieved, the courts should refrain from implementing any further restrictions or requirements on the use of affirmative action by colleges and universities.

Perhaps Justice O’Connor was correct in her assertion that the need to consider an applicant’s race in the admissions process can be eliminated within the next couple of decades. However, it is clear that such a society does not currently exist.²⁶⁵ Until it is evident that students of all

²⁶³ WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 277 (1998).

²⁶⁴ *Id.*

²⁶⁵ Jose J. Soto, legislative chairman of the American Association for Affirmative Action, listed ten indicators that will lead him to argue for the end of affirmative action, equity, and diversity efforts in higher education. The indicators are as follows:

1) When women and minorities have attained their proportionate share of

backgrounds are on an “equal playing field,” in the best interests of justice and public policy, Justice O’Connor’s deadline must be ignored and the law toward affirmative action must maintain its current shape.

leadership and decision-making roles in our institutions of higher education, business and industry, and government.

2) When the voices and views of minorities and women are actively solicited, present, heard and accorded due respect and weight in the processes of hiring, promotion, merit and retention in higher education, business and industry, and government.

3) When policies, practices, attitudes and structures within our institutions, organizations and workplaces support the development and success of qualified minorities and women to the same extent that others are developed and supported.

4) When the cultural, social and interactional environments of our social institutions and places of work, play and education are welcoming, supportive and affirming of diverse “ways of thinking, being and doing.”

5) When the inclusion, representation and participation of minorities and women are not afterthoughts or add-ons, but up-front and expected considerations as processes, activities and events are planned, designed and developed.

6) When diversity “enriches” more than it “enrages.”

7) When diversity unites more than it divides.

8) When diversity is perceived and treated as an asset instead of a deficit.

9) When race and gender, as well as other statuses and characteristics, don’t matter.

10) When minorities and women no longer have to work twice as hard to be perceived as being “half-as-good.”

Jose J. Soto, *United States is Not Ready for End of Affirmative Action*, LINCOLN J. STAR, Apr. 21, 2008, at B4.