Brigham Young University Education and Law Journal

Volume 2005 | Issue 2 Article 7

Fall 3-2-2005

Confusing Means with Ends: How the Ninth Circuit Continues the Tradition of Mistaking Diversity as an End in *Parents Involved in Community Schools v. Seattle School District, No. 1*

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CONFUSING MEANS WITH ENDS: HOW THE NINTH CIRCUIT CONTINUES THE TRADITION OF MISTAKING DIVERSITY AS AN END IN *PARENTS INVOLVED IN COMMUNITY SCHOOLS V. SEATTLE SCHOOL DISTRICT, NO. 1*

I. INTRODUCTION

"A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[1] In his eloquent way, Justice Holmes recognized that language is imperfect and changeable. Despite the fluidity of words, the legal profession seeks stability in the law by using words to create lasting rules. Unfortunately, judges are often unable to create a clear, stable rule of law because of the fluctuating nature of words and the changing circumstances that shape their meaning.

Nowhere is this dilemma more prevalent than in cases involving race and diversity, especially in education. In 1978, Justice Powell determined in *Regents of the University of California v. Bakke*[2] that diversity in a university setting was a compelling state interest. Since then, many courts—including the Supreme Court itself—have struggled to define the compelling state interest and determine how diversity plays a role in such an interest. As epitomized in *Parents Involved in Community Schools v. Seattle School District No.1*,[3] cases addressing compelling state interests when using racial classifications have deteriorated from using diversity as a means to a more compelling end to making diversity an end in itself. This is detrimental because it bases law on jargon and distorts true goals. After a recent decision to rehear the case, *Parents* is now pending before an en banc court, and the Ninth Circuit once again has the opportunity

1. *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

2. 438 U.S. 265, 315 (1978).

3. 377 F.3d 949 (9th Cir. 2004) ("*Parents*"), *vacated, rehearing granted*, 395 F.3d 1168 (9th Cir. 2005). Note that this case has been addressed in federal court several times. *See Parents Involved in Community Schs. v. Seattle Sch. Dist., No. 1*, 137 F. Supp. 2d 1224 (W.D. Wash 2001) ("*Parents I*"), *rev'd*, 285 F.3d 1236 (9th Cir. 2002) ("*Parents II*"), *and rehearing granted*, 294 F.3d 10845 (9th Cir. 2002) ("*Parents III*").

establish a clear rule.[4]

Parents is the first federal circuit case involving race classifications in a school setting since the Supreme Court decisions in the University of Michigan cases—*Grutter v. Bollinger* and *Gratz v. Bollinger*.[5] It is an example of the analysis and decision that courts may reach in light of the Supreme Court's most recent decisions. By studying *Parents*, we can see the possible future of race classifications cases and the difficulties that may be encountered in these cases.

This Note begins in Part II with a description of the facts surrounding *Parents*. Part III describes the cases that create a background for *Parents*, detailing tests used and outcomes reached in the Supreme Court, Ninth Circuit, and other jurisdictions. Part IV discusses how the Ninth Circuit confuses diversity as an end and why this is a mistake. Finally, Part V provides a brief conclusion to this analysis.

II. FACTS IN PARENTS INVOLVED IN COMMUNITY SCHOOLS V. SEATTLE SCHOOL DISTRICT, NO. 1

Seattle School District, No. 1 (District) encompasses ten public high schools that "vary widely in quality."[6] Though the District was never legally segregated, without intervention of some kind "Seattle's racially imbalanced housing patterns" would result in de facto segregation.[7] Thus, rather than using a simple geographic system to determine what school a child will attend, the District created a system that allowed parents to rank high schools in order of preference. If the parents' first-choice school was full, the student would be placed in the second-choice school unless that was also full. This process continued until each child was assigned a school.[8]

However, because of the great disparity in the quality of the schools, some high schools were consistently over-requested, while others were consistently under-requested. For example, during the 2000–2001 school year, five of the schools were over-requested and five were under-requested.[9] In order to resolve this problem, the District employed a four-tier tiebreaker system. The first tiebreaker gave "preference to

4. *Parents Involved in Community Schs. v. Seattle Sch. Dist., No. 1*, 395 F.3d 1168 (9th Cir. 2005) (deciding to rehear the case by an en banc panel of eleven judges).

5. *Parents* was first decided on July 27, 2004—approximately one year after *Grutter*, 539 U.S. 306 (2003), and *Gratz*, 539 U.S. 244 (2003), which were both decided on June 23, 2003.

6. *Parents*, 377 F.3d at 954.

7. *Id.* at 954.

8. *Id.* at 955.

9. *Id.*

students with siblings already attending the requested school."[10] The second tiebreaker was based solely on race. If a school had "fewer than [thirty-one] percent or more than [fifty-one] percent white students, the tiebreaker would operate."[11] Thus, if a school had only twenty percent white students, the District would preferentially allow a white student into that school. But if a school had sixty percent white students, the District would then preferentially allow a non-white student into that school. If the race tiebreaker did not solve the problem of an over-requested school, then the District used a distance tiebreaker that gave preference to students living closer to the school. This tiebreaker usually resolved the problem and the final tiebreaker of a random lottery was rarely necessary.[12]

The plaintiff in this case, Parents Involved in Community Schools (PICS), is a group that formed in response to the District's use of the race tiebreaker. The group claimed that the District's use of race as a factor in determining enrollment violated state law, as well as the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.[13]

Both the District and PICS agreed on the general facts of the case and both parties moved for summary judgment before the federal district court.[14] The district court found for Seattle School District No. 1 on both state and federal claims.[15] PICS appealed to the Ninth Circuit, and on April 16, 2002 the circuit court reversed the district court's decision and enjoined the Seattle School District from using the race tiebreaker.[16] However, the Ninth Circuit granted rehearing on the request of the Seattle School District and then withdrew its previous decision and vacated its injunction.[17] At the same time, the Ninth Circuit certified to the Washington Supreme Court the question of whether the racial tiebreaker violated Washington state law.[18] The state supreme court heard arguments on this issue and determined that state law did not

10. *Id.*

11. *Id.* at 956 n. 6.

12. *Id.* at 956.

13. *Id.* The PICS's state law claim came under the Washington Civil Right Act, otherwise known as Initiative 200, which passed in 1998 and prohibited the government from giving preferential treatment based on race. *See* John Burbank, *Seattle Parents Exercise Right to Sue - and Throw Schools Into Turmoil*, The News Trib. (Tacoma, Wash.) (24, 2002) (available at http://www.eoionline.org/News-Education-TacomaNewsTribune042402.htm).

14. *Parents*, 377 F.3d at 957.

15. *See Parents I*, 137 F. Supp. 2d 1224, *rev'd*, *Parents*, 388 F.3d 949 .

16. *Parents*, 377 F.3d at 957.

17. *Parents*, 377 F.3d at 957 (citing *Parents III*, 294 F.3d at 1086).

18. *Parents*, 377 F.3d at 957 (citing *Parents III*, 294 F.3d at 1087).

prohibit the District from using the race tiebreaker "so long as it remains neutral on race and ethnicity and does not promote a less qualified minority applicant over a more qualified applicant."[19] The Ninth Circuit then heard argument on the federal questions. A week after the Ninth Circuit panel released their decision regarding the federal questions, the Seattle School District petitioned for an en banc hearing.[20] The petition was granted and the case will be reheard three to six months after February 1, 2005.[21]

Clearly, therefore, this case continues to be a long and complex battle. Not only is *Parents* the first circuit court case to be decided since the Supreme Court issued its rulings in the University of Michigan affirmative action cases, but the ultimate decision in this case remains uncertain as the parties wait for the Circuit to congregate en banc and rehear the case. As noted in the *Parents* dissent, the Supreme Court "has never decided a case involving the consideration of race in a voluntarily imposed school assignment program that is intended to promote integrated secondary schools."[22] Thus, while the Ninth Circuit followed the "guiding principles" of Supreme Court cases addressing similar issues,[23] it had no direct guidance from the Court in making this decision. As the first relevant circuit case to be decided since the Supreme Court issued its rulings in the University of Michigan affirmative action cases,[24] *Parents* potentially reflects how these Supreme Court cases may affect lower courts' analysis of future diversity cases.

III. BACKGROUND CASE LAW

It is well-established precedent that any government function that uses racial classifications must pass a strict scrutiny test for the function to be upheld as constitutional.[25] Strict scrutiny is divided into two issues. First, the government must show it has a compelling state interest in using the racial classification.[26] Second, the government must also show that its use of race is narrowly tailored to "'assur[e] that [the government]

19. *Parents*, 377 F.3d at 957 (citing *Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1*, 72 P.3d 151, 166 (Wash. 2003)).

20. *Court to Review 'Racial Tiebreakers': Full 9th Circuit Takes Seattle Student Assignment Case*, Seattle Post-Intelligencer B2 (Feb. 2, 2005).

21. *Id.*

22. *Parents*, 377 F.3d at 989 (Graber dissenting).

23. *Id.*

24. These cases, *Grutter*, 539 U.S. 306, and *Gratz*, 539 U.S. 244, will be discussed in more detail in the next section.

25. *See e.g. Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

26. *Id.*

is pursuing a goal important enough to warrant use of a highly suspect tool.'"[27] Although this seems to be a clear-cut and simple test, lower courts often struggle in its application. For this reason, a brief history of strict scrutiny cases illustrates not only why this test is actually quite complex, but provides the context within which *Parents* arose.

In 1978, the Supreme Court addressed the question of whether race classifications could be used in admission policies for higher education programs in *Regents of the University of California v. Bakke*.[28] The impact of this case on future decisions is significant, as shown by the fact that it has been cited over 3,000 times in the past twenty-six years.[29] Interestingly, the justices of the Supreme Court filed six different opinions for *Bakke* and, consequently, courts have disputed whether a majority even existed in the decision.[30] Most courts cite Justice Powell's opinion as the majority decision in the case.[31]

Justice Powell determined that while the University of California was likely attempting to achieve the compelling state interest of creating a diverse student body, its method in doing so was not narrowly tailored and thus failed the strict scrutiny test. Justice Powell stated more specifically that the goal of achieving a diverse student body "clearly is a constitutionally permissible goal for an institution of higher education."[32] However, Justice Powell also noted that "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids."[33] Justices Brennan, White, Marshall, and Blackmun in their concurring and dissenting opinion agreed that race classifications may be used by the government, but *only* "so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination."[34] After this case, many courts assumed that diversity, by itself, was a compelling state interest and that attempts to promote diversity would therefore pass strict scrutiny as long as the method of

27. *Grutter*, 539 U.S. at 326 (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)). Of course, the highly suspect tool being referred to is race classification.

28. 438 U.S. 265.

29. As shown by Shepardizing the case on LexisNexis, it is cited in nearly 3,000 law reviews, over 330 cases, and over 80 other sources (last Shepardized on October 4, 2004).

30. *See e.g. S. Fla. Chapter of the Associated Gen. Contractors of Am., Inc. v. Metro. Dade County*, 723 F2d. 846, 850 (11th Cir. 1984) ("*Bakke* . . . did not produce a majority opinion.").

31. *See e.g. Uzzell v. Friday*, 591 F.2d 997, 998 (4th Cir. 1979) (citing Justice Powell as the writer of the majority opinion).

32. *Bakke*, 438 U.S. at 311–312.

33. *Id.* at 307 (citations omitted).

34. *Id.* at 326 n. 1 (Brennn, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part).

achieving this goal did not employ race quotas.[35]

However, after the *Bakke* decision, members of the Supreme Court determined in several cases that diversity alone is not a compelling state interest. In *Metro Broadcasting, Inc. v. FCC*,[36] four justices of the Supreme Court explicitly stated that "[m]odern equal protection doctrine has recognized only one such [compelling state] interest: remedying the effects of racial discrimination."[37] Likewise, the Court held in *Freeman v. Pitts*,[38] a case addressing court-ordered school desegregation, that "[r]acial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation."[39]

In cases previous to *Parents*, the Ninth Circuit followed these Supreme Court cases, holding that diversity alone is not a compelling state interest. In *Higgins v. Vallejo*, the court determined that "a government agency's [diversity] plan is valid only if the agency had a compelling interest in remedying past discrimination."[40] In the 1991 case *Coral Construction Co. v. King*, the court held that "[r]ace-based classifications must be reserved strictly for remedial settings."[41] In the more recent case, *Ho v. San Francisco Unified School District*, the Ninth Circuit held that race "may still be employed if its use is found to be necessary as the way of repairing injuries inflicted on persons because of race."[42]

Circuit courts have followed the above Supreme Court decision in considering whether race or diversity is a compelling state interest. The Tenth Circuit determined diversity alone is not a compelling interest. In *Cunico v. Pueblo School District No. 60*, the court stated that the "purpose of race-conscious affirmative action must be to remedy the effects of past discrimination against a disadvantaged group that itself has been the victim of discrimination."[43] Likewise, the Fifth Circuit held, in *Cavalier v. Caddo Parish School Board*, that "[r]emedying the present effects of past discrimination is a compelling interest that in particular

35. *See e.g. Hopwood v. Texas*, 236 F.3d 256, 274–75 (5th Cir. 2000).

36. 497 U.S. 547 (1990), *overruled, Adarand Constructors, Inc.*, 515 U.S. 200, 225–27 (overruling *Metro Broadcasting* on grounds other than those discussed here).

37. *Id.* at 612 (O'Connor, J., Rehnquist, C.J., Scalia & Kennedy, JJ., dissenting).

38. 503 U.S. 467 (1992).

39. *Id.* at 494 (noting that "[o]nce the racial imbalance due to the *de jure* violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors." *Id.* (citation omitted)).

40. 823 F.2d 351, 358 (9th Cir. 1987) (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 269 (1986)).

41. 941 F.2d 910, 920 (9th Cir. 1991) (citing *Richmond*, 488 U.S. at 493).

42. 147 F.3d 854, 864 (9th Cir. 1998) (citing *Freeman*, 503 U.S. at 494).

43. 917 F.2d 431, 437 (citing *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979); *Wygant*, 476 U.S. at 275; and *Bakke*, 438 U.S. at 300–01).

circumstances may justify appropriate use of certain racial classifications."[44] The court specifically noted that the parties must show an interest beyond merely achieving a racial balance in order to satisfy the strict scrutiny test.[45]

In the recent University of Michigan cases, the Supreme Court examined the practices of the university's law school admissions program, in *Grutter*,[46] and its undergraduate admissions policy, in *Gratz*.[47] In both *Grutter* and *Gratz*, the University of Michigan used race as a factor in considering a candidate for admission. The Court made an important distinction between the two cases in the "narrowly tailored" prong of the strict scrutiny test: the law school used race as one of many "soft" factors to consider in admissions,[48] while the undergraduate program used a point system that awarded extra points for members of underrepresented minority groups.[49] The Supreme Court upheld the law school's program but held the undergraduate admissions program unconstitutional.[50]

In analyzing the "compelling interest" prong of strict scrutiny, the *Grutter* Court referred to *Bakke*. The Court stated that "[c]ourts . . . have struggled to discern whether Justice Powell's diversity rationale [in *Bakke*] is binding precedent. The Court finds it unnecessary to decide this issue because the Court endorses Justice Powell's view that *student body diversity is a compelling state interest in the context of university admissions*."[51] Despite previous cases stating the contrary, the Court claimed that "we have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination."[52]

IV. ANALYSIS

After examining the above line of cases it is easy to understand why there is little consistency in strict scrutiny cases. The Supreme Court, the Court whose decisions set precedent for all other courts in the nation, has

44. 403 F.3d 246, 250 (5th Cir. 2005).

45. Id. at 260 ("Racial balance is not to be achieved for its own sake. . . . Once the racial imbalance due to the *de jure* violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors.") (quoting *Freeman v. Pitts*, 503 U.S. 467, 493 (1992)).

46. 539 U.S. 306.

47. 539 U.S. 244.

48. *Grutter*, 539 U.S. at 316.

49. *Gratz*, 539 U.S. at 254–56.

50. *Grutter*, 539 U.S. at 343; *Gratz*, 539 U.S. at 275–76.

51. *Grutter*, 156 L. Ed. 2d 304, 320–21 (emphasis added).

52. *Grutter*, 539 U.S. at 328.

often faltered in its analysis of the use of race. At times, the Court held that racial diversity as a state goal may only be used to correct past discrimination, but at other times, as recently as the *Gratz* and *Grutter* cases of 2003, it held that the goal of racial diversity may have the singular purpose of achieving diversity. The Ninth Circuit, in *Parents*, continued the trend of mistaking diversity as an end in itself by allowing diversity to serve as a compelling state interest.

In the context of *Parents*, it is valuable to analyze the difference between what the government actor (Seattle School District No. 1) considers a compelling state interest and what the circuit court's majority and dissent considered a compelling state interest. Then finally, with these views in mind, this analysis will examine why diversity should not be an end, but rather a means to a higher end.

A. What Is Compelling?

1. What the Seattle School District Sees as Compelling

In seeking to justify the use of race classification, the Seattle School District provided the court with an exhaustive list of what the District deemed compelling state interests. These interests included:

> [T]he educational benefits of attending a racially and ethnically diverse school"; "integration of schools which . . . would otherwise tend to become racially isolated"; "ensuring that public institutions are open and available to all segments of American society"; "alleviating de facto segregation"; "increasing racial and cultural understanding"; "avoiding racial isolation"; fostering "cross-racial friendships"; and "reduc[ing] prejudice and increas[ing] understanding of cultural differences.[53]

Many of these interests overlap and more than a few may have been written for the sole purpose of embracing a statement that would help the District's plan pass strict scrutiny. The "Statement Reaffirming [the] Diversity Rationale" written by the District's School Board is more telling of what the District hoped to achieve. The Statement reads in part:

> Providing students the opportunity to attend schools with diverse student enrollment also has inherent educational value. . . . Diversity brings different viewpoints and experiences to classroom discussions and thereby enhances the educational process. . . .
>
> The District provides these opportunities for students to attend a racially and ethnically diverse school . . . because it believes that providing a diverse learning environment is educationally beneficial for

53. *Parents*, 377 F.3d at 961.

all students.[54]

This statement focuses on the goal of providing a higher quality education through allowing interaction with a more diverse peer group. Thus, the real goal of the District is not simply to allow a white child to see a black child on a regular basis and in closer proximity. The goal behind the interaction is to provide greater education for students of every race.

The District is likely correct in asserting that education may certainly be enhanced by a more diverse environment. It is a common conception in the United States that it is important to have students of different races in the same classroom.[55] The educational value, however, is not derived simply from having diversity in the classroom. The value is found in both allowing and even creating interaction that can be mind-opening and in allowing access to good schools regardless of the race of the child. For example, studies show that the majority of state schools with high minority enrollment receive less funding than schools with low minority enrollment.[56] Thus, if the goal is to allow children to receive a good education, then creating schools with mixed-race enrollment may be one method of achieving this goal because diversifying schools may help increase the funding for a previously under-funded school.

2. What the Parents Majority Saw as Compelling

The majority in *Parents* adopted the "diversity rationale" provided by the Supreme Court in *Grutter*.[57] The *Parents* majority explained that the benefits of diversity "are as compelling in the high school context as they are in higher education."[58] These benefits include "cross-racial understanding," "break[ing] down of racial stereotypes," and livelier classroom discussions.[59] In short, the majority recognized the "internal educational and external societal benefits [that] flow from the presence of racial and ethnic diversity in educational institutions."[60]

This language again illustrates the Ninth Circuit's misunderstanding

54. *Id.*

55. A study by Scripps Survey Research Center in February, 2004 found that sixty percent of Americans polled believe it is "very important" and another twenty-eight percent believe it is "somewhat important" that students of different races are in class together. Kenneth Jost, *School Desegregation: How Can the Promise of Equal Education Be Fulfilled?* 14 The CQ Researcher 345, 358 (April 23, 2004).

56. *Id.* at 348. (citing Kevin Carey, *The Funding Gap 2004: Many States Still Shortchange Low-Income and Minority Students*, The Education Trust, (Oct. 19, 2003)).

57. *Parents*, 377 F.3d at 962–64.

58. *Parents*, 377 F.3d at 964.

59. *Id.* at 963 (citing *Grutter*, 539 U.S. at 330).

60. *Id.* at 964.

of what is a compelling interest and what is a means to reach that interest. The interest, as stated by the majority, is in benefits such as increased understanding, destruction of stereotypes, and enlightened discussions.[61] Racial and ethnic diversity alone is not the interest, but rather represents one method of meeting the real interests. Perhaps in some cases this may be the only method of reaching such goals. Once again however, the court failed to distinguish between the means and the end—and by doing so the majority lacks clarity and misses the real goals.

3. What the Parents Dissent Saw as Compelling

The dissent in *Parents*, authored by Circuit Judge Graber, believed that the District had a "compelling interest in the *educational benefits* of racial diversity in secondary education" and "in reducing racial isolation and ameliorating de facto segregation."[62] The dissent did not simply state that diversity is a compelling interest. Rather, the dissent clearly defined the compelling interests that may be met through the use of diversity. The dissent recognized the importance of "identify[ing] precisely the governmental interests—the ends—to which the government's use of race must be fitted."[63]

Further, the dissent explained that while the majority relied on *Grutter* when claiming that diversity is a compelling interest, the "compelling interest that the [Supreme] Court recognized in *Grutter* is not 'diversity' per se but, rather, promotion of the specific educational and societal benefits that flow *from* diversity."[64] Likewise, Justices Thomas and Scalia, in their minority opinion in *Grutter*, agreed that "[a]ttaining 'diversity,' whatever it means, is the mechanism by which the . . . [s]chool obtains educational benefits, not an end of itself."[65] The dissent in *Parents* recognized the important distinction the majority overlooked: diversity is valuable when used as a means to a higher end, but is meaningless when used as an end unto itself.

B. Why Diversity Is a Means, Not an End

1. The Ill Effects of Confusing Ends with Means

A means is a "method, a course of action, or an instrument by which

61. *Id.* at 963

62. *Parents*, 377 F.3d at 991, 993 (Graber dissenting) (emphasis added).

63. *Id.* at 990.

64. *Id.*

65. *Grutter*, 539 U.S. at 354–55 (Thomas & Scalia, JJ., concurring in part and dissenting in part).

an act can be accomplished or an end achieved."[66] An end is a result, outcome, or goal.[67] The problems caused by confusing a means with an end include: (1) using meaningless jargon as a rule of law, (2) creating a circumstantial application of a rule of law, and (3) distorting true and worthy goals.

a. The Meaningless Jargon Problem

First, allowing diversity to serve as a compelling state interest allows meaningless jargon to become a rule of law.[68] Throughout *Parents*, the Ninth Circuit hailed diversity as a legitimate state goal; however, the court also recognized that the term "diversity" is often considered "'amorphous,' 'abstract,' 'malleable,' and 'ill-defined.'"[69] Justice Thomas described the problem with the term 'diversity' in his opinion in *Grutter*: "'[D]iversity,' for all of its devotees, is more a fashionable catchphrase than it is a useful term, especially when something as serious as racial discrimination is at issue.... I refer to [an interest in diversity] as an 'aesthetic.'"[70]

When a court creates a rule of law, it is essential that it is defined with "precision" in order to avoid ambiguity.[71] Diversity, a loose term, has no one meaning. For example, in Webster's 1913 Dictionary, diversity is defined first as "A state of difference; dissimilitude; unlikeness."[72] However, in a dictionary that is much more modern and includes many colloquial definitions, diversity is defined as "variety or multiformity."[73] These definitions show a subtle, but meaningful, shift in society's meaning of diversity. In 1913, the definition emphasized the differences caused by diversity. Today, the definition embraces diversity

66. *The American Heritage Dictionary of the English Language* 1086 (4th ed., Houghton Mifflin 2000).

67. *Id.* at 589.

68. As one lawyer and educator commented on diversity: "Not many labels have been productive of more confused thinking in our time than this one [diversity].... Diversity for its own sake is meaningless and can clearly be shown to lead to unacceptable results." Dallin H. Oaks, Address, *Weightier Matters* (Brigham Young U., Provo, Utah, Feb. 9, 1999) in Jan. 2001 Ensign 13 (also available at http://speeches.byu.edu/htmlfiles/OaksW99.html).

69. *Parents*, 377 F.3d at 962 (citations omitted).

70. *Grutter*, 539 U.S. at 354 n. 3 (Thomas & Scalia, JJ., concurring in part and dissenting in part).

71. *See id.* at 354 (Thomas & Scalia, JJ., concurring in part and dissenting in part). Here Justice Thomas explains his attempt to "define with precision the interest being asserted by the Law School." *Id.*

72. *Webster's 1913 Dictionary*, http://www.webster-dictionary.org/definition/diversity (accessed Mar. 5, 2005).

73. *Dictionary.com*, http://dictionary.reference.com/search?q=diversity (accessed Mar. 5, 2005).

with a more positive focus on the creation of variations.

Judicial definitions of diversity have also shifted over time. In *Bakke*, Justice Powell described diversity as a factor in creating a "heterogeneous student body."[74] In recognizing the term "diversity" as ambiguous, the majority in *Parents* noted an attempt to clarify the term by describing it as "an educational institution's 'enroll[ment of] a critical mass of minority students.'"[75] These two ideas of diversity differ. Justice Powell attempted to avoid the usual association of diversity with race. The court in *Parents*, however, clearly noted that diversity often refers to classification by race.

An interest that is compelling enough to justify the use of racial classifications must constitute more than meaningless jargon. The Ninth Circuit in *Parents* had an opportunity to clearly define what kind of interest was sufficiently compelling. The court failed to do so. For example, the court listed "diverse interactions," "educational diversity," and "racial and ethnic diversity" as interests.[76] Each of these phrases describes a unique interest, yet the court essentially used them interchangeably. Further, the court provided no explanation as to what these interests entail. It seems the court was satisfied to simply repeat jargon rather than create a clear rule of law. With the pending en banc hearing, the Ninth Circuit has the opportunity to correct these mistakes and avoid adding problematic jargon to this important area of law.

b. The Circumstantial Application Problem

Second, because diversity is subject to a variety of definitions, when diversity is used as an end alone, it allows for circumstantial application of the law. This is particularly devastating in cases involving race because it has long been held that race is the most suspect of all classifications.[77] The potential for circumstantial application of the diversity rationale is especially evident in the *Parents* case. *Parents* arose in a high school setting, while many other cases addressing the diversity rationale arose in higher education settings. Because of the ambiguity of the term diversity, it was easy for the District to claim that the diversity rationale, as

74. *Bakke*, 438 U.S. at 314.

75. *Parents*, 377 F.3d at 963 (citing *Grutter*, 539 U.S. at 330).

76. *Id.* at 964.

77. Justice Thomas explained that, "The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all." *Grutter*, 539 U.S at 353 (Thomas & Scalia, JJ., concurring in part and dissenting in part).

employed in other cases, simply did not apply in a high school setting.[78] A rule of law should be more stable and should not be subject to such circumstantial application.

The circumstantial nature of diversity as an end is embodied in the policy behind the District's racial tiebreaker: "Diversity brings different viewpoints and experiences to classroom discussions and thereby enhances the educational process."[79] This is a contextual argument. The court discusses the argument that there is value in students having "different-looking peers" in a school setting.[80] The supposed value here is in preparing children for a diverse world. Is this same argument valid in a work setting? Once the children are grown and are in the workplace, does a justification exist for seeking diversity? Will the Ninth Circuit's response change simply because the setting has changed?

One valid measure of the effectiveness of a rule of law is its clarity and its applicability to a variety of contexts. By this measure the rule that diversity is a compelling state interest, as first established by Justice Powell in *Bakke* and affirmed by the Ninth Circuit in *Parents*, is not effective. The application of the rule that diversity is a compelling state interest is convoluted even within decisions—such as *Parents*—that uphold the rule. For example, the majority in *Parents* first explained that the diversity rationale has been sanctioned by the Supreme Court and that the Ninth Circuit will thus sanction it as well.[81] However, the majority went on to state that the actions of the District "represent[ ] a stubborn adherence to the use of race for race's sake, with the effect that some non-preferred student applicants will be displaced solely because of their racial and ethnic identities—to no benefit at all."[82] Thus, one must question what rule the Ninth Circuit was really upholding in *Parents*. Even as the court purported to allow diversity for diversity's sake as a compelling state interest, it also claimed that the state cannot use race for race's sake. The difference, if any, between a state's interest in diversity and its interest in race is ambiguous and open to interpretation that would lead to vastly different results in different situations and by different courts.

78. The District asserted that, "'[T]he Michigan decisions have meaning only in the context of [college] admissions.... [The] argument that race may be considered [only] in a holistic individualized review as one factor among many contributing to diversity is not applicable to [high schools].'" *Parents*, 377 F.3d at 976.

79. *Id.* at 961 (quoting the School Board's "Statement Reaffirming Diversity Rationale").

80. *Id.* at 986 (suggesting this argument is the dissent's characterization of the District's argument).

81. *Id.* at 962.

82. *Id.* at 975.

c. The Distortion Problem

Third, the use of diversity as an end rather than a mean distorts the more worthy and important compelling state interests. Holding that diversity is a compelling end puts the complete focus on racial and ethnic differences. With all of the focus on these differences, any other important consideration is distorted. This principle is best illustrated by examining the methods of photography. If one focuses a camera on one object alone, all other objects become a blur in the background. In order to see an entire scene clearly, one must step back from the single object and allow the camera to focus on more elements. Likewise, one must step back from a singular focus on diversity in order to see other elements that may be of equal or even greater importance than diversity alone.

This distortion is seen in *Smith v. University of Washington* as the Ninth Circuit contradicted itself by treating diversity as both a means and an end.[83] The court first stated that diversity alone is a compelling state interest.[84] Later in the opinion, however, the court stated that the interest lies in the "educational benefits that flow from a diverse student body."[85] This treatment creates confusion as the court's focus shifts from the true goal to what is confused for a goal (but is actually a means to a different end). Confusing this point leads the court to focus on diversity rather than the educational benefits that are sought. The goal is out of focus. Other means to reaching this goal are likewise out of focus.

This confusion and lack of proper focus does not mean the court was completely wrong. Research shows that diversity has positive educational effects.[86] Empirical evidence "consistently demonstrates that a diverse student body adds value to the educational process."[87] However, this does not suggest that diversity is the only way to achieve such value or that only one type of diversity adds value. Therefore, courts must be clear

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83. *Smith*, 392 F.3d 367, 369, 371 (9th Cir. 2004).

84. *Id.* at 369–70.

85. *Id.* at 371.

86. *See* Jeffrey F. Milem, *The Educational Benefits of Diversity: Evidence from Multiple Sectors*, in *Compelling Interest: Examining the Evidence on Racial Dynamics in Colleges and Universities* 126, 126–30 (Mitchell J. Chang et al. eds., Stanford U. Press 2003). This text addresses diversity within university settings; however, the analysis can be applied to high school education as well.

87. Daria Witt, Mitchell J. Chang & Kenji Hakuta, *Introduction*, in *Compelling Interest: Examining the Evidence on Racial Dynamics in Colleges and Universities* 1, 2; *but see* Thomas E. Wood & Malcolm J. Sherman, *Race and Higher Education: Why Justice Powell's Diversity Rationale for Racial Preferences in Higher Education Must Be Rejected* 65, http://www.nas.org/rhe.pdf (accessed Mar. 9, 2005) (quoting California Association of Scholars, *Accreditation and Diversity: A Critique of WASC's "Draft Report on Diversity"* 30 (1993)) ("In a number of crucial areas, the study fails to provide the expected evidence that diversity and excellence are positively correlated, and in some areas it actually provides evidence that they may be negatively correlated.").

on this point: states have a compelling interest in seeking a more valuable educational process. Diversity for its own sake is not a compelling interest, but the means to achieving educational value.

2. Why Diversity Should Be Viewed as a Means

Quite simply, no purpose is served by diversity alone. Diversity for diversity's sake is futile—and may even be harmful. Even courts that hold diversity is a compelling state interest haverecognized this.[88] Diversity must be viewed as a means in order to recognize important goals and prevent tunnel vision when creating solutions.

First, courts must recognize truly compelling state interests, or end goals, in order to solve problems in public education. For example, as previously noted, there is an incredible disparity in funding for public high schools.[89] School districts with a high percentage of minority students often receive less funding than schools with a high percentage of white students.[90] If courts were to address this problem, the appropriate goal would be to increase educational opportunities through more equal funding. However, if a court viewed diversity as the only useful compelling interest, the goal of creating equal funding for adequate education would be lost in the search for diversity alone.

Therefore, focusing on racial diversity alone may also create tunnel vision that does not explore other possible means to reaching a goal or consider other types of diversity that may be valuable. Again, if the goal is to provide equal funding, one potential method to reach this goal may be through increased diversity. However, because most public schools are funded through property tax, schools may need increased economic diversity, rather than racial diversity, in order to reach a goal of equal funding. Thus, by acknowledging the real goal of equal funding, one may better understand the best method to obtain this goal.

In another situation, the goal may be to enhance students' educational experiences. Diversity may be a means to reaching this goal. However, diversity may not be the only method of enhancing education. New curriculum, better equipment, or better teachers may be equal or even better methods of enhancing education. In any case, distinguishing the actual goal from potential methods of achieving that goal also enables one to discover more possible solutions.

One lawyer and educator describes the harm that can result from

88. The majority in *Parents* chastised the District's program for using "race for race's sake." *Parents*, 377 F.3d at 975. At the same time, however, the majority allows diversity for diversity's sake to pass as a compelling state interest. *Id.* at 964.

89. Jost, *supra* n. 53, at 3.

90. *Id.* This funding gap can be as large as $1,000 per student. *Id.*

focusing solely on diversity without distinguishing the true goals from the methods employed to reach those goals:

> Diversity for its own sake is meaningless and can clearly be shown to lead to unacceptable results. For example, if diversity is the underlying goal for a neighborhood, does this mean we should seek to assure that the neighborhood includes thieves and pedophiles, slaughterhouses and water hazards? Diversity can be a good *method* to achieve some long-term goal, but public policy discussions need to get beyond the slogan to identify the goal, to specify the proposed diversity, and to explain how this kind of diversity will help to achieve the agreed-upon goal.[91]

The pursuit of diversity for its own sake is meaningless. Courts must look beyond diversity to discover meaningful goals and find solutions that best meet such goals.

V. CONCLUSION

"In absence of clearly defined goals, we become strangely loyal to performing acts of . . . trivia."[92] In *Parents*, the Ninth Circuit was given the opportunity to delineate what goal constitutes a compelling state interest when a school district seeks to increase the diversity of its high schools. Rather than recognizing the real educational goals of the District, the court identified diversity alone as a compelling state interest, thus trivializing the interest. In doing so, the Ninth Circuit continued the trend of confusing ends with means. Fortunately, this case will soon be reheard before the court in an en banc hearing, and the Ninth Circuit will have the opportunity to correct its course. To avoid repeating its mistake, the Ninth Circuit should unambiguously recognize that while diversity may be a *method* of reaching important social and educational goals, diversity alone is not a sufficient goal.

Maria Funk Miles

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91. Oaks, *supra* n. 69 (emphasis added).

92. *The Quotations Page*, http://www.quotationspage.com/quote/2099.html (accessed December 30, 2004).