

The Case for the New Compelling Government Interest: Improving Educational Outcomes

INTRODUCTION

Over the past decades, the federal courts have overturned several school systems' policies that attempt to integrate and diversify their student bodies by using race as a factor in admissions or class placement.¹ Even those programs that have not been overturned often have been heavily scrutinized.² These decisions have left universities, colleges, and elementary and secondary schools scrapping for ways to justify their race-conscious and affirmative action programs.³ Since the Supreme Court has come to view programs that specifically benefit racial minorities in the same way that it views practices that intentionally discriminate against minorities,⁴ educators often cannot find any justification other than that of remedying past discrimination.⁵ If educators intend to continue promoting

1. See, e.g., *Univ. of Cal. Bd. of Regents v. Bakke*, 438 U.S. 265, 318–20 (1978); *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234, 1237 (11th Cir. 2001); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 701 (4th Cir. 1999); *Wessmann v. Gittens*, 160 F.3d 790, 792 (1st Cir. 1998); *Hopwood v. Texas*, 78 F.3d 932, 934 (5th Cir. 1996); *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 879 (E.D. Mich. 2001). See generally GARY ORFIELD & JOHN T. YUN, RESEGREGATION IN AMERICAN SCHOOLS 18 (1999) (recognizing the shift in federal courts' policy towards such programs).

2. See, e.g., *Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 745 (2d Cir. 2000); *Hunter ex rel. Brandt v. Regents of the Univ. of Cal.*, 190 F.3d 1061, 1063 (9th Cir. 1999); *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 819–30 (E.D. Mich. 2000).

3. See Mark R. Killenbeck, *Pushing Things Up to Their First Principles: Reflections on the Value of Affirmative Action*, 87 CAL. L. REV. 1299, 1319–20 (1999) (documenting the responses of university administrators to the new challenges of obtaining a racially diverse student body); Kira M. Feeny, Comment, *Race-Conscious Admissions Programs in Higher Education: It's Not a Black and White Issue*, 25 U. DAYTON L. REV. 109, 110 (1999) (discussing the ongoing legal attacks on race-based admissions programs); Harriet Chiang, *Affirmative Action Setback: State Supreme Court Rules Prop. 209 Prohibits Minority-based Outreach*, S.F. CHRON., Dec. 1, 2000, at A1 (discussing the University of California's scramble to determine whether a California Supreme Court decision would end their newest version of affirmative action); Joel E. Sannes, *Circuit Court Scrap—Affirmative Action Path Unclear to Law Schools*, ARIZONA ATT'Y, Oct. 2001, at 23–24 (discussing the price law schools are paying to defend their admissions programs).

4. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 223–30 (1995); see also ORFIELD & YUN, *supra* note 1, at 17 (stating that the Supreme Court believes discrimination has largely ended, thus causing it to take a new stance on race).

5. See, e.g., *Hopwood* 78 F.3d at 944. In *Hopwood*, the Fifth Circuit writes: "Supreme Court decisions regarding education state that non-remedial state interests will never justify racial classifications." *Id.*; see also *Johnson v. Bd. of Regents of the Univ. of Ga.*, 106 F. Supp. 2d 1362, 1371–72 (S.D. Ga. 2000) (finding the university's concept of diversity to be too "amorphous" and based on speculation); MORGAN APPEL ET AL., ASSOCIATION OF AMERICAN COLLEGES AND UNIVERSITIES, THE IMPACT OF DIVERSITY ON STUDENTS: A PRELIMINARY

racial diversity through their admissions policies, they must reconceptualize their motives and actions. No longer is integration for the sake of integration a legitimate government objective to pursue.⁶ Presumably, the best objective an educational institution could pursue, by definition, is improving the education that all students receive, regardless of race. A growing body of research shows that racial diversity improves educational outcomes in several distinct ways.⁷ Relying on this research, educators should change their agenda from fostering diversity for its own sake to improving educational outcomes through the means of diversity.⁸ This Comment argues that such a shift would be justified and would create an objective that meets the constitutional compelling interest standard.

This Comment focuses on addressing why these systems have had such a difficult time justifying their programs, and how they might succeed.⁹ First, this Comment details the legal history of racial classifications and diversity in education, laying out the Supreme Court's standards¹⁰ and the lower courts' interpretation and application of these standards.¹¹ Second, this Comment explores the educational research that has been developing during the disposition of these cases, but which courts have yet to consider adequately.¹² Finally, this Comment analyzes how this new research fits into the current legal framework, and suggests that proper application of the new research may allow certain racial classifications to withstand judicial scrutiny and lead to different outcomes.¹³

I. CONTROLLING SUPREME COURT PRECEDENT

The Equal Protection Clause of the Fourteenth Amendment and the

REVIEW OF THE RESEARCH LITERATURE 2 (1996) (stating that educators currently do not have data or knowledge about the effects of diversity and therefore have nothing with which to justify their programs).

6. *Bakke*, 438 U.S. at 307 (holding that the over-reliance on race for its own sake, without any specific justification, was unconstitutional). Later Supreme Court jurisprudence made it clear that amorphous governmental interests such as integration are not by themselves sufficient to justify racial classifications. See *Adarand*, 515 U.S. at 235 (requiring that all uses of race be supported by compelling government interests and be narrowly tailored).

7. See *infra* notes 151–56, 179–283 and accompanying text.

8. *Johnson*, 263 F.3d at 1253. The Court in *Johnson* makes it clear that pursuing diversity for its own sake would be constitutionally insufficient. *Id.* at 1253 n.18. Rather, the focus should be on providing a “superior education.” *Id.* at 1253; see also Jonathan R. Alger, *The Educational Value of Diversity*, ACADEME, Jan.–Feb. 1997, at 20, 21 (stating that universities have gotten themselves into trouble by making diversity an end in itself). Alger writes that universities must now “fully and forcefully” articulate the educational benefits of diversity. *Id.*

9. For a discussion of why this is important, see APPEL ET AL., *supra* note 5, at 2 (stating that educators currently do not have the research evidence necessary to justify their programs).

10. See *infra* notes 14–65 and accompanying text.

11. See *infra* notes 66–150 and accompanying text.

12. See *infra* notes 151–285 and accompanying text.

13. See *infra* notes 286–348 and accompanying text.

Due Process Clauses of the Fifth Amendment govern state and federally imposed racial classifications.¹⁴ Applying these clauses, the Supreme Court has held that race-based classifications are “inherently suspect.”¹⁵ Thus, the Court subjects race-based classifications to “strict scrutiny,” requiring the government actor to show: 1) a compelling interest to justify the use of the classification and 2) means that are narrowly tailored to this interest.¹⁶ Since deciding *City of Richmond v. J.A. Croson*,¹⁷ the Supreme Court has required states to have a compelling interest that justifies the use of a racial classification,¹⁸ regardless of whether the racial classification is benign¹⁹ or invidious.²⁰ In the educational context, a school’s interest in remedying *de jure* segregation or racial discrimination will generally suffice as a compelling interest.²¹ To show a compelling interest, the schools need only demonstrate that they are remedying their own well-documented discrimination.²² For schools that are confronted with such segregation or discrimination, the most difficult problem is not showing a compelling interest, but rather showing that the means they have used to eliminate segregation or discrimination are not overly broad under a narrowly tailored analysis.²³ However, for those schools that cannot

14. See generally *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (applying equal protection and due process analysis under the Fifth and Fourteenth Amendments to a program that benefited racial minorities in selecting contractors for federal construction projects.)

15. *Univ. of Cal. Bd. of Regents v. Bakke*, 438 U.S. 265, 291 (1978); see also *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964).

16. *Adarand*, 515 U.S. at 235.

17. 488 U.S. 469 (1988).

18. *Adarand*, 515 U.S. at 224–30 (stating that “any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny”).

19. “Benign” racial classifications generally refer to those used in affirmative action programs to benefit a historically disadvantaged minority. See *id.* at 225 (discussing benign discrimination).

20. “Invidious” racial classifications are those that have been used to discriminate against and disadvantage minorities. *Id.* at 240–41 (Thomas, J., concurring).

21. Compliance with judicial desegregation orders that were handed down during the 1960’s and 70’s generally still serves as a compelling interest. See *Missouri v. Jenkins*, 515 U.S. 70, 137 (1995) (discussing court orders to desegregate and how they relate to compelling interests).

22. See *id.* at 112 (O’Connor, J., concurring) (noting that state actors can enact remedial programs “to further the compelling governmental interest in redressing the effects of past discrimination”).

23. See *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 701 (4th Cir. 1999) (assuming, but not holding, that diversity is a compelling interest, but invalidating the school’s policy because it was not narrowly tailored). The “narrowly tailored” analysis requires a tight congruence between the compelling interest and the means used to achieve it. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000) (discussing the need for congruence and proportionality under Fourteenth Amendment). *Adarand* brought the seriousness of this issue to the forefront when it demanded strict scrutiny of benign racial classifications, thus requiring educational programs that were narrow in scope. See *Adarand*, 515 U.S. at 226 (holding that all racial classifications, including benign classifications, are subject to strict scrutiny).

document racial discrimination, the first obstacle is showing a compelling interest.²⁴ Although it has never held so, in some narrow instances the Supreme Court has suggested that diversity is a compelling interest that might be relied on by schools that cannot document that they are remedying discrimination.²⁵ As a result of the Supreme Court's ambiguous stance towards diversity, the circuit courts are split.²⁶ The primary case serving as the locus of confusion is *University of California Regents v. Bakke*.²⁷

Bakke was the first Supreme Court case to specifically question an affirmative action program in the educational context. In *Bakke*, the University of California at Davis Medical School operated an admissions program that reserved spots for minority applicants.²⁸ Bakke, a white student, applied to the medical school twice and was denied admission both times.²⁹ His grade point average and test scores, however, were significantly higher than those of several minority students who were admitted.³⁰ As a result, Bakke claimed that the program was racially discriminatory. The majority of the Court agreed and ruled in his favor.³¹ The Court held that setting aside a certain number or percentage of seats for minority applicants was an unconstitutional use of race that amounted to

24. See, e.g., *Brewer v. West Irondequoit Cent. Sch.*, 212 F.3d 738, 746–47 (2d Cir. 2000).

25. See *Univ. of Cal. Bd. of Regents v. Bakke*, 438 U.S. 265, 311–15 (1978). Justice Powell argued that diversity was a compelling interest, though no other Justice in the majority supported this suggestion. *Id.* Outside the educational context, the Court explicitly recognized diversity as a justification for the use of racial classifications. See *Metro Broad., Inc. v. Fed. Communications Comm'n*, 497 U.S. 547, 564–65 (1990) (upholding FCC minority preference policies as substantially related to an important government objective). However, the diversity rationale was only subjected to an intermediate level of scrutiny. See *id.* (declining to apply strict scrutiny because the Court had yet to hold that strict scrutiny applies to benign racial classifications).

26. Compare *Tuttle*, 195 F.3d at 701 (assuming, but not holding, that diversity is a compelling interest), with *Hunter ex rel. Brandt v. Regents of the Univ. of Cal.*, 190 F.3d 1061, 1063–65 (9th Cir. 1999) (accepting diversity as a compelling interest in the context of operating a research-oriented school dedicated to improving the quality of education in urban public schools), and *Wessmann v. Gittens*, 160 F.3d 790, 796–800 (1st Cir. 1998) (rejecting a school's pursuit of diversity through "racial balancing"), and *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996) (rejecting diversity as a compelling interest), and *Wittmer v. Peters*, 87 F.3d 916, 920–21 (7th Cir. 1996) (accepting a non-remedial use of race as a compelling interest), and *Johnson v. Bd. of Regents of U. of Ga.*, 264 F.3d 1234, 1245 (11th Cir. 2001) (stating that the issue of diversity as a compelling interest is an open question that should be decided by the Supreme Court), and *Smith v. U. of Wash. Law School*, 233 F.3d 1188, 1201 (9th Cir. 2000) ("educational diversity is a compelling governmental interest that meets the demands of strict scrutiny of race-conscious measures").

27. 438 U.S. 265 (1978).

28. *Id.* at 265.

29. *Id.* at 266.

30. *Id.*

31. *Id.* at 266–67.

nothing more than a quota system.³² The Court, however, reached no consensus for the reasoning behind its result; no single opinion received more than four votes.³³ Since Justice Powell was the swing vote, many have recognized his opinion as the functional equivalent of a majority opinion.³⁴ He wrote that “the attainment of a diverse student body. . . is a constitutionally permissible goal for an institution of higher education.”³⁵ The problem with this program, however, was its over-reliance on race to achieve a diverse student body. Powell wrote that if race had been but one of several factors, none of which were determinative, or only a “plus” to a student’s application strength, the outcome may have been different.³⁶ Therefore, Powell’s opinion suggests that diversity can be a compelling interest, and under proper circumstances, race can be used as a factor to achieve that diversity.³⁷

Since the Court’s distaste for the admissions program in *Bakke* was largely predicated on the existence of what it perceived as a strict “quota” system, the application of strict scrutiny to other racial classifications that benefited minorities, but did not use “quotas,” remained unclear. During the decade that followed *Bakke*, the Court moved to the political right³⁸ and eventually settled the issue in *City of Richmond v. J.A. Croson*,³⁹ in which the Court held that strict scrutiny would in fact apply to all racial classifications, even if they benefited racial minorities.⁴⁰ In *Croson*, Justice

32. *Id.*

33. Six different opinions were authored in *Bakke*. *Id.*

34. *See, e.g.*, Smith v. University of Washington, 233 F.3d 1188, 1198–2000 (9th Cir. 2000); Michelle M. Inouye, *The Diversity Justification for Affirmative Action in Higher Education: Is Hopwood v. Texas Right?*, 11 NOTRE DAME J.L. ETHICS & PUB. POL’Y 385, 389 (1997) (arguing that Powell was the swing vote and his opinion has been considered as controlling law); Killenbeck, *supra* note 3, at 1352 (noting that Powell’s opinion has been regarded as that of the Court).

35. *Bakke*, 438 U.S. at 311–12. Powell discussed the value of diversity at length in his opinion and at one point wrote that the future of our nation depends on the robust exchange of ideas and exposure to differing perspectives, which is promoted by diversity. *Id.* at 312–13.

36. *Id.* at 316.

37. *Id.* at 311–12; *see also* Vincent Blasi, *Bakke as Precedent: Does Mr. Justice Powell Have a Theory?*, 67 CAL. L. REV. 21, 32 (discussing the different opinions in *Bakke* and concluding that Powell’s opinion should allow courts to uphold certain types of admissions programs).

38. Stephen C. Halpern & Charles M. Lamb, *The Supreme Court and New Constitutional Eras*, 64 BROOK. L. REV. 1183, 1197–1200 (1998) (discussing the shift in the Supreme Court’s ideological stance).

39. 488 U.S. 469 (1988).

40. *Id.* at 493–94. In *Croson*, the City of Richmond operated a program that awarded thirty percent of the total dollar amount of its construction contracts to minorities. *Id.* at 477–78. The city asserted that it was doing so to remedy past discrimination. *Id.* at 498. The city also argued that strict scrutiny should not be applied to this racial classification because it was benign. *Id.* at 498. The Supreme Court disagreed and held that all racial classifications, regardless of their motivations, are subject to strict scrutiny. *Id.* at 493–94.

O'Connor reasoned that distinguishing between benign and invidious classifications on their face is impossible because benign racial classification can just as easily be motivated "by illegitimate notions of racial inferiority or simple racial politics."⁴¹ Justice O'Connor indicated that the very "purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool."⁴² After *Croson*, even a program that is designed to benefit minorities must have a compelling government interest and be narrowly tailored to this end.

The Supreme Court has recognized only a few interests as sufficiently compelling to satisfy the first prong of the "strict scrutiny" analysis. Remedying one's own discrimination is clearly accepted as a compelling interest.⁴³ This may include remedying past discrimination or breaking the hold of ongoing discrimination.⁴⁴ In either instance, the Court requires strong evidence to prove that discrimination is actually present.⁴⁵ Often governmental entities attempt to demonstrate this discrimination by showing that the discrimination is traceable to *de jure* segregation,⁴⁶ in which case the state is required affirmatively to remedy the problem.⁴⁷ For example, the Supreme Court in *United States v. Fordice*⁴⁸ explicitly charged schools to eradicate "policies and practices traceable to its prior *de jure* dual system" that continue to foster segregation or have discriminatory effects.⁴⁹

However, the mere existence of a statistical disparity between the educational outcomes of races is generally not sufficient to establish a compelling interest that would allow a governmental actor to use racial

41. *Id.* at 493. While Justice O'Connor wrote the judgment of the Court in *J.A. Croson*, only three other justices joined her reasoning here. However, her position was later adopted by the majority of the Court in *Adarand*.

42. *Id.*

43. See *Croson*, 488 U.S. at 492 (stating that public entities have a compelling interest in preventing public funds from being used to finance private prejudices); *United States v. Paradise*, 480 U.S. 149, 166–67 (1987) (stating that the government unquestionably has a compelling interest in remedying discrimination by a state actor); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) ("The Court is in agreement that, whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program.").

44. See Michel Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1753 (1989) (stating that Justice O'Connor's opinion requires a showing of past discrimination or ongoing discrimination).

45. *Croson*, 488 U.S. at 500 (citing *Wygant*, 476 U.S. at 277).

46. See Bradley W. Joondeph, *Missouri v. Jenkins and the De Facto Abandonment of Court-Enforced Desegregation*, 71 WASH. L. REV. 597, 610–11 (1996) (discussing the importance of showing that discrimination is traceable to *de jure* segregation).

47. *United States v. Fordice*, 505 U.S. 717, 724–25 (1992).

48. 505 U.S. 717 (1992).

49. *Id.* at 728–29.

classifications to correct the disparity.⁵⁰ Rather, the disparity must be traceable to some prior or ongoing intentional discrimination by the government.⁵¹ In addition, a state actor may correct only its own specific acts of discrimination, not some other actor's, and certainly not general societal discrimination to which equal protection prohibitions do not apply.⁵² The Court has said repeatedly that the state is powerless to remedy societal discrimination and any attempt to do so through racial classification is unconstitutional.⁵³

In addition to upholding the remedial use of race,⁵⁴ the Court has upheld a non-remedial use of race.⁵⁵ In *Metro Broadcasting, Inc. v. Federal Communications Commission*, the Court found that pursuing diversity and the benefits that accrue from it sufficiently justifies the use of racial classifications.⁵⁶ *Adarand Constructors, Inc. v. Peña*⁵⁷ later overruled *Metro Broadcasting*, but only to the extent *Metro Broadcasting* applied intermediate scrutiny, not its approval of a non-remedial use of racial classifications.⁵⁸ Thus, although the Supreme Court has never explicitly held that promoting diversity is a compelling interest under strict scrutiny, some commentators suggest that it would be in certain contexts, such as education.⁵⁹ Conversely, the Court has rejected similar ends, such as

50. See *McCleskey v. Kemp*, 481 U.S. 279, 291–99 (1987) (holding that general evidence of discrimination is not sufficient to prove discrimination against a specific individual in the context of capital sentencing).

51. See *Croson*, 488 U.S. at 498–500.

52. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986). Equal protection prohibitions only apply to state action. *Georgia v. McCollum*, 505 U.S. 42, 50 (1992).

53. See, e.g., *Croson*, 488 U.S. at 485 (requiring a showing of prior governmental discrimination, rather than societal discrimination in the private contracting industry, to show a compelling interest); *Johnson v. Transp. Agency*, 480 U.S. 616, 664–65 (1987) (reiterating the mandates of *Wygant*); *Wygant*, 476 U.S. at 274–76 (invalidating a minority school teacher preference that was aimed at alleviating the effects of societal discrimination).

54. Attempts to remedy racial discrimination are referred to as “remedial” uses of race. See, e.g., *Croson*, 488 U.S. at 486, 488.

55. *Metro Broad., Inc. v. Fed. Communications Comm’n*, 497 U.S. 547, 564–65 (1990). The Court did so under an intermediate level of scrutiny rather than strict scrutiny. *Id.* at 564. This difference, however, should be negligible because, as Justice O’Connor states, there is little relevant difference between a “compelling” and “important” interest. *Wygant*, 476 U.S. at 286 (O’Connor, J., concurring in part).

56. 497 U.S. at 564–65.

57. 515 U.S. 200 (1995).

58. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995); Killenbeck, *supra* note 3, at 1372.

59. See Killenbeck, *supra* note 3, at 1372–73; Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 381, 384–85 (1998). But see Robert J. Donahue, Note, *Racial Diversity As a Compelling Government Interest*, 30 IND. L. REV. 523, 549 (1997) (predicting that the Supreme Court will not find racial diversity to be a compelling interest); Barbara Phillips Sullivan, *The Gift of Hopwood: Diversity and the Fife Drum March Back to the Nineteenth Century*, 34 Ga. L. Rev. 291, 292–94

providing role models for minority students or reducing societal discrimination, holding that they fall short of a compelling government interest.⁶⁰ In summary, remedying well-documented discrimination is always a compelling interest, but whether the non-remedial use of race is compelling is unresolved, and may well vary from context to context. In any case, when the Court finds a compelling interest to justify the use of racial classifications, it will then examine the means to determine whether they are narrowly tailored.⁶¹

The Court weighs several factors when deciding whether the means are narrowly tailored, including: whether the government considered race-neutral alternatives, the scope of the program in question, whether a waiver mechanism narrows the scope, whether race is the *only* factor in determining eligibility for a program or whether race is just one factor in the decision making process, whether the program has an intended numerical target for minorities, the duration and possible stopping point of the program, and the burden caused by the program.⁶² The extent to which each of the factors applies, if at all, will vary from case to case. In any event, the narrowly tailored requirement is difficult to meet because it requires a very tight fit between the interest a state actor is pursuing and the means used to achieve it.⁶³ Often, a state actor will demonstrate a

(1999) (arguing that diversity rationales reinforce white supremacy and contradict the Thirteenth, Fourteenth, and Fifteenth Amendments). This Comment concentrates on education only and does not suggest that the Court would find diversity as a compelling interest outside of the educational context.

60. *Miller v. Johnson*, 515 U.S. 900, 920 (1995); *Wygant*, 476 U.S. at 276.

61. *See id.* at 274.

62. Scott R. Palmer, *Diversity and Affirmative Action: Evolving Principles and Continuing Legal Battles*, in *DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION* 81, 83 (Gary Orfield & Michael Kurlaender eds., 2001) (quoting Memorandum from Walter Dellinger, Assistant Attorney General, U.S. Dep't of Justice, to General Counsels 19–20 (June 28, 1995)); *see also* *United States v. Paradise*, 480 U.S. 149, 171 (1987) (plurality opinion) (discussing the following factors: efficacy of alternatives to the use of race; the flexibility and duration of the use of race; a waiver for the use of race; and the impact on the rights of third parties).

63. Once a state identifies racial discrimination in one of its programs, it must be careful to limit its remedy to correcting only that discrimination. A remedy that is overbroad, either in addressing discrimination for which the state itself is not responsible or that places minorities in a better position than they would have been absent the discrimination, would be vulnerable. *See generally* *Tuttle v. Arlington Co. Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999) (overturning a remedy because it was too broad). In more simplistic terms, if a school has only denied admission to twenty-three minorities in the past, it cannot now use racial classifications to offer an additional twenty-five spots to minorities because it would be remedying more discrimination than it had previously caused. In the modern context, however, it may be difficult to determine what the exact harm done to minorities has been, and to quantify this harm in a way that would allow a state to enact remedies narrowly tailored to remedying the harm. Carl L. Livingston, *Affirmative Action on Trial: The Retraction of Affirmative Action and the Case for Its Retention*, 40 *HOW. L.J.* 145, 197 (1996) (discussing narrow tailoring and describing discrimination as “difficult to quantify”).

compelling interest and still have its program invalidated under the narrowly tailored part of strict scrutiny.⁶⁴ Thus, a state often frequently the problem of knowing that it can or must act, but not knowing *how* it can act constitutionally.⁶⁵

II. CIRCUIT COURT APPLICATION OF RACE TO THE EDUCATION CONTEXT

Not only have states had difficulty in applying these standards, the circuits have had problems as well. The first and probably most important split among the circuits concerns whether non-remedial uses of race can be legitimate compelling interests.⁶⁶ The Fifth Circuit's decision in *Hopwood v. Texas*⁶⁷ is the leading decision rejecting non-remedial uses of race.⁶⁸ The case involved an admissions program at the University of Texas School of Law that took race into account.⁶⁹ The court first stated that there was no specific evidence of racial discrimination by the law school to be remedied, and then turned to the issue of whether non-remedial purposes could be compelling.⁷⁰ Although it failed to cite a Supreme Court case in support of its assertion, the court in *Hopwood* wrote, "subsequent Supreme Court decisions [to *Bakke*] regarding education state that non-remedial state interests will never justify racial classifications."⁷¹ The court argued that

64. See, e.g., *Tuttle*, 195 F.3d at 701 (4th Cir. 1999); *Wessmann v. Gittens*, 160 F.3d 790, 799 (1st Cir. 1998). In *Tuttle*, the court assumed that the state had a compelling interest, but applying the narrowly tailored analysis, it was troubled by the fact that the state had established no logical stopping point to the race-based program in question. 195 F.3d at 706.

65. For example, in *Fordice*, it was clear that a state actor had an affirmative duty to remedy the past discrimination, but it was not clear what remedies were appropriate. 505 U.S. 717, 727–28 (1992) (stating in general terms only that a school must use race-neutral policies and eradicate *de jure* discrimination).

66. See *supra* note 26 and accompanying text (comparing the differing circuit opinions regarding the non-remedial use of diversity).

67. 78 F.3d 932 (5th Cir. 1996) (2–1 decision).

68. *Id.* at 934–35.

69. *Id.* at 936–38.

70. *Id.* at 948. The law school asserted that it was part of the larger system of education in the entire state of Texas, which had discriminated based on race. Thus, the law school argued that it could act to remedy disadvantage in its part of the system, which was a result of discrimination in another part. *Id.* at 953–54. The court rejected this argument totally, stating that "even if the state is the proper government unit to scrutinize, the law school's admissions program would not withstand our review." *Id.* at 951. The Court felt that the legislature would have had to have been the one to address discrimination on a system-wide basis, not the law school. *Id.*

71. *Id.* at 944. The court, however, was not unanimous in its conclusion about non-remedial uses of race. *Id.* at 964 (Wiener, J., concurring). Furthermore, the circuit refused a rehearing en banc over the vigorous dissent of seven other circuit judges. *Hopwood v. Texas*, 84 F.3d 720 (1996) (per curiam). One author flatly states, "*Hopwood* bears little precedential value and *Bakke* remains the controlling law on this subject." Marty B. Lorenzo, *Race-Conscious Diversity Admissions Programs: Furthering a Compelling Interest*, 2 MICH. J. RACE & L. 361, 390 (1997).

the racial diversity interest supported by Justice Powell⁷² has never been accepted as compelling under a strict scrutiny review.⁷³ It distinguished the Supreme Court's acceptance of diversity as a justification in *Metro Broadcasting, Inc. v. FCC*⁷⁴ because *Metro* was not decided under strict scrutiny.⁷⁵ Therefore, the court in *Hopwood* held that considering race in admissions with the purpose of promoting student body diversity is not a compelling interest and thus violates the Fourteenth Amendment.⁷⁶

Other circuits have declined to decide whether diversity is a compelling interest under strict scrutiny analysis. In *Wessmann v. Gittens*,⁷⁷ the Boston Latin School operated an affirmative action program that sought to create a student body that was a diverse, "fair representation of a cross-section of students' of the Boston public schools."⁷⁸ In *Wessmann*, the First Circuit wrote:

It may be that the *Hopwood* panel is correct and that, were the Court to address the question today, it would hold that diversity is not a sufficiently compelling interest to justify a race-based classification. It has not done so yet, however, and we are not prepared to make such a declaration in the absence of a clear signal that we should. . . . As matters turn out, we need not definitively resolve this conundrum today. Instead, we assume *arguendo*—but we do not decide—that *Bakke* remains good law and that some iterations of "diversity" might be sufficiently compelling, in specific circumstances, to justify race-conscious actions.⁷⁹

Although it assumed that diversity is a compelling interest, the First Circuit noted that several different types of diversity exist—not all of which relate to ethnic or racial diversity.⁸⁰ Arguing that the Boston Latin School was overly concerned with racial diversity at the expense of other types of diversity, the court held that the means the school used were not narrowly tailored to the end of "true" diversity.⁸¹

72. *Supra* notes 34–36 and accompanying text.

73. *Hopwood*, 78 F.3d at 944.

74. 497 U.S. 547 (1990).

75. *Hopwood*, 78 F.3d at 944. The Court in *Metro* applied intermediate scrutiny because the racial classification was benign." 497 U.S. at 564–65. Relying on *Adarand*'s later holding that all racial classification will be subjected to strict scrutiny and *Crosby*'s plurality opinion disapproving of a non-remedial use of race, the *Hopwood* court argued that *Metro*'s acceptance of diversity as a compelling interest is no longer valid. 78 F.3d at 944–45.

76. *Hopwood*, 78 F.3d at 944–45.

77. 160 F.3d 790 (1st Cir. 1998).

78. *Id.* at ____.

79. *Id.* at 796 (citation omitted).

80. *Id.* at 798.

81. *Id.* at 799. The court states that the school's policy is, "at bottom, a mechanism for racial balancing. . . . It cannot be said that racial balancing is either a legitimate or necessary means of advancing the lofty principles recited in the Policy." *Id.*

The First Circuit's willingness to independently define diversity as "true" diversity in its analysis of narrowly tailored requirements, rather than accepting educators' definition, could be viewed as a rejection of *racial* diversity as a compelling interest. That is, if the court was sincere in assuming that diversity was a compelling interest, it likely would have been more deferential to the educators' professional judgment of diversity requirements. Furthermore, for the court to say that it assumes "diversity" is a compelling interest without understanding diversity to include *racial* diversity is to assume nothing, because strict scrutiny would not be triggered in the first place if all that a school did was assemble a student body of diverse viewpoints. By closely examining what is meant by educational "diversity" and coming to a conclusion that differs from that of the educators, *Wessmann*, in effect, implicitly adopted the *Hopwood* standard.⁸²

The Fourth Circuit has also addressed racial classifications in education. In *Tuttle v. Arlington*,⁸³ a public school system used a weighted lottery that factored in race to determine admission to certain schools.⁸⁴ The *Tuttle* court approached the issue in a similar fashion to the *Wessmann* court by asserting that it would assume, but not hold, that diversity is a compelling interest.⁸⁵ It also followed the *Wessmann* court in finding that the program in question was merely an example of racial balancing.⁸⁶ However, the Fourth Circuit did not go into the *Wessmann* court's discussion of the meaning of "diversity." Instead, it simply stated that the program engages in racial balancing because it "skew[s] the odds of selection in favor of certain minorities," and therefore resembles the racial quotas prohibited by *Bakke*.⁸⁷ Thus, the *Tuttle* court's willingness to assume diversity, however defined, is a compelling interest is arguably more genuine than in *Wessmann* because the court here invalidates the program on matters that are independent of how one defines "diversity."⁸⁸

82. See Palmer, *supra* note 62, at 86 (stating that *Wessmann* adopted the *Podberesky* standard, which was the same standard adopted by *Hopwood*).

83. 195 F.3d 698 (4th Cir. 1999).

84. *Id.* at 701–02.

85. *Id.* at 701.

86. *Id.* at 707.

87. *Id.* This court's argument was bolstered by the finding that "if the applicant pool does not reflect the required 15% racial and ethnic diversity, each child's probability of selection in the lottery is adjusted corresponding to his or her stated race." *Id.* With such a policy, it appears nearly impossible that the final number of minorities actually admitted could be anything less than fifteen percent. Thus, "[a]lthough the Policy does not explicitly set aside spots solely for certain minorities, it has practically the same result." *Id.*

88. In addition, the racial balancing issue was not necessary for the court's decision because the lack of a logical stopping point for the program also rendered it violative of narrowly tailored requirement. *Id.* at 706.

The Eleventh Circuit confronted the issue of diversity in a challenge of the University of Georgia's admission program. The Eleventh Circuit staked out a middle ground that appears to fall between the First Circuit's apparently less than genuine assumption of the validity of diversity and the Fourth Circuit's flat rejection of a diversity program through a narrowly tailored analysis. While the Eleventh Circuit in *Johnson v. Board of Regents of the University of Georgia*⁸⁹ did ultimately find the University of Georgia's admission program unconstitutional under a narrowly tailored analysis⁹⁰—reflecting a perspective that functionally may be the same as that of the Fourth Circuit—the *Johnson* court grappled with the substance of the law on this issue before rendering its decision.⁹¹ First, the court conducted an in depth analysis of Supreme Court and other circuit court precedence in attempting to answer what it thought to be the key issue: “whether student body diversity may be a compelling interest.”⁹² After a lengthy review, the court decided that “the constitutional viability of student body diversity as a compelling interest is an open question, and ultimately one . . . that warrants consideration by the Supreme Court.”⁹³ Rather than attempt to answer a question that the circuit suggested only the Supreme Court can answer, it assumed for the purposes of this case that diversity is a compelling interest.⁹⁴

The manner in which the court applied its narrowly tailored review suggested that its assumption of diversity's validity was genuine. The court took a deliberate look at the narrow tailoring factors other courts have used in different contexts, such as employment.⁹⁵ The court then sculpted a set of factors that it found more relevant to the issue of diversity in education.⁹⁶ Although the court ultimately found the Georgia program unconstitutional using these factors, these factors reflect the court's willingness to adopt an analysis that takes into account both the reality of how diversity is used in the educational context as well as the logic behind

⁸⁹ 263 F.3d 1234 (11th Cir. 2001).

⁹⁰ *Id.* at 1237.

⁹¹*Id.* at 1244–54 (attempting to ascertain the law on whether diversity can be a compelling interest and shaping narrow tailoring factors that are relevant to the context of education).

⁹²*Id.* at 1242. The court spent seven pages discussing *Bakke* and cases from other Circuits in reaching the conclusion that whether diversity is a compelling interest is an open question. *Id.* at 1244–50.

⁹³*Id.* at 1245.

⁹⁴*Id.* at 1245–46.

⁹⁵*Id.* at 1252–53.

⁹⁶*Id.* at 1253. The factors that the court found relevant to the narrowly tailored review of diversity in education were: whether race is used in a rigid or mechanical way that does not take into account other factors that relate to diversity, whether race-neutral factors that relate to diversity are taken into account, whether a diversity program give disproportionate or arbitrary weight to race, whether a school has genuinely considered race-neutral alternatives for creating a diverse student body. *Id.*

it.⁹⁷ For instance, it found that factors like the duration of the program “may not be an important consideration,” because unlike remedying past-discrimination, which has a logical stopping point, “the goal of exposing students to a diverse student body may not.”⁹⁸ The court’s central concern in its analysis appeared to be the flexibility of the program used to achieve diversity.⁹⁹ If a program is flexible in its use of race, the types of diversity it considers, and its examination of admissions applications, the court seemed willing to permit it. One can disagree with the court’s ultimate disapproval of the university’s policy, but it is merely the court’s perception that the university gave too much weight to race,¹⁰⁰ the amount of which the university was unable to justify,¹⁰¹ and the university’s failure to take other diversity factors into account that caused the court to find the program unconstitutional, not a rejection of diversity.¹⁰² The court neither explicitly nor implicitly questioned the validity of pursuing diversity. Rather, the court’s opinion gave the University a good notion of what type of program would be constitutional.

Several other circuit courts have decided the issue of diversity and non-remedial uses of race different than *Wessmann, Johnson or Tuttle*. For example, in *Wittmer v. Peters*,¹⁰³ the Seventh Circuit recognized that “the rectification of past discrimination is not the only setting in which government officials can lawfully take race into account in making decisions.”¹⁰⁴ Furthermore, the court pointed out that the cases suggesting otherwise do so only in dicta and not in holdings.¹⁰⁵ With this as a framework, the court held that the state could use race in the selection of prison personnel when evidence shows the presence of minority personnel

⁹⁷*Id.* at 1252–53 (discussing the need to formulate factor in the narrowly tailored analysis that are relevant to diversity in education).

⁹⁸*Id.* at 1252. *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 824 (E.D. Mich. 2000).

⁹⁹*Johnson*, 263 F.3d at 1254–55 (honing on the issue of flexibility and finding the lack of it to be a “fatal flaw”).

¹⁰⁰*Id.* at 1255–56.

¹⁰¹*Id.* at 1257. The court quotes the admissions director as stating that the weight the school gives race is made “out of the blue.” *Id.* The University’s counsel also admits that there is no statistical basis for choosing the weight the school gives to race. *Id.*

¹⁰²*Id.* at 1255 (discussing the University’s failure to give sufficient weight to other factors).

103. 87 F.3d 916 (7th Cir. 1996). This case occurred in the context of the penal system and is, therefore, not directly applicable to schools, but its discussion on the use of race is important in answering the question of whether race can be used for non-remedial purposes. In this case, the plaintiffs were white men who argued that a less qualified individual was promoted to the rank of lieutenant over them because he was black. *Id.* at 917. In a test given to the applicants for the position, the man who was promoted to lieutenant ranked forty-second, whereas the white plaintiffs ranked third, sixth, and eighth. *Id.* The state did not deny that race was a factor in his promotion, nor did its justification rest upon remedying past discrimination. *Id.*

104. *Id.* at 919.

105. *Id.*

is critical to the prison's success.¹⁰⁶

While recognizing that the Supreme Court has explicitly rejected the "role model" argument as a compelling non-remedial interest, the Seventh Circuit in *Wittmer* noted that the state's action did not rest on a role model theory.¹⁰⁷ Rather, the correctional system had an important management and security interest at stake. Unrebutted expert testimony provided that a "black lieutenant is needed because the black inmates are believed unlikely to play the correctional game of brutal drill sergeant and brutalized recruit unless there are some blacks in authority in the camp."¹⁰⁸ The testimony concluded that the prison boot camp would have failed unless a black male was promoted to a lieutenant position.¹⁰⁹ Limiting its decision to these circumstances, the court held that the race-conscious policies were permissible for this non-remedial purpose.¹¹⁰ At the very least, this decision suggests that other situations, including the educational arena, may justify the non-remedial use of race. Just as prisons present special circumstances about which prison personnel and administrators have expert knowledge (and to which courts should defer) so do school systems.¹¹¹

The Ninth Circuit specifically addressed whether special circumstances in the educational context would justify non-remedial uses of race in *Hunter ex. rel. Brandt v. Regents of the University of California*¹¹² In *Hunter*, the University of California at Los Angeles Graduate School of Education operated an elementary school as a research laboratory.¹¹³ The purpose of the school was "to help the State of

106. *Id.* at 920–21. The "evidence" used to justify the use of race in this context was the prison's own expert testimony that black lieutenants were needed. *Id.* at 920. The point to be made here is that just as prison officials have expert judgments about how their prisons should be run, so do education officials have expert opinions about how their students should be educated; in *both* cases the courts should recognize this and defer to the experts. See, e.g., *Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 208 (1982) (citing *San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973) for the proposition that "courts lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy'"); *Mrs. B. v. Milford Bd. of Educ.*, 103 F.3d 1114, 1121 (2d Cir. 1997) (holding that courts may not second guess educators' policy decisions).

107. *Id.* at 919–20 (referring to the Supreme Court's holding in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), that retaining minority teachers to serve as role models was not a compelling interest).

108. *Id.* at 920.

109. *Id.*

110. *Id.* The court makes clear that the state could not have taken steps to make the "racial composition of the security staff mirror that of the inmate population." *Id.* There was a specific compelling need that required a specific response, nothing more. Such needs may or may not occur in other prisons. *Id.*

111. See, e.g., _____. Courts can easily second guess educators, but their second guessing by definition comes from a detached position that may bear little or no relevance to the reality of the educational setting. See *id.* at ____.

112. 190 F.3d 1061 (9th Cir. 1999).

113. *Id.* at 1062.

California meet the needs of a dramatically changing public school population.”¹¹⁴ Furthermore, the school used the research it collected to identify issues that are specifically relevant to the education and social development of children from multiracial, urban communities.¹¹⁵ From this research, the graduate school developed more effective techniques to teach these communities, and shared its findings with public schools throughout California.¹¹⁶ In making admissions determinations for the elementary school, the university considered gender, race or ethnicity and family income.¹¹⁷ The court, after applying strict scrutiny to the program, held that in light of the purpose of doing research to benefit California’s public education system the “interest in operating a research-oriented elementary school is compelling.”¹¹⁸ This holding represents an explicit recognition of a non-remedial compelling interest in the educational context. Furthermore, the court also found that the means used to achieve this end were narrowly tailored.¹¹⁹ The court recognized that a racially diverse student population was necessary to do the research and thus did not apply the narrowly tailored means analysis in a way that would second guess the state’s methods of defining or pursuing diversity.¹²⁰ Since “it would not be possible, nor would it be reasonable, to require the defendants to attempt to obtain an ethnically diverse representative sample of students without the use of specific racial targets and classifications,”¹²¹ the court did not force the state to respond to a litany of unreasonable hypotheticals or suggest that the state’s purpose was racial balancing.

In a more recent case, the Second Circuit moved beyond a fact-specific holding and recognized the reduction of racial isolation as another compelling non-remedial interest. The court in *Brewer v. West Irondequoit Central School District*¹²² addressed a school placement program that allowed only minority students to transfer from urban school districts to suburban school districts, and only nonminority students to transfer from suburban school districts to urban school districts.¹²³ The main purpose of this voluntary program was to eliminate minority isolation in the urban

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* In the interest of selecting favorable research subjects, the university also considered the child’s dominant language and residency and the parent’s willingness to meet a mandatory involvement requirement. *Id.*

118. *Id.* at 1064.

119. *Id.* at 1067.

120. *Id.*

121. *Id.* at 1066.

122. 212 F.3d 738 (2d Cir. 2000).

123. *Id.* at 741.

schools.¹²⁴ The court considered the districts' actions as an attempt to reduce *de facto* segregation, but based on the record the court could not determine whether *de facto* segregation actually existed in the districts.¹²⁵ Since there was no claim that intentional discrimination was ever present, the district's use of race was by definition non-remedial. The *Brewer* court noted that *Croson* did not address the issue of non-remedial uses of race¹²⁶ and held that local schools can voluntarily remedy *de facto* segregation and, indeed, such action serves important societal functions.¹²⁷ Under the narrowly tailored analysis, the court held that the proper inquiry is whether the means are narrowly tailored to reducing racial isolation, not whether they are narrowly tailored to some goal of "true diversity."¹²⁸ This is a direct rejection of the type of narrow tailoring that the Fifth Circuit applied in *Wessmann*.¹²⁹ The acceptance of racial isolation as a compelling interest under strict scrutiny is also a direct rejection of the *Hopwood* court's compelling interest analysis.¹³⁰

The Ninth Circuit has also revisited this issue in the recent case *Smith v. University of Washington*,¹³¹ and adopted a position that in no way can be reconciled with *Hopwood*.¹³² To this point, *Smith* is the strongest circuit decision in support of diversity. The court devoted almost the entire substance of its decision toward deciding what the law of the land is on this issue, ultimately finding that *Bakke* permits universities to use race as a factor in attaining a diverse student body.¹³³ The Circuit hinged its analysis

124. *Id.* at 742. The program also identifies other goals, including encouraging intercultural learning, promoting academic excellence, and fostering responsible civic leadership. *Id.*

125. *Id.* at 745.

126. *Id.* at 748 (citing *Wittmer v. Peters*, 87 F.3d 916, 919 (7th Cir. 1996)).

127. *Id.* at 751 (referring to *Balaban v. Rubin*, 20 A.D.2d 438, 446, 248 N.Y.S.2d 574, 581–83 (2d Dep't), *aff'd*, 14 N.Y.2d 193, 199 N.E.2d 375, 250 N.Y.S.2d 281, cert. denied, 379 U.S. 881 (1964); *see also* *Willan v. Menomonee Falls Sch. Bd.*, 658 F. Supp. 1416, 1422 (E.D. Wis. 1987)).

128. *Id.* at 752.

129. *See* *Wessmann v. Gittens*, 160 F.3d 790, 798–99 (1st Cir. 1998) (using a narrowly tailored analysis to hold that the school was not pursuing true diversity). The *Brewer* Court remained true to its framework, unlike the Court in *Wessmann*. The Court in *Brewer* wrote that it accepts reducing isolation as a compelling interest and then examined the program to determine if it was narrowly tailored to the compelling interest of reducing racial isolation. The *Wessmann* Court stated that it assumed diversity was a compelling interest, but when it examined the program, rather than seeing whether it was narrowly tailored to diversity, the Court quarreled with the type of diversity the program pursued. The *Wessmann* Court sought to redefine the type of diversity the program should pursue rather than *actually* assuming that "diversity" (as conceptualized by educators) was a compelling interest. In effect, the *Wessmann* court substitutes its judgment for that of educators.

130. *See* *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996) (stating that non-remedial uses of races can never constitute a compelling interest).

131. 233 F.3d 1188 (9th Cir. 2000).

¹³²*Id.* at 1201 n.9.

¹³³*Id.* at 1197.

on the Supreme Court's mandate in *Marks v. United States*.¹³⁴ The *Marks* Court wrote, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, . . . the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."¹³⁵

In order to determine the narrowest holding of the Court, the Ninth Circuit systematically analyzed the various different stances of the justices in *Bakke*.¹³⁶ In doing so, the *Smith* court found that the constitutional interpretation that separates Justice Powell's decision from that of four other Justices—Brennan, White, Marshall, and Blackmun—is how expansively they would allow a university to use race.¹³⁷ Powell would only permit its use in limited circumstances and ways, whereas the other four Justices also would have permitted a much more expansive use of race.¹³⁸ By logical necessity, the other four Justices would have approved of programs that met Powell's test.¹³⁹ Thus, the Ninth Circuit found that Powell's was the narrowest rationale upon which five Justices would agree, and therefore under *Marks* is the holding of the Court.¹⁴⁰ In addition, because the Supreme Court has not revisited the issue of university admissions, nor has it "indicated that Justice Powell's approach has lost its vitality," the *Smith* court concluded that race can be used as a factor in university admissions programs.¹⁴¹

While anticipating which if any of the circuit court cases will reach the Supreme Court is nearly impossible, the Sixth Circuit is currently deliberating one of the most watched cases in the country dealing with diversity. The case before the Sixth Circuit combines two district court cases from the Eastern District of Michigan, *Gratz v. Bollinger*¹⁴² and *Grutter v. Bollinger*.¹⁴³ Both cases have gained national attention.¹⁴⁴ The judge in the first case held that diversity was a compelling interest and upheld the University of Michigan's undergraduate admission program.¹⁴⁵

¹³⁴430 U.S. 188 (1977).

¹³⁵*Id.* at 193.

¹³⁶*Smith*, 233 F.3d at 1198–1200.

¹³⁷*Id.* at 1198–99.

¹³⁸*Id.* at 1999.

¹³⁹*Id.* at 1999–2000.

¹⁴⁰*Id.*

¹⁴¹*Id.* at 1200.

¹⁴²122 F. Supp. 2d 811 (E.D. Mich. 2000).

¹⁴³137 F. Supp. 2d 821 (E.D. Mich. 2001)

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¹⁴⁵*Gratz v. Bollinger*, 122 F. Supp. 2d at 820. In *Gratz*, the University of Michigan did not attempt to justify its use of race as remedial. Rather, the University asserted that among its admissions objectives was the objective to "compose a class of students from diverse races, ethnicities, cultures, and socioeconomic backgrounds." *Id.* at 814. Based on extensive research,

The other judge, reviewing the University of Michigan Law School admission program, held diversity did not rise to the level of a compelling interest,¹⁴⁶ and furthermore that the program was not narrowly tailored.¹⁴⁷ Other than different judges, distinguishing between these cases is difficult since the same attorneys litigated the cases and they presented much of the same expert evidence.¹⁴⁸ The importance of these cases, however, is that they set themselves apart from the others discussed above, because here a full record with expert testimony from researchers was developed on the issue of diversity. Unlike the other circuits that only speculated on or assumed the value of diversity based on personal opinions or Supreme Court dicta, the Michigan cases involved testimony by researchers who had conducted studies and reviewed relevant data to assess the issue. Possibly for this reason, many commentators expect this to be the case that the Supreme Court takes to finally decide the issue of diversity.¹⁴⁹

the University sought to prove that such an environment resulted in educational benefits. *Id.* at 822. The district court applied strict scrutiny to the program. *Id.* at 816. However, first the court analyzed the multiple opinions of *Bakke*, and found that although no five Justices agreed that diversity was a compelling interest, five Justices did agree “that universities may take race into account in admissions when done so properly.” *Id.* at 819. Thus, the district court concludes that diversity is a compelling interest in the context of higher education and that this conclusion is further supported “with solid evidence regarding the educational benefits.” *Id.* at 820, 822. Furthermore, upon reviewing the specifics of the program, the court found that program was narrowly tailored using the traditional factors, flexibility, race-neutral alternatives, etc. *Id.* at 827–31.

¹⁴⁶*Grutter v. Bollinger*, 137 F. Supp. 2d at 844.

¹⁴⁷*Id.* at 850. At the outset, the district court in *Grutter* heavily scrutinized the law school’s admissions procedures, fettering out the exact nature of the use of race in the procedure. *Id.* at 825–40. The court then analyzes *Bakke* and some other affirmative action cases that followed it. *Id.* at 843–50. Ultimately, the court decided that Justice’s Powell’s discussion of diversity “is not among the governing standards to be gleaned from *Bakke*.” *Id.* at 847. Furthermore, later Supreme Court decisions reject his rationale. *Id.* at 848. Unlike other courts, the district court here refused to apply the framework of *Marks v. United States*, 430 U.S. 188, 193 (1977), that controls how one should interpret a fragmented decision. *Grutter*, 137 F. Supp. 2d at 847. The court’s reasoning was that there is no “narrow” holding in regard to diversity upon which *Bakke* can stand. Before leaving the subject, however, the court discussed diversity in a similar fashion to that of the First Circuit in *Wessman*, making a distinction between racial diversity and viewpoint diversity. *Id.* at 849. Thus, the court resembles the First Circuit in being highly skeptical of race’s ability to achieve “diversity” as the court conceives it. *Id.* at 849–50. Yet even if racial diversity were a compelling interest, the court argued that the law school’s admissions program was not narrowly tailored, particularly focusing on the defense’s inability to pinpoint the size of a “critical mass,” and its failure to create a stopping point for the program. *Id.* at 850–51. Finally, the court criticized the program for resembling a quota system and disregarding distinctions between minorities. *Id.* at 851–52.

¹⁴⁸Sannes, *supra* note 3, at 23 (discussing the difference between the cases as one judge validating diversity and the other repudiating it).

¹⁴⁹Sannes, *supra* note 3, at 22–23 (stating the Circuits have created a rift the Supreme Court will soon decide and discussing the Michigan cases the place where the Supreme Court might decide). Victor G. Rosenblum, *Surveying the Current Legal Landscape for Affirmative Action in Admissions*, 27 J.C. & U.L. 709, 727 (2001) (stating that the Michigan cases are likely to come before the Supreme Court).

After the Sixth Circuit's decision in the Michigan cases, the circuits will have surely completed a full spectrum of ways to interpret and apply Supreme Court precedent on race-conscious programs. However, until the Supreme Court speaks on the issue or until new evidence and ways of approaching the issue are developed, the direction that schools should take is far from clear.¹⁵⁰ Regardless, the research on racial diversity in education appears promising in justifying new government interests should the issue be taken up by the Supreme Court.

III. RESEARCH ON THE BENEFITS OF RACIAL DIVERSITY IN EDUCATION

Given the uncertainty and divergence in the circuits regarding whether pursuing diversity through non-remedial uses of race can be a compelling governmental interest, analyzing the research that identifies the concrete benefits that arise from diversity in the educational system is essential to predicting how the Supreme Court should resolve the issue. A great deal of research supports the conclusion that racial diversity in educational settings results in several benefits primary, secondary, and post-secondary students.¹⁵¹ These benefits include better teaching and learning,¹⁵²

150. See APPEL ET AL., *supra* note 5, at 2 (suggesting that schools need to grasp the educational evidence before pursuing a course of conduct).

151. See, e.g., Grutter v. Bollinger, No. 97-75928 (E.D. Mich. <<need year>>), reprinted in 5 MICH. J. RACE & L. 363 (1999) (showing positive correlations between increased cross-racial student interactions and several learning, democracy, and living and working outcomes); Patricia Gurin, Expert Reports Submitted on Behalf of the University of Michigan: The Compelling Need for Diversity in Higher Education: *Gratz v. Bollinger*, No. 97-75321 (E.D. Mich. <<need year>>); Alexander W. Astin, *Diversity and Multiculturalism on the Campus: How Are Students Affected?*, CHANGE, Mar./Apr. 1993, at 44, 46 (showing how a racially diverse student body on college campuses changes social attitudes and activities); Carl Bankston, III & Stephen J. Caldas, *The American School Dilemma: Race and Scholastic Performance*, 38 SOC. Q. 423, 428 (1997) (showing racially integrated settings are linked to improved achievement for black high school students); Jomills Henry Braddock, II & James M. McPartland, *The Social and Academic Consequences of School Desegregation*, in EQUITY AND CHOICE 5, 63-68 (1988) [hereinafter Braddock & McPartland, *Social and Academic Consequences*] (showing both long and short term consequences of racially diverse primary and secondary schools and colleges, including improved race relations, increased academic achievement, and preparation for diverse work settings); Marvin P. Dawkins & Jomills Henry Braddock, II, *The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society*, 63 J. NEGRO EDUC. 394, 397-400 (1994) (reviewing studies showing that black students from majority white elementary and secondary schools are more likely to persist at majority white colleges, have higher job expectations, move into integrated neighborhoods, acquire jobs, major in scientific or technical fields, and work in desegregated work environments); Maureen T. Hallinan, *Diversity Effects on Student Outcomes: Social Science Evidence*, 59 OHIO ST. L.J. 733 (1998) (providing social science evidence supporting the theory that racial diversity promotes educational benefits in primary and secondary schools and in higher education); Sylvia Hurtado, *Linking Diversity and Educational Purpose: How Diversity Affects the Classroom Environment and Student Development*, in DIVERSITY CHALLENGED, *supra* note 62, at 197 (finding that persons who studied with someone of another race reported greater growth in racial and cultural

tolerance, leadership, critical thinking skills, and problem solving skills); MATHTECH, INC., THE OUTCOMES OF DIVERSITY IN HIGHER EDUCATION, in MID-YEAR REPORT PREPARED FOR OFFICE OF EDUCATIONAL RESEARCH AND IMPROVEMENT, VII-4 to VII-7 (1998) (concluding that racial diversity has positive effects on student cognitive growth, interaction in the diverse work environment, and breaking down racial stereotypes); Janet Ward Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary School Students*, in HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 597 [hereinafter HANDBOOK] (James A. Banks ed., 1995) (providing an overview of the social science evidence, both positive and negative, behind the value of diversity in primary and secondary education); Robert E. Slavin, *Cooperative Learning and Intergroup Relations*, in HANDBOOK, *supra*, 628, 632 [hereinafter Slavin, *Cooperative Learning*] (showing that cooperative learning in racially diverse primary and secondary schools can improve racial attitudes and academic achievement among all students); Robert E. Slavin, *Effects of Biracial Learning Teams on Cross-Racial Friendships*, 71 J. EDUC. PSYCHOL. 381, 386 (1979) [hereinafter Slavin, *Effects of Biracial Learning*] (showing the long term positive effects of interracial cooperative learning); Maurianne Adams & Yu-Hui Zhou-McGovern, *The Sociomoral Development of Undergraduates in a "Social Diversity" Course: Developmental Theory, Research and Instructional Applications*, 27-29, 34-76 (Apr. 1994) (paper presented at the Annual meeting of the American Educational Research Association, New Orleans) (showing positive effects on cognitive development and achievement) (on file with the North Carolina Law Review). **Check order of authority.**

152. *See, e.g.*, Gurin, *supra* note 151 (concluding from a longitudinal study that cross-racial student interactions have a positive effect on learning); AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, DOES DIVERSITY MAKE A DIFFERENCE? THREE RESEARCH STUDIES ON DIVERSITY IN COLLEGE CLASSROOMS (2000) (analyzing data from college faculty member questionnaires, including the role that diversity plays in increasing cognitive learning); APPEL ET AL., *supra* note 5, at v (reviewing research that shows racial diversity improves academic development and success in higher education); Braddock & McPartland, **Social and Academic Consequences**, *supra* note 151, 8-9 (providing an overview of the academic consequences of school desegregation); Thomas D. Cook, *What Have Black Children Gained Academically From School Integration? Examination of the Meta-Analytic Evidence*, in SCHOOL DESEGREGATION AND BLACK ACHIEVEMENT, 6, at 41 (T. Cook et al., eds. 1984) (concluding that desegregated schools have a positive effect on black students' reading scores); Robert L. Crain & Rita E. Mahard, *School Racial Composition and Black College Attendance and Achievement Test Performance*, 51 SOC. OF EDUC. 81, 98-99 (1978) (showing positive effects of desegregation on black students' achievement in the North, but negative effects in the South, possibly from exposure to a hostile environment); Roxane Harvey Gudeman, *Faculty Experience with Diversity: A Case Study of Macalester College*, in DIVERSITY CHALLENGED, *supra* note 62, at 258 (finding that "faculty deem diversity to be an asset to teaching and learning"); Hurtado, *supra* note 151, at 198 (showing that persons who studied with someone of another race reported growth in critical thinking skills); MATHTECH, INC., *supra* note 151, at V-4 (concluding that racial diversity positively affects student cognitive growth); Jeffery Milem, *The Educational Benefits of Diversity: Evidence from Multiple Sectors*, in COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN HIGHER EDUCATION (Mitchell Chang et al., eds., forthcoming summer 2002) (analyzing multidisciplinary research that shows the learning benefits of attending a racially diverse college); Slavin, *Cooperative Learning*, *supra* note 151, at 632 (providing an overview of studies showing the improved academic achievements of students in racially diverse cooperative learning situations); Ernest T. Pascarella et al., *What Have We Learned from the First Year of the National Study of Student Learning?*, 37 J.C. & STUDENT DEV. 182, 188 (1996) (summarizing a federally funded study that found positive effects of racial diversity on students' cultural openness); Richard A. White, *Law School Faculty Views on Diversity in the Classroom and the Law School Community* (2000) (surveying law school professors' opinions about the positive and possible negative effects of diversity in the classroom)<<**Derek: is White an article? Is it published? Do you have a copy?>>; Case Note, *An Evidentiary Framework for Diversity as a Compelling Interest in Higher Education*,**

improved civic values,¹⁵³ increased employment opportunities,¹⁵⁴ and

109 HARV. L. REV. 1357, 1372–73 (1996) (discussing several studies that demonstrate that diversity positively affects educational outcomes); Adams & Zhou-McGovern, *supra* note 151, at 33–34 (showing that participation in a social diversity course has a positive effect on students' cognitive development by exposing them to different perspectives).

153. See, e.g., Gurin, *supra* note 151 (showing the positive effects of racial diversity on democracy); APPEL ET AL., *supra* note 5, at v (reviewing literature that shows that racial diversity changes attitudes); Jomills Henry Braddock, II & James McPartland, *Social-Psychological Processes That Perpetuate Racial Segregation: The Relationship Between School and Employment Desegregation*, 19 J. BLACK STUD. 267, 283–84 (1989) [hereinafter Braddock & McPartland, *Social-Psychology Processes*] (suggesting that high school desegregation promotes positive perceptions and social contacts among blacks and whites); Braddock & McPartland, *Social and Academic Consequences*, *supra* note 151, at 68–70 (showing positive race relations and preparation for future diverse settings as a consequence of desegregation); Jomills Henry Braddock, II et al., *A Long-Term View of School Desegregation: Some Recent Studies of Graduates as Adults*, PHI DELTA KAPPAN <<Is the N correct?>>259, 260–61 (Dec. 1984) (discussing several studies that show white and black students who attend desegregated schools are more likely to attend diverse colleges as adults, live in integrated neighborhoods, work in diverse firms, and have friends of another racial group); Dawkins & Braddock, *supra* note 151, at 399 (“Blacks who attend desegregated schools are more likely to move into integrated neighborhoods and have a greater number of White friends.”); Marcia Edison et al., *Influences on Students' Openness to Diversity and Challenge in the First Year of College*, 67 J. HIGHER EDUC. 174, 187–92 (1996) (measuring the influence of diversity on college campuses); Hallinan, *supra* note 151, at 745, 750 (discussing studies that show diversity reduces racial prejudice and increases interracial friendliness); Maureen T. Hallinan & Steven S. Smith, *The Effects of Classroom Racial Composition on Students' Interracial Friendliness*, 48 SOC. PSYCHOL. Q. 3, 13–14 (1985) (showing that desegregated classrooms increase interracial friendships); Willis D. Hawley et al., *Strategies for Reducing Racial Prejudice: Essential Principles for Program Design*, in TOWARD A COMMON DESTINY 423, 426–27 (W.D. Hawley & A.W. Jackson, eds. 1995) (suggesting ways that diversity can reduce racial prejudice and improve racial equality); MATHTECH, INC., *supra* note 151 (concluding that racially diverse education opportunities positively affect interaction in diverse work environments and break down racial stereotypes); Milem, *supra* note 152, at 11 (showing improved civic values as a benefit of racial diversity in education); Janet W. Schofield, *School Desegregation and Intergroup Relations: A Review of the Literature*, in REVIEW OF RESEARCH IN EDUCATION 335 (G. Grant ed., 1991) (providing a historical overview of research on the effects of desegregation on intergroup relations); Slavin, *Cooperative Learning*, *supra* note 151, at 633 (reviewing studies that show cooperative learning in racially diverse settings improves racial attitudes and friendships among all students); Slavin, *Effects of Biracial Learning*, *supra* note 151 (showing the positive effects of cooperative learning on interracial friendships); Peter B. Wood & Nancy Sonleitner, *The Effect of Childhood Interracial Contact on Adult Antiblack Prejudice*, 20 INT'L J. INTERCULTURAL REL. 1, 14–15 (1996) (concluding cross-racial interaction among children has a positive long-term effect on decreasing racial prejudice toward blacks); Case Note, *supra* note 152, at 1373 (discussing studies that show the positive effect of diversity on cultural awareness); Janet W. Schofield & Rebecca Eurich-Fulcer, *When and How School Desegregation Improves Intergroup Relations*, in INTERGROUP PROCESSES 475 (Rupert Brown & Samuel L. Gaertner eds., 2001) (stating that cross-racial integration has been proven to improve race relations).

154. See, e.g., Jomills Henry Braddock, II, Marvin P. Dawkins & William Trent, *Why Desegregate? The Effects of School Desegregation on Adult Occupational Desegregation of African Americans, Whites and Hispanics*, 31 INT'L J. CONTEMP. SOC. 273, 280 (1994) (showing that black, white and Mexican Americans who attend desegregated high schools are more likely to work in desegregated firms); Braddock et al., *supra* note 153, at 260–61 (reviewing studies concluding that going to desegregated schools positively affects opportunities to work in diverse

higher achievement and more educational opportunities, especially for black students.¹⁵⁵ Both minority and non-minority students realize these

environments); Jomills Henry Braddock, II & James M. McPartland, *How Minorities Continue to Be Excluded from Equal Employment Opportunities: Research on Labor Market and Institutional Barriers*, 43 J. SOC. ISSUES 5, 8 (1987) [hereinafter Braddock & McPartland, *How Minorities Continue to Be Excluded*] (addressing the issue of segregated social networks and reduced opportunities for minorities who attend predominantly racially isolated schools); Braddock & McPartland, *Social and Academic Consequences*, *supra* note 152, at 9–10 (reviewing the consequences of school desegregation, including preparation for future racially diverse work environments); Braddock & McPartland, *Social-Psychology Processes*, *supra* note 153, at 271–72 (explaining the relationship between desegregated schools and integrated work environments, along with positive interactions within the work environment); Dawkins & Braddock, *supra* note 151, at 397–400 (reviewing studies showing the positive effects of school desegregation on integrating the work environment); Gurin, *supra* note 151 (citing work outcomes as a positive effect of racially diverse educational opportunities); James M. McPartland & Jomills Henry Braddock, II, *Going to College and Getting a Good Job: The Impact of Desegregation, in EFFECTIVE SCHOOL DESEGREGATION: EQUALITY, QUALITY, AND FEASIBILITY* 141, at 141 (Willis D. Hawley ed., 1981) [hereinafter McPartland & Braddock, *Going to College*] (arguing that the major positive effects of going to desegregated elementary and secondary schools are increased opportunities in both higher education and the job market); Milem, *supra* note 152, at 12–15 (finding that those students who attend diverse colleges often earn higher wages and are more prepared to enter the global economy); Schofield, *supra* note 153, at 605–07 (providing an overview of social science evidence on the effects of school desegregation on African-American's occupational attainment); William Trent, *Outcomes of School Desegregation: Findings from Longitudinal Research*, 66 J. NEGRO EDUC. 255, 256–57 (1997) (discussing a survey that shows that desegregated schooling has a positive benefit for black students' later earnings and occupational attainment); Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-term Effects of School Desegregation*, 64 REV. EDUC. RES. 531, 552–53 (1994) (concluding that school desegregation leads to increased job attainment for minorities); Anthony P. Carnevale, *Campus Diversity and the New Economy* 20 (Jan. 14–16, 1999) (paper presented at ACE conference on Achieving Inclusion and Equity in Higher Education) (on file with North Carolina Law Review) (describing the reality and value of diversity in business today and arguing that diverse educational institutions better prepare students for employment than segregated institutions).

155. See, e.g., Bankston & Caldas, *supra* note 151, <<Need pp>> (documenting the increased achievement on graduation exams for black students in racially diverse environments); Braddock & McPartland, *Social and Academic Consequences*, *supra* note 151, <<Need PP>> (providing an overview of school desegregation consequences, including increased academic achievement); Dawkins & Braddock, *supra* note 151, at 397–400 (providing an overview of several studies illustrating the long-term benefits of school desegregation, especially minority inclusion in the job market and society as a whole); Rita E. Mahard & Robert L. Crain, *Research on Minority Achievement in Desegregated Schools*, in *THE CONSEQUENCES OF SCHOOL DESEGREGATION* 103, at 124 (Christine H. Rossell & Willis D. Hawley, eds. 1983) (showing the positive effects of desegregation on minority achievement); McPartland & Braddock, *Going to College*, *supra* note 154, at 141 (arguing that increased educational opportunities for minorities result from desegregated schools); Slavin, *Cooperative Learning*, *supra* note 151, <<Need PP>>; Wells & Crain, *supra* note 154, at 546 (providing an overview of studies on the long-term benefits of desegregation for black students, which include increased educational attainment); Jomills Henry Braddock, II, *Black Student Attendance at Segregated Schools and Colleges: More Evidence on the Perpetuation of Segregation Across Levels of Education*, (1986) (paper presented at the National Conference on School Desegregation Research, The University of Chicago, Chicago, IL) [hereinafter Braddock, *Perpetuation of Segregation*] (on file with North Carolina Law Review) (showing that blacks who attend desegregated high schools are more likely to attend desegregated colleges and major in scientific or technical fields).

benefits.¹⁵⁶ In fact, the research so uncontrovertibly proves that diversity benefits students that those who oppose the use of race in admissions did not even attempt to rebut the evidence **in the well- publicized case involving the admissions program** at the University of Michigan.¹⁵⁷ Furthermore, plaintiffs in that case were willing to assume that diversity is “good, important, and valuable.”¹⁵⁸

Traditionally, the legal community has thought of racial diversity as purely a matter of desegregation and integration instead of as an educationally recognizable benefit to all students.¹⁵⁹ After *Brown v. Board of Education*,¹⁶⁰ the primary goal of integration was not to make students smarter, get them better jobs or improve their civic values. Rather, the goal was primarily to eliminate the racialized nature of our schools that was “harmful to the educational, social, and psychological development of [black] children.”¹⁶¹ All-black schools were seen as inherently unequal because of the stigma that was attached to attending such schools and the

156. William G. Bowen, Expert Reports Submitted on Behalf of the University of Michigan: The Compelling Need for Diversity in Higher Education: *Gratz v. Bollinger*, No. 97-75321 (E.D. Mich.); *Grutter v. Bollinger*, No. 97-75928 (E.D. Mich.), reprinted in 5 MICH. J. RACE & L. 427, 431 (1999); APPEL ET AL., *supra* note 5, at ix, 11; BUSINESS-HIGHER EDUCATION FORUM, INVESTING IN PEOPLE: DEVELOPING ALL OF AMERICA’S TALENT ON CAMPUS AND IN THE WORKPLACE 14, 31 (2002); DARYL G. SMITH & ASSOCIATES, DIVERSITY WORKS: THE EMERGING PICTURE OF HOW STUDENTS BENEFIT, at v (1997); Jonathan R. Alger, *Unfinished Homework for Universities: Making the Case for Affirmative Action*, 54 WASH. U. J. URB. & CONTEMP. L. 73, 80–81 (1998) (stating that emerging evidence indicates educational benefits for both minorities and non-minorities alike); Akhil Reed Amar & Neal Kumar Katyal, *Bakke’s Fate*, 43 UCLA L. REV. 1745, 1749 (1996) (writing “[i]ntegrated education . . . does not just benefit minorities—it advantages all students in a distinctive way, by bringing rich and poor, black and white, urban and rural, together to teach and learn from each other as democratic equals”); Michel Kurlaender & John T. Yun, *Is Diversity a Compelling Educational Interest? Evidence from Louisville*, in DIVERSITY CHALLENGED, *supra* note 62, at 113; Milem, *supra* note 152, at 11–12 (finding that diversity benefits *students*; refusing to make distinctions based on race). In fact, in discussing law students’ education, Gary Orfield and Dean Whitla write that white students may benefit more greatly from diversity than minorities, because white students come from a more segregated educational experience in elementary and secondary education. Gary Orfield & Dean Whitla, *Diversity and Legal Education: Student Experiences in Leading Law Schools*, in DIVERSITY CHALLENGED, *supra* note 62, at ____; see also Alger, *supra* note 8, at 22 (stating that those students previously isolated from minorities have the most to gain).

157. *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 823 (E.D. Mich. 2001).

158. *Id.*

159. See, e.g., SMITH & ASSOCIATES, *supra* note 156, at 3 (stating the original focus was merely on access for minorities); McPartland & Braddock, *Going to College*, *supra* note 154, at 141 (discussing the focus of desegregation and the concentration on minority issues); ORFIELD & YUN, *supra* note 1, at 11 (stating that the court’s focus in *Brown* was only on the inequalities of segregation).<<Derek/David: ORFIELD & YUN cite still needs to be checked>>

160. 347 U.S. 483 (1954).

161. DAVID J. ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW 67 (1995) (speaking of the Supreme Court’s intellectual motivation in *Brown*); see also SMITH & ASSOCIATES, *supra* note 156, at 3 (noting that the early goal was merely to provide access to white schools).

sense of inferiority that it fostered in racial minorities.¹⁶² Much of the educational research that formed the foundation of the Court's decision in *Brown* dealt with black children's self-esteem problems.¹⁶³ Researchers concluded that black children's segregated social lives caused these self-esteem problems.¹⁶⁴

In some cases prior to *Brown*, the Supreme Court emphasized the unequal resources allocated on the basis of race. For example, in *State of Missouri ex rel. Gaines v. Canada*,¹⁶⁵ the Court forced the State of Missouri to desegregate its law school because the State did not have a separate law school for blacks to attend.¹⁶⁶ The Court focused on the legal education opportunities Missouri offered to black students within the State.¹⁶⁷ Since no such opportunities existed, the Court ordered the State to admit the black student to the white law school.¹⁶⁸ To solve a similar problem, the State of Texas built an all-black law school. But in *Sweat v. Painter*,¹⁶⁹ the Court held that the state must still admit black students to the all-white law school because of intangible factors, like the quality of the faculty and interaction with peers, that all-black law schools could not provide, and which therefore made the education unequal.¹⁷⁰ However, none of these cases focused squarely on improving educational outcomes. Rather, the focus was generally on the negative effects of segregation and its inherent inequality.¹⁷¹ In response, the goal of the educational litigation, as well as the ultimate solution from the Supreme Court, was for white and black students to go to school together, because this would provide the equal

162. *Brown*, 347 U.S. at 494; see also ORFIELD & YUN, *supra* note 1, at 11.<<Derek/David: Orfield cite still needs to be checked>>

163. *Brown*, 347 U.S. at 494–95 (citing K.B. Clark, Effect of Prejudice and Discrimination on Personality Development, Midcentury White House Conference on Children and Youth 1950); THEODORE BRAMELD, EDUCATIONAL COSTS IN DISCRIMINATION AND NATIONAL WELFARE 44–48 (R.M. MacIver ed., 1949); E. FRANKLIN FRAZIER, THE NEGRO IN THE UNITED STATES 674–81 (1949); GUNNAR MYRDAL ET AL., AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (1944); HELEN LELAND WITMER ET AL., PERSONALITY IN THE MAKING 135–58 (Helen Leland Witmer & Ruth Kotinsky eds., 1952); Isidor Chein, *What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?*, 3 INT'L. J. OPINION AND ATTITUDE RES. 229 (1949); Max Deutscher & Isidor Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 J. PSYCHOL. 254 (1948); see also Schofield & Eurich-Fulcer, *supra* note 117, at 2 (discussing the research on self-esteem that was before the Supreme Court).

164. *Brown* 347 U.S. at 494 (discussing a sense of inferiority in children who attend segregated schools and concluding the modern research supports this conclusion).

165. 305 U.S. 337 (1938).

166. *Id.* at 342. The only option for black students was to leave Missouri and have the state pay their tuition somewhere else. *Id.* at 342–43.

167. *Id.* at 349.

168. *Id.* at 351–52.

169. 339 U.S. 629 (1950).

170. *Id.* at 632–36.

171. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954).

opportunities that negate stigma.¹⁷² Most often courts ordered racial integration to remedy the past effects of *de jure* segregation or to break its current hold.¹⁷³ Civil rights proponents and courts visualized this process with an end in sight; their ultimate goal was to develop an “integrated society” by maintaining the legal status of a “unitary” school system.¹⁷⁴ Quite frankly, it appeared at times that Americans wanted to integrate schools for the sake of being “integrated,” which in the historical context was certainly necessary in light of the stigma that was placed on children in all-black schools. Thus, any use of race beyond that which is minimally necessary to end *de jure* segregation was viewed by some as nothing more than using race for race’s sake.¹⁷⁵ This is certainly how courts like *Hopwood* have conceptualized the issue, stating that “we see the case law as sufficiently established that the use of ethnic diversity *simply to achieve racial heterogeneity*, even as part of a number of factors, is unconstitutional.”¹⁷⁶

This Comment presents research that is not related to the goals of reducing stigma, segregation, or inequality, nor does it present a conflict with the *Hopwood* court’s notion of using race for race’s sake.¹⁷⁷ Instead, the research relates to the pursuit of providing children with the best possible education, and taking whatever steps are necessary to achieve it. The compelling government interest here is improving and optimizing our children’s education and life opportunities. The following research shows that the means of achieving these interests involves the creation of racially diverse classrooms and schools.¹⁷⁸ Thus race or diversity is being used for education’s sake, rather than for the sake of race, desegregation, diversity

172. See, e.g., *Brown v. Bd. of Educ. of Topeka et al.*, 349 U.S. 294, 301 (1955) (requiring federal courts to supervise the desegregation of schools).

173. See generally *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (discussing and evaluating desegregation plans); Gary Orfield, *Introduction to DIVERSITY CHALLENGED*, *supra* note 62, at _____ (discussing the role of courts in forcing desegregation).

174. See Ankur J. Goel et al., *Black Neighborhoods Becoming Black Cities: Group Empowerment, Local Control and the Implications of Being Darker Than Brown*, 23 HARV. C.R.-C.L. L. REV. 415, 416–17 (1988) (discussing the goals of the Civil Rights movement); Jordan A. Lavine, Note, *The Supreme Court’s Latest Rendition of Equality in Education: Examining the Traditional Components of Success in Missouri v. Jenkins*, 40 VILL. L. REV. 1395, 1396–98 (1995) (discussing school system’s attempts to gain unitary status).

175. John Dayton, *An Analysis of Judicial Opinions Concerning the Legal Status of Racial Diversity Programs in Educational Institutions*, 133 ED. LAW REP. 297, 302–03 (1999) (discussing the use of race for its own sake); Scott R. Palmer, *A Policy Framework for Reconceptualizing the Legal Debate Concerning Affirmative Action in Higher Education*, in *DIVERSITY CHALLENGED*, *supra* note 62, at 52.

176. *Hopwood v. Texas*, 78 F.3d 932, 945–46 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996) (emphasis added).

177. See generally Alger, *supra* note 8, at 21–22 (distinguishing the benefits of diversity from the rationale of remedying discrimination).

178. See *infra* notes 179–283 and accompanying text.

or integration.

A. *Elementary and Secondary Education*

Because the educational research may diverge on certain points, this Comment discusses elementary and secondary schools separately from higher education. At the elementary and secondary school level, arguably the most important and compelling findings about the role of diversity in education relate to teaching and children's ability to learn. Over the past forty years, several studies have been conducted to measure the academic effects of desegregation.¹⁷⁹ In large part, these studies have shown that minority students attain higher academic achievement in integrated schools when compared with racially isolated schools.¹⁸⁰ The reasons for this improvement are multifaceted, and include increased resources, different teaching styles, and a more rigorous curriculum.¹⁸¹ Also, minority students in integrated schools develop higher educational and occupational aspirations that can translate into greater effort and achievement.¹⁸² Regardless of which variables are most determinative,¹⁸³ the fact remains that minority students are afforded more educational opportunities and achieve greater academic success in racially diverse schools.¹⁸⁴ In addition, racially diverse schools can give both white and black students the opportunity to influence one another, which studies have shown also improves academic achievement.¹⁸⁵ Moreover, cooperative learning studies suggest that the close and interactive relationship between people of

179. For a cumulative review of these studies, see CARLA J. STEVENS & MICAH DIAL, *COMPARISON OF STUDENTS ACADEMIC PERFORMANCE AT MULTI-ETHNIC SCHOOLS VERSUS SINGLE-ETHNIC SCHOOLS* 14–32 (1993); Carl Bankston, III & Stephen J. Caldas, *Majority African American Schools and Social Injustice: The Influence of De Facto Segregation on Academic Achievement*, 75 *SOC. FORCES* 535, 552–53 (1996); Bankston & Caldas, *supra* note 151, at 425–28; Crain & Mahard, *supra* note 152, at 98; Doris R. Entwisle & Karl L. Alexander, *Summer Setback: Race, Poverty, School Composition, and Mathematics Achievement in the First Two Years of School*, 57 *AM. SOC. REV.* 72, 81–82 (1992); William G. Spady, *The Impact of School Resources on Students*, in 1 *REV. OF RES. IN EDUC.* 135, 155–62 (Fred N. Kerlinger ed., 1973).

180. *See infra* notes 204–11 and accompanying text. *But see* Schofield & Eurich-Fulcher, *supra* note 153, at 604 (discussing an increase in suspension as well as dropout rates among minorities in desegregated schools that may or may not correlate with desegregation, but concluding that the research does not support this).

181. *See* Hallinan, *supra* note 151, at 737–40.

182. Braddock & McPartland, *Social-Psychology Processes*, *supra* note 153, at 185; Marvin P. Dawkins, *Black Students' Occupational Expectations: A National Study of the Impact of School Desegregation*, 18 *URBAN ED.* 98, 106 (1983); Wells & Crain, *supra* note 152, at 536–46.

183. The issue of what variables are actually determinative in the results could be an important matter in the narrowly tailored analysis because it may require that, if possible, race-neutral means are used. *See supra* note 62 and accompanying text.

184. Hallinan, *supra* note 151, at 741–42.

185. *See* Slavin, *Cooperative Learning*, *supra* note 151, at 632–33 (discussing an increase in cross-racial friendships and academic achievement in a forced integrated study on learning).

different races fosters greater learning and achievement.¹⁸⁶ Researchers have also made the important note that these educational benefits extend to students of all races.¹⁸⁷

An overwhelming amount of research finds that this interpersonal interaction also directly relates to improving children's civic values. Much of the research stems from Gordon Allport's contact hypothesis that asserts intergroup contact will reduce prejudice.¹⁸⁸ Following up on his theory, studies have shown that when children from different races are given the opportunity to interact through desegregated schools, they are more likely to form friendships with people of other races.¹⁸⁹ Thus, as a general matter, racially diverse schools operate as a means of improving overall racial friendliness and reducing racial prejudice and stereotypes.¹⁹⁰ By achieving these results early, the benefits are more likely to accrue in the long term and be carried into adulthood.¹⁹¹ Adults who went to racially diverse schools are more likely to attend diverse colleges and universities, live in integrated neighborhoods, and work in racially diverse settings.¹⁹² Furthermore, exposing students to diversity has been shown to improve citizenship, increase political participation, and foster volunteering.¹⁹³ Twenty or thirty years ago these long term benefits may have seemed only desirable, but with the changing demographics of our country¹⁹⁴ they may have become absolutely necessary. Learning these civic values at an early age will prepare children for the world they will enter as adults, one in which the majority of people in the United States are racial minorities.¹⁹⁵ By attending racially diverse schools, children will be less prejudiced, more understanding, and thus more capable of interacting in a racially diverse

186. *Id.*

187. *See supra* note 156 (discussing the benefits of diversity to students of all races).

188. *See generally* GORDON ALLPORT, *THE NATURE OF PREJUDICE* (1954).

189. Braddock et al., *supra* note 153, at 262; Hallinan & Smith, *supra* note 153, at 8; Schofield & Eurich-Fulcher, *supra* note 153, at 4–25 (discussing the multiple factors in desegregated schools that contribute to the formation of strong friendships).

190. Hallinan, *supra* note 151, at 745–46.

191. *See generally* Braddock et al., *supra* note 153 (providing an overview of studies showing the long term effects of school desegregation).

192. *Id.* at 261–62.

193. *See, e.g.,* Kurlaender & Yun, *supra* note 156, at 113, 130.

194. Martha Farnsworth Riche, *America's Diversity and Growth: Signposts for the 21st Century*, 55 *POPULATION BULL.* 3 (2000); Mary C. Waters, *Immigration, Inter marriage, and the Challenges of Measuring Racial/Ethnic Identities*, 90 *AM. J. PUB. HEALTH* 1735 (2000); Editorial, *The Minority Majority: Our Shifting Demographics Are Proof of Their Insignificance*, *L.A. DAILY NEWS*, Sept. 4, 2000, at N12.

195. APPEL ET AL., *supra* note 5, at 1 (noting that the country will soon be majority-minority); *The Minority Majority: Our Shifting Demographics Are Proof of Their Insignificance*, *supra* note 154 (citing that California is already officially a majority-minority state).

society.¹⁹⁶ This ability to interact will be valuable, particularly in an increasingly diverse workplace.

Studies show that students from racially diverse schools accrue multiple benefits in the job market.¹⁹⁷ Over the course of eradicating *de jure* school segregation, there has been a corresponding desegregation in employment.¹⁹⁸ Therefore, today's graduates face a much different work environment than they would have thirty years ago. The academic research on this issue concludes that students who matriculate from and develop social values in racially diverse schools will be better prepared to succeed in today's work environment.¹⁹⁹ While these benefits extend to students of all races,²⁰⁰ racial minorities may achieve additional benefits. Although the job market is not rigidly segregated today, the inroads to entering it are still often *de facto* separate, and racial minorities who go to racially isolated schools have fewer opportunities in this job market than do white students and minorities who go to diverse schools.²⁰¹ Attending racially diverse schools opens up social networks to racial minorities,²⁰² which often lead to additional job opportunities. As these benefits increase, they will perpetuate themselves naturally, and further integrate the job market and social networks.²⁰³

In addition to the employment benefits that result from racially diverse educational settings, minority students in particular receive generalized academic benefits. For example, a study by Carl Bankston and Stephen Caldas shows that racial diversity is linked to an improvement by black students on graduation exams.²⁰⁴ This study theorizes that the improvement is due to the students' enhanced expectation of upward mobility.²⁰⁵ Other

196. Woods & Sonleitner, *supra* note 153, at 14–15 (finding that exposure to many races as a child has “real and lasting improvement in racial attitudes into adulthood”).

197. *See infra* notes 198–203 and accompanying text; *see also* Kurlaender & Yun, *supra* note 156, at 130 (reporting that students also believe diversity benefits them in the job market).

198. Braddock & Dawkins, *supra* note 151, at 402–03; McPartland & Braddock, *Going to College*, *supra* note 154, at 150–51.

199. McPartland & Braddock, *Going to College*, *supra* note 154, at 151 (asserting that minorities who attend integrated schools are more successful in desegregated situations later in life); *see also* McPartland & Braddock, *How Minorities Continue to Be Excluded*, *supra* note 151 (arguing that students from predominantly minority schools may be shut out of job opportunities).

200. *See, e.g.*, Kurlaender & Yun, *supra* note 156, at 123, 130 (stating that working well in a diverse environment is critical to success in today's economy, and finding that eighty-five percent of students believe learning in a diverse environment has prepared them to work in today's market).

201. McPartland & Braddock, *Going to College* *supra* note 154, at 151–52.

202. *Id.* at 152 (stating that desegregation generally helps “penetrate the continuing exclusionary barriers” thereby creating more opportunity in adulthood).

203. Jomills Braddock's reviews of multiple longitudinal studies look at a variety of the effects of desegregation and suggest an interrelated process of perpetuation. *See, e.g.*, Braddock et al., *supra* note 153, at **Need pinpoint**.

204. Bankston & Caldas, *supra* note 151, at 425.

205. *Id.*

studies have duplicated this showing of increased achievement in other academic areas.²⁰⁶ Some researchers have cited teacher expectations as the major factor that affects the increased achievement of black students.²⁰⁷ According to these researchers, because teacher expectation for minority student achievement is greater in integrated schools, students' chances of educational success are also greater.²⁰⁸ Rita Mahard and Robert Crain have theorized that high teacher expectations are interrelated with conveying the message to black students that they can control their own destiny, which results in higher achievement.²⁰⁹ Again, as this type of environment develops, students begin to harbor greater educational and job aspirations.²¹⁰ Moreover, minority students' chances of attending, remaining, and succeeding at majority white colleges are greater when they attended racially diverse elementary and primary schools.²¹¹

B. Higher Education

In recent years, research has started gravitating toward the impact of racial diversity on higher education. As researchers have concentrated their studies on higher education, a greater mass of research with clearer results is being completed.²¹² As in primary or secondary education, racial diversity benefits students of all races in higher education in a variety of ways.²¹³ Patricia Gurin's expert testimony before the district court in the University of Michigan's affirmative action litigation sets the benchmark

206. See, e.g., Cook, *supra* note 152, at 41 (concluding desegregation has a positive effect on reading scores); Rita E. Mahard & Robert L. Crain, *Research on Minority Achievement in Desegregation Schools*, in THE CONSEQUENCES OF SCHOOL DESEGREGATION 103, 121–24 (Christine H. Rossell & Willis D. Hawley eds., 1983) (presenting a meta-analysis that shows the positive effects of desegregation on black achievement, specifically in early grades). For an overview of academic research in this area, see Braddock & McPartland, *Social and Academic Consequences* *supra* note 151, **PP**.

207. See, e.g., Ronald F. Ferguson, *Teacher Perceptions and Expectations and the Black-White Test Score Gap*, in THE BLACK WHITE TEST SCORE GAP 273, 289 (Christopher Jencks & Meredith Phillips eds., 1998); Ray Rist, *Student Social Class and Teacher Expectations: The Self-Fulfilling Prophecy in Ghetto Education*, 40 HARV. EDUC. REV. 411, **PP**(1970).

208. Ferguson, *supra* note 207, at **PP**; Rist, *supra* note 207, at **PP** (finding that the way teachers act towards children from the "ghetto" greatly affects their achievement).

209. Mahard & Crain, *supra* note 206, at 122–24.

210. Dawkins, *supra* note 182, at 110 (showing that southern blacks from desegregated schools have greater professional occupational expectations); Wells & Crain, *supra* note 152, at **PP** (reviewing studies showing increased higher education attainment for black students from desegregated schools).

211. Jomills Henry Braddock, II & James M. McPartland, *Assessing School Desegregation Effects: New Directions in Research*, in 3 SOC. EDUC. & SOCIALIZATION 259, 272–76 (1982) (relying on data from a 1966 study by the U.S. Commission on Civil Rights); Braddock, *Perpetuation of Segregation*, *supra* note 155, at 185.

212. See *infra* notes 214–84 and accompanying text.

213. See *infra* notes 156, 261 and accompanying text.

for much of the research on diversity in higher education.²¹⁴ It has been characterized as providing “conclusive proof that a racially and ethnically diverse university” results in benefits for students of all races.²¹⁵ Although she relied on previous research done by others, her work is unique for several reasons.²¹⁶ First, she concentrated specifically on how diversity affects the educational setting and her study is recognized as the first of its kind.²¹⁷ Second, she attempted to measure and identify the specific benefits and possible drawbacks of diversity.²¹⁸ Finally, the fact that her studies were longitudinal, studying outcomes over long periods of time, makes her conclusions some of the most reliable reached to date.²¹⁹ In her testimony and research, Gurin has concluded that a plethora of benefits result from racially diverse universities and colleges, not just for minorities but for all students.²²⁰ In particular, she identified two broad benefits: learning outcomes and democracy outcomes.²²¹ The importance of these benefits cannot be overstated, as they relate to the core goals of higher education and are furthered directly by increasing racial diversity.²²² Furthermore, Gurin’s conclusions are substantiated by an almost unparalleled series of empirical analyses conducted on diversity in the educational setting.

214. Gurin, *supra* note 151, at PP. In reaching her conclusions, Patricia Gurin examined national data from several different institutions, extensive surveys of students at the University of Michigan, and data from a classroom program implemented at the University of Michigan. *Id.* at 363–66.

215. *Introduction to Reports Submitted on Behalf of the University of Michigan: The Compelling Need for Diversity in Higher Education*, 5 MICH. J. RACE & L. 243, 249 (1999) <<Is there an author for this source?>>; see also APPEL ET AL., *supra* note 5, at ix, 11.

216. See Killenbeck, *supra* note 3, at 1327–29 (recognizing Gurin’s work as one of the two leading analyses on this issue and also the importance of the conclusions she reaches).

217. John Friedl, *Making a Compelling Case for Diversity in College Admissions*, 61 U. PITT. L. REV. 1, 36 (1999) (quoting Editorial, *Racial Diversity: In College Benefits Are Clear and Lasting*, DETROIT FREE PRESS, Mar. 27, 1999, at 10A).

218. *Id.*

219. See Gurin, *supra* note 151, at 365–66 (studying outcomes over time); see also Victor G. Rosenblum, *Surveying the Current Legal Landscape for Affirmative Action in Admissions*, 27 J.C. & U.L. 709, 731 & n.128 (2001) (recognizing Patricia Gurin’s distinguished thirty-four years of experiences that includes several publications).

220. Gurin, *supra* note 151, at 364.

221. *Id.* at 366.

222. Palmer, *supra* note 175, at 52. A 1998 report to the President echoes Gurin’s testimony, stating,

Diversity improves teaching and learning by providing a range of perspectives that enrich the learning environment; strengthens students’ critical-thinking skills by challenging their existing perspectives; teaches students how to interact comfortably with people different than themselves and thereby how to function as good citizens and neighbors; improves students’ preparation for employment by teaching them the value of different perspectives, how to function in diverse domestic marketplace and the expanding global marketplace; and fosters the advancement of knowledge by spurring study in new areas of concern.

One America in the 21st Century: Forging a New Future, The Advisory Board’s Report to the President 66 (1998).

<<DB: Need to cite to these studies or delete this sentence>>

Concerning the first category of benefits, Gurin flatly stated, “Students learn better in a diverse educational environment.”²²³ The reasoning and research behind this conclusion are quite clear.²²⁴ Most of what educators call “thinking” is actually automatic and mindless action.²²⁵ Most of the time our “thought” is based upon previous learning that is so routine that creative thinking is not required.²²⁶ Diverse educational experiences, however, can break through these mundane thought processes. When children grow up in a homogeneous environment and continue to live and learn in a similar environment, their intellect is not challenged and thus often remains in the mindless state.²²⁷ But when people encounter new diverse environments, they learn to think in deeper and more complex ways.²²⁸ They are forced to face novel situations in which their previous thought processes may not be helpful, thus requiring them to find creative new ones.²²⁹ Colleges and universities are the best places to engage in this learning, because at this age students are at a critical developmental stage in which they are most suited to making the leap of becoming conscious learners and critical thinkers.²³⁰ In fact, racial diversity in higher education creates the exact variables that research has determined are vital in developing the critical thinking that is expected of students.²³¹ Because of the severity of residential segregation, colleges and universities are the only place most people can gain these skills and get exposure to diversity.²³²

223. Gurin, *supra* note 151, at 365.

224. *Id.* at 366 (stating that her conclusions are reached from strong evidence in three empirical analyses and through social science theory and research).

225. *Id.* at 371. Gurin cites Ellen Langer, *Rethinking the Role of Thought in Social Interaction*, in *NEW DIRECTIONS IN ATTRIBUTION RESEARCH* 2, 35–58 (J. Harvey et al. eds., 1978). Langer contends that thinking occurs when one is faced with a novel situation.

226. *Id.*

227. *Id.* at 369 (drawing on Erik Erikson’s studies that suggest discontinuity with past experiences is necessary for personal development).

228. *Id.* at 370.

229. *Id.* at 369–70.

230. *Id.* “According to Erikson’s emphasis on the importance of discontinuity from the past environment, higher education will be especially influential when its social milieu is different from the home and community background, and when it is diverse enough and complex enough to encourage intellectual experimentation . . .” *Id.* at 369; *see also* BUSINESS-HIGHER EDUCATION FORUM, *supra* note 156, at 14 (stating that college may be the only place where many people can gain the skills that diversity provides).

231. Gurin, *supra* note 151, at 368–70. Gurin found that students who were exposed to racial diversity in the classroom showed the greatest growth in active thinking processes, intellectual engagement/motivation, and intellectual/academic skills. *Id.*

232. Bowen, *supra* note 156, at 427–28 (“Universities therefore are responsible for imparting civic and democratic values that are essential to the functioning of our nation”); BUSINESS-HIGHER EDUCATION FORUM, *supra* note 156, at 14; *see also* DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 74–78

Thus, it is incumbent upon universities to meet the challenge of engaging students intellectually by providing the diverse setting that students need.²³³

Racial diversity also furthers another goal of colleges and universities: preparing students for active participation in our pluralistic and democratic society.²³⁴ It is well accepted that an educated populace is essential to ensuring active participation in a democracy.²³⁵ Because our country is becoming an increasingly racially heterogeneous society, an understanding of and ability to deal with racial diversity is an absolutely necessary ingredient of education.²³⁶ A racially diverse educational setting helps students understand and resolve the conflicts that exist between multiple perspectives and also find and pursue the common ground among these perspectives.²³⁷ Students who are exposed to this environment are better able to “acknowledge that group differences are compatible with the interests of the broader community.”²³⁸ Not only does racial diversity increase students’ democratic understanding, Gurin’s research reveals that students who are educated in diverse settings are more likely to engage actively in the roles of citizenship.²³⁹ Furthermore, these positive outcomes continue after graduation.²⁴⁰ These very types of experiences can help

(1993) (discussing the “hyper-segregation” of blacks). Based on Massy and Denton’s study, it would be incorrect to say minorities are merely “segregated,” rather they are “hyper-segregated” into highly dense racially isolated urban cores. *Id.*

233. *Id.*

234. *Id.*

235. Gurin, *supra* note 151, at 374. The Supreme Court in *Brown I* contended that education is “the very foundation of good citizenship.” *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

236. Gurin, *supra* note 151, at 375. As Gurin stated: “Students educated in diverse settings are better able to participate in a pluralistic democracy.” *Id.* at 374. Furthermore, Gurin concludes that students must “learn how to accept diversity, negotiate conflicts, and form coalitions with individuals and groups” if they are going to be effective leaders in a heterogeneous society. *Id.* at 375; *see also supra* notes 194–96 and accompanying text; BUSINESS-HIGHER EDUCATION FORUM, *supra* note 156, at 13 (describing exposure to diversity as imperative).

237. Gurin, *supra* note 151, at 374–75. The very earliest notions of democracy in Greece also embrace this ideology. *Id.* Aristotle actually embraced diversity. “The typologies that fill almost every page of Aristotle’s *Politics* show him uniting and separating, finding underlying unity and significant differences.” Arlene Saxonhouse, FEAR OF DIVERSITY: THE BIRTH OF POLITICAL SCIENCE IN ANCIENT GREEK THOUGHT 235 (1992). Aristotle believed that democratic unity and success would become stronger in a heterogeneous society than a monolithic one. *Id.* In fact, he viewed a lack of heterogeneity as something that threatened the fabric of society, comparing it to an incestuous relationship. *Id.* According to Gurin, equality, not unanimity, among citizens with diverse ideas and civil discourse over issues of conflict cause a democratic society to thrive. Gurin, *supra* note 151, at 374 (citing H.F. Pitkin & S.M. Shumer, *On Participation*, in ORGANIZING DEMOCRACY (Goodwyn ed., 1982)).

238. Gurin, *supra* note 151, at 399; *see also* *Ambach v. Norwick*, 441 U.S. 68, 76–77 (1979). In *Ambach*, the Supreme Court wrote, “public schools [are] an ‘assimilative force’ by which diverse and conflicting elements in our society are brought together on a broad but common ground.” *Id.*

239. Gurin, *supra* note 116, at 399.

240. *Id.* at 386, 389, 399. Gurin’s study reveals that students who attend diverse colleges

individuals negotiate the challenges that an increasingly heterogeneous population poses. In fact, some argue that this type of education is essential to the nation's survival because society's previous conceptions of democracy expect a homogeneity that is in conflict with the current social reality.²⁴¹

Several studies addressing more narrow issues of diversity in higher education support the conclusions in Gurin's work. These studies tend to identify three categories of benefits: 1) teaching and learning, 2) civic values, and 3) employment. Addressing the first category, surveys of university professors indicate that they believe racial diversity in their classrooms increases the students' learning opportunities.²⁴² These assertions are well founded in light of the substantial evidence indicating that learning occurs not only between teachers and students but also among students.²⁴³ Thus when the diversity of the student body increases, the opportunities for students to learn also increases.²⁴⁴ In a study by Sylvia Hurtado, students who studied with someone of another race reported

have more diverse friends, neighbors and co-workers nine years after entering college. *Id.* at 386.

241. *Id.* at 374–75 (discussing Jefferson's notion of homogeneity and our country's current trend towards heterogeneity); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312–13 (1978) (plurality opinion) (arguing that the nation's future depends on leaders trained in a diverse environment); Neil L. Rudenstine, *Student Diversity and Higher Learning*, in DIVERSITY CHALLENGED, *supra* note 62, at 39 (stating that diversity in college is "vital to the health and effective functioning of our democracy").

242. White, *supra* note 152; Roxane Harvey Gudeman, *Faculty Experience with Diversity: A Case Study of Macalester College*, in DIVERSITY CHALLENGED, *supra* note 62, at 270–71; Geoffrey Maruyama & Jose F. Moreno, *University Faculty Views About the Value of Diversity on Campus and in the Classroom*, in REPORT FOR THE AMERICAN COUNCIL ON EDUCATION AND THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS (2000). <<Derek: you wanted to insert 86 ACADEME 54 here>> The experience of Kent D. Syverud, Dean and Professor of Law at the Vanderbilt Law School, provides a compelling example of what diversity has brought to education. He admits that while teaching at Michigan Law School he was skeptical of racial diversity, particularly the notion that it might improve his student's educational experience. After his class incorporated racial diversity, he changed his mind, discovering instead that his students were receiving "an immeasurably better legal education" and becoming "immeasurably better lawyers." Kent D. Syverud, *Expert Report: Grutter v. Bollinger*, No. 97-75928 (E.D. Mich.), 5 MICH. J. RACE & L. 451, 451–52 (1999). Syverud testified that racial diversity enhances the utility of the Socratic method as a teaching technique, and even improves the quality of classes that are far removed from race in law. *Id.* at 452–54.

243. ERNEST T. PASCARELLA & PATRICK T. TERENCEZINI, HOW COLLEGE AFFECTS STUDENTS 620 (1991). "[S]tudents' interaction with their peers . . . [has] a strong influence on many aspects of change during college," including "intellectual development and orientation." *Id.*

244. See Rudenstine, *supra* note 241, at 31 (arguing that students learn from their peers). **Professor??** Rudenstine, referring to diversity in higher education, writes that "[s]tudents benefit in countless ways from the opportunity to live and learn among peers whose perspectives and experiences differ from their own. A diverse educational environment challenges them to explore ideas and arguments at a deeper level." *Id.* They are forced to elevate their thinking to a level that can be attained only when their own ideas are challenged by students who have different ideas. *Id.*

growth not only in racial tolerance, but also in critical thinking skills and problem solving.²⁴⁵ The deans of Michigan and Harvard Law Schools also found similar opinions among their students.²⁴⁶ The vast majority of students at these two schools believe that racial diversity has provided them with learning experiences that improved their critical thinking skills.²⁴⁷ And although it does not relate directly to racial diversity in the classroom, studies in higher education have found that participation in social diversity courses has positive effects on students' cognitive development.²⁴⁸ The reasoning for this is much the same as that of actual racial diversity in the classroom: it exposes students to different perspectives and forces them to reflect on issues from multifaceted points of view.²⁴⁹ Gurin's research, however, stresses that the benefits from these social diversity courses also requires racially diverse classrooms.²⁵⁰

The most obvious benefit of racial diversity in higher education is improving students' civic values. In large part, this improvement happens merely because of the cross-racial interaction that occurs in racially diverse settings.²⁵¹ Studies show that racial diversity on college campuses changes student attitudes and reduces prejudices,²⁵² creating a climate in which students are better suited to get along with people of other races.²⁵³ Once this attitudinal shift occurs, the positive civic benefits are far reaching. Individuals learning in these settings form friendships with people of different races, are more likely to work for employers who employ a racially diverse work force, and are more likely to live in integrated housing.²⁵⁴ Furthermore, these benefits persist over time.²⁵⁵ These benefits

245. See Hurtado, *supra* note 151, at 198.

246. Gary Orfield & Dean Whitla, *Diversity and Legal Education: Student Experiences in Leading Law Schools*, in DIVERSITY CHALLENGED, *supra* note 62, at ____.

247. *Id.* at 158 tbl.8.

248. See, e.g., Adams & Zhou-McGovern, *supra* note 151, at 6 (describing the positive effects of diverse learning environments on the cognitive development of undergraduates).

249. *Id.*

250. Gurin, *supra* note 151, at 376–77.

251. See Allport, *supra* note 188, at 251–67. Allport introduced the “contact hypothesis,” arguing contact with people from different races reduces prejudice toward them. *Id.* James L. Werth and Charles G. Lord define the hypothesis, stating that “contact with members of a negatively stereotyped group might ameliorate attitudes both toward the specific group member or members with whom contact occurred, and toward the group as a whole.” *Previous Conceptions of the Typical Group Member and the Contact Hypothesis*, 13 BASIC & APPLIED SOC. PSYCHOC. 351, 351 (1992).

252. See, e.g., Astin, *supra* note 151, at 46–48; Hurtado, *supra* note 151, at 189–90; MATHTEC, INC., *supra* note 151, at vii–4.

253. See, e.g., WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER 225 (1998)<<Derek: consider adding a parenthetical here>>; Hawley et al., *supra* note 153, at 426 (discussing how diversity can reduce prejudice when properly implemented).

254. Braddock et al., *supra* note 153, at 261–64 (reviewing studies that collectively show that students who attend desegregated high schools and colleges are more likely to live in integrated neighborhoods, have racially diverse friends, and work in racially diverse firms); Janet Ward

culminate in “acceptance of people of different races/cultures, cultural awareness, tolerance of people with different beliefs, and leadership abilities.”²⁵⁶ Each of these outcomes is particularly important in maintaining the vitality of a democracy because they each directly relate to the individual’s participation in a pluralistic society. Students who learn this acceptance are more likely to support basic democratic values such as political inclusion.²⁵⁷

In a more concrete way, racial diversity in educational settings improves students’ ability to obtain jobs and succeed in the job market. In fact, some researchers argue that the major benefit of going to desegregated and racially diverse schools is the increased opportunity for minorities in the job market.²⁵⁸ Research tends to show that minorities who attend racially segregated schools also have racially segregated social networks that effectively operate to narrow their occupational opportunities.²⁵⁹ In contrast, racial minorities who attend diverse schools have greater occupational aspirations, leading to increased motivation, and resulting in increased accomplishment.²⁶⁰

Racial minorities, however, are not the only students for whom racially diverse schools increase employment opportunities.²⁶¹ All students need to be prepared to meet the new challenges that an increasingly diverse

Schofield, *Maximizing the Benefits of Student Diversity: Lessons from School Desegregation Research*, in *DIVERSITY CHALLENGED*, *supra* note 62, at 107; *see also* Dawkins & Braddock, *supra* note 151, at 394 <<**Parenthetical needed**>>.

255. *See* Gurin, *supra* note 151, at 386, 389, 399.

256. Hurtado, *supra* note 151, at 200.

257. Gurin, *supra* note 151, at 399–400 (discussing the increased cross-racial interaction and the willingness to accept the interests of the broader community).

National studies dealing with changes during the college years in attitudes and values related to civil rights, civil liberties, racism, anti-Semitism, or general tolerance for nonconformity uniformly report shifts toward social, racial, ethnic, and political tolerance and greater support for the rights of individuals in a wide variety of areas.

PASCARELLA & TERENCEZINI, *supra* note 243, at 279.

258. *See, e.g.*, Kermit Daniel et al., *Racial Differences in the Effects of College Quality and Student Body Diversity on Wages*, in *DIVERSITY CHALLENGED*, *supra* note 62, at 221; McPartland & Braddock, *Going to College*, *supra* note 154, at **PP needed**.

259. *See* McPartland & Braddock, *How Minorities Continue to Be Excluded*, *supra* note 154, at 8.

260. *See generally* Braddock & McPartland, *Social and Academic Consequences*, *supra* note 151 **Parenthetical needed**. However, it is important to note that the results may simply relate to the increased opportunities.

261. BUSINESS-HIGHER EDUC. FORUM, *supra* note 156, at 14–15 (stating that benefits accrue for “all graduates”); MATHTEC, INC., *supra* note 151, at I-1; Carnevale, *supra* note 154, at 20; Daniel et al., *supra* note 258, at 221; *see also* Gurin, *supra* note 151, at 364, 401 (showing the overall benefits for students of all races and stating that diversity prepares students to live and work in our society); Milem, *supra* note 152, at 12 (finding an increase in wages of students who attended racially diverse universities).

business environment will present.²⁶² New employees will have no choice but to deal with people who come from different cultural, ethnic, and racial backgrounds.²⁶³ These differences may create barriers to interaction for those from racially isolated backgrounds.²⁶⁴ Thus, obtaining diversity skills is “essential” for students’ success in the new economy.²⁶⁵ Universities and colleges that maintain racially diverse student bodies are best able to prepare students for this changing work environment by teaching them the skills necessary to succeed in the new economy.²⁶⁶ Furthermore, employers who foresee the coming of a more multicultural world prefer students who have a multicultural education.²⁶⁷ Not only do employers want employees who can navigate the work environment socially, but employers also want a racially diverse workforce because they believe that it improves productivity.²⁶⁸ Studies show that racial and ethnic diversity promotes problem solving and the creation of more effective and feasible ideas in the workplace.²⁶⁹ In jobs that require teamwork and creativity, racial diversity

262. See BUSINESS-HIGHER EDUC. FORUM, *supra* note 156, at 33 (concluding that these “skills are essential to the nation’s success”); Gerry Romano, *Including All*, 52 ASS’N MGMT. 30, 32 (2000) (addressing the changing racial and ethnic diversity in the workplace).

263. BOWEN & BOK, *supra* note 253, at 225. “As the population of the country becomes even more diverse, . . . the need to work effectively with individuals of other races will become an increasingly inescapable reality to members of every racial group.” *Id.*

264. BUSINESS-HIGHER EDUC. FORUM, *supra* note 156, at 32–34 (suggesting that people who have not acquired diversity skill will not be prepared for the new economy); Thomas J. Sugrue, Expert Reports Submitted on Behalf of the University of Michigan: The Compelling Need for Diversity in Higher Education: *Gratz v. Bollinger*, No. 97-75321 (E.D. Mich.); Grutter, et al. v. Bollinger, et al., No. 97-75928 (E.D. Mich.), *reprinted in* 5 MICH. J RACE & L. 261, 264 (1999) (stating that segregation reinforces perceptions of racial difference and limits the employment opportunities of minorities). “Persons of different races likely have some differences that are real, based on their different cultures and experiences,” which can work to build stereotypes. Palmer, *supra* note 175, at 76 n.67.

265. BUSINESS-HIGHER EDUC. FORUM, *supra* note 156, at 33.

266. Carnevale, *supra* note 154, at 20–21; Palmer, *supra* note 175, at 62; *see also* MATHTECH, INC., *supra* note 151, at I-1 (concluding that diversity can meet the challenge of preparing students for the workplace); Milem, *supra* note 152, at 1 (discussing the need to teach students certain skills and discussing the fact that diversity enhances schools’ ability to do this).

267. See BUSINESS-HIGHER EDUC. FORUM, *supra* note 156, at 33–34 (finding that top companies value the skills that a diverse education provides and that these companies believe that “diversity brings value to their enterprises”); SECRETARY’S COMMISSION ON ACHIEVING NECESSARY SKILLS, WHAT WORK REQUIRES OF SCHOOLS: A SCANS REPORT FOR AMERICA 2000, at 2 (1991) (listing working with people from diverse backgrounds as one of the essential competencies necessary to succeed in today’s job market); *see also* Sugrue, *supra* note 264, at 290 (discussing employers who favor employees who have been exposed to diversity); David A. Thomas & Robin J. Ely, *Making Differences Matter: A New Paradigm for Managing Diversity*, 74 HARV. BUS. REV. 9, 79–80 (1996) (surveying employers and finding managers increasingly believe a more diverse workforce increases effectiveness and productivity).

268. BUSINESS-HIGHER EDUC. FORUM, *supra* note 156, at 34 (stating education in a diverse setting “enhances the creativity, innovation, and problem-solving skills” of graduates); Carnevale, *supra* note 154, at 2 (stating that some United States companies have diverse workforces because it makes them “more effective, creative, and flexible”).

269. See BUSINESS-HIGHER EDUC. FORUM, *supra* note 156, at 34; Poppy Laurretta McLeod et

appears to be an invaluable asset to an employer. It is important to note, however, that this type of increased work productivity accrues only when the employees understand how to function in diverse settings.²⁷⁰ The forum that creates understanding is school. Since the majority of individuals in the United States attend racially segregated primary and secondary schools²⁷¹ and an even larger majority live in racially segregated neighborhoods,²⁷² colleges and universities are the only places that most people can learn the skills and be exposed to the environments that will make them more marketable employees.²⁷³ Once they attain these skills, a recent study shows that many employers are rewarding these employees with higher wages for their increased marketability.²⁷⁴ This is precisely the type of evidence that demonstrates the concrete benefits of racial diversity and supplements Gurin's conclusions about occupational benefits.

C. How Much Diversity is Required?

In both elementary and secondary education, an important issue with respect to the research on racial diversity is what numerical level of diversity is necessary to achieve the benefits at all levels of education.²⁷⁵ To date, the research has yet to adequately concentrate on the precise critical mass of racial minorities that is required.²⁷⁶ The only maxim that

al., *Ethnic Diversity and Creativity in Small Group*, 27 SMALL GROUP RES. 248, 257–61 (1996) (analyzing the effects of diversity on group problem solving and creativity); L.R. Hoffman & N.R.F. Maier, *Quality and Acceptance of Problem Solutions By Members of Homogeneous and Heterogeneous Groups*, 62 J. ABNORMAL & SOC. PSYCHOL. 401, 405–07 (1961). *But see* Kamalesh Kumar, Warren E. Watson & L.K. Michaelsen, *Cultural Diversity's Impact on Interaction Process and Performance: Comparing Homogeneous and Diverse Task Groups*, 36 ACAD. MGMT. J. 590, 595–96 (1993) (finding that initially homogeneous groups are better at problem solving, with diverse groups becoming better after longer periods of time).

270. *See* McLeod, *supra* note 269, at 249 (finding that ethnic diversity produces positive effects in the workplace when “managed” properly).

271. ORFIELD & YUN, *supra* note 1, at 18–29 (detailing the demographic shifts that show a resegregation of schools across the nation). Orfield and Yan's study also shows that whites are actually the most segregated racial group in education. *Id.*; *see also* Tim Simmons & Susan Ebbs, *Separate and Unequal, Again*, NEWS & OBSERVER, Feb. 18, 2001, at A1 (Raleigh, N.C.) (citing the recent increase in school racial segregation).

272. Sharon A. Jackson et al., *The Relation of Residential Segregation to All-cause Mortality: A Study in Black and White*, 90 AM. J. PUB. HEALTH 615, 616 (2000) (citing the high levels of residential segregation and its correlation with higher mortality rates).

273. BUSINESS-HIGHER EDUC. FORUM, *supra* note 156, at 14. This may be particularly true for white students because they come from the most segregated backgrounds. Orfield and Whitley argue that for this reason, a diverse educational setting may be more necessary and more beneficial to white students. Orfield & Whitley, *supra* note 156, at 172.

274. Daniel et al., *supra* note 258, at 225–28.

275. This issue troubled the court in *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 850–51 (E.D. Mich. 2001) (arguing that the program is not narrowly tailored because the concept of a “critical mass” cannot be pinpointed).

276. *Id.*; Alger, *supra* note 156, at 89 (locating this issue as a weakest link in the diversity

emerges from the research places the appropriate percentage of racial minorities at an amount more than “tokenism.”²⁷⁷ Tokenism presents a problem for two reasons. First, without a significant minority presence, most of the students in the racial majority will not encounter minorities and experience the meaningful contact that fosters positive outcomes.²⁷⁸ Second, tokenism, particularly in higher education, may lead minorities to feel alienated, which necessarily decreases their likelihood of persisting at a majority white university.²⁷⁹

Patricia Gurin attempted to address what racial representation beyond tokenism is necessary, but her analysis concentrated primarily on how diversity creates benefits, not on the level of diversity required. Instead of coming to a conclusion about levels of diversity, she merely explained that diversity is required in three different formats for students to accrue significant benefits.²⁸⁰ In a section subtitled “Adequate Representation,” she merely echoed the findings that tokenism will not result in benefits.²⁸¹

research).

277. See Sylvia Hurtado, *The Institutional Climate for Talented Latino Students*, 35 RES. HIGHER EDUC. 21, 23–24 (1994) (discussing the notion of a necessary critical mass versus a mere statistical percentage of racial minorities). “Tokenism” refers to the situation in which a school has accepted only a minute number of racial minorities so that a statistical percentage is present, but the low percentage does not amount to an environment that either reflects the racial diversity of society or is sufficient to create a pluralistic setting. **Need authority here.**

278. Sylvia Hurtado et al., *Exclusion or Self Segregation? Interaction Across Racial/Ethnic Groups on Campus*, AMERICAN EDUCATIONAL RESEARCH ASSOCIATION (1994) <<David/Derek: this cite still needs to be checked>> <<Also needs pp.>>

279. See generally Chalsa M. Loo & Garry Rolison, *Alienation of Ethnic Minority Students at a Predominantly White University*, 57 J. HIGHER EDUC. 58, 71–72 (1986). **Needs parenthetical**

280. Gurin, *supra* note 151, at 376–77. This part of her work starts with three concepts: structural diversity, classroom diversity, and informal interactional diversity. *Id.* Structural diversity is basically the racial and ethnic composition of the student body. *Id.* at 376. Classroom diversity is “the incorporation of knowledge about diverse groups into the curriculum that colleges and universities present” to their students. *Id.* Informal interactional diversity is the opportunity to interact with a diverse group of students outside of the classroom. *Id.* Gurin concludes that these three types of diversity interact to produce the above mentioned results. *Id.* at 377. She argues that benefits that accrue from classroom diversity are linked to the existence of structural diversity. *Id.* at 376. Tying all the categories together, she writes, “Structural diversity is essential but, by itself, usually not sufficient to produce substantial benefits; in addition to being together on the same campus, students from diverse backgrounds must also learn about each other in the courses that they take and in informal interaction outside of the classroom.” *Id.* at 377.

281. *Id.* at app. B, available at <http://www.umich.edu/~urel/admissions/legal/expert/gurintoc.html> (last visited Feb. 19, 2002) (on file with the North Carolina Law Review). However, she does add something to the discussion, arguing that tokenism may hurt both minority and majority students. *Id.* Minority students may encounter a more hostile environment, and majority students tend to view the minority students as symbolic. *Id.* By viewing individual minority students as symbols of the larger group, the racial majority may either exaggerate the differences between racial groups or distort the image of the individual minority members to reflect their pre-held stereotypes about the minority group. *Id.* (citing R.M. Kanter, *Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women*, 82 (5) AM. J. SOC. 965 (1977)).

Her only assertion regarding “how much is necessary” is that: “As the educational institution becomes more multicultural in focus and its functioning, it is able to realize the benefits of various forms of diversity for all students.”²⁸² While never explicitly stated, Gurin’s and others’ possible conclusion is first that tokenism is inadequate,²⁸³ and second that once tokenism is surpassed, the students’ benefits increase correspondingly with increases in diversity.²⁸⁴ Yet, one should not be extremely critical of the research on this point because when dealing with an issue such as diversity in education, the multiple different factors that necessarily effect the campus climate may make it impossible to isolate a level of diversity that is universally effective.²⁸⁵

D. Distinguishing the Research’s Perspective From the Supreme Court’s

An important problem underlies this entire discussion, one with which the judicial system has at times taken issue. The research suggests that individuals of different races each bring a unique or varied perspective to the educational environment, particularly in the areas of learning and civic values, and experiencing these different perspectives leads to enhanced personal growth.²⁸⁶ The basic idea is that an individual’s race statistically correlates with certain background experiences that may affect his or her viewpoint. Over the past decade or so, however, the Supreme Court has grown skeptical of this type of argument.²⁸⁷ Justice O’Connor, dissenting in *Metro Broadcasting, Inc. v. FCC*, wrote: “At the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens ‘as individuals, not as simply

282. Gurin, *supra* note 151, at app. B, available at <http://www.umich.edu/~urel/admissions/legal/expert/gurintoc.html> (last visited Feb. 19, 2002) (on file with the North Carolina Law Review).

283. *See id.*; Jack E. Bynum & William E. Thompson, *Dropouts, Stopouts, and Persisters: The Effects of Race and Sex Composition on College Classes*, COLLEGE AND UNIVERSITY, 39–48 (1983) (determining if and how racial representation in first year college classes effects behavior); E.J. Gosman et al., *Predicting Student Progression: The Influence of Race and Other Student and Institutional Characteristics on College Student Performance*, 18 RES. HIGHER EDUC. 209–36 (1983) (suggesting that racial discrepancies in student progression and retention disappear when statistical controls are used).

284. *See* Gurin, *supra* note 151 (stating that as institutions become “more” diverse, they realize additional benefits, and stating that minorities perform best at schools where their proportion is in the nine to forty-nine percent range).

285. Alger, *supra* note 156, at 89 (stating that “critical mass in this context defies simple definition” and leads to inevitable problems); *Gratz v. Bollinger*, 121 F. Supp. 2d 811, 823 (E.D. Mich. 2000) (stating that the inability to articulate a requisite level of diversity does not prevent diversity from being a compelling interest).

286. *Supra* notes 179–274.

287. *See generally* *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993). **Need paratheticals.**

components of a racial, religious, sexual or national class.’ ”²⁸⁸ She argued that the type of affirmative action implemented there was based on the assumption that race determines how a person thinks.²⁸⁹ Writing for the majority in *Shaw v. Reno*,²⁹⁰ O’Connor argued that these assumptions “reinforce the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike.”²⁹¹ The Court later extended a line of reasoning related to O’Connor’s argument, in effect broadening the scope of impermissible racial assumptions.²⁹² Justice Kennedy echoed O’Connor’s argument in *Miller v. Johnson*,²⁹³ writing that these assumptions demean minorities because they are based on the belief that “members of defined racial groups ascribe to certain ‘minority views’ that must be different from those of other citizens.”²⁹⁴ Furthermore, the majority of the Court continues to argue that such thinking operates as a divisive force of balkanization among racial groups, rather than a tool of equality.²⁹⁵ These arguments have also taken hold in the lower courts.²⁹⁶ What the Supreme Court is really addressing in these arguments appears to be an issue of stereotyping,²⁹⁷ which most would agree is repugnant.

This type of criticism by the Court, however, should not be lodged against the evidence in the above research²⁹⁸ because these studies are not predicated on stereotypes.²⁹⁹ Instead, the research and its findings flow naturally from the factual realities that exist in the United States.

288. 497 U.S. 547, 602 (1990) (O’Connor, J., dissenting) (quoting *Ariz. Governing Comm. for Tax Deferred Annuity and Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1083 (1983)).

289. *Id.* (addressing a program that encouraged minority ownership in broadcasting).

290. 509 U.S. 630 (1993).

291. *Id.* at 647.

292. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 229 (1995) (finding that an affirmative action program was based on assumptions of racial inferiority and stigmatized blacks).

293. 515 U.S. 900 (1995).

294. *Id.* at 914 (quoting *Metro Broad.*, 497 U.S. at 636 (Kennedy, J., dissenting)).

295. *Shaw v. Reno*, 509 U.S. 630, 657 (1993); *Adarand*, 515 U.S. at 229.

296. *See, e.g., Hopwood v. Texas*, 78 F.3d 932, 946 (5th Cir 1996). The Fifth Circuit asserts, “To believe that a person’s race controls his point of view is to stereotype him.” *Id.*

297. *Shaw*, 509 U.S. at 647. Early in its analysis, the *Shaw* Court was concerned with the bizarre shape of a voting district in part because the shape suggested that the lines had been drawn to correspond to racial demographics. *Id.* at 641–47. Towards the end of the opinion, however, the Court focused its discussion on stereotypes, describing them as something that they flatly reject. *Id.* at 647. The Court seems concerned not with the existence of a racially identifiable district, but rather with the stereotypical assumptions that motivated the legislature to draw the lines. *Id.*

298. *See supra* notes 179–274 and accompanying text.

299. *See generally* Alger, *supra* note 8, at 21–22 (discussing the misperceptions about diversity and countering the argument that it is predicated on stereotypes); *see also* ORFIELD & YUN, *supra* note 1, at 15–25 (combating the argument that the benefits of diversity are based on stereotypes and essentializing).<<Derek/David: still need to check Alger & Orfield cites>>

Statistically, race strongly correlates with several aspects of life, including the area where one resides,³⁰⁰ one's political affiliation,³⁰¹ and one's economic standing.³⁰² The research concludes that it "is not that a person's race controls his/her viewpoint, but rather that a person's race may affect his/her background and life experiences and, in turn, his/her perspective on certain issues."³⁰³ This does nothing more than take into account the fact that where one is born and raised may have an effect on one's perspective.³⁰⁴ It is actually these differing experiences, not race—although the experiences are tied to race—that affect one's viewpoint and enable many individuals to bring true diversity to the educational setting. Tanya Murphy, arguing for diversity in higher education wrote: "The variety of viewpoints that the University seeks to foster does not come from any innate difference between the races themselves, but rather from the varying life experiences of the individual due in large part to their racial backgrounds."³⁰⁵ **<<DB: Editor suggested that the following sentence be the last sentence of the paragraph>>** Thus, for the Court to construe the above research as based on stereotypes, it would simply miss the point of what leads to the results in the research. Jonathan Alger, in an article specifically addressing the misconceptions about diversity, counters the argument that the research is predicated on stereotypes and an over-reliance on the relationship between one's race and background.³⁰⁶ He concludes that diversity does not foster an exchange of group perspectives, but rather

300. See, e.g., John A. Powell, *An Agenda for the Post-Civil Rights Era*, 29 U.S.F. L. REV. 889, 902 (1995) (stating that race is the best indicator of whether one lives near a toxic waste site) (citing RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS: A TIME FOR DISCOURSE **Need pp** (B. Bryant & P. Mohai eds., 1992)); Ian F. Harvey Lopez, *The Illusion of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 3-5 (1994) (discussing the large influence race has on an individual's life).

301. See, e.g., David Bositis, *Gore Was Rational Choice for African-Americans*, STAR TRIB. (Minneapolis & St. Paul), Dec. 10, 2000, at 33A (arguing that economically Gore was the rational choice for blacks); CeCi Connolly, *Gore Battles For Black Vote*, CHI. SUN TIMES, Sept. 17, 2000, at 31 (noting that eighty-four percent of blacks voted for Bill Clinton in 1996, and that in Sept. 2001, eighty percent of blacks supported Al Gore while only seven percent supported Bush); Stan Simpson, *Blacks Flex Political Muscle*, HARTFORD DAILY COURANT, Nov. 20, 2000, at A3 (noting that ninety percent of blacks voted for Gore).

302. See, e.g., Dalton Conley, BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA **<<NEED PP>>**(1999) (presenting the vast wealth inequality for blacks as opposed to whites).

303. Palmer, *supra* note 175, at 54; see also Case Note, *supra* note 152, at 1370-71 (writing that "[b]ecause their experiences determine their frame of reference, minority students bring the influence of these experiences to assignments and discussions").

304. Palmer, *supra* note 175, at 54.

305. Tanya Y. Murphy, *An Argument for Diversity Based Affirmative Action in Higher Education*, 95 ANN. SURV. AM. L. 515, 542 (1996).

306. Alger, *supra* note 8, at 21-23.

a multitude of individual perspectives.³⁰⁷

In one of the Supreme Court's most recent cases dealing with race, *Easley v. Cromartie*,³⁰⁸ the Court recognized that when the use of race is not predicated on stereotypes, but rather on the demonstrated statistical correlation between race and one's voting pattern, and when race is not used as the sole criteria in making a decision, the use of race can be appropriate.³⁰⁹ Furthermore, the Court in this case was persuaded by the fact that although the legislature used race as a factor, the goal they pursued was not racial.³¹⁰ The findings of the educational research would suggest that race should be used in much the same manner as that of which the Court approved in *Easley*. Educators would be pursuing the educational benefits that result from exposing students to other students who possess different backgrounds, which spawn different perspectives.³¹¹ Because these differing backgrounds strongly correlate with race, race provides a way of obtaining these results.³¹² Furthermore, race would not be used in a stereotypical way that assumes that all people of a race think the same.³¹³ Rather, race can be used as one of the factors in making educational decisions, just as race was used as one of the factors in drawing voting districts, because it correlates with the educational goal of and benefits of diversity.³¹⁴ Lastly, many of the benefits of diversity in areas such as civic values result because interacting in diverse groups breaks down the very racial stereotypes that have historically concerned the Court.

IV. APPLYING RESEARCH TO THE LEGAL CONTEXT

The above research concludes that students benefit from racial diversity in three categories: 1) learning outcomes, 2) civic values, and 3) occupational opportunity.³¹⁵ Any educational program implemented to achieve these results through diversity would almost necessarily use race as a classification because of the difficulty that would result in trying to maintain the proper mix of diversity without using race as a factor.³¹⁶ As a

307. *Id.* at 21.

308. *Easley v. Cromartie* 532 U.S. 234 (2001) (reviewing a congressional district's boundaries that had in part been drawn using race as a factor).

309. *See generally id.* (holding that race could be used as a factor in drawing voting districts so long as it was not the predominant factor).

310. *Id.*

311. *See, e.g., supra* notes 223–33 (discussing the need to expose students to varied perspectives and introduce them to environments that are different from their home life).

312. *See supra* note 282 and accompanying text (stating that racial diversity leads to educational benefits).

313. *See* ORFIELD & YUN, *supra* note 1, at 15–25; Alger, *supra* note 8, at 23.

314. *See supra* notes 35–37 and accompanying text.

315. *See supra* notes 151–56, 179–283 and accompanying text.

316. *See, e.g., Hunter ex rel. Brandt v. Regents of the Univ. of Cal.*, 190 F.3d 1061, 1063 (9th Cir. 1999); Bowen, *supra* note 156, at 434–35.

result, any court reviewing such programs would apply strict scrutiny.³¹⁷ The first hurdle the program would have is showing a compelling government interest.³¹⁸ Unlike the programs of the past, however, the compelling interest in these programs would not be racial diversity, rather it would be achieving educational benefits for all students.³¹⁹ This distinction is important because the Supreme Court has yet to rule on whether racial diversity for the sake of diversity is a compelling interest,³²⁰ and the lower courts have varied in their attempts to decide the issue for themselves.³²¹ But by arguing this **claim** as an educational benefits issue, the issue of diversity—at least diversity for diversity’s sake—can be avoided, as racial diversity is merely the means for achieving educational benefits. And if schools were actually pursuing the educational benefits, it is hard to imagine how a court could argue that improving learning, civic values, and job opportunities are not the type of compelling interests that a state should promote.³²² In fact, the Supreme Court has suggested that these are the very purposes of education in our society.³²³ Based on historical support of education in general and the compelling policy behind improving educational outcomes, an educational program that resulted in these benefits should satisfy the first prong of strict scrutiny.

These programs would also appear to meet the second prong of the strict scrutiny analysis: narrowly tailored means. First, the Supreme Court has traditionally deferred to schools in matters of curriculum and

317. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (requiring the application of strict scrutiny to all racial classifications).

318. *Id.*

319. Palmer, *supra* note 175, at 50.

320. *Wessmann v. Gittens*, 160 F.3d 790, 796 (1st Cir. 1998); *Johnson v. Board of Regents of the University of Georgia*, 263 F.3d 1234, 1245 (11th Cir. 2001).

321. *Supra* note 26.

322. Congress itself passed education legislation in 2000, stating its goals as: teaching civics, teaching students to use their mind, teaching responsible citizenship, and preparing students for productive employment. Goals 2000: Educate America Act and the Strengthening and Improvement of Elementary and Secondary Schools Act. 20 U.S.C.A. § 5812(3)(A) <<Derek/David: need to get correct date>>; see also Lisa Kelley, *Yearning For Lake Wobegon: The Quest For the Best Test At the Expense of the Best Education*, S. CAL. INTERDISC. L.J. 41, 75 (1998) (concluding that the “intention of educational reform is to provide all American children with an in-depth education, comparable to our foreign peers, an education that will allow them to compete in the global economy of the twenty-first century”).

323. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683 (1986). *Bethel* stated that the inculcation of civic values is “truly ‘the work of schools.’” *Id.* at 683 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969)). In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Court stated that “[t]his Nation long ago committed itself to primary reliance upon publicly supported public education to serve its important goals in secular education.” *Id.* at 658. And teaching good civic values, higher levels of thought, and preparation for the job market are certainly part of a secular education. *Bethel*, 478 U.S. at 683.

educational judgments.³²⁴ According to the Court, deference is appropriate because the educator has the expert judgment and vantage point, not the court system.³²⁵ William Bowen, current president of the Andrew W. Mellon foundation and past president of Princeton University, argues that granting educational institutions the freedom to control the makeup of their student bodies is fundamental to their success.³²⁶ In *University of Pennsylvania v. EEOC*,³²⁷ the Court held that when substantively reviewing the academic choices made by educators, judges “should show great respect for the faculty’s professional judgment.”³²⁸ Dealing specifically with the issue of educationally necessary uses of race, the Ninth Circuit explicitly recognized this maxim, as it accepted a research institute’s educational judgment without attempting to second guess it through a narrowly tailored analysis.³²⁹ Although the Court has afforded deference in several such instances,³³⁰ whether it would do so again, and if so, to what extent, remains an open question. In any case, educational programs must still satisfy the narrowly tailored requirement.³³¹ If the compelling interest is correctly conceptualized as educational benefits, then the programs should be able to pass this scrutiny. The research shows that racial diversity is the ingredient that results in educational benefits.³³² Thus, racial diversity is not being pursued as a goal in and of itself, or to promote integration. Rather, maintaining racial diversity is the direct means of achieving the desired educational outcomes.³³³ One might argue that a simple diversity of ideas is “true diversity,” and can achieve the same learning outcomes without the need for a racially diverse student body, but this is not what the research shows. Although it does show that courses on diversity result in these outcomes, a strong causal factor in these results is the amount of racial diversity in these classrooms.³³⁴ Such findings show that the diversity of ideas in conjunction with racial diversity is what leads

324. *Univ. of Penn. v. EEOC*, 493 U.S. 182, 199 (1990); *Regents of Mich. v. Ewing*, 474 U.S. 214, 225 (1985); *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 96, n.6 (1978) (Powell, J. concurring); *id.* at 90–92 (opinion of the court).

325. *Univ. of Penn.*, 493 U.S. at 199.

326. Bowen, *supra* note 156, at 429.

327. 493 U.S. 182 (1990).

328. *Id.* at 199 (citing *Ewing*, 474 U.S. at 225).

329. *Hunter ex rel. Brandt v. Regents of the Univ. of Cal.*, 190 F.3d 1061, 1063 (9th Cir. 1999) (refusing to second guess the university’s professional judgment that race was necessary to create the type of setting required to do its research).

330. *Univ. of Penn.*, 493 U.S. at 199; *Ewing*, 474 U.S. at 225; *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 96, n.6 (1978) (Powell, J. concurring); *id.* at 90–92 (opinion of the court).

331. *See generally* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (requiring narrowly tailored means for all racial classifications).

332. *See supra* notes 231–33 and accompanying text.

333. Gurin, *supra* note 151, at 364 (discussing how diversity improves education).

334. *Id.* at 376.

to the learning benefits.³³⁵ This conclusion seems intuitive with respect to the civic and occupational benefits, as reading about cultural differences may not give students a full understanding. Students' attitude changes and ability to work with others are based upon direct interaction with individuals of other races, which allows them to overcome stereotypes and understand the diversity that exists even within other racial groups themselves.³³⁶ In fact, what students often learn is the Supreme Court's own assertion: race does not determine who one is or what one thinks.³³⁷ Quite simply, racial diversity "is the most effective of all weapons in challenging stereotypical preconceptions."³³⁸ However, they also learn that because of race, individuals often have different experiences that shape different perspectives.³³⁹ The research findings and implications demonstrate that racial diversity works tightly in conjunction with understanding viewpoints and adopting positive civic values.³⁴⁰ Therefore, it is likely that at this point in our history, no other alternative to race exists that would garner the same results.³⁴¹ Assuming that the research is conclusive, an educational program founded on race neutrality simply would not be able to achieve these educational benefits.³⁴² If the aforementioned statements are correct, then the only issue remaining in the narrowly tailored analysis should be how much racial diversity is necessary.

As to this, the research is probably not sufficient. In cases to which strict scrutiny is applied, the Supreme Court consistently has required a strong evidentiary basis to support the conclusion that race consciousness is necessary.³⁴³ The large volume of research appears to present this evidence in regard to the compelling interest and most of the narrow tailoring analysis, but the research is clearly lacking in the area of how much diversity is needed.³⁴⁴ A requirement of something more than tokenism is probably not specific enough, particularly because tokenism is tinged with

335. *Id.* at 376–77.

336. *See generally* Slavin, *Cooperative Learning*, *supra* note 151, at 630–33 (discussing various studies demonstrating the benefits of racial interaction in the classroom).

337. *See generally* *Miller v. Johnson*, 515 U.S. 900, 911–12 (1995) (discussing the demeaning notion that people of the same race all think alike).

338. Alger, *supra* note 156, at 80.

339. Alger, *supra* note 8; Palmer, *supra* note 175, at 54–55.

340. *See supra* notes 188–196, 234–40 and accompanying text.

341. Bowen, *supra* note 156, at 434 (concluding that no alternative to race would be as effective "in enrolling an academically wee prepared and diverse student body").

342. *See Hunter ex rel. Brandt v. Regents of the Univ. of Cal.*, 190 F.3d 1061, 1063 (9th Cir. 1999) (concluding that it would not be possible to obtain the needed ethnic diversity without using racial classifications).

343. *See, e.g., Adarand*, 515 U.S. at 228.

344. *See supra* notes 275–85 and accompanying text.

vagueness as to absolute percentages. This vagueness could easily lead the Court to conclude that a program that attempted to achieve a certain level of racial diversity was either underinclusive or overbroad. Based on the Court's skepticism of racial classifications, it is likely to require proof that a precise amount of racial diversity garners the desired results.³⁴⁵ However, if the deduction from Gurin's work that benefits increase as diversity increases can be shown, then this problem may not arise. **In any case, it may be practically impossible to identify an "adequate" representation level due to the** multiple variables affecting campus climate and educational settings. If such is the case, the Court should not hold educators responsible for this practical shortcoming.

<<**Derek: note new paragraph**>>Although these questions would probably limit the current ability of a school to implement a racially diverse educational program, the most important educational findings have already been achieved. The remaining issue of critical mass necessities may be **either** a technicality that can be settled with directed research, or something for which educators are not responsible. Finally, because students of all races would benefit from a racially diverse education, it would be difficult to argue that race consciousness burdens anyone.³⁴⁶ The benefits necessarily require the presence of a racially diverse student body, which is not the same as a preference for one group over another, but rather a preference for a pluralistic setting. For instance if a white student were denied admission to a program, he would not succeed with a claim that he has better academic credentials than those who were admitted because academic credentials are not the only ingredient that is necessary for the student body to benefit from one another. Instead, the argument against such a plaintiff is that if the school relied only on academic credentials, the result might be a diminished educational environment that deprived students of all races of the type of diversity necessary for their success.³⁴⁷

345. See *Univ. of Cal. Bd. of Regents v. Bakke*, 438 U.S. 265, 298 (1978) (discussing the burden that racial classifications place on the individuals whom they are not intended to benefit). The Court's objective would probably be to find the point at which the least amount of racial diversity results in the largest amount of benefits.

346. See *Bowen*, *supra* note 156, at 429 (stating that no students have a right to a spot in a particular college, but rather that the college has "an obligation to make use of the limited number of places in each entering class so as to advance as effectively as possible the broad purposes the school seeks to serve"). Universities are concerned with the overall quality of the education it provides, which is enhanced not only by the individual qualities of students, but also by "the characteristics of the entire group of students who share in a common educational experience." *Id.* Their purpose is "to assemble a total class of students" who create a diverse amalgam that enhances the educational environment. See also *supra* notes 156-261 and accompanying text.

347. Essentially, the argument is that the exclusion of this plaintiff is a benefit to students of all races, including whites, and thus does not favor one race over the other. This same argument could be applied to an over-qualified black plaintiff who was denied admission at a historically black school that was attempting to improve the school's educational outcomes by increasing

As the former president of Princeton states in relation to assembling a student body, “[t]hough clearly relevant, grades and test scores are by no means all that matter.”³⁴⁸

CONCLUSION

The research presented in this Comment provides three different justifications for a new compelling interest. To make use of this research, however, educators must reconceptualize why racial diversity is important. They must promote improving educational outcomes that result from racial diversity, instead of pursuing racial diversity for its own intrinsic worth. Racial diversity in education directly results in improved learning outcomes, civic values, and occupational opportunities for students of all races. A choice to pursue these ends must be a professional judgment by educators, based on their desire to provide all students with the best possible education. In light of the Supreme Court precedent, courts should afford this educational judgment great deference. If this course of analysis is accepted, any of the three benefits of racial diversity should satisfy the requirement of a compelling interest. A program that used race-based admission decisions to achieve these ends would generally be narrowly tailored because achieving these ends would be nearly impossible without the use of race. However, the fact that no research clearly shows exactly how much diversity is needed to achieve the benefits may cause the court system to find that a program in question is overbroad. To assure that programs incorporating racial classifications are not overruled under the narrowly tailored analysis, further research needs to be conducted on the question of how much diversity is required. Once this is done, educators’ use of racial classifications to pursue the resulting benefits should be constitutionally defensible.

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diversity.

348. Bowen, *supra* note 156, at 433; *see also* Alger, *supra* note 156, at 83 (noting the educational mission’s need to consider “factors other than test scores and grade point averages”).