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

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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. Even those programs that have not been overturned often have been heavily scrutinized. These decisions have left universities, colleges, and elementary and secondary schools scrapping for ways to justify their race-conscious and affirmative action programs. 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, educators often cannot find any justification other than

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4. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 223–30 (1995); see also ORFIELD, 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).
that of remedying past discrimination.\textsuperscript{5} If educators intend to continue promoting 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 educational systems have had such a difficult time justifying their programs, and how they might succeed.\textsuperscript{9} First, this Comment details the legal history of racial classifications and diversity in education, laying out the Supreme Court’s standards\textsuperscript{10} and the lower courts’

\textsuperscript{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), aff’d, Johnson v. Board of Regents of Univ. of Ca., 263 F.3d 1234 (11th Cir. 2001) (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 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).

\textsuperscript{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).

\textsuperscript{7} See infra notes 151–56, 179–283 and accompanying text.

\textsuperscript{8} Johnson v. Bd. of Regents of the Univ. of Ga., 263 F.3d 1234, 1253 (11th Cir. 2001). 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 and end in itself). Alger writes that universities must now “fully and forcefully” articulate the educational benefits of diversity. Id.

\textsuperscript{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).

\textsuperscript{10} See infra notes 14–65 and accompanying text.
interpretation and application of these standards. 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. 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.

I. CONTROLLING SUPREME COURT PRECEDENT

The Equal Protection Clause of the Fourteenth Amendment and the Due Process Clauses of the Fifth Amendment govern state and federally imposed racial classifications. Applying these clauses, the Supreme Court has held that race-based classifications are "inherently suspect." 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. Since deciding City of Richmond v. J.A. Croson, the Supreme Court has required states to have a compelling interest that justifies the use of a racial classification, regardless of whether the racial classification is benign or invidious. In the educational context, a school's interest in remedying de jure segregation or racial discrimination will generally suffice as a compelling interest. To show a compelling

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.
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.
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 1960s and 70s generally still serve as a compelling interest. See Missouri v. Jenkins, 515
interest, the schools need only demonstrate that they are remedying their own well-documented discrimination. 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. However, for those schools that cannot document racial discrimination, the first obstacle is showing a compelling interest. 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. As a result of the Supreme Court's ambiguous stance towards diversity, the circuit courts are split. The primary

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).


25. See Regents of the Univ. of Cal. 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. FCC, 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), Wessmann v. Gittens, 160 F.3d 790, 796-800 (1st Cir. 1998) (rejecting a school's pursuit of diversity through "racial balancing"), Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996) (rejecting diversity as a compelling interest), Wittmer v. Peters, 87 F.3d 916, 920-21 (7th Cir 1996) (accepting a non-remedial use of race as a compelling interest), Johnson v. Bd. of Regents of Univ. 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. Univ. of Wash. Law School,
case serving as the locus of confusion is *Regents of the University of California v. Bakke.*

*Bakke* was the first Supreme Court case to question specifically 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.

Bakke, a white student, applied to the medical school twice and was denied admission both times. His grade point average and test scores, however, were significantly higher than those of several minority students who were admitted. As a result, Bakke claimed that the program was racially discriminatory. The majority of the Court agreed and ruled in his favor. 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 nothing more than a quota system. The Court, however, reached no consensus for the reasoning behind its result; no single opinion received more than four votes. Since Justice Powell was the swing vote, many have recognized his opinion as the functional equivalent of a majority opinion. He wrote that "the attainment of a diverse student body... is a constitutionally permissible goal for an institution of higher education." 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. Therefore, Powell's opinion

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233 F.3d 1188, 1201 (9th Cir. 2000) ("[E]ducational diversity is a compelling governmental interest that meets the demands of strict scrutiny of race-conscious measures.").

28. Id. at 265.
29. Id. at 266.
30. Id.
31. Id. at 266–67.
32. Id.
33. Six different opinions were authored in *Bakke.* Id. at 267.
34. See, e.g., Smith v. Univ. of Wash., 233 F.3d 1188, 1198–2000 (9th Cir. 2000) (concluding that Powell's opinion is the controlling precedent from *Bakke*); 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.
suggests that diversity can be a compelling interest, and under proper circumstances, race can be used as a factor to achieve that diversity.\textsuperscript{37}

Since the Court’s distaste for the admissions program in \textit{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 \textit{Bakke}, the Court moved to the political right\textsuperscript{38} and eventually settled the issue in \textit{City of Richmond v. J.A. Croson},\textsuperscript{39} in which the Court held that strict scrutiny would in fact apply to all racial classifications, even if they benefited racial minorities.\textsuperscript{40} In \textit{Croson}, Justice 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.”\textsuperscript{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.”\textsuperscript{42} After \textit{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. Remediying one’s own discrimination is clearly accepted as a compelling interest.\textsuperscript{43} This may include remedying past

\begin{footnotesize}
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\item \textsuperscript{37} \textit{Id.} at 311–12; see also Vincent Blasi, \textit{Bakke as Precedent: Does Mr. Justice Powell Have a Theory?}, 67 CAL. L. REV. 21, 32 (discussing the different opinions in \textit{Bakke} and concluding that Powell’s opinion should allow courts to uphold certain types of admissions programs).
\item \textsuperscript{39} 488 U.S. 469 (1989).
\item \textsuperscript{40} \textit{Id.} at 493–94. In \textit{Croson}, the City of Richmond operated a program that awarded thirty percent of the total dollar amount of its construction contracts to minorities. \textit{Id.} at 477–78. The city asserted that it was doing so to remedy past discrimination. \textit{Id.} at 498. The city also argued that strict scrutiny should not be applied to this racial classification because it was benign. \textit{Id.} The Supreme Court disagreed and held that all racial classifications, regardless of their motivations, are subject to strict scrutiny. \textit{Id.} at 493–94.
\item \textsuperscript{41} \textit{Id.} at 493. While Justice O’Connor wrote the judgment of the Court in \textit{Croson}, only three other justices joined her reasoning here. However, her position was later adopted by the majority of the Court in \textit{Adarand Constructors v. Pena}, 515 U.S. 200 (1995).
\item \textsuperscript{42} \textit{Croson}, 488 U.S. at 493.
\item \textsuperscript{43} See \textit{id.} 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
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discrimination or breaking the hold of ongoing discrimination. In either instance, the Court requires strong evidence to prove that discrimination is actually present. Often governmental entities attempt to demonstrate this discrimination by showing that the discrimination is traceable to de jure segregation, in which case the State is required affirmatively to remedy the problem. For example, the Supreme Court in United States v. Fordice 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.

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 classifications to correct the disparity. Rather, the disparity must be traceable to some prior or ongoing intentional discrimination by the government. 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. 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.

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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).


49. Id. at 728–29.


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
In addition to upholding the remedial use of race, the Court has upheld a non-remedial use of race. In *Metro Broadcasting, Inc. v. FCC*, the Court found that pursuing diversity and the benefits that accrue from it sufficiently justifies the use of racial classifications. *Adarand Constructors, Inc. v. Pena* 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. 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. Conversely, the Court has rejected similar ends, such as providing role models for minority students or reducing societal discrimination, holding that they fall short of a compelling government interest. 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

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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. FCC*, 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).


57. 497 U.S. at 564–65.


will then examine the means to determine whether they are narrowly tailored.\footnote{62}{See, e.g., Wygant, 476 U.S. at 274.}

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 \textit{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.\footnote{63}{Scott R. Palmer, \textit{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).}
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 it is using to achieve it.\footnote{64}{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. \textit{See generally} Tuttle v. Arlington County 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, \textit{Affirmative Action on Trial: The Retraction of Affirmative Action and the Case for Its Retention}, 40 \textit{How. L.J.} 145, 197 (1996) (discussing narrow tailoring and describing discrimination as "difficult to quantify").}

Thus, a state frequently has
the problem of knowing that it can or must act, but not knowing how it can act constitutionally.\(^6\)

II. CIRCUIT COURT APPLICATION OF RACE TO THE EDUCATION CONTEXT

Not only have states had difficulty navigating these standards, the circuits have had problems applying them. The first and probably most important split among the circuits concerns whether non-remedial uses of race can be legitimate compelling interests.\(^6\)

The Fifth Circuit's decision in *Hopwood v. Texas*\(^6\) is the leading decision rejecting non-remedial uses of race.\(^6\)

The case involved an admissions program at the University of Texas School of Law that took race into account.\(^7\)

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.\(^7\)

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.”\(^7\)

The court argued that the racial diversity interest supported by Justice Powell\(^7\) has never been accepted as compelling.

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\(^6\) For example, in *United States v. 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).

\(^7\) See supra note 26 and accompanying text (comparing the differing circuit opinions regarding the non-remedial use of diversity).

\(^8\) 78 F.3d 932 (5th Cir. 1996) (2–1 decision).

\(^9\) Id. at 934–35.

\(^7\) 10. Id. at 936–38.

\(^1\) 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.

\(^1\) 12. Id. at 944. The court, however, was not unanimous in its conclusion about non-remedial uses of race. See 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 curium). 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).

\(^7\) See supra notes 34–36 and accompanying text.
under a strict scrutiny review. It distinguished the Supreme Court’s acceptance of diversity as a justification in *Metro Broadcasting* because *Metro* was not decided under strict scrutiny. 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.

Other circuits have simply avoided deciding whether diversity is a compelling interest under strict scrutiny analysis. In *Wessmann v. Gittens*, 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.” 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.

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. 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.

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74. *Hopwood*, 78 F.3d at 944.
75. *Id.* at 944. The Court in *Metro Broadcasting* 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 *Croson’s* plurality opinion disapproving of a non-remedial use of race, the *Hopwood* court argued that *Metro Broadcasting’s* acceptance of diversity as a compelling interest is no longer valid. *Hopwood*, 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 798.
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 in education 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 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.\(^8^2\)

The Fourth Circuit has also addressed racial classifications in education. In Tuttle v. Arlington County School Board,\(^8^3\) a public school system used a weighted lottery that factored in race to determine admission to certain schools.\(^8^4\) 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.\(^8^5\) It also followed the Wessmann court in finding that the program in question was unconstitutional, and merely an example of racial balancing.\(^8^6\) 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.\(^8^7\) Thus, the Tuttle court’s willingness to assume diversity, however defined, is a compelling interest is arguably more genuine than the Wessmann court’s because the court here invalidates the

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82. See Palmer, supra note 63, 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.
program on matters that are independent of how one defines "diversity."\textsuperscript{88}

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. The Eleventh Circuit confronted the issue of diversity in a challenge of the University of Georgia's admission program. While the Eleventh Circuit in \textit{Johnson v. Board of Regents of the University of Georgia}\textsuperscript{89} did ultimately find the University of Georgia's admission program unconstitutional under a narrowly tailored analysis—reflecting a perspective that functionally may be the same as that of the Fourth Circuit—the \textit{Johnson} court grappled with the substance of the law on this issue before rendering its decision.\textsuperscript{91} First, the court conducted an in depth analysis of Supreme Court and other circuit court precedents in attempting to answer what it though to be the key issue: "whether student body diversity may be a compelling interest."\textsuperscript{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."\textsuperscript{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.\textsuperscript{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 other contexts, such as employment.\textsuperscript{95} The court then sculpted a set of factors that it found

\textsuperscript{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. \textit{Id.} at 706.
\textsuperscript{89} 263 F.3d 1234 (11th Cir. 2001).
\textsuperscript{90} \textit{Id.} at 1237.
\textsuperscript{91} \textit{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).
\textsuperscript{92} \textit{Id.} at 1242. The court spent seven pages discussing \textit{Bakke} and cases from other circuits in reaching the conclusion that whether diversity is a compelling interest is an open question. \textit{Id.} at 1244–50.
\textsuperscript{93} \textit{Id.} at 1245.
\textsuperscript{94} \textit{Id.} at 1245–46.
\textsuperscript{95} \textit{Id.} at 1252–53.
more relevant to the issue of diversity in education. Although the court ultimately found the Georgia program unconstitutional using these factors, their use reflects 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 it. 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." The court's central concern in its analysis appeared to be the flexibility of the program used to achieve diversity. If a program were 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 was merely the court's perception that the University gave too much weight to race—the amount of which the University was unable to justify—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. 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, the Seventh Circuit

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 gives disproportionate or arbitrary weight to race, and whether a school has genuinely considered race-neutral alternatives for creating a diverse student body. Id.

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


99. Johnson, 263 F.3d at 1254-55 (honoring 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
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." Furthermore, the court pointed out that the cases suggesting otherwise do so only in dicta and not in holdings. 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 is critical to the prison's success.

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. 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." The testimony concluded that the prison boot camp would have failed unless a black male was promoted to a lieutenant position. Limiting its decision to these circumstances, the court held that the race-conscious policies were permissible for this non-remedial purpose.

At the very least, this individual was promoted to the rank of lieutenant over them because he was black. 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. The State did not deny that race was a factor in his promotion, nor did its justification rest upon remedying past discrimination.

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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.*

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., Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 208 (1982) (citing San Antonio Indep. 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 (2nd Cir. 1997) (holding that courts may not second guess educators' policy decisions).

107. *Wittmer*, 87 F.3d 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
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.\textsuperscript{111}

The Ninth Circuit specifically addressed whether special circumstances in the educational context would justify non-remedial uses of race in \textit{Hunter ex rel. Brandt v. Regents of the University of California}.\textsuperscript{112} In \textit{Hunter}, the University of California at Los Angeles Graduate School of Education operated an elementary school as a research laboratory.\textsuperscript{113} The purpose of the school was "to help the State of California meet the needs of a dramatically changing public school population."\textsuperscript{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.\textsuperscript{115} From this research, the graduate school developed more effective techniques to teach these communities, and shared its findings with public schools throughout California.\textsuperscript{116} In making admissions determinations for the elementary school, the University considered gender, race or ethnicity and family income.\textsuperscript{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."\textsuperscript{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.\textsuperscript{119} The court recognized that a racially diverse student population was necessary to do the research

\textsuperscript{111} \textit{Id.} See \textit{supra} note 106. 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. \textit{See supra} note 106 (discussing the need to defer to educators).

\textsuperscript{112} 190 F.3d 1061 (9th Cir. 1999).

\textsuperscript{113} \textit{Id.} at 1062.

\textsuperscript{114} \textit{Id.}

\textsuperscript{115} \textit{Id.}

\textsuperscript{116} \textit{Id.}

\textsuperscript{117} \textit{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. \textit{Id.}

\textsuperscript{118} \textit{Id.} at 1064.

\textsuperscript{119} \textit{Id.} at 1067.
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. 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," 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 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. The main purpose of this voluntary program was to eliminate minority isolation in the urban schools. 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. 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 race and held that local schools can voluntarily remedy de facto segregation and, indeed, such action serves important societal functions. 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." This is a direct rejection of the type

120. Id.
121. Id. at 1066.
122. 212 F.3d 738 (2d Cir. 2000).
123. Id. at 741.
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)).
128. Brewer, 212 F.3d at 752.
of narrow tailoring that the Fifth Circuit applied in Wessmann.\textsuperscript{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.\textsuperscript{130}

The Ninth Circuit has also directly revisited the issue of diversity in the recent case Smith v. University of Washington,\textsuperscript{131} and adopted a position that in no way can be reconciled with Hopwood.\textsuperscript{132} To date, 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.\textsuperscript{133} The Circuit hinged its analysis on the Supreme Court’s mandate in Marks v. United States.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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

\textsuperscript{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.

\textsuperscript{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).

\textsuperscript{131} 233 F.3d 1188 (9th Cir. 2000).

\textsuperscript{132} Id. at 1201 n.9.

\textsuperscript{133} Id. at 1197.

\textsuperscript{134} 430 U.S. 188 (1977).

\textsuperscript{135} Id. at 193.

\textsuperscript{136} Smith, 233 F.3d at 1198–1200.
race. 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. By logical necessity, the other four Justices would have approved of programs that met Powell's test. Thus, the Ninth Circuit found that Powell's was the narrowest rationale upon which the five Justices would agree, and therefore under Marks is the holding of the Court. 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.

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 and Grutter v. Bollinger. Both cases have gained national attention. The judge in the first case held that diversity was a compelling interest and upheld the University of Michigan's undergraduate admission program. The other judge, reviewing the University of Michigan Law School admission program, held diversity

137. Id. at 1198-99.
138. Id. at 1199.
139. Id. at 1199-1200.
140. Id.
141. Id. at 1200.
145. Gratz, 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 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.
did not rise to the level of a compelling interest,\textsuperscript{146} and furthermore that the program was not narrowly tailored.\textsuperscript{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.\textsuperscript{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 finally takes to decide the issue of diversity.\textsuperscript{149}

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 diversity programs. However, until the Supreme Court speaks on the issue or until new evidence and ways of approaching the issue are developed,

\textsuperscript{146} Grutter, 137 F. Supp. 2d at 844.

\textsuperscript{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 analyzed 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 Powell's 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.

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

\textsuperscript{149} Sannes, supra note 3, at 22-23 (stating that the circuits have created a rift the Supreme Court will soon decide and discussing the Michigan cases as the place where the Supreme Court might decide). See 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).
the direction that schools should take is far from clear.® 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 for primary, secondary, and post-secondary students.™ These benefits include better teaching and learning,®

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., Patricia Gurin, Expert Report of Patricia Gurin, reprinted in 5 MICH. J. RACE & L. 363 (1999) (expert report for Gratz v. Bollinger, No. 97-75321 (E.D. Mich. 2000); Grutter v. Bollinger, No. 97-75928 (E.D. Mich. 2001)) (showing positive correlations between increased cross-racial student interactions and several learning, democracy, and living and working outcomes); 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 63, 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

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); 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); Braddock & McPartland, Social and Academic Consequences, supra note 151, at 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. 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 63, 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,
improved civic values, increased employment opportunities, and higher achievement and more educational opportunities. Both 188 (1996) (summarizing a federally funded study that found positive effects of racial diversity on students' cultural openness); Case Note, An Evidentiary Framework for Diversity As a Compelling Interest in Higher Education, 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 et al., A Long-Term View of School Desegregation: Some Recent Studies of Graduates as Adults, PHI DELTA KAPPAN 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); 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-Psychological Processes] (suggesting that high school desegregation promotes positive perceptions and social contacts among blacks and whites); Jomills Henry Braddock, II & James McPartland, School and Employment Desegregation, 19 J. BLACK STUD. 267, 283-84 (1989) [hereinafter Braddock & McPartland, Social-Psychological 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); 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' Intergroup 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); Janet W. Schofield & Rebecca Eurich-Fulcer, When and How School Desegregation Improves Intergroup Relations, in INTERGROUP PROCESSES 487 (Rupert Brown & Samuel L. Gaertner eds., 2001) (stating that cross-racial integration has been proven to improve race 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 Bilingual 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
154. See, e.g., Braddock et al., supra note 153, at 260–61 (reviewing studies concluding that going to desegregated schools positively affects opportunities to work in diverse environments); Jomills Henry Braddock, II et al., 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); 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); Milm, 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 151, 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) (describing the reality and value of diversity in business today and arguing that diverse educational institutions better prepare students for employment than segregated institutions) (on file with the North Carolina Law Review).

155. The achievement and opportunity benefits accrue especially for black students. See, e.g., Bankston & Caldas, supra note 151, passim (documenting the increased achievement on graduation exams for black students in racially diverse environments); Braddock & McPartland, Social and Academic Consequences, supra note 151, passim (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
minority and non-minority students realize these benefits. 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. Furthermore, plaintiffs in that case were willing to assume that diversity is "good, important, and valuable."

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. After Brown v. 

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, passim; 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] (showing that blacks who attend desegregated high schools are more likely to attend desegregated colleges and major in scientific or technical fields) (on file with the North Carolina Law Review).


158. Id.

159. See, e.g., ORFIELD, supra note 1, at 11 (stating that the Court's focus in Brown was only on the inequalities of segregation); SMITH & ASSOCIATES, supra note 156, at 3 (stating the original focus was merely on access for minorities); McPartland & Braddock,
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." All-black schools were seen as inherently unequal because of the stigma that was attached to attending such schools and the sense of inferiority that it fostered in racial minorities. Much of the educational research that formed the foundation of the Court's decision in Brown dealt with black children's self-esteem problems. Researchers concluded that black children's segregated social lives caused these self-esteem problems.

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, 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. The Court focused on the legal education opportunities Missouri offered to black students within the State. Since no such opportunities existed, the Court ordered the State to admit the black student to the...
white law school.\textsuperscript{168} To solve a similar problem, the State of Texas built an all-black law school. But in \textit{Sweat v. Painter},\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 opportunities that negate stigma.\textsuperscript{172} Most often courts ordered racial integration to remedy the past effects of \textit{de jure} segregation or to break its current hold.\textsuperscript{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.\textsuperscript{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. Furthermore, any use of race beyond that which is minimally necessary to end \textit{de jure} segregation was viewed by some as nothing more than using race for race's sake.\textsuperscript{175} This is certainly how courts like \textit{Hopwood} have conceptualized the issue, stating that "we see the case law as sufficiently established that

\begin{itemize}
\item \textsuperscript{168} Id. at 351–52.
\item \textsuperscript{169} 339 U.S. 629 (1950).
\item \textsuperscript{170} Id. at 632–36.
\item \textsuperscript{171} \textit{See}, e.g., Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954).
\item \textsuperscript{172} \textit{See}, e.g., Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955) (requiring federal courts to supervise the desegregation of schools).
\item \textsuperscript{173} \textit{See generally} Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (discussing and evaluating desegregation plans); Gary Orfield, \textit{Introduction} to DIVERSITY CHALLENGED, supra note 63, at 2 (discussing the role of courts in forcing desegregation).
\item \textsuperscript{175} John Dayton, \textit{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, \textit{A Policy Framework for Reconceptualizing the Legal Debate Concerning Affirmative Action in Higher Education}, in DIVERSITY CHALLENGED, supra note 63, at 52.
\end{itemize}
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 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

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.
180. See infra notes 204–11 and accompanying text. But see Schofield & Eurich-Fulcher, supra note 151, 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 finding).
styles, and a more rigorous curriculum.\textsuperscript{181} Also, minority students in integrated schools develop higher educational and occupational aspirations that can translate into greater effort and achievement.\textsuperscript{182} Regardless of which variables are most determinative,\textsuperscript{183} the fact remains that minority students are afforded more educational opportunities and achieve greater academic success in racially diverse schools.\textsuperscript{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.\textsuperscript{185} Moreover, studies on cooperative learning suggest that the close and interactive relationship between people of different races fosters greater learning and achievement.\textsuperscript{186} Researchers have also made the important note that these educational benefits extend to students of all races.\textsuperscript{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.\textsuperscript{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.\textsuperscript{189} Thus, as a general matter, racially diverse schools operate as a means of improving overall racial friendliness and reducing racial prejudice and stereotypes.\textsuperscript{190} By achieving these results early, the benefits are more likely to accrue in

\textsuperscript{181} See Hallinan, supra note 151, at 737–40.
\textsuperscript{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 63 and accompanying text.
\textsuperscript{184} Hallinan, supra note 151, at 741–42.
\textsuperscript{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).
\textsuperscript{186} Id.
\textsuperscript{187} See supra note 156 (discussing the benefits of diversity to students of all races).
\textsuperscript{188} See generally GORDON ALLPORT, THE NATURE OF PREJUDICE (1954).
\textsuperscript{189} Braddock et al., supra note 153, at 262; Hallinan & Smith, supra note 153, at 8; Schofield & Eurich-Fulcher, supra note 153, at 478–87 (discussing the multiple factors in desegregated schools that contribute to the formation of strong friendships).
\textsuperscript{190} Hallinan, supra note 151, at 745–46.
the long term and be carried into adulthood. 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. Furthermore, exposing students to diversity has been shown to improve citizenship, increase political participation, and foster volunteering. Twenty or thirty years ago these long term benefits may have seemed only desirable, but with the changing demographics of our country 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. By attending racially diverse schools, children will be less prejudiced, more understanding, and thus more capable of interacting in a racially diverse society. 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. Over the course of eradicating de jure school segregation, there has been a corresponding desegregation in employment. 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.

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.
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).
196. Wood & 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. Dawkins & Braddock, 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,
While these benefits extend to students of all races, 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 racially diverse schools. Attending racially diverse schools opens up social networks to racial minorities, 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.

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. This study theorizes that the improvement is due to the students' enhanced expectation of upward mobility. Other studies have duplicated this showing of increased achievement in other academic areas. Some researchers have cited teacher expectations as the major factor that affects the increased achievement of black students. According to

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, passim.

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

205. Id.

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, passim.

these researchers, because teacher expectation for minority student achievement is greater in integrated schools, students' chances of educational success are also greater. 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. Again, as this type of environment develops, students begin to harbor greater educational and job aspirations. Moreover, minority students' chances of attending, remaining, and succeeding at majority white colleges are greater when they attended racially diverse elementary and primary schools.

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. As in primary or secondary education, racial diversity benefits students of all races in higher education in a variety of ways. Patricia Gurin's expert testimony before the district court in the University of Michigan's affirmative action litigation sets the benchmark for much of the research on diversity in higher education. It has been characterized as providing "conclusive proof that a racially and ethnically diverse university" results in benefits for students of all races. Although she relied on previous research done by others, her work is unique for

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208. Ferguson, supra note 207, at 289; Rist, supra note 207, at 411 (finding that the way teachers act towards children from the "ghetto" greatly affects their achievement).


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


212. See infra notes 214–85 and accompanying text.

213. See supra note 156 and accompanying text; infra note 261 and accompanying text.

214. Gurin, supra note 151, at 363–66. 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.

several reasons. First, she concentrated specifically on how diversity affects the educational setting and her study is recognized as the first of its kind. Second, she attempted to measure and identify the specific benefits and possible drawbacks of diversity. 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. 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. In particular, she identified two broad benefits: learning outcomes and democracy outcomes. 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. Furthermore, Gurin's conclusions are substantiated by an almost unparalleled series of empirical analyses conducted on diversity in the educational setting.

Concerning the first category of benefits, Gurin flatly stated, "Students learn better in a diverse educational environment." The reasoning and research behind this conclusion are quite clear. Most
of what educators call "thinking" is actually automatic and mindless action.226 Most of the time our "thought" is based upon previous learning that is so routine that creative thinking is not required.227 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.228 But when people encounter new diverse environments, they learn to think in deeper and more complex ways.229 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.230 Colleges and universities are the best places to engage in this learning, because students at this age are at a critical developmental stage in which they are most suited to making the leap of becoming conscious learners and critical thinkers.231 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.232 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.233 Thus, it is incumbent upon universities to meet the challenge of engaging

226. 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.

227. Id.

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

229. Id. at 370.

230. Id. at 369–70.

231. 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).

232. 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.

233. 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 (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.
students intellectually by providing the diverse setting that students need.\(^{234}\)

Racial diversity also furthers another goal of colleges and universities: preparing students for active participation in our pluralistic and democratic society.\(^{235}\) It is well accepted that an educated populace is essential to ensuring active participation in a democracy.\(^{236}\) 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.\(^{237}\) 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.\(^{238}\) Students who are exposed to this environment are better able to “acknowledge that group differences are compatible with the interests of the broader community.”\(^{239}\) 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.\(^{240}\)

\(^{234}\) Gurin, supra note 151, at 366–68.

\(^{235}\) Id.

\(^{236}\) Id. at 374. The Supreme Court in Brown contended that education is “the very foundation of good citizenship.” Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

\(^{237}\) 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 BUSINESS-HIGHER EDUCATION FORUM, supra note 156, at 13 (describing exposure to diversity as imperative); supra notes 194–96 and accompanying text.

\(^{238}\) 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)).

\(^{239}\) Gurin, supra note 151, at 399; see also Ambach v. Norwich, 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.

\(^{240}\) Gurin, supra note 151, at 399.
Furthermore, these positive outcomes continue after graduation. These very types of experiences can help 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.

Several studies addressing more narrow issues of diversity in higher education support the conclusions from 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 students’ learning opportunities. This belief is well founded in light of the substantial evidence indicating that learning occurs not only between teachers and students but also among students. Thus when the diversity of the student body increases, the opportunities for students to learn also increases. In a study by Sylvia Hurtado, students who studied

241. *Id.* at 386, 389, 399. Gurin’s study reveals that students who attend diverse colleges have more diverse friends, neighbors and co-workers nine years after entering college. *Id.* at 386.

242. 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); Gurin, *supra* note 151, at 374–75 (discussing Jefferson’s notion of homogeneity and our country’s current trend towards heterogeneity); Neil L. Rudenstine, *Student Diversity and Higher Learning, in Diversity Challenged, supra* note 63, at 39 (stating that diversity in college is “vital to the health and effective functioning of our democracy”).

243. *White, supra* note 152; Gudeman, *in Diversity Challenged, supra* note 152, 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). 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 of Kent D. Syverud, 5 Mich. J. Race & L. 451, 451–52 (1999) (expert report for Grutter v. Bollinger, No. 97-75928 (E.D. Mich. 2001)). 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.

244. 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.*

245. See Rudenstine, *supra* note 241, at 31 (arguing that students learn from their peers). Neil Rudenstine, referring to diversity in higher education, writes that “[s]tudents
with someone of another race reported growth not only in racial tolerance, but also in critical thinking skills and problem solving.\textsuperscript{246} The deans of Michigan and Harvard Law Schools also found similar opinions among their students.\textsuperscript{247} 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.\textsuperscript{248} 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.\textsuperscript{249} 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.\textsuperscript{250} Gurin's research, however, stresses that the benefits from these social diversity courses also requires racially diverse classrooms.\textsuperscript{251}

The most obvious benefit of racial diversity in higher education is improving students' civic values. In large part, this improvement happens because of the cross-racial interaction that occurs in racially diverse settings.\textsuperscript{252} Studies show that racial diversity on college campuses changes student attitudes and reduces prejudices,\textsuperscript{253} creating a climate in which students are better suited to get along with people of other races.\textsuperscript{254} Once this attitudinal shift occurs, the positive 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.\textsuperscript{246} \textit{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. \textit{Id.}

\textsuperscript{246} \textit{See} Hurtado, \textit{supra} note 151, at 198.
\textsuperscript{247} Orfield \& Whitla, \textit{in} DIVERSITY CHALLENGED, \textit{supra} note 156, at 154–72.
\textsuperscript{248} \textit{Id.} at 158 tbl.8.
\textsuperscript{249} \textit{See, e.g.,} Adams \& Zhou-McGovern, \textit{supra} note 151, at 6 (describing the positive effects of diverse learning environments on the cognitive development of undergraduates).
\textsuperscript{250} \textit{Id.}
\textsuperscript{251} Gurin, \textit{supra} note 151, at 376–77.
\textsuperscript{252} \textit{See} ALLPORT, \textit{supra} note 188, at 251–67. Allport introduced the "contact hypothesis," arguing contact with people from different races reduces prejudice toward them. \textit{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." \textit{Previous Conceptions of the Typical Group Member and the Contact Hypothesis, 13 BASIC \& APPLIED SOC. PSYCHOC.} 351, 351 (1992).
\textsuperscript{253} \textit{See, e.g.,} Astin, \textit{supra} note 151, at 46–48; Hurtado, \textit{supra} note 151, at 189–90; MATHTECH, INC., \textit{supra} note 151, at vii–4.
\textsuperscript{254} \textit{See, e.g.,} WILLIAM G. BOWEN \& DEREK BOK, \textit{THE SHAPE OF THE RIVER} 225 (1998) (finding that college helped students get along with and work with students of
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.\textsuperscript{255} Furthermore, these benefits persist over time.\textsuperscript{256} These benefits culminate in "acceptance of people of different races/cultures, cultural awareness, tolerance of people with different beliefs, and leadership abilities."\textsuperscript{257} 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.\textsuperscript{258}

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.\textsuperscript{259} 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.\textsuperscript{260} In contrast, racial minorities who

\begin{itemize}
  \item different races); Hawley et al., \textit{supra} note 153, at 426 (discussing how diversity can reduce prejudice when properly implemented).
  \item 255. Braddock et. al., \textit{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 Schofield, \textit{Maximizing the Benefits of Student Diversity: Lessons from School Desegregation Research}, in \textit{DIVERSITY CHALLENGED}, \textit{supra} note 63, at 107; see also Dawkins & Braddock, \textit{supra} note 151, at 397–400 (reviewing studies that black students from desegregated high schools are more likely to persist at majority white colleges, have higher job expectations, live in integrated neighborhoods, and work in desegregated job settings).
  \item 256. \textit{See} Gurin, \textit{supra} note 151, at 386, 389, 399.
  \item 257. Hurtado, \textit{supra} note 151, at 200.
  \item 258. Gurin, \textit{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.\textit{PASCARELLA & TERENZINI}, \textit{supra} note 244, at 279.
  \item 259. \textit{See}, e.g., Kermit Daniel et al., \textit{Racial Differences in the Effects of College Quality and Student Body Diversity on Wages}, in \textit{DIVERSITY CHALLENGED}, \textit{supra} note 63, at 221; McPartland & Braddock, \textit{Going to College}, \textit{supra} note 154, at 141.
\end{itemize}
attend diverse schools have greater occupational aspirations, leading to increased motivation, and resulting in increased accomplishment.261

Racial minorities, however, are not the only students for whom racially diverse schools increase employment opportunities.262 All students need to be prepared to meet the new challenges that an increasingly diverse business environment will present.263 New employees will have no choice but to deal with people who come from different cultural, ethnic, and racial backgrounds.264 These differences may create barriers to interaction for those from racially isolated backgrounds.265 Thus, obtaining diversity skills is "essential" for students' success in the new economy.266 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.267 Furthermore, employers who foresee the coming of a more multicultural world...

261. See generally Braddock & McPartland, Social and Academic Consequences, supra note 151 (showing improved academic achievement and preparation for diverse work settings as a consequence of desegregated schools). However, it is important to note that the results may simply relate to the increased opportunities.

262. BUSINESS-HIGHER EDUCATION FORUM, supra note 156, at 14-15 (stating that benefits accrue for "all graduates"); Daniel et al., supra note 259, at 221; MATHTECH, INC., supra note 151, at 1-1; Carnevale, supra note 154, at 20; 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).

263. See BUSINESS-HIGHER EDUCATION 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).

264. BOWEN & BOK, supra note 254, 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.


266. BUSINESS-HIGHER EDUCATION FORUM, supra note 156, at 33.

267. Palmer, supra note 175, at 62; Carnevale, supra note 154, at 20-21; 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).
prefer students who have a multicultural education. 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. Studies show that racial and ethnic diversity promotes problem solving and the creation of more effective and feasible ideas in the workplace. In jobs that require teamwork and creativity, racial diversity 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. The forum that creates understanding is school. Since the majority of individuals in the United States attend racially segregated primary and secondary schools and an even larger majority live in racially segregated neighborhoods, colleges and universities are the only

268. See BUSINESS-HIGHER EDUCATION 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 265, 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).

269. BUSINESS-HIGHER EDUCATION 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”).


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

272. ORFIELD, supra note 1, at 18–29 (detailing the demographic shifts that show a resegregation of schools across the nation). Orfield’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 (Raleigh, N.C.), Feb. 18, 2001, at A1 (citing the recent increase in school racial segregation).

273. 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).
places that most people can learn the skills and be exposed to the environments that will make them more marketable employees. 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. To date, the research has yet to adequately concentrate on the precise critical mass of racial minorities that is required. The only maxim that emerges from the research places the appropriate percentage of racial minorities at an amount more than "tokenism."

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

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


276. 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).

277. Id.; Alger, supra note 156, at 89 (locating this issue as a weakest link in the diversity research). Some studies, however, attempt to place a general need to have a student body of which minorities are twenty percent. See, e.g., HAWLEY, STRATEGIES FOR EFFECTIVE DESEGREGATION: LESSONS FROM RESEARCH (1983); Schofield & Eurich-Fulcer, supra note 153, at 482-83. Otherwise, minorities may self-segregate and their presence will be unfelt. Schofield & Eurich-Fulcer, supra note 153, at 482-83.

278. 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. See generally Barbara L. Bernier, The Creed According to the Legal Academy: Nihilistic Musings on Pedagogy and Race Relations, 6 WASH. & LEE RACE & ETHNIC ANCESTRY LAW J. 27 (2000) (discussing tokenism in law faculties); Sheila Foster, Difference and Equality: A Critical Assessment of the Concept of "Diversity," 1993 WIS. L. REV. 105, 155-56 (discussing the tokenism).
contact that fosters positive outcomes. Second, tokenism, particularly in higher education, may lead minorities to feel alienated, which necessarily decreases their likelihood of persisting at a majority white university.

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. In a section subtitled "Adequate Representation," she merely echoed the findings that tokenism will not result in benefits. 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." While never explicitly stated, Gurin's and others’

281. 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.
282. Id. at app. B, available at http://www.umich.edu/~urell/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 AM. J. SOC. 965 (1977)).
possible conclusion is first that tokenism is inadequate, and second that once tokenism is surpassed, the students' benefits increase correspondingly with increases in diversity. Yet, even if these conclusions cannot be derived from the research, 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 and different factors that necessarily affect the campus climate may make it impossible to isolate a level of diversity that is universally effective.

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. 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. Justice O'Connor, dissenting in Metro Broadcasting, 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 components of a racial, religious, sexual or national class.'" She

284. See id.; Jack E. Bynum & William E. Thompson, Dropouts, Stopouts, andPersisters: The Effects of Race and Sex Composition on College Classes, COLL. & UNIV. 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).

285. 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).

286. 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); Alger, supra note 156, at 89 (stating that "critical mass in this context defies simple definition" and leads to inevitable problems).

287. See supra notes 179-275.


argued that the type of affirmative action implemented there was based on the assumption that race determines how a person thinks.\footnote{290} Writing for the majority in \textit{Shaw v. Reno},\footnote{291} 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."\footnote{292} The Court later extended a line of reasoning related to O'Connor's argument, in effect broadening the scope of impermissible racial assumptions.\footnote{293} Justice Kennedy echoed O'Connor's argument in \textit{Miller v. Johnson},\footnote{294} 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."\footnote{295} 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.\footnote{296} These arguments have also taken hold in the lower courts.\footnote{297} What the Supreme Court is really addressing in these arguments appears to be an issue of stereotyping,\footnote{298} which most would agree is repugnant.

This type of criticism by the Court, however, should not be lodged against the evidence in the above research\footnote{299} because these studies are not predicated on stereotypes.\footnote{300} Instead, the research and its findings flow naturally from the factual realities that exist in the United States. Statistically, race strongly correlates with several
aspects of life, including the area where one resides, one's political affiliation, and one's economic standing. 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." 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. 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. Similarly, 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." 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. He concludes that diversity does not foster an exchange of group perspectives, but rather a multitude of individual perspectives. Thus, for the Court to construe the above


304. 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").

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


308. Id. at 21.
research as based on stereotypes, it would simply miss the point of what leads to the results in the research.

In one of the Supreme Court's most recent cases dealing with race, *Easley v. Cromartie*, 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. 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. 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. Because these differing backgrounds strongly correlate with race, race provides a way of obtaining these results. Furthermore, race would not be used in a stereotypical way that assumes that all people of a race think the same. 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. 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 opportunities. Any educational program implemented to achieve these results through diversity would almost

309. 532 U.S. 234 (2001) (reviewing a congressional district's boundaries that had in part been drawn using race as a factor).
310. 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).
311. Id.
312. See, e.g., supra notes 224–34 (discussing the need to expose students to varied perspectives and introduce them to environments that are different from their home life).
313. See supra note 283 and accompanying text (stating that racial diversity leads to educational benefits).
314. See ORFIELD, supra note 1, at 15–25; Alger, supra note 8, at 23.
315. See supra notes 35–37 and accompanying text.
316. See supra notes 151–56, 179–284 and accompanying text.
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. As a result, any court reviewing such programs would apply strict scrutiny. The first hurdle the program would have is showing a compelling government interest. 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. 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, and the lower courts have varied in their attempts to decide the issue for themselves. 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. In fact, the Supreme Court has suggested that these are the very purposes of education in general and the compelling policy behind

317. 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.
319. Id.
320. Palmer, supra note 175, at 50.
321. Johnson v. Bd. of Regents of the Univ. of Ga., 263 F.3d 1234, 1245 (11th Cir. 2001); Wessmann v. Gittens, 160 F.3d 790, 796 (1st Cir. 1998).
322. See supra note 26.
324. 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. (citing Tinker v. Des Moines Indep. Cnty. 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.
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 educational judgments. According to the Court, deference is appropriate because the educator has the expert judgment and vantage point, not the court system. William Bowen, current president of the Andrew W. Mellon foundation and former president of Princeton University, argues that granting educational institutions the freedom to control the makeup of their student bodies is fundamental to their success. In University of Pennsylvania v. EEOC, the Court held that when substantively reviewing the academic choices made by educators, judges “should show great respect for the faculty’s professional judgment.” 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. Although the Court has afforded deference in several such instances, 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. 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. Thus, racial diversity is not being pursued as a goal in and of itself, or to

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326. Univ. of Penn., 493 U.S. at 199.
327. Bowen, supra note 156, at 429.
329. Id. at 199 (citing Ewing, 474 U.S. at 225).
330. 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).
331. 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).
333. See supra notes 231–33 and accompanying text.
promote integration. Rather, maintaining racial diversity is the direct means of achieving the desired educational outcomes.\textsuperscript{334} 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.\textsuperscript{335} Such findings show that the diversity of ideas in conjunction with racial diversity is what leads to the learning benefits.\textsuperscript{336} 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 appreciate the diversity that exists even within other racial groups themselves.\textsuperscript{337} In fact, what students often learn is the Supreme Court's own assertion: race does not determine who one is or what one thinks.\textsuperscript{338} Quite simply, racial diversity "is the most effective of all weapons in challenging stereotypical preconceptions."\textsuperscript{339} However, they also learn that because of race, individuals often have different experiences that shape different perspectives.\textsuperscript{340} The research findings and implications demonstrate that racial diversity works tightly in conjunction with understanding viewpoints and adopting positive civic values.\textsuperscript{341} Therefore, it is likely that at this point in our history, no other alternative to race exists that would garner the same results.\textsuperscript{342} Assuming that the research is conclusive, an educational program founded on race neutrality simply would not be able to achieve these educational benefits.\textsuperscript{343} If the aforementioned statements are correct, then the only issue remaining

\textsuperscript{334} Gurin, supra note 151, at 364 (discussing how diversity improves education).
\textsuperscript{335} Id. at 376.
\textsuperscript{336} Id. at 376–77.
\textsuperscript{337} See generally Slavin, Cooperative Learning, supra note 151, at 630–33 (discussing various studies demonstrating the benefits of racial interaction in the classroom).
\textsuperscript{339} Alger, supra note 156, at 80.
\textsuperscript{340} Alger, supra note 8; Palmer, supra note 175, at 54–55.
\textsuperscript{341} See supra notes 188–196, 235–41 and accompanying text.
\textsuperscript{342} Bowen, supra note 156, at 434 (concluding that no alternative to race would be as effective "in enrolling an academically weel prepared and diverse student body").
\textsuperscript{343} 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).
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.\footnote{344} 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.\footnote{345} A requirement of something more than tokenism may not be specific enough, particularly because tokenism is tinged with 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.\footnote{346} However, if the deduction from Gurin's work that benefits increase as diversity increases can be shown, then this problem may not arise. Conversely, 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.

Although these questions may 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.\footnote{347} 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 standardized scores than those who were admitted because standardized scores 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 standardized scores, the result might be a diminished educational environment that deprived students of all races of the type of diversity necessary for their success.\(^\text{348}\) 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."\(^\text{349}\)

CONCLUSION

The research presented in this Comment provides three different justifications for the recognition of 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,

\(^{348}\) 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 diversity.

\(^{349}\) 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").
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 will be completely constitutionally defensible.

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