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NOTE

UPHOLDING RACIAL DIVERSITY IN THE CLASSROOM AS A COMPELLING INTEREST[†]

*"People do not learn very much when they are surrounded only
by the likes of themselves."*¹

INTRODUCTION

The recognition that diversity plays an essential role in the development and education of a child is not a novel idea. While years of Supreme Court jurisprudence firmly entrenched segregation in education,² educators fought for diversity in the classroom.³ In fact, studies showing the adverse effects of segregation on the education of African-American students played a large role in the eventual overthrow of segregation in *Brown v. Board of Education*.⁴ In recent years, the argument for diversity in education has gained even more strength and support as school districts seek to improve the overall quality of education, particularly in areas where de facto segregation

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¹ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 n.48 (1978) (quoting the President of Princeton University).

² See, e.g., *Cumming v. Richmond County Bd. of Educ.*, 175 U.S. 528, 545 (1899) (failing to strike down a Georgia law requiring blacks and whites to be educated separately); *Gong Lum v. Rice*, 275 U.S. 78, 85-86 (1927) ("Were [separate but equal] a new question, it would call for very full argument and consideration, but we think that it is the same question which has been many times decided to be within the constitutional power of the state legislature . . .").

³ See Thomas I. Emerson et al., *Segregation and the Equal Protection Clause: Brief for the Committee of Law Teachers against Segregation in Legal Education*, 34 MINN. L. REV. 289 (1950).

⁴ 347 U.S. 483 (1954). Footnote eleven in *Brown* specifically cited the work of several renowned researchers who, as a result of their studies, concluded that segregation harmed African-American students educationally and socially.

exists.⁵ Those who fight for diverse classrooms recognize that when students from a variety of backgrounds are brought together, it is not only those of the minority class who benefit. Rather, all students can learn from being surrounded by those who are different from them.⁶

In the courts, however, the quest for racial diversity has received mixed treatment. This has left both courts and school districts wondering how best to attain racial diversity in the classroom without violating the Equal Protection Clause of the Fourteenth Amendment.⁷ The Supreme Court has yet to specify what interests it will consider sufficiently compelling to allow consideration of race in the admissions policy of an educational institution or school district. As a result of the Supreme Court's silence, several circuit courts have reached markedly different results when confronted with challenges to school admission programs that use race as a factor.⁸ This lack of conformity confounds and inhibits school districts when they attempt to promote diversity within their school systems. Despite this confusion, the Supreme Court has passed up several opportunities to resolve the "diversity interest" question.⁹

This Note urges the Supreme Court to end the uncertainty by firmly pronouncing that achieving diversity in the classroom is a sufficiently compelling interest to satisfy strict scrutiny, allowing narrowly tailored admissions programs to consider racial diversity in their decisions. Part I looks at recent Supreme Court decisions considering affirmative action programs in education and the economic sector. Part II analyzes the legal arguments used by the various cir-

⁵ De facto segregation is segregation resulting from "factors, such as residential housing patterns, which are beyond the control of state officials." *NAACP v. Lansing Bd. of Educ.*, 559 F.2d 1042, 1045 (6th Cir. 1977). Unlike de jure segregation, it is not the result of a deliberate attempt to separate people of different races. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 17-18 (1971) (de facto segregation is present "where racial imbalance exists in the schools but with no showing that this was brought about by discriminatory action of state authorities").

⁶ It is essential to point out that many facets of diversity exist, including ethnic origin, religion, socio-economic status, and the many other traits that contribute to each person's individuality. This Note deals only with race because it alone triggers strict scrutiny review in the courts.

⁷ See U.S. CONST. amend. XIV, §1: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

⁸ Compare *Hopwood v. Texas*, 78 F.3d 932, 934 (5th Cir. 1996) (holding that the University of Texas School of Law may not use race as a factor in law school admission), with *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 752 (2d Cir. 2000) (holding that "a compelling interest can be found in a program that has as its object the reduction of racial isolation and what appears to be de facto segregation"), and *Hunter ex rel. Brandt v. Regents of the Univ. of Cal.*, 190 F.3d 1061, 1067 (9th Cir. 1999), cert. denied 121 S. Ct. 186 (2000) (upholding the constitutionality of an elementary school's use of race/ethnicity in its admission process).

⁹ The Supreme Court has not heard an affirmative action case dealing with education since it first addressed the issue in *Bakke*.

cuit courts to either reject or uphold diversity as a compelling interest in education. Part III points out that a vast amount of educational research supports the conclusion that diversity in education is a compelling interest. Furthermore, Part III goes on to contend that the Supreme Court's decisions in *Regents of the University of California v. Bakke*¹⁰ and subsequent cases provide a sound legal basis on which to rest such a decision. Finally, Part IV discusses several factors that a school district should consider in narrowly tailoring an admissions program to cultivate a racially diverse school system.

I. A BRIEF HISTORY OF AFFIRMATIVE ACTION IN THE SUPREME COURT

A. Justice Powell's Opinion in Bakke

The Supreme Court's treatment of affirmative action programs over the last twenty-two years has been nothing short of fickle. Characterized by sharply divided courts, plurality opinions, and seemingly contradictory holdings,¹¹ the Court's jurisprudence in this area has perplexed and provoked commentators and courts alike. Perhaps no case is as indicative of this lack of uniformity as *Regents of the University of California v. Bakke*.¹²

In *Bakke*, the plaintiff challenged the admissions policy of the University of California, Davis Medical School after twice applying for and being denied admission.¹³ At the time of Alan Bakke's application, Davis utilized an admissions system that set aside 16 of the 100 possible openings in each class for members of specified minority groups, including: African Americans, Chicanos, Asians, and American Indians.¹⁴ The minimum qualifications required for entrance to one of the 16 "minority" slots were less stringent than those required for white students.¹⁵ Hence, the Davis admissions committee passed over Bakke, a white male possessing above-average academic credentials, in favor of arguably less qualified minority students.¹⁶ Bakke then sued, claiming that that he had been denied equal

¹⁰ 438 U.S. 265 (1978).

¹¹ See AUGUSTUS J. JONES, *AFFIRMATIVE TALK, AFFIRMATIVE ACTION*, at xi-xii (1991). Of the first eleven affirmative action decisions handed down by the Supreme Court, six of them upheld a gender or race based set-aside program by a 5-4 margin. In the remaining five, the Court struck down affirmative action programs by no more than a 6-3 margin. *Id.* at xii.

¹² 438 U.S. 265 (1978).

¹³ *Id.* at 275.

¹⁴ *Id.* at 274-75.

¹⁵ For example, minority students under consideration for one of the sixteen "set-aside" seats did not have to adhere to the minimum 2.5 GPA requirement for general admission to the school. *Id.* at 275.

¹⁶ *Id.*

protection under the Constitution and that the set-aside program violated Title VI of the Civil Rights Act of 1964.¹⁷

It took six separate opinions from a deeply fractured Supreme Court to determine that the Davis program was unlawful. Four justices, led by Justice Stevens, declined to reach the equal protection issue.¹⁸ Instead, they would have struck down the Davis program as a violation of Title VI's "broad prohibition against the exclusion of any individual" because of that individual's race.¹⁹ A different group of four, led by Justice Brennan, would have upheld the program on equal protection grounds.²⁰ They thought that the Court should apply intermediate scrutiny to "benign" racial preferences.²¹ According to Brennan, strict scrutiny should not apply to whites as a class because they had never been subjected to "a history of purposeful unequal treatment, or relegated to such a position of political powerlessness."²² Under this intermediate standard of review, Brennan concluded that the Davis program did not violate the Constitution.²³

Justice Powell, in an opinion joined in separate parts by each group of four justices, struck down the Davis program as unconstitutional while holding that, under the right circumstances, race could be appropriately considered in admissions.²⁴ He started his analysis by stating that, because of the potential for abuse inherent in any distinction based on race, strict scrutiny applies regardless of whom the distinction is designed to benefit.²⁵ This forced Davis to show a compelling interest behind the program. Davis suggested four justifications, including "the attainment of a diverse student body."²⁶ Powell wrote that attaining diversity "clearly is a constitutionally permissible

¹⁷ Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1994).

¹⁸ *Bakke*, 438 U.S. at 413 (Stevens, J., concurring in part and dissenting in part). Chief Justice Burger and Justices Stewart and Rehnquist joined Justice Stevens in his opinion.

¹⁹ *Id.*

²⁰ *Id.* at 361.

²¹ *Id.* (Brennan, J., concurring in part and dissenting in part). Justices Marshall, White, and Blackmun joined Justice Brennan in his opinion.

²² *Id.* at 357 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

²³ *Id.* at 379.

²⁴ *Id.* at 320.

²⁵ *Id.* at 291 ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.").

²⁶ *Id.* at 311. The other justifications Davis offered for the program were "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession," "countering the effects of societal discrimination," and "increasing the number of physicians who will practice in communities currently underserved." *Id.* at 306. Of these latter three, Powell held that only the interest in remedying past discrimination could be compelling, but that Davis could not invoke this interest because the school could not show specific findings of past discrimination. *Id.* at 307-11.

goal.²⁷ He based his reasoning on both the recognition that academic freedom is a “special concern” of the First Amendment,²⁸ and the strength of several statements and policies submitted by prestigious universities in favor of diversity.²⁹ Powell concluded by holding that the Davis program failed to survive strict scrutiny because it was not narrowly tailored to its goal of attaining diversity.³⁰ Specifically, Powell contrasted the Davis admissions program to that of Harvard University, which considered race as a “plus” in a particular applicant’s file, rather than setting aside seats exclusively for those of a certain race.³¹

Bakke remains the only Supreme Court case addressing whether attaining diversity in education can be a compelling interest. As a result, public schools and universities have relied upon Powell’s recognition that an interest in diversity can be compelling to justify consideration of race in admissions.

B. The Supreme Court’s Affirmative Action Opinions After Bakke

In *Wygant v. Jackson Board of Education*,³² the Supreme Court considered the constitutionality of a collective bargaining agreement which provided that minority teachers in the Jackson, Michigan school district would not be laid off in greater proportion than their existing percentage in the school system. As in *Bakke*, the Court in *Wygant* issued several opinions, making the holding somewhat difficult to interpret.

Justice Powell, writing again for a plurality, struck down the school board’s articulated interest in providing “role models” for minority students.³³ This interest, according to Powell, could not prevail because the Jackson school board based it on societal discrimination rather than specific findings of past discrimination by the school board.³⁴ He also noted that less restrictive means could be employed to retain minority teachers; therefore, the agreement failed the “nar-

²⁷ *Id.* at 311-12.

²⁸ *Id.* at 312 (“The freedom of a university to make its own judgments as to education includes the selection of its student body.”).

²⁹ *Id.* at 312, 316. Powell quoted extensively from statements made by the President of Princeton University emphasizing the importance of diversity in creating a learning atmosphere. Additionally, he pointed to a brief submitted as *amici curiae* by Columbia University, Harvard University, Stanford University, and the University of Pennsylvania, which argued similarly.

³⁰ *Id.* at 315. In fact, Powell wrote that the Davis program “would hinder rather than further attainment of genuine diversity” by focusing solely on racial diversity at the expense of “a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.” *Id.*

³¹ *Id.* at 317.

³² 476 U.S. 267 (1986).

³³ *Id.* at 275-76.

³⁴ *Id.*

rowly tailored" requirement as well.³⁵ Justice O'Connor, in a concurring opinion, warned not to confuse the goal of "providing good 'role models' . . . with the very different goal of promoting racial diversity among the faculty."³⁶

Powell's contention that benign racial preference programs should be subjected to strict scrutiny finally prevailed in *City of Richmond v. J.A. Croson Co.*³⁷ In *Croson*, a Richmond, Virginia, building contractor sought to invalidate a local set-aside program. The program in dispute required contractors securing construction contracts from the city to subcontract at least thirty percent of the dollar amount of each contract to minority-owned businesses.³⁸ Justice O'Connor, writing for a plurality, confirmed what the Court had intimated in *Wygant*, that asserting an interest in remedying general, societal discrimination would not survive strict scrutiny.³⁹ Therefore, the Richmond set-aside requirement failed because the city could not show specific findings of discrimination in the Richmond construction industry.⁴⁰

In contrast, the Court upheld a program designed to promote diversity in broadcasting and radio programming in *Metro Broadcasting, Inc. v. Federal Communications Commission*.⁴¹ In a 5-4 decision, Justice Brennan, relying on Justice Powell's opinion in *Bakke*, held that the FCC had a substantial interest in encouraging diversity in broadcasting.⁴² Brennan recognized that all members of the listening audience would gain from increased broadcast diversity, as Powell recognized that diversity in education benefited all students.⁴³ Notably, Brennan applied only intermediate scrutiny to the FCC program, deferring to the congressional authorization of the program.⁴⁴ Justice O'Connor dissented, arguing that the potential for abuse inherent in racial classifications required strict scrutiny review.⁴⁵ She

³⁵ *Id.* at 273-74.

³⁶ *Id.* at 288 (O'Connor, J., concurring).

³⁷ 488 U.S. 469 (1989).

³⁸ *Id.*

³⁹ *Id.* at 499.

⁴⁰ *Id.* at 505.

⁴¹ 497 U.S. 547 (1990), *overruled by* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). The program gave preference to racial minorities in two ways: by giving minorities an advantage in comparative licensing proceedings and by allowing licensees struggling to keep their licenses to sell to minority-owned businesses at distress sale prices. *See id.* at 556-558.

⁴² *Id.* at 569.

⁴³ *See id.* at 579-83.

⁴⁴ *Id.* In applying intermediate scrutiny, Brennan relied on the holding in *Fullilove v. Klutznick*, 448 U.S. 448 (1980). In *Fullilove*, the Court appeared to defer to Congress by applying only an intermediate form of scrutiny to a congressional set-aside program similar to that in *Croson*. *Id.* at 473, 490.

⁴⁵ *Metro Broad.*, 497 U.S. at 602 (O'Connor, J., dissenting).

also argued that only an interest in remedying past racial discrimination could ever be compelling.⁴⁶

Justice O'Connor's argument that strict scrutiny should apply to all racial classifications, whether state or federal, won out in *Adarand Constructors, Inc. v. Peña*.⁴⁷ Overruling *Metro Broadcasting*, the *Adarand* Court ordered that strict scrutiny be applied to a federally-funded construction program that granted preference in subcontracting to firms owned by "socially and economically disadvantaged individuals."⁴⁸ Despite this holding, O'Connor cautioned that strict scrutiny should not be "strict in theory, but fatal in fact," and noted that racial classifications could still be sustained under the right circumstances.⁴⁹ Justice Stevens, in dissent, pointed out that, although the Court overturned *Metro Broadcasting's* use of intermediate scrutiny, *Adarand* did not disturb the holding that diversity could be a compelling interest.⁵⁰

II. THE CIRCUIT COURTS' TREATMENT OF THE DIVERSITY INTEREST

Confronted with this tangled web of Supreme Court precedent, the circuit courts have struggled to address whether an interest in diversity in secondary education is compelling. While many courts have chosen to await Supreme Court guidance,⁵¹ others have expressed opinions either supporting or striking down the diversity interest. Of those choosing to rule on the enduring vitality of the diversity justification, only one circuit has conclusively pronounced it dead, holding that no non-remedial interest could justify consideration of race.⁵² In contrast, a number of courts have upheld racial preference programs on the strength of asserted interests other than remedying past specific discrimination.⁵³

⁴⁶ *Id.* at 612.

⁴⁷ 515 U.S. 200 (1995).

⁴⁸ *Id.* at 224. Members of specified minority groups were automatically considered to fall within this category under the program. *Id.* at 205.

⁴⁹ *Id.* at 237 (Marshall, J., concurring) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980)).

⁵⁰ *Id.* at 258 (Stevens, J., dissenting).

⁵¹ See, e.g., *Wessmann v. Gittens*, 160 F.3d 790, 796 (1st Cir. 1998) (noting the Supreme Court's silence and assuming—without deciding—that diversity can be compelling).

⁵² See *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

⁵³ See *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738 (2d Cir. 2000); *Hunter ex rel. Brandt v. Regents of the Univ. of Cal.*, 190 F.3d 1061 (9th Cir. 1999), cert. denied 121 S. Ct. 186 (2000).

A. *Rejecting the Diversity Interest*

In *Hopwood v. Texas*,⁵⁴ four white applicants to the University of Texas School of Law challenged the school's use of separate admissions standards and policies for minority and non-minority students. At the time, the admissions program divided applicants into two categories: non-minority applicants, and black and Mexican-American applicants.⁵⁵ It ranked the students by establishing an index score based on a combination of their GPA and LSAT scores and then placing them in one of three categories based on their score: "presumptive admit," "presumptive deny," and a "discretionary zone."⁵⁶ Separate admissions criteria, waiting lists, and reviewing subcommittees were used for each category of applicant.⁵⁷ As a result of the separate standards, the school denied admission to the four plaintiffs but admitted black and Mexican-American students with lower GPA and LSAT scores.⁵⁸

The Court of Appeals for the Fifth Circuit, after extensively reviewing *Bakke* and several other Supreme Court affirmative action cases, declared that Justice Powell's approval of the diversity justification was not binding precedent.⁵⁹ They arrived at this conclusion by arguing that, to the extent that Powell upheld the diversity interest, no other Justice had ever joined or endorsed Powell's opinion.⁶⁰ Moreover, even if Powell's opinion had once been binding, the Fifth Circuit felt the Supreme Court's holding in *Adarand* and other affirmative action cases handed down after *Bakke* had eroded it.⁶¹ The court concluded by boldly proclaiming that "the use of race to achieve a diverse student body . . . simply cannot be a state interest compelling enough to meet the steep standard of strict scrutiny."⁶² Indeed, the court held that the only interest that could ever be compelling was

⁵⁴ 78 F.3d 932 (5th Cir. 1996).

⁵⁵ *Id.* at 938.

⁵⁶ *Id.* at 936-38.

⁵⁷ *Id.*

⁵⁸ *See id.* at 936. Non-minority students with an index score of 192 were in the "presumptive deny" category, while black and Mexican-American students with an index score of 189 fell into the "presumptive admit" category. *Id.*

⁵⁹ *Id.* at 944 ("[T]here has been no indication from the Supreme Court, other than Justice Powell's lonely opinion in *Bakke*, that the state's interest in diversity constitutes a compelling justification for governmental race-based discrimination.").

⁶⁰ *Id.* (noting that "only one Justice concluded that race could be used solely for the reason of obtaining a heterogeneous student body").

⁶¹ *Id.* at 945-46 ("[W]e see the caselaw as sufficiently established that the use of ethnic diversity simply to achieve racial heterogeneity, even as part of the consideration of a number of factors, is unconstitutional.").

⁶² *Id.* at 948.

that of remedying specific past racial discrimination on the part of the institution promoting the racial preference.⁶³

In a special concurrence, Judge Wiener disagreed with the panel's conclusion that diversity could never be a compelling interest.⁶⁴ Rather, he would have chosen to "assume *arguendo* that diversity can be a compelling interest but conclude that the admissions process . . . was not narrowly tailored to achieve diversity."⁶⁵ To extend Supreme Court cases such as *Adarand* to education, according to Wiener, was "an extension of the law . . . both overly broad and unnecessary to the disposition of [the] case."⁶⁶ Noting "the difficulty inherent in applying *Bakke* and the minimal guidance in *Adarand*,"⁶⁷ Wiener felt it improper to "rush in where the Supreme Court fears—or at least declines—to tread."⁶⁸ He then analyzed whether the program was narrowly tailored, concluding that because it used percentages "virtually indistinguishable from quotas" and focused only on two ethnic groups, blacks and Mexican-Americans, the program failed strict scrutiny.⁶⁹

Although no other court has gone as far as *Hopwood* in pronouncing the diversity justification to be without merit, a few other circuits have expressed doubt as to its vitality. In *Wessmann v. Gittens*,⁷⁰ the First Circuit considered the constitutionality of an examination school's admissions program that considered the applicant's race in admissions decisions.⁷¹ Sarah Wessmann, a white student, applied for and was denied admission to the prestigious Boston Latin School.⁷² The school accepted 90 students that year, with the first 45 receiving admittance based solely on a combination of GPA and a standardized test score.⁷³ The remaining 45 seats were allocated to students of various racial groups in the same proportion as each race

⁶³ *Id.* at 949.

⁶⁴ *Id.* at 962 (Wiener, J., specially concurring).

⁶⁵ *Id.*

⁶⁶ *Id.* at 963.

⁶⁷ *Id.* at 964-65 (footnote omitted).

⁶⁸ *Id.* at 965.

⁶⁹ *Id.* at 966.

⁷⁰ 160 F.3d 790 (1st Cir. 1998).

⁷¹ Examination schools offer students an alternative to attending their local secondary school. Usually noted for increased prestige and challenging curriculum, examination schools attract applicants from across several school districts within a geographic region. Because they generally receive more applications than they have seats, admissions are selective. Students are offered seats based on an admissions examination score and the student's prior academic record, among other factors.

⁷² *Wessmann*, 160 F.3d at 793.

⁷³ *Id.*

appeared in the remaining applicant pool.⁷⁴ Although Wessmann ranked 91st in the applicant pool, Boston Latin rejected her in favor of several minority students with lesser scores, leading her to sue the school selection committee.⁷⁵

The First Circuit, mindful of the Supreme Court precedent on which the *Hopwood* panel rested its decision, rejected the selection committee's asserted interest in a diverse student body.⁷⁶ However, in an opinion akin to Judge Wiener's *Hopwood* concurrence, the First Circuit hesitated to foreclose all possibility of the diversity interest ever being compelling.⁷⁷ The court instead analyzed the program's scope, arguing that, by focusing only on racial diversity, the committee ran "afoul of the guidance provided by the principal authority on which it relies," Powell's opinion in *Bakke*.⁷⁸ It concluded that, for a program to focus solely on racial and ethnic diversity, "the need would have to be acute—much more acute than the relatively modest deviations that attend the instant case."⁷⁹

One year later the Fourth Circuit handed down a similar ruling in *Eisenberg ex rel. Eisenberg v. Montgomery County Public Schools*.⁸⁰ The school district in Montgomery County had developed a magnet program offering enriched curricula in specific areas, such as math and science or a foreign language, and sought to attract a diverse group of applicants from outside each school's geographic region. Accordingly, the county permitted voluntary student transfers from one school to another within the county only when the transfer would not "negatively affect diversity."⁸¹ When Jacob Eisenberg, a white student, requested a transfer from an overwhelmingly minority elementary school to a math and science oriented magnet school, the county denied his request.⁸²

⁷⁴ *Id.* For example, for the 1997 entering class, 27.83% of the qualified remaining applicants were black. Therefore, 13 of the 45 remaining seats were filled by the black applicants with the 13 highest scores. *Id.*

⁷⁵ *Id.* Two applicants, both ranked in the top 45 of the applicant pool, declined to attend the Boston Latin School. Thus, Wessmann's rank, although not in the top 90, would have ensured her admission to the school if not for the racial preference given to minorities. *Id.*

⁷⁶ *Id.* at 800.

⁷⁷ *See id.* at 796. The court, echoing Judge Wiener, chose to "assume *arguendo*—but [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." *Id.*

⁷⁸ *Id.* at 798.

⁷⁹ *Id.*

⁸⁰ 197 F.3d 123 (4th Cir. 1999), *cert. denied*, 529 U.S. 1019 (2000).

⁸¹ *Id.* at 126. For example, a white student could not generally transfer from a predominantly minority school to a predominantly white school without showing some countervailing necessity or hardship. *Id.*

⁸² *Id.* at 127.

Much like the First Circuit in *Wessmann*, the Fourth Circuit declined to address diversity as a compelling interest, assuming (without deciding) that it could be compelling.⁸³ The court disagreed with *Hopwood*'s conclusion that the Supreme Court had declared the diversity justification invalid, pointing out that "the Supreme Court has not decided this issue."⁸⁴ As in *Wessmann*, the court resorted to the "narrowly tailored" prong of strict scrutiny analysis to strike down the program. Here, the program's fatal flaw was that it "[did] not allow every applicant for a transfer to be eligible for every available spot."⁸⁵ Instead, it denied or approved transfer requests based on the applicant's race, essentially a form of racial balancing. This, according to the Fourth Circuit, "was not a narrowly tailored remedy."⁸⁶

B. Upholding Diversity Beyond Remediating Past Discrimination

In *Brewer v. West Irondequoit Central School District*,⁸⁷ the Second Circuit addressed an interdistrict transfer program initiated to increase diversity in the public schools within the district.⁸⁸ The program operated by allowing only minority students to transfer from schools in the Rochester district to suburban schools, and similarly permitted only non-minority students to transfer from the suburbs to the Rochester district.⁸⁹ A white student denied transfer to a suburban school from a school within the Rochester district filed suit, alleging an equal protection violation and seeking a mandatory injunction.⁹⁰ The district court, expressing doubt that the school district could prevail on the merits, granted the injunction.⁹¹

The Second Circuit, relying on Powell's opinion in *Bakke*, vacated the injunction.⁹² In reversing, the appellate court cited two "fatal flaws" in the district court's ruling.⁹³ First, the ruling improperly relied on *Wygant* and *Croson* for the proposition that a non-remedial

⁸³ *Id.* at 130.

⁸⁴ *Id.* at 131.

⁸⁵ *Id.* at 133.

⁸⁶ *Id.*

⁸⁷ 212 F.3d 738 (2d. Cir. 2000).

⁸⁸ *Id.* at 742. The stated goal of the program was to reduce "'racial isolation' within the population of the participating school districts." *Id.* (quoting *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 32 F. Supp. 2d 619, 621 (W.D.N.Y. 1999)).

⁸⁹ *Id.* at 741.

⁹⁰ *Id.*

⁹¹ *Id.* In order to prevail on a motion for a mandatory preliminary injunction, a party must show (1) that it will be irreparably harmed in the absence of the injunction, and (2) a "clear" or "substantial" likelihood of success on the merits. *Id.* at 743-44 (citing *Jolly v. Coughlin*, 76 F.3d 468, 473 (2d Cir. 1996)).

⁹² *Id.* at 753.

⁹³ *Id.* at 748.

state interest could never satisfy strict scrutiny.⁹⁴ This was so because the Supreme Court had never reached that conclusion, particularly in the educational domain.⁹⁵ Second, the district court erred in relying on *Hopwood*, “the only [case] since *Bakke* to hold that a non-remedial state interest, such as diversity, may never justify race-based programs in the educational context.”⁹⁶ In doing so, the district court not only embraced a conclusion that just one circuit had reached, but it ignored binding Second Circuit precedent, which held that “reducing *de facto* segregation, arguably the goal of the [interdistrict transfer program], serves a compelling government interest.”⁹⁷ The Second Circuit concluded by holding that, because reducing *de facto* segregation is a constitutionally permissible goal, the district court erred in enjoining a program arguably aimed at that goal.⁹⁸

The Ninth Circuit has also recognized that a non-remedial purpose can serve as a compelling interest. In *Hunter ex rel. Brandt v. Regents of the University of California*,⁹⁹ the court upheld the ability of a research-oriented elementary school, operated by UCLA’s Graduate School of Education and Information Studies, to consider race in its admissions process.¹⁰⁰ The graduate school used the elementary school as an experimental laboratory through which it hoped to conduct research aimed at improving the quality of education in the Los Angeles elementary school system. In order to accomplish this goal, the graduate school considered “gender, race/ethnicity, and family income in its admissions process” in order to obtain a student population that roughly constituted a cross-section of the Los Angeles public school system.¹⁰¹ The parents of Keeley Hunter, a student denied admission to the school, challenged the

⁹⁴ *Id.*

⁹⁵ *Id.* at 748 (“[N]othing the Court has said [in *Wygant*] necessarily forecloses the possibility that the Court will find other governmental interests . . . “compelling” to sustain the use of affirmative action policies.”) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O’Connor, J., concurring)).

⁹⁶ *Id.* at 748.

⁹⁷ *Id.* at 749. See also *Parent Ass’n of Andrew Jackson High Sch. v. Ambach*, 738 F.2d 574 (2d Cir. 1984) (“*Andrew Jackson II*”); *Parent Ass’n of Andrew Jackson High Sch. v. Ambach*, 598 F.2d 705 (2d Cir. 1979) (“*Andrew Jackson I*”). In the *Andrew Jackson* cases, the Second Circuit held that, while “there is no judicially-enforceable constitutional obligation, under existing law, to take affirmative action to remedy racial imbalance,” if action is voluntarily undertaken then the goal of reducing *de facto* segregation could survive strict scrutiny. *Andrew Jackson I*, 598 F.2d at 713.

⁹⁸ *Brewer*, 212 F.3d at 753.

⁹⁹ 190 F.3d 1061 (9th Cir. 1999), *cert. denied*, 531 U.S. 877 (2000).

¹⁰⁰ *Id.* at 1063.

¹⁰¹ *Id.* at 1062. The demographic breakdown of the 215 applicants for the 1995-1996 school year (including Hunter, a student described as one-quarter Japanese and three-quarters Caucasian) was as follows: “110 Caucasians (51.2%); 49 mixed-race (22.8%); 23 African-Americans (10.7%); 19 Asians (8.8%); and 14 Latinos (6.5%). The demographic racial breakdown, as self-reported, of the 46 admitted applicants was as follows: 18 Caucasians (39.1%); 8

nied admission to the school, challenged the constitutionality of the admissions process.

The court, after reviewing testimony by leading educators as to the problems facing urban education, found that "the defendants' interest in operating a research-oriented elementary school is compelling."¹⁰² In doing so, the court deliberately rejected the notion that only remedial interests can justify racial consideration in admissions.¹⁰³ Echoing Justice Powell's opinion in *Bakke*, the court also discussed the important role of education and public schooling, noting that they are "'perhaps the most important function of state and local governments.'"¹⁰⁴ Furthermore, the court found the program narrowly tailored to its goal because, in light of the small number of students admitted to the elementary school, "it would not be possible, nor would it be reasonable, to require the [school] to attempt to obtain an ethnically diverse representative sample of students without the use of specific racial targets and classifications."¹⁰⁵ Therefore, the court felt it should "defer to researchers' decisions about what they need for their research."¹⁰⁶

III. COMPELLING INTERESTS: THE FIRST EQUAL PROTECTION PRONG

The decisions in the various circuit courts, as noted above, have encompassed a broad spectrum of possible outcomes when the courts have faced the issue of whether a diverse population in a public school is a compelling goal. The Supreme Court, possessing the power to choose which cases it will hear, has added to the confusion by failing to address the vitality of the diversity justification in education. The time to answer this question is overdue—a problem that will doubtless be remedied in the near future. When that time comes, the Supreme Court should look in two places for the answer to the diversity question. First, it should consider the vast body of modern educational research indicating the importance of diversity to effective education. Second, it should recognize the inapplicability of marketplace and workplace affirmative action cases to the narrow

mixed-race (17.4%); 6 African-Americans (13%); 4 Asians (8.7%); and 10 Latinos (21.7%)." *Id.* at 1068 n.5.

¹⁰² *Id.* at 1064.

¹⁰³ *Id.* at 1064 n.6 ("The Supreme Court has never held that only a state's interest in remedial action can meet strict scrutiny.").

¹⁰⁴ *Id.* at 1063 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)). The court in *Hunter* also quoted several other Supreme Court decisions voicing the same proposition. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) ("Providing public schools ranks at the very apex of the function of a State.").

¹⁰⁵ *Hunter*, 190 F.3d at 1066 (giving significant weight to the testimony of numerous educational researchers in arriving at this conclusion).

¹⁰⁶ *Id.*

issue of diversity in education. Instead, the Court should embrace Justice Powell's opinion in *Bakke* and the conclusions of *Hunter*, *Brewer*, and other cases upholding diversity in public schools.

A. *How the Supreme Court Can Uphold Diversity as a Compelling Educational Interest*

Any judicial ruling upholding the diversity interest in education would clearly begin with Justice Powell's opinion in *Bakke*. Powell's words have been the cornerstone on which every effort to increase diversity through racial consideration in admissions has rested. In order, then, to assess whether diversity is compelling, the question must be answered: Is *Bakke* still valid precedent? If *Bakke* survives, then *Hopwood* is incorrect, and diversity (as well as other non-remedial interests) can satisfy strict scrutiny if narrowly tailored. On the other hand, if subsequent Supreme Court jurisprudence overturned *Bakke*, then no foundation exists on which to rest the diversity interest.

Close examination of this question reveals several indications that *Bakke* has endured as a legitimate precedent in support of diversity. Although the Supreme Court has gutted affirmative action programs in the workplace and marketplace, in most circumstances requiring specific findings of past discrimination to uphold racial preferences, it has left room for a holding that diversity can still be compelling in education.¹⁰⁷ Indeed, no Supreme Court majority has ever held that diversity cannot serve as a compelling interest.¹⁰⁸ The vast differences between diversity in the economic sector and diversity in education serve to distinguish cases such as *Wygant* and *Adarand*.¹⁰⁹

Education has long held a special status in the courts. It is "perhaps the most important function of state and local governments,"¹¹⁰

¹⁰⁷ See generally Philip T.K. Daniel & Kyle Edward Timken, *The Rumors of My Death Have Been Exaggerated: Hopwood's Error in "Disregarding" Bakke*, 28 J.L. & EDUC. 391 (1999) (arguing that the decision in *Hopwood* overstepped its authority by precluding the use of diversity as a compelling state interest). See also Lackland H. Bloom, Jr., *Hopwood, Bakke, and the Future of the Diversity Justification*, 29 TEX. TECH L. REV. 1, 40 (1998) ("Since *Bakke*, the Court has not decided another educational admissions case nor has it purported to confront the Powell opinion directly. Therefore . . . *Bakke* is still good law . . ."); Marty B. Lorenzo, *Race-Conscious Diversity Admissions Programs: Furthering a Compelling Interest*, 2 MICH. J. RACE & L. 361, 389 (1997) ("[T]he reason no case has affirmed educational diversity as a compelling interest is only because the issue has not yet come before the Court.").

¹⁰⁸ See Lorenzo, *supra* note 107, at 390 ("[T]he Supreme Court has not declared the use of race as a criterion for diversity to be unconstitutional.").

¹⁰⁹ See Daniel & Timken, *supra* note 107, at 400 ("The cases that the *Hopwood* court relied upon [in limiting diversity] were totally unrelated to higher education admissions programs and thus reliance upon them is tenuous at best.").

¹¹⁰ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

ranking at the "very apex of the function of a State."¹¹¹ Justice Powell, in *Bakke*, noted that "[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment."¹¹² Education involves the "robust exchange of ideas,"¹¹³ an exchange clearly not found in construction contracts and employment. As stated by the Second Circuit, "desegregation of a student population in the public school system . . . is more compelling than reduction of racial isolation or underrepresentation in the commercial context—teachers' jobs and the construction industry—at issue in *Wygant* and *Croson*."¹¹⁴

The awarding of a construction contract, in contrast, hardly invokes First Amendment rights or an "exchange of ideas." An employment dispute does not foster in people the lifelong impressions of other racial groups that children first form in school.¹¹⁵ A construction contract granting a percentage of the total contract amount to minorities benefits only the minority—usually at the expense of another, non-minority business. Diversity in education, on the other hand, benefits all children, particularly at a young age.¹¹⁶ Furthermore, while racial preferences in the commercial context breed competition and animosity between those benefited and those burdened, diversity in education can promote friendship, familiarity, and mutual understanding between those of differing race and background.¹¹⁷

¹¹¹ *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972).

¹¹² *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978). Powell went on to list the "four essential freedoms" of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and *who may be admitted to study*." *Id.* (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in result)) (emphasis added).

¹¹³ *Id.* (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

¹¹⁴ *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 751 (2d Cir. 2000).

¹¹⁵ See Janet Ward Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary School Students*, in HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 597 (James A. Banks & Cherry A. McGee Banks eds., 1995) (noting that interracial interaction at a young age helps children to form positive impressions of those of a different race).

¹¹⁶ See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 315 (1986) ("[O]ne of the most important lessons that the American public schools teach is that the diverse ethnic, cultural, and national backgrounds that have been brought together in our famous 'melting pot' do not identify essential differences among the human beings that inhabit our land. It is one thing for a white child to be taught by a white teacher that color, like beauty, is only 'skin deep'; it is far more convincing to experience that truth on a day-to-day basis during the routine, ongoing learning process.") (Stevens, J., dissenting).

¹¹⁷ See Schofield, *supra* note 115, at 610. See also Joanna R. Zahler, Note, *Lessons in Humanity: Diversity as a Compelling State Interest in Public Education*, 40 B.C. L. REV. 995, 1024-25 (1999) (citing Schofield and arguing that diversity in education serves a compelling interest by fostering friendship between white and minority students at a young age). Zahler cites Schofield's discussion of a 1979 National Opinion Research Center Survey finding that "white students in desegregated schools situations were more likely to report having a close African-American friend and having had African-American friends visit their homes." Zahler, *supra*, at 1025. Schofield also found that increased social interaction between white and minor-

Hand in hand with the notion that education is a vital aspect of state and local government is the principle that courts should defer to local school administrators regarding educational policy.¹¹⁸ In *Swann v. Charlotte-Mecklenburg Board of Education*,¹¹⁹ the Supreme Court stated in dicta that school authorities should have "broad power to formulate and implement educational policy," including prescribing percentages of minority students "in order to prepare students to live in a pluralistic society."¹²⁰ Admittedly, the *Swann* Court directed these words toward a different situation—admonishing federal courts against infringing on the discretion of local school officials by imposing desegregation remedies on school districts where only de facto segregation existed.¹²¹ However, at least one circuit court has cited *Swann* in support of the contention that school officials may voluntarily formulate measures designed to "remedy de facto segregation existing in schools."¹²² This ruling is supported by the belief that school officials, having built careers by determining how to most effectively educate children, possess special expertise in their field with which courts should not interfere.¹²³

Another indication of *Bakke*'s enduring legacy is the repeated citations made to it by Supreme Court justices in other cases. Most significantly, the *Metro Broadcasting* Court adopted Powell's diversity justification in upholding diversity in broadcasting.¹²⁴ Although *Adarand* overturned *Metro Broadcasting*, it only did so with regards to *Metro Broadcasting*'s application of intermediate scrutiny to the race-based classification in question.¹²⁵ As the dissent in *Adarand* pointed out, the diversity justification was never asserted in *Adarand*;

ity students at a young age resulted in each group forming more positive impressions of the other. Schofield, *supra*, at 610.

¹¹⁸ See, e.g., *Wygant*, 476 U.S. at 315 (1986) (listing several Supreme Court cases promoting deference to local school officials).

¹¹⁹ 402 U.S. 1 (1971).

¹²⁰ *Id.* at 16.

¹²¹ See *Wessmann v. Gittens*, 160 F.3d 790, 796-97 (1st Cir. 1998) (rejecting the school officials' argument that *Swann* gave them the discretion to implement race-based admissions policies).

¹²² *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 751 (2d Cir. 2000). See also *Willan v. Menomonee Falls Sch. Bd.*, 658 F. Supp. 1416, 1422 (E.D. Wis. 1987) ("It is well-settled in federal law that state and local school authorities may voluntarily adopt plans to promote integration even in the absence of a specific finding of past discrimination."). Remedying de facto segregation has been described as "a negatively-phrased expression for attaining the opposite of racial isolation which is racial diversity." *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 32 F. Supp. 2d 619, 627 (W.D.N.Y. 1999), *vacated*, 212 F.3d 738 (2d Cir. 2000).

¹²³ See *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 230 (1985) (Powell, J., concurring) ("Judicial review of academic decisions, including those with respect to the admission or dismissal of students, is rarely appropriate . . .").

¹²⁴ *Metro Broad., Inc. v. Fed. Communications Comm'n.*, 497 U.S. 547, 567-68 (1990), *overruled by Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

¹²⁵ *Adarand*, 515 U.S. at 226-27 (1995).

thus, the majority's decision did not decide the question of whether diversity could serve as a compelling interest in the future.¹²⁶

In *Wygant*, Justice O'Connor noted that "nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently . . . 'compelling' to sustain the use of affirmative action policies."¹²⁷ Similarly, in *Croson*, the Court did not address the diversity question because the only justification raised was remedying past discrimination.¹²⁸ Although in both cases the Court struck down affirmative action programs, neither case specifically struck down the diversity justification.

In *Croson*, Justice O'Connor struck down the construction contract set-aside by relying on Justice Powell's opinion in *Bakke* for the proposition that all race-based classifications should be subjected to strict scrutiny.¹²⁹ Furthermore, she followed *Bakke* in holding that racial classifications enacted for remedial purposes must address specific instances of past discrimination rather than generalized assertions.¹³⁰ Despite these repeated citations to Justice Powell's opinion, Justice O'Connor failed even once to mention the diversity justification in *Croson*. Moreover, no other Justice wrote against diversity as a compelling interest, despite the obvious opportunity to do so. At the least, this implies that *Croson* did not intend to bury the diversity justification, and, in fact, the justification survives.¹³¹

A final indication of the educational diversity justification's enduring potency is the reliance several circuit and district courts have placed on Justice Powell's opinion. Of these, the *Brewer* and *Hunter* decisions, discussed above, are the most germane. Both cases addressed race-based programs designed to encourage diversity at the grade school level, and both upheld the school's use of race for that purpose. *Brewer* discussed *Bakke* and its progeny at length and con-

¹²⁶ *Id.* at 257-58 (Stevens, J., dissenting) ("The proposition that fostering diversity may provide a sufficient interest to justify such a program is *not* inconsistent with the Court's holding today—indeed, the question is not remotely presented in this case . . .").

¹²⁷ *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring).

¹²⁸ *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (striking down a city's plan, which required prime contractors to subcontract at least 30% of each contract to minority business enterprises, because the city failed to demonstrate a compelling government interest by identifying past discrimination).

¹²⁹ *Id.* at 494.

¹³⁰ *Id.* at 496-98.

¹³¹ *See Daniel & Timken*, *supra* note 107, at 402 ("[T]he *Croson* Court, relying on *Bakke*, could have easily dismissed the diversity rationale as a compelling state interest. But, the plurality opinion, the concurrence, and the dissent all lack any critique of the diversity rationale. These factors alone highlight the fact that the diversity rationale remains an appropriate compelling interest in the field of higher education and perhaps elsewhere.").

cluded that Justice Powell's opinion remained valid precedent.¹³² *Hunter*, although it did not explicitly mention *Bakke*, nevertheless reached the same conclusion—that the Supreme Court “has never held that only a state's interest in remedial action can meet strict scrutiny.”¹³³

In addition to *Brewer* and *Hunter*, some recent decisions addressing university and graduate school admissions have likewise followed *Bakke* and concluded that an interest in diversity can be compelling. In *Smith v. University of Washington Law School*,¹³⁴ the Ninth Circuit held that they would not “declare that the *Bakke* rationale regarding university admissions policies has become moribund,” but rather that race could permissibly be a factor in admissions decisions.¹³⁵ In arriving at this conclusion, the Ninth Circuit relied on several Supreme Court decisions which, when considered together, “required” the court to uphold the diversity justification.¹³⁶

The Ninth Circuit scrutinized *Bakke* through the lens of *Marks v. United States*,¹³⁷ which held that “[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.’”¹³⁸ Under this approach, the court determined that, although Justice Stevens' opinion provided the necessary votes to strike down the Davis admissions program, a majority of the Justices “would have allowed for some race-based considerations in educational institutions, both under Title VI and under the Fourteenth Amendment.”¹³⁹ Therefore, the narrower of Justice Powell and Justice Brennan's opinions would qualify as the Court's holding under the *Marks* analysis.¹⁴⁰ The Ninth Circuit then concluded that because

¹³² *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 747-49 (2d Cir. 2000).

¹³³ *Hunter ex rel. Brandt v. Regents of the Univ. of Cal.*, 190 F.3d 1061, 1064 n.6 (9th Cir. 1999), *cert. denied*, 121 S. Ct. 186 (2000).

¹³⁴ 233 F.3d 1188 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 2192 (2001). The conflict arose when three white applicants to the University of Washington Law School were denied admission. They sued, alleging that the law school's admissions process discriminated against Caucasians by using race as an admissions criterion. *Id.* at 1191.

¹³⁵ *Id.* at 1200-01 (“[T]he Fourteenth Amendment permits University admissions programs which consider race for other than remedial purposes, and educational diversity is a compelling government interest that meets the demands of strict scrutiny of race-conscious measures.”).

¹³⁶ *Id.* at 1200.

¹³⁷ 430 U.S. 188 (1977).

¹³⁸ *Smith*, 233 F.3d at 1199 (quoting *Marks*, 430 U.S. at 193).

¹³⁹ *Id.* See also *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 819 (E.D. Mich. 2000) (agreeing with *Smith* that “five justices reached the same conclusion . . . that universities may take race into account in admissions when done so properly . . .”).

¹⁴⁰ *Smith*, 233 F.3d at 1200. Both Justice Powell and Justice Brennan allowed for the use of race in admissions in circumstances beyond remedying past discrimination. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

"virtually every point in Justice Brennan's opinion would establish broader grounds for allowing [consideration of race], . . . Justice Powell's analysis is the narrowest footing upon which a race-conscious decision making process could stand."¹⁴¹

Having determined that Justice Powell's opinion constituted the holding of the *Bakke* Court regarding the diversity justification, the Ninth Circuit moved on to consider whether his words had been undermined by subsequent Supreme Court decisions. In language implicitly critical of the outcome in *Hopwood*, the panel reminded circuit courts of their duty to follow clear Supreme Court precedent until such time as that Court determines to reverse itself.¹⁴² Because the Supreme Court had never explicitly overruled *Bakke*, the Ninth Circuit concluded that diversity could still be compelling in education.¹⁴³

Even *Wessmann* and *Eisenberg*, two decisions that struck down race-based programs, recognized that the diversity justification might potentially endure. Although each questioned whether the justification had survived *Wygant* and *Adarand*, both left that determination to the Supreme Court, and instead focused their attention on whether the programs addressed were narrowly tailored.¹⁴⁴ This approach recognizes that the Supreme Court, should it choose to do so, can still pronounce that educational diversity is a compelling interest without upsetting its own precedent.

B. Why the Supreme Court Should Uphold Diversity as a Compelling Interest

The difficulty in establishing the importance of diversity to the educational growth of children of both the minority and non-minority races is well-documented.¹⁴⁵ Courts have hesitated to uphold the diversity justification based only on generalized, lofty statements of the

¹⁴¹ *Smith*, 233 F.3d at 1200.

¹⁴² *See id.* *See also* *Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("[O]ther courts should [not] conclude [that] our more recent cases have, by implication, overruled an earlier precedent."); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

¹⁴³ *See Smith*, 233 F.3d at 1200.

¹⁴⁴ *See Eisenberg ex rel. Eisenberg v. Montgomery County Pub. Schs.*, 197 F.3d 123, 130 (4th Cir. 1999), *cert. denied*, 120 S. Ct. 1420 (2000) ("We will assume, without holding, . . . that diversity may be a compelling governmental interest, and proceed to examine whether the transfer policy is narrowly tailored to achieve diversity."); *Wessmann v. Gittens*, 160 F.3d 790, 796 (1st Cir. 1998) (assuming *Bakke* remains good law).

¹⁴⁵ *See Wessmann*, 160 F.3d at 796 ("The word 'diversity,' like any other abstract concept, does not admit of permanent, concrete definition."). *See also* John Friedl, *Making a Compelling Case for Diversity in College Admissions*, 61 U. PITT. L. REV. 1, 29-32 (1999) (discussing the lack of concrete, empirical evidence substantiating the value of diversity in education).

benefits of diversity.¹⁴⁶ However, until recently nothing more existed to substantiate the value of a diverse classroom than evidence of an anecdotal nature.¹⁴⁷

In response to the great need for concrete research supporting diversity, many studies have attempted to give substance to the argument. Researchers have examined the impact of racial diversity on both minority and white students, at the grade school, university, and graduate school levels.¹⁴⁸ These efforts consistently find that diversity enhances a student's education by providing two types of distinct benefits: academic benefits, such as an increase in test scores and intellectual growth, and social benefits, such as greater interaction and goodwill between those of different races.¹⁴⁹

1. *Diversity's Impact on Academic Success*

A substantial body of research has attempted to isolate the role diversity plays in academic achievement. Most recently, a study conducted by Patricia Gurin, Professor of Psychology and Women's Studies at the University of Michigan, concluded that the academic success of a student could be promoted by surrounding the student with classmates of different backgrounds and races.¹⁵⁰ Gurin's study, relied on heavily in a recent district court case upholding the University of Michigan's race-conscious admissions program, utilized data collected from nearly 200 colleges and universities in reaching its conclusions.¹⁵¹ The benefits to students identified in her study include growth in intellectual and academic skills, heightened potential for critical thinking, increased intellectual motivation and engagement in active thinking processes, and a greater ability to understand and consider multiple perspectives and deal with the conflicts that different perspectives sometimes create.¹⁵² Students who learn in a diverse environment also demonstrate an ability to offer more creative solu-

¹⁴⁶ See *Wessmann*, 160 F.3d at 797 ("[A]ny proponent of any notion of diversity could recite a . . . litany of virtues. Hence, an inquiring court cannot content itself with abstractions.").

¹⁴⁷ See Friedl, *supra* note 145, at 29-32 ("To date, almost all of the evidence in support of diversity in higher education is anecdotal in nature . . .").

¹⁴⁸ See, e.g., Schofield, *supra* note 115 (studying diversity at the elementary school level); Patricia Gurin, *Expert Report of Patricia Gurin*, available at <http://www.umich.edu/~urel/admissions/legal/expert/gurintoc.html> (last visited Oct. 7, 2001) (assessing diversity at the university level).

¹⁴⁹ See Zahler, *supra* note 117, at 1021-26 (noting that, while an increase in test scores and similar academic indicators may be linked to racial diversity, the greatest benefit to students derives from social interaction between races).

¹⁵⁰ See Gurin, *supra* note 148.

¹⁵¹ *Id.* See also *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 822-23 (E.D. Mich. 2000) (discussing Gurin's studies and concluding that diversity in admissions is a compelling interest).

¹⁵² See Gurin, *supra* note 148.

tions to problems than do students from homogenous classrooms.¹⁵³ In addition, students from diverse schools are more active in democratic participation and citizenship.¹⁵⁴ For each of these benefits Gurin's "analyses show[ed] a striking pattern of consistent, positive relationships between student learning in college and both classroom diversity and informal interactional diversity."¹⁵⁵ Furthermore, Gurin noted that these benefits increase as the diversity of the institution increases.¹⁵⁶

Significantly, Gurin also discovered that, for white students, the results were "especially impressive."¹⁵⁷ After interacting with students of other races, white students demonstrated "increased scores on the measures of complex thinking and social/historical thinking," increased "drive to achieve, intellectual self-confidence, and goals for creating original works," heightened "post-graduate degree aspirations," and "growth in students values placed on their intellectual and academic skills."¹⁵⁸ Gurin attributes this increase in intellectual ability to the challenges presented to students by interaction with those of different races.¹⁵⁹ Specifically, she contends that by encountering "novel situation[s]," such as interracial interaction, students are forced to abandon automatic, routine modes of thought in favor of "effortful and conscious modes of thought."¹⁶⁰ Therefore, she concluded that diversity is essential to training students to be complex, sophisticated thinkers.¹⁶¹

While Gurin's studies assessed diversity at the university level, many researchers have tried to quantify the impact of diversity on elementary and secondary school children. Along these lines, several studies comparing student performance on standardized tests in integrated and segregated schools are particularly illuminating.¹⁶² A 1993-1994 study comparing student scores on the Iowa Test of Basic Skills showed that black students in mostly segregated schools failed to reach the national average for their age bracket, while black stu-

¹⁵³ *Id.*

¹⁵⁴ *Id.* See also Gratz, 122 F. Supp. 2d at 822-23 (summarizing the benefits cited by Gurin's study).

¹⁵⁵ See Gurin, *supra* note 148.

¹⁵⁶ *Id.* ("Social diversity is especially likely to increase effortful, active thinking when institutions of higher education capitalize on these conditions in the classroom and provide a climate in which students from diverse backgrounds frequently interact with each other.").

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ See *id.*

¹⁶⁰ *Id.*

¹⁶¹ See *id.*

¹⁶² See GARY ORFIELD & SUSAN EATON, *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* (1996). Orfield and Eaton challenge the recent trend of school districts reverting to segregation by ceasing to take measures to ensure diversity.

dents in integrated schools exceeded the national average.¹⁶³ Furthermore, scores for both white and black students rose by approximately 20 points during a period of time when busing promoted racial diversity in the area schools.¹⁶⁴

Another study, based on results of the Virginia Literacy Testing Program, found that students in integrated schools outperformed students in segregated schools in "all subject areas [and] in every grade."¹⁶⁵ In particular, the passing rates for writing and math were substantially higher in the more diverse schools.¹⁶⁶ A comparison of student scores on the Science Research Associates Assessment Survey Series confirmed these results, finding that black student's scores decreased after the area's reversion to segregated schools.¹⁶⁷ Researcher Vivian Ipka concluded that "[s]egregated educational settings may serve to retard the development of children."¹⁶⁸ In contrast, students in racially diverse settings demonstrated enhanced development.¹⁶⁹

These studies were not alone in finding that diversity in the classroom can increase academic performance. Janet Ward Schofield, a leading researcher on the effects of racial integration, concluded that significant gains in the test scores of minority students, particularly in reading and English, resulted from racially integrated classrooms.¹⁷⁰ Moreover, in a study commissioned by the Connecticut State Department of Education, Schofield found that these gains

¹⁶³ *Id.* at 130-31. This study, conducted by Susan Eaton and Christina Meldrum, took place after local school officials in Norfolk, Virginia were given permission to end court-ordered busing. The end of busing, and subsequent return to neighborhood schooling, resulted in many integrated schools becoming segregated. The purpose behind the study was to assess the academic impact on students from this return to segregation. Eaton and Meldrum's data came from students in the same school districts and schools, taken before and after those schools "reseggregated." Thus, their results cannot be explained away by suggesting that the students in the integrated schools received increased funds, better teachers, or superior curriculum. *Id.*

¹⁶⁴ *Id.* at 132. This Note does not intend to express any arguments for or against busing as a remedy for segregation. However, because busing is a remedy designed, in essence, to force school diversity, these studies are highly relevant to assessing the academic impact of diversity.

¹⁶⁵ *Id.* at 133.

¹⁶⁶ *Id.* The passing rates in writing and math in the segregated schools were 57 and 61 percent, respectively. These rates rose to 70 and 82 percent in integrated school settings.

¹⁶⁷ *Id.* at 132-33. For black students, the mean score decreased from 52 to 47. In order to obtain accurate results, the study controlled for several factors including "school racial composition, teacher and student expenditures, instructional materials, substitute and teacher salaries, the age of school buildings, teacher education levels and library size." *Id.*

¹⁶⁸ *Id.* at 131 (quoting Ipka, a researcher from the University of Central Florida).

¹⁶⁹ *Id.*

¹⁷⁰ Schofield, *supra* note 115, at 610-11. See also Zahler, *supra* note 117, at 1025 (discussing Schofield's findings).

intensified when desegregation began in the first grade.¹⁷¹ Yet another study, by Robert Crain and Rita Mahard, found that the benefits of desegregation became of greater significance when integration began at an early age and persisted throughout the student's school years.¹⁷²

Although both Schofield's work and Crain and Mahard's research found test score gains to be statistically significant, they both described these increases as "modest."¹⁷³ Nonetheless, at least one leading researcher contends that their significance may be underestimated. Desegregation expert Gary Orfield notes that "few educational reforms . . . show unambiguous short-term impacts on test scores."¹⁷⁴ In fact, Orfield points out that none of the major education reform proposals of the past generation resulted in large, immediate test score gains.¹⁷⁵ Therefore, the "modest" gains attributed to diverse classrooms compare quite favorably to other education reforms.¹⁷⁶ Orfield goes on to suggest that the true measure of diversity, as asserted by Crain and Mahard, can only be assessed over a longer period of time.¹⁷⁷

2. *Diversity's Impact on Social Benefits*

Notwithstanding the evidence demonstrating the purely intellectual benefits diversity confers upon students, many researchers feel the social gains attributed to diversity are even more substantial.¹⁷⁸ A 1970s study conducted at Johns Hopkins suggested that test scores were an inadequate measure of diversity's value.¹⁷⁹ Instead, the researchers asserted that desegregation benefited minority students most by offering them access to opportunities previously available only to whites.¹⁸⁰ They described segregation as "isolation from mainstream

¹⁷¹ See GARY ORFIELD & CAROLE ASHKINAZE, *THE CLOSING DOOR: CONSERVATIVE POLICY AND BLACK OPPORTUNITY* 130 (1991). Schofield also found overwhelming evidence that desegregation did not harm the academic achievement of white children. *Id.*

¹⁷² ORFIELD & EATON, *supra* note 162, at 105.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 104.

¹⁷⁵ *Id.* at 104-05.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 105.

¹⁷⁸ See Zahler, *supra* note 117, at 1021-22.

¹⁷⁹ See JoMills Henry Braddock II & James M. McPartland, *Social-Psychological Processes that Perpetuate Racial Segregation: The Relationship Between School and Employment Desegregation*, 19 J. BLACK STUD. 267, 285-86 (1989) (discussing the need for further studies on the social-psychological factors that perpetuate segregation at various stages of life). See also ORFIELD & ASHKINAZE, *supra* note 171, at 130 (discussing the "dramatic impacts of desegregation . . . in areas other than achievement scores").

¹⁸⁰ See generally Braddock & McPartland, *supra* note 179, at 286 (concluding that early school desegregation promotes adult desegregation in work environments); ORFIELD & ASHKINAZE, *supra* note 171, at 130 (concluding that students from integrated schools were more

opportunities,” and found that integration offered minorities previously denied access to higher education, employment, and choice of community.¹⁸¹ Other researchers have referred to this cycle of isolation as “perpetuation theory,” and found that students who attend diverse secondary schools are statistically more likely to break the cycle and enjoy college and career success later in life than those students from racially homogenous schools.¹⁸²

Interaction with a diverse student body benefits both white and minority students in another significant way: by challenging and eroding the harmful prejudice, fear, and mistrust that can exist between races. Experts in social learning state that prejudices are acquired “relatively early in a child’s life” and can lead to “hostile-aggressive responses” when children interact with the target of the prejudice.¹⁸³ Overwhelming evidence, however, indicates these prejudices are minimized when students interact with those of other races at early ages.¹⁸⁴

Schofield, for example, conducted an intensive study of a racially diverse middle school and found that “black and white children became somewhat more friendly and willing to work with each other” during their time at the school.¹⁸⁵ Sharing a classroom with students of other races also helped alleviate the initial fear of black classmates that is well-documented in many white children.¹⁸⁶ They learned to recognize black classmates as individuals, rather than as members of a race.¹⁸⁷ Avoidance of other-race students decreased, and children

likely to attend selective colleges, live in integrated neighborhoods, and find employment in growth sectors of the economy).

¹⁸¹ ORFIELD & EATON, *supra* note 162, at 105 (summarizing the findings of Braddock, McPartland, and Robert Crain in the Johns Hopkins study).

¹⁸² See Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 REV. OF EDUC. RES. 531, 532-33 (1994) (explaining that segregation tends to repeat itself across the stages of the life cycle if the cycle is not broken by sustained experiences in desegregated settings early in life). See also ORFIELD & EATON, *supra* note 162, at 106; Zahler, *supra* note 117, at 1022. The findings of Wells and Crain were based on the results of twenty-one studies of the long-term effects of desegregation. Wells & Crain, *supra*, at 531-32.

¹⁸³ ALBERT BANDURA & RICHARD H. WALTERS, *SOCIAL LEARNING AND PERSONALITY DEVELOPMENT* 19 (1963). As an example, the authors cite the aggressive behavior Southern children demonstrated towards minorities after observing similar behavior from their parents. *Id.*

¹⁸⁴ See Peter M. Hall, *Race, Ethnicity, and Schooling in America: An Introduction*, in RACE, ETHNICITY, AND MULTICULTURALISM: POLICY AND PRACTICE 18-19 (Peter M. Hall ed., 1997) (summarizing the results of several studies finding that children from racially diverse classrooms are more likely to have friends of other races and work in racially diverse environments as adults).

¹⁸⁵ JANET WARD SCHOFIELD, *BLACK AND WHITE IN SCHOOL: TRUST, TENSION, OR TOLERANCE?* 181 (1983).

¹⁸⁶ See *id.* at 161-67.

¹⁸⁷ See *id.* at 167-70.

became more accepting of those different than themselves.¹⁸⁸

Research has shown these results to be most acute when teachers and authority figures within the school actively encourage integration and punish racially motivated negative behavior.¹⁸⁹ These results are also maximized when cooperative learning techniques are used to encourage students to work together for a common goal with students of other races.¹⁹⁰ Both of these features, an authority structure and a cooperative, reward-based learning system, naturally exist in many elementary and middle schools. This makes these schools an ideal forum for this type of social growth and learning, making diversity "more important at this stage than at any other."¹⁹¹

IV. NARROWLY TAILORED: THE SECOND EQUAL PROTECTION PRONG

An analysis of diversity in education, and its ability to serve as a compelling interest, would not be complete without also considering the second prong of strict scrutiny: the requirement that the racial preference program be narrowly tailored to the diversity-related goals it espouses. If a program is not the least restrictive means of achieving its goal, it will fail strict scrutiny despite promoting a compelling interest. This prevents school districts from overzealously implementing racial preferences without a compelling need for them. Otherwise, as noted by the dissent in *Hunter*, "[e]very stratum of a state's public education system . . . may now, in the name of 'research on

¹⁸⁸ See *id.* at 156-61.

¹⁸⁹ See *id.* at 29. The notion that children's undesirable behavior can be changed by correction and reinforcement from authority figures is supported by social learning theory. See Bandura & Walters, *supra* note 183, at 10 ("[R]einforcement procedures are more effective when the agent of reward is a high-prestige person . . ."). See also Schofield, *supra* note 115, at 608; Zahler, *supra* note 117, at 1024.

¹⁹⁰ See BANDURA & WALTERS, *supra* note 183, at 4-6 (discussing the role of rewards in social learning); Hall, *supra* note 184, at 13-15 (discussing the benefits of cooperative learning for racially diverse classes). See also Deborah A. Byrnes, *Addressing Race, Ethnicity and Culture in the Classroom*, in COMMON BONDS: ANTI-BIAS TEACHING IN A DIVERSE SOCIETY 11, 15 (Deborah A. Byrnes & Gary Kiger eds., 2d ed. 1996) ("One of the most effective ways students become more accepting of others is through cooperative-learning groups. Research on cooperative grouping shows increased academic achievement, as well as improved interracial relations.") (citations omitted).

¹⁹¹ *Boston's Children First v. City of Boston*, 62 F. Supp. 2d 247, 259 (D. Mass. 1999) (recognizing the importance of diversity at the elementary school level to children's social growth), *mandamus granted*, *In re Boston's Children First*, 244 F.3d 164 (1st Cir. 2001) (granting mandamus to address improper comments the trial judge made to the press rather than the merits of the decision); *Eisenberg v. Montgomery County Pub. Schs.*, 19 F. Supp. 2d 449, 455 (D. Md. 1998), *rev'd sub nom Eisenberg ex rel. Eisenberg v. Montgomery County Pub. Schs.*, 197 F.3d 123 (4th Cir. 1999), *cert. denied*, 529 U.S. 1019 (2000) ("Where children first begin to forge social relationships and interactions with their peers . . . the need for diversity is at its greatest.").

effective educational strategies,' implement a racially classified admissions system."¹⁹²

Many appellate court cases, rather than state that diversity in education is a compelling interest, have circumvented the issue by assuming that it can be (while awaiting a Supreme Court decision).¹⁹³ In many cases, these courts have then struck down the racial preference programs for failing to narrowly tailor the program's means to its ends.¹⁹⁴ By cumulating the factors that failed strict scrutiny review in each of these cases, a blueprint for how to narrowly tailor a race-based school program emerges. In order to survive judicial examination, the program should possess the following features: it should be flexible, rather than based on quotas or set-asides; it should consider diversity as a whole, including characteristics beyond race; and it should provide an alternative for any student denied admission.

A. Flexibility

A common theme throughout affirmative action cases, including those considering diversity in education, is intolerance for racial quotas and set-asides. Justice Powell expressed this in *Bakke*, writing, "assignment of a fixed number of places to a minority group is not a necessary means toward [educational diversity]."¹⁹⁵ In a constitutionally permissible program, a student cannot be "foreclosed from all consideration for [a] seat simply because he was not the right color or had the wrong surname."¹⁹⁶ Rather, race simply should serve as an indicator of the potential of that student to contribute to the diversity of the school and should count only minimally towards admission for that student.¹⁹⁷ Only when the student's "combined qualifications, which may [include] similar nonobjective factors," outweigh those of another student should one be accepted and the other rejected.¹⁹⁸ In other words, the program should "treat[] each applicant as an individual in the admissions process."¹⁹⁹

¹⁹² *Hunter ex rel. Brandt v. Regents of the Univ. of Cal.*, 190 F.3d 1061, 1075 (9th Cir. 1999) (Beezer, J., dissenting), *cert. denied*, 531 U.S. 877 (2000).

¹⁹³ *See, e.g., Eisenberg ex rel. Eisenberg v. Montgomery County Pub. Schs.*, 197 F.3d 123 (4th Cir. 1999), *cert. denied*, 529 U.S. 1019 (2000); *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998).

¹⁹⁴ *See Eisenberg*, 197 F.3d at 131-33; *Wessmann*, 160 F.3d at 798-800.

¹⁹⁵ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 316 (1978).

¹⁹⁶ *Id.* at 318.

¹⁹⁷ *Id.* An example of this would be the "Harvard Plan" described by Justice Powell, where race counts as a "plus" in an applicant's file.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

This theme is echoed in recent decisions such as *Wessmann*.²⁰⁰ The First Circuit equated Boston Latin's admissions scheme with the strict set-aside forbidden by *Bakke*, noting that, once the allotted slots available to persons of a certain race were filled, applicants of that race were foreclosed for consideration for the other slots.²⁰¹ This ran afoul of the *Bakke* requirement that no student be eliminated from all consideration for a seat because of his or her race.²⁰² Similarly, the transfer program at issue in *Eisenberg* did not survive judicial review because the school district grounded its transfer decisions in maintaining racial balance at each school.²⁰³ In other words, it was no more than racial balancing based on countywide racial percentages.²⁰⁴ Programs such as these lack flexibility and deny students their right to individual consideration for every available seat, and therefore will not meet the constitutional requirement that the program be narrowly tailored.

On the other hand, race-based programs that "[do] not utilize rigid quotas or seek to admit a predetermined number of minority students" have been upheld.²⁰⁵ The University of Michigan allows admissions counselors to "flag" applications submitted by students who possess characteristics "deem[ed] important to the composition of its freshman class," including whether the student is a member of an "under-represented race."²⁰⁶ These "flags" keep applicants who may not initially meet the threshold for admission in the qualified pool for further review.²⁰⁷ Like Justice Powell's "plus" in an applicant's file, the University of Michigan's admissions system effectively considers race without setting aside places solely for minorities.²⁰⁸

Admittedly, the University of Michigan's admissions system is of limited use to elementary schools. Elementary school students are "unlikely . . . [to] have extensive resumes which may be weighed and considered in addition to their race in [formulating] diverse class-

²⁰⁰ 160 F.3d 790, 800 (1st Cir. 1998).

²⁰¹ *Id.*

²⁰² *Id.* ("The Policy does precisely what Justice Powell deemed anathematic: at a certain point, it effectively forecloses some candidates from all consideration for a seat at an examination school simply because of the racial or ethnic category in which they fall.")

²⁰³ *Eisenberg ex rel. Eisenberg v. Montgomery County Pub. Schs.*, 197 F.3d 123, 131 (4th Cir. 1999).

²⁰⁴ *Id.*

²⁰⁵ *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 827 (E.D. Mich. 2000).

²⁰⁶ *Id.* The court also upheld the University's practice of adding points to the index scores of under-represented minority students.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 827-28. *But see Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (holding that the University of Michigan Law School's admissions program was unconstitutional because it focused only on race in attempting to foster diversity).

rooms.”²⁰⁹ However, many magnet and examination schools have admissions programs that resemble those of selective colleges and universities.²¹⁰ For these schools, utilizing “flags” and “pluses” would be a narrowly tailored means of enhancing racial diversity.

B. Consider All Aspects of Diversity

Perhaps the most significant factor in whether a race-based admissions program is sufficiently narrow to survive judicial review is the program's attention to all details of diversity, rather than simply race. A program claiming to promote diversity while focusing solely on race will almost always be defeated in the courts.²¹¹ “True” diversity, the goal towards which any permissible race-based admissions program should strive, also includes gender, religion, socio-economic background, physical abilities, and class. Furthermore, it encompasses the totality of traits, achievements, characteristics, and unique skills that shape each person's personality.²¹²

Justice Powell found this notion paramount in his opinion in *Bakke*. He pointed out that “[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”²¹³ The admissions set-aside in *Bakke* that focused only on race would “hinder, rather than further attainment of genuine diversity” because it failed to recognize diversity beyond race.²¹⁴ Quoting from a brief submitted as amici curiae by several prominent universities, Justice Powell's opinion recognized that “a farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer.”²¹⁵ What Justice Powell also seemed to recognize is that, in many instances, a white student from Idaho may offer more to true diversity than a black student from Boston. Focusing solely on race, in such situations, might result in

²⁰⁹ *Boston's Children First v. City of Boston*, 62 F. Supp. 2d 247, 259 (D. Mass. 1999) (quoting *Eisenberg v. Montgomery County Pub. Schs.*, 19 F. Supp. 2d 449, 454-55 (D. Md. 1998), *rev'd sub nom Eisenberg ex rel. Eisenberg v. Montgomery County Pub. Schs.*, 197 F.3d 123 (4th Cir. 1999)), *mandamus granted*, *In re Boston's Children First*, 244 F.3d 164 (1st Cir. 2001).

²¹⁰ The Boston Latin examination school challenged in *Wessmann*, for example, used an admissions system similar to those used in higher education. See *Wessmann v. Gittens*, 160 F.3d 790, 793-94 (1st Cir. 1998).

²¹¹ See, e.g., *Wessmann*, 160 F.3d at 797-98 (striking down an admissions program that sought to obtain a “racial mix,” rather than true diversity).

²¹² See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978).

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.* at 316 (quoting Application to Brief for Columbia University, Harvard University, Stanford University, and the University of Pennsylvania, as Amici Curiae 2-3).

the admission of a black student with potentially less to offer towards diversity than a white student of unique background. A narrowly tailored program, by focusing on multi-faceted diversity, avoids this dilemma.

At the secondary school level, the First Circuit chastised the Boston Latin School for “focus[ing] exclusively on racial and ethnic diversity” in its admissions.²¹⁶ Although the program asserted an interest in true diversity, it only considered whether the student fell into one of five racial categories—black, white, Hispanic, Asian, and Native American.²¹⁷ Such a focus invokes precisely the dangers Justice Powell feared in *Bakke*. Rather than a means towards achieving true diversity, the First Circuit saw the program as “a mechanism for racial balancing” that was not “a legitimate or necessary means of advancing the lofty principles [of diversity] recited by the [p]olicy.”²¹⁸

This principle, that a narrowly tailored program must encompass traits beyond race, is manifested in several other circuit court cases. In *Hunter*, the UCLA laboratory school considered race, gender, and family income in admissions, as well as any other factors relevant to mirroring the composition of the Los Angeles school district.²¹⁹ The Ninth Circuit approved the laboratory school’s admissions policy as narrowly tailored to its unique goal. In contrast, the Fourth Circuit invalidated an interdistrict transfer program that approved or rejected transfer requests based on the impact the request would have on racial diversity within the schools involved.²²⁰ This program, focused solely on race, could not survive the court’s scrutiny because it constituted “mere racial balancing in a pure form.”²²¹ Thus, attention to all aspects of diversity is as essential in the secondary school context, at least for magnet and examination schools, as it is in higher education.

This requirement becomes more problematic at the elementary school level. Admissions at an elementary school is a function of geography, rather than a conscious admissions process, and the options available to a school seeking to increase diversity are limited accordingly. At least one solution to this dilemma, however, appears capable of surviving strict scrutiny. In 1989, the Boston School Committee divided the city into three zones designed to “reflect the system-wide proportion of students of different races at the K-8

²¹⁶ *Wessmann*, 160 F.3d at 798.

²¹⁷ *Id.*

²¹⁸ *Id.* at 799.

²¹⁹ *Hunter ex rel. Brandt v. Regents of the Univ. of Cal.*, 190 F.3d 1061, 1062 (9th Cir. 1999), *cert. denied*, 531 U.S. 877 (2000).

²²⁰ *Eisenberg ex rel. Eisenberg v. Montgomery County Pub. Schs.*, 197 F.3d 123 (4th Cir. 1999), *cert. denied*, 529 U.S. 1019 (2000).

²²¹ *Id.* at 131.

level.”²²² Students are given the option of applying to any school within their zone.²²³ Admission to a student’s first choice of school is then dependent on several factors, including race.²²⁴ This makes the program appear quite similar to admissions at a university or examination school, and attention to all aspects of diversity should be required. If, however, the city met this requirement, the program would appear to be a constitutionally permissible means of obtaining diversity at the elementary school level.²²⁵

C. Offer an Alternative

A final requirement of a narrowly tailored race-based admissions program is that it must provide an equal, alternative educational opportunity for those students denied admission. In the context of an interdistrict transfer denial, the *Brewer* court upheld the use of race in considering transfer requests in part because those students denied transfer were able to receive an equivalent education at another school.²²⁶ The court distinguished the plaintiff in *Brewer* from that in *Bakke* because, while “the plaintiff in *Bakke* was completely denied his education,” the student in *Brewer* “was only prevented from attending the school of her choice.”²²⁷ The court similarly distinguished *Wessmann* as “more akin to *Bakke* because the plaintiff was not offered an equivalent alternative education.”²²⁸

The Second Circuit’s approach in *Brewer* has firm roots in *Bakke*. Judge Straub’s opinion notes that the Davis Medical School “‘did not arrange for [Bakke] to attend a different medical school’ which made Bakke’s situation ‘wholly dissimilar’ to that of an elementary or secondary school student who is admitted to one school rather than another in an effort to promote racial or ethnic integration.”²²⁹ Due to the ubiquitous requirement among states that students receive public schooling until a certain age, an alternative will clearly always exist at the elementary and secondary level. The issue then is whether the alternative is substantially equivalent.²³⁰ In the rare situa-

²²² *Boston’s Children First v. City of Boston*, 62 F. Supp. 2d 247, 252 (D. Mass. 1999), *mandamus granted*, *In re Boston’s Children First*, 244 F.3d 164 (1st Cir. 2001).

²²³ *Id.*

²²⁴ *Id.*

²²⁵ The district court in *Boston’s Children First* did not discuss whether the program addressed all aspects of diversity. Nonetheless, the details of the city’s program provide an excellent example of a situation where attention to “true” diversity would be relevant and required at the elementary school level.

²²⁶ *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 751 (2d Cir. 2000).

²²⁷ *Id.*

²²⁸ *Id.* at 752.

²²⁹ *Id.* at 751 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 300 n.39 (1978)).

²³⁰ *Id.*

tion where it is not, as when a student is denied admission to a prestigious magnet or examination school, the school district should strive to ensure that the student rejected is able to attend a school that offers substantially similar programs.²³¹

CONCLUSION

Clearly, diversity is an elusive, underrated, yet essential component of an effective and complete education. Every person carries with them experiences and traits, both immutable and fluid, which contribute to their own unique personality. These may include a person's religion, social class, or gender. They may include that person's race. What courts need to recognize, as educators already have, is that these traits do more than simply define an individual student's personality. They also contribute tremendously to the social growth and intellectual development of those who work and learn beside that student on a daily basis. Because this growth and development is maximized when diversity is at its highest, attention to various aspects of diversity, including race, is often necessary.

Despite the correlation between diversity and student achievement, the viability of the diversity justification in education is by no means secure. Supreme Court affirmative action jurisprudence has limited the use of race-based classifications in the economic sector and called into question whether diversity survives in education. However, in the midst of this web of precedent, a path remains for diversity to tread. It is this path that the Supreme Court should follow, embracing diversity in education along the way, and allowing students of every race to achieve things together that they could not surrounded only by those like themselves.

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²³¹ For example, while other schools may not be able to match the tremendous prestige of the Boston Latin School, the local school district should at least attempt to provide students unable to attend Boston Latin with the same classes, extracurricular activities, advanced placement opportunities, and other similar programs.

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JUDGE JACK G. DAY



