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Lesson in Humanity: Diversity as a Compelling State Interest in Public Education

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LESSONS IN HUMANITY: DIVERSITY AS A COMPELLING STATE INTEREST IN PUBLIC EDUCATION

I was friends with sons of furriers as well as factory workers. I had white and black bowling partners . . . . The interracial friendships taught me about individual humanity in a racist country . . . .[1]

INTRODUCTION

As affirmative action programs at public universities across the country are being challenged and dismantled, the scope of attack has broadened in recent years to include racially-sensitive admissions policies at the public elementary and secondary school level. The nation's best public schools—whether prestigious exam high schools such as Boston Latin or Bronx Science, or specialized magnet elementary schools—must often develop admissions policies because they are unable to accept all interested students.[2] Recognizing the importance of diversity in the classroom, many public schools have adopted admissions policies that take race and ethnicity into account. In the last few years, the racially sensitive admissions policies of at least four public schools have been challenged as violative of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.[3] Constitutional arguments against affirmative action policies im-

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[1] *See* Derrick Z. Jackson, *My Vehicle to the American Dream*, BOSTON GLOBE, Jan. 13, 1999, at A19. This is an excerpt from a recent op-ed piece regarding Jackson's childhood experience with Boston's METCO busing. *See id.* METCO is a program, in operation for over thirty years, which buses thousands of children from Boston's inner city to suburban schools in an effort to desegregate schools and bring about racial harmony and educational advantages for all children in Boston. *See* Rosalie Griesse, *Ending Metco Would Be Irresponsible*, BOSTON GLOBE, Mar. 14, 1999, *available in* 1999 WL 6052922.

[2] Magnet programs in schools accept children from all over the city or county, rather than only within a given school district. In addition, these schools often offer enhanced curriculum. Exam schools are prestigious public secondary schools which admit students from all over the county or city based on students' exam scores as well as other defined criteria, such as grade point average.

[3] *See* U.S. CONST. amend. XIV:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws;

see also Wessmann v. Gittens, 160 F.3d 790, 800 (1st Cir. 1998); Eisenberg v. Montgomery County Pub. Sch., 19 F. Supp. 2d 449, 451 (D. Md. 1998).

plemented in the workplace, the marketplace and higher education have been extended recently to the arena of public elementary and secondary schools in a number of lawsuits challenging public school admissions and transfer policies.[4] In the wake of the U.S. Court of Appeals for the First Circuit decision in *Wessmann v. Gittens* in November of 1998, which struck down a racially-sensitive admissions policy at Boston Latin School while assuming that diversity was a compelling state interest, the challenge is to establish empirically and concretely the value of diversity through results from long-term educational research.[5]

In light of the unique mission of public schools, pedagogical theory and recent longitudinal research supporting diversity in the classroom, the U.S. Supreme Court should regard public kindergarten through twelfth grade ("K–12") education as a context distinct from the workplace, the marketplace and higher education, in which diversity does serve a compelling state interest.[6] This Note argues that the achievement of a diverse student body in public K–12 education should be regarded as a compelling state interest under a strict scrutiny standard of review.[7] Part I examines the most recent United States Supreme Court decisions addressing the constitutionality of affirmative action policies. Part II discusses the affirmative action case law at the U.S. Court of Appeals and District Court level.[8] Part III analyzes the legal

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[4] *See, e.g., Wessmann*, 160 F.3d at 800; *Eisenberg*, 19 F. Supp. 2d at 453–54.

[5] *See* 160 F.3d at 800; Kate Zernike, *Diversity's Rainbow Fading into Abstract Idea*, BOSTON GLOBE, Nov. 20, 1998, at B6. Since the *Wessman v. Gittens* decision, the prospects for racially diverse classrooms in Boston have become even more bleak. *See id.* On July 14, 1999, the Boston School Committee voted to eliminate race as a factor in deciding where students go to school—a move that would end the desegregation efforts that began with busing in 1974. *See* Kate Zernike & Doreen Iudica Vigue, *Ex-Foes Join as End OK'd to Schools Race Policy*, BOSTON GLOBE, Jul. 15, 1999, at A1. The new system will still offer parents a choice of where to send their children, but rather than considering a student's race, schools will look at a student's lottery results, where siblings are in school, and how close a student lives to a school. *See id.* Many believe the School Committee's decision signified their "caving in" to a recent lawsuit filed by a small group of white students who claimed the assignment plan discriminated against them. *See id.* Boston Superintendent of Schools Thomas Payzant admitted that, given recent court decisions against racial preferences, the [School Committee] vote simply could not wait. *See* Jay Lindsay, *Boston Ends Race-Based Busing*,. BOSTON GLOBE, Jul. 15, 1999. Nevertheless, critics fear the new assignment plan will lead to the same segregation that the 1974 court order sought to eliminate. *See* Zernicke & Vigue, *supra* at A1.

[6] The unique mission of public schools was announced in *Brown v. Board of Education* as: "the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." 347 U.S. 483, 493 (1954).

[7] *See infra* notes 11–71 and accompanying text.

[8] *See infra* notes 72–140 and accompanying text.

framework as it applies to diversity in the public school context and argues that in light of extensive pedagogical research supporting the benefits of school desegregation, diversity should be regarded as a compelling state interest.[9] Part III further argues that the reasoning from U.S. Supreme Court desegregation case law should be adopted and used to support the achievement of diversity in public education.[10]

I. The Constitutionality of Affirmative Action Policies: Recent U.S. Supreme Court Decisions

A. *Equal Protection Analysis and Strict Scrutiny*

In the last few decades, affirmative action and racial preferencing programs have been challenged as violating the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.[11] The Equal Protection Clause guarantees that government classifications will not be based on impermissible criteria or arbitrarily used to burden individuals.[12] Specifically, the clause mandates that no government entity shall burden persons or deny a benefit to them because they are members of a racial minority.[13]

Under the Equal Protection guarantee, the Court uses a "strict scrutiny" standard of review when a government classification distinguishes between persons based upon some "suspect" classification.[14] In addition, courts must apply strict scrutiny even if the classification is "benign" discrimination: a classification that operates to aid a group that historically has been the subject of governmental discrimination.[15] Thus, the Court has applied strict scrutiny in the context of challenges to affirmative action and other minority preferencing policies.[16] All racial classifications imposed by federal, state or local government must be reviewed under the strict scrutiny standard.[17] Under a strict scrutiny

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[9] *See infra* notes 141–292 and accompanying text.

[10] *See generally* Washington v. Seattle Sch. Dist., 458 U.S. 457 (1982); Brown v. Board of Educ., 347 U.S. 483 (1954); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); *infra* notes 293–340 and accompanying text.

[11] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 270 (1978); Wessmann v. Gittens, 160 F.3d 790, 794 (1st Cir. 1998); Hopwood v. Texas, 78 F.3d 932, 934 (5th Cir. 1996).

[12] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

[13] *See id.*

[14] *See id.* at 227–28. In light of historical discrimination against racial minorities, laws that classify persons on the basis of race or national origin will be deemed "suspect" and subject to this strict standard of review. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944).

[15] *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273 (1986).

[16] *See, e.g.*, City of Richmond v. J.A. Croson, Co., 468 U.S. 469, 505 (1989).

[17] *See Adarand*, 515 U.S. at 227.

standard of review, courts will not defer to the decisions of other branches of government, but instead will determine independently whether the classification is narrowly tailored to serve a compelling governmental purpose.[18]

B. *The United States Supreme Court Decisions Addressing Affirmative Action Policies*

To date the U.S. Supreme Court has not addressed squarely the constitutionality of racial preferencing programs employed by public schools.[19] The Court last considered affirmative action in the 1978 case, *Regents of the University of California v. Bakke*.[20] In *Bakke*, the United States Supreme Court declared unconstitutional the special admissions program at the University of California, Davis Medical School ("Davis"), while also holding that an educational institution was not enjoined from according any consideration of race in the admissions process.[21] The Davis admissions program employed a strict set-aside, reserving sixteen out of one-hundred positions in its class for applicants who were "members of specified minority groups, including: African Americans, Chicanos, Asians, and American Indians."[22] The applications of these candidates were forwarded to a special admissions committee and rated by the committee.[23] Minority applicants did not have to meet the 2.5 grade-point average cut-off that applied to non-minority applicants.[24] The committee then recommended "special" applicants until the school admitted sixteen "minority" applicants.[25] Alan Bakke, a white male, applied to the Davis Medical School in 1973

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[18] *See id.*

[19] *See* Wessmann v. Boston Sch. Comm., 996 F. Supp. 120, 129 (D. Mass. 1998) (citing Hunter v. Regents of Univ. of Cal., 971 F. Supp. 1316, 1325 (C.D. Cal. 1997) (stating "no majority of the [Supreme] Court has ever explicitly held that remedial action may constitute the only valid compelling state interest")).

[20] *See* 438 U.S. 265, 270 (1978).

[21] *See id.* Four justices (Brennan, White, Marshall, and Blackmun) believed the goal of admitting students who are disadvantaged by the effects of past discrimination (remedying prior discrimination by the government) was sufficiently important and found the Davis Medical School admissions policy constitutional. *See id.* at 325. Four justices (Stevens, Burger, Stewart, and Rehnquist) invalidated the plan on statutory grounds. *See id.* at 421. Justice Powell wrote the deciding opinion, in which he agreed with the Brennan Four that Davis should be able to take an applicant's race into account (employing different reasoning, as explained below), but found Davis' policy of reserving places in the class which could only be filled by minorities was unconstitutional. *See id.* at 271–72.

[22] *See Bakke*, 438 U.S. at 274–75.

[23] *See id.*

[24] *See id.* at 275.

[25] *See id.*

and 1974 and was denied admission twice.[26] Bakke brought suit against Davis, challenging the special admissions policy under the Equal Protection Clause of the Fourteenth Amendment and seeking injunctive relief compelling his admission.[27]

Announcing the Court's judgment, Justice Powell concluded that while racial and ethnic classifications of any sort are inherently suspect under the Equal Protection Clause and require strict scrutiny, the goal of achieving a diverse student body is clearly a constitutionally permissible goal for an institution of higher education.[28] Affirming diversity's educational value, Justice Powell reasoned that the atmosphere of "speculation, experiment and creation," essential to the quality of higher education, is promoted by a diverse student body.[29] Justice Powell noted the right of universities to select those students who will contribute to the most "robust exchange of ideas" implicates a countervailing constitutional interest—that of the First Amendment.[30]

Despite finding diversity to be a compelling state interest, Justice Powell ruled that Davis' rigid set-aside was not narrowly tailored and thus invalid.[31] Justice Powell cautioned that applicants must be considered as individuals and that race must be only one factor in the admissions process.[32] Diversity that furthers a compelling state interest, Justice Powell reasoned, encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single, though important, element.[33] Justice Powell cited to Harvard College's admissions program, which admits the top 150 academic students and

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[26] *See id.* at 275, 277–78.

[27] *See Bakke*, 438 U.S. at 277–79.

[28] *See id.* at 311–12 (Powell, J.).

[29] *Id.* at 312.

[30] *See id.* at 312–13 (Powell, J.). In addition, Justice Powell articulates the importance of diversity at the graduate level:

> [O]ur tradition and experience lend support to the view that the contribution of diversity is substantial . . . . Physicians serve a heterogeneous population. An otherwise qualified medical student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.

Id. at 313–14 (Powell, J.).

[31] *See Bakke*, 438 U.S. at 311–15, 319–20.

[32] *See id.* at 315. Justices Brennan, White, Marshall, and Blackmun joined the part of Justice Powell's opinion which held that a university should be able to take an applicant's race into consideration, but these four Justices employed different reasoning. *See id.* at 324–25. In their concurrence, the Brennan Four reasoned that the goal of remedying prior discrimination by the government is a sufficiently compelling interest. *See id.* at 325.

[33] *See id.* at 315.

then, when reviewing a large middle group of "admissible" applicants, considers race, as well as geographical origin, life experience and ethnicity, one of many "plus" factors.[34] Justice Powell found this admissions policy flexible enough in its consideration of all pertinent elements of diversity in light of the particular qualifications of each applicant.[35] Thus, although the Court declared that Davis' admissions policy's explicit set-aside based on race was unconstitutional, it nevertheless held that an educational institution was not enjoined from any consideration of race in the admissions process.[36]

The Supreme Court went on to address affirmative action in the education context in 1986.[37] In *Wygant v. Jackson Board of Education*, a divided Court held that a collective bargaining agreement, which extended protection against layoffs to some school employees because of their race, violated the Fourteenth Amendment.[38] The challenged agreement, negotiated by the Jackson, Michigan Board of Education and its teachers union, provided that, regardless of seniority, minority teachers would not be laid off in greater proportion than their existing percentage in the school system.[39]

The Court rejected the argument that providing role models for minority students justified the race-conscious layoff program because the role model theory was based on societal discrimination rather than specific and identifiable past discrimination by the Board.[40] Thus, the Court found that the plan had "no logical stopping point."[41] The Court further concluded that the layoff plan was not narrowly tailored because other, less intrusive means of retaining minority teachers were available.[42] The Court, therefore, held that the collective bargaining agreement extending preferential treatment to minority school teachers violated the Equal Protection Clause.[43]

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[34] *See Bakke*, 438 U.S. at 316–17, 321–24.

[35] *See id.* at 316–19, 323.

[36] *See id.* at 220 (Powell, J.).

[37] *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273–74 (1986).

[38] *See id.* at 283–84.

[39] *See id.* at 270–71.

[40] *See id.* at 274–75.

[41] *See id.*

[42] *See Wygant*, 476 U.S. at 283–84.

[43] *See id.* It is important to note, however, that Justice O'Connor's concurring opinion left open the possibility of recognizing diversity as a compelling state interest. *See id.* at 286 (O'Connor, J., concurring) ("Although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently compelling at least in the context of higher education, to support the use of racial considerations in furthering that interest . . . certainly nothing the Court has said today necessarily forecloses the possibility that the Court will find other government interests which have been relied upon in the lower courts but which have not

Declining to revisit the constitutionality of affirmative action in the education context, the U.S. Supreme Court instead has most recently addressed affirmative action policies in the government contracting context.[44] In *City of Richmond v. Croson*, a 1989 decision, the Court struck down a municipal set-aside program that required prime contractors awarded city construction contracts to subcontract at least thirty percent of the dollar amount of each contract to one or more "Minority Business Enterprises" ("MBEs").[45]

In September 1983, J.A. Croson Company, a mechanical plumbing and heating contractor, received bid forms issued by the city on a project for the provision and installation of plumbing fixtures at a city jail.[46] In October, 1983, Croson submitted a request for a waiver of the city's required thirty percent set-aside, indicating that one MBE was unqualified and the other MBEs he had contacted had been unresponsive or unable to quote a bid.[47] The city denied Croson's request for a waiver on two occasions and ultimately decided to rebid the project.[48] Croson subsequently brought suit against the city, challenging the constitutionality of the Richmond ordinance requiring the thirty percent set-aside.[49]

Writing for the Court, Justice O'Connor reasoned that classifications based on race carry a danger of stigmatic harm.[50] She added that unless classifications are reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to racial hostility.[51] The Court found that the city failed to demonstrate, with specificity, evidence that their own spending practices had exacerbated a pattern of discrimination in the Richmond construction industry.[52] Thus, the Court reasoned, the city could not make the argument that it was

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been passed on here to be sufficiently important or compelling to sustain the use of affirmative action policies.").

[44] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995); Metro Broad., Inc. v. FCC, 497 U.S. 547, 600–01 (1990); City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 511 (1989); Hopwood v. Texas, 78 F.3d 932, 948 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996).

[45] *See* 488 U.S. at 478, 511. "Minority Business Enterprises" were defined as a business at least 51% of which is owned and controlled by minority group members. *See id.* at 488 U.S. at 478. "Minority group members" were defined as citizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos or Aleuts. *See id.*

[46] *See id.* at 481.

[47] *See id.* at 482.

[48] *See Crossen*, 488 U.S. at 483.

[49] *See id.* at 483.

[50] *See id.* at 493–94.

[51] *See id.*

[52] *See id.* at 505.

remedying effects of prior discrimination.[53] The Court further reasoned that the use of racial preferences based on nothing more than societal discrimination is "amorphous" and would result in "a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs."[54] Finding that the city failed to demonstrate a compelling governmental interest, the Court struck down Richmond's apportionment of public contracting opportunities as a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.[55]

In 1990, one year after *Croson*, the Court held that the minority ownership preferencing program instituted by the Federal Communications Commission ("FCC") did not violate equal protection principles in *Metro Broadcasting, Inc. v. Federal Communications Commission*.[56] The FCC initiated two racial preferences: one that gave minority-owned businesses an advantage in comparative license proceedings and another that allowed licensees who were on the verge of losing their licenses to sell to minority-owned businesses at distress-sale prices.[57] The preference programs were intended to increase programming oriented toward minorities by increasing minority ownership of broadcast licenses.[58]

The *Metro Broadcasting* Court applied an intermediate, rather than a strict, standard of review to the "benign" federal preferencing program.[59] Relying on Justice Powell's diversity rationale in *Bakke*, the Court found a legitimate government interest in the achievement of broadcast diversity.[60] The Court reasoned that just as a diverse student body is a constitutionally permissible goal on which a race-conscious university admissions program may be predicated because it contributes to a "robust exchange of ideas," the diversity of views and information on the airwaves serves important First Amendment values.[61] The Court found the benefits of such diversity are not limited to the members of minority groups who gain access to the broadcasting

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[53] *See Croson*, 488 U.S. at 511.

[54] *See id.* at 499, 505–06.

[55] *See id.* at 511.

[56] *See* 497 U.S. 547, 600–01 (1990), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

[57] *See* Metro Broad., Inc. v. FCC, 497 U.S. 547, 556–58 (1990).

[58] *See id.* at 554–58.

[59] *See id.* at 564–66. The FCC's program was regarded as benign because it operated against a group (whites) that historically had not been the subject of governmental discrimination.

[60] *See id.* at 567–68; Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978).

[61] *See Bakke*, 438 U.S. at 312.

industry by virtue of the ownership policies.[62] Rather, the Court reasoned, the benefits would be shared by all members of the viewing and listening audience who would gain from having access to a wider diversity of information sources.[63] Thus, the Court sustained the FCC's use of racial preferencing programs in *Metro Broadcasting*.[64]

In 1995, the Court overruled *Metro Broadcasting* in *Adarand Constructors, Inc. v. Pena*, holding that all racial classifications —regardless of "benign motivation"—must be reviewed under a strict scrutiny standard.[65] In *Adarand*, the terms of a prime contract awarded by the Central Federal Lands Highway Division of the United States Department of Transportation provided that the awarded company, Mountain Gravel, would receive additional compensation if it hired subcontractors certified as small businesses controlled by "socially and economically disadvantaged individuals."[66] Adarand, a subcontractor, did not fall into the category of businesses controlled by "socially and economically disadvantaged individuals."[67] Despite Adarand's lower bid, Mountain Gravel awarded the subcontract to Gonzales, a "socially and economically disadvantaged" business, because of the additional payment Mountain Gravel received for hiring Gonzales.[68] Adarand filed suit, claiming the federal government's practice of giving general contractors on government projects a financial incentive to hire subcontractors controlled by "socially and economically disadvantaged individuals" violated Equal Protection principles.[69]

The Court reasoned that the "good intentions" of the federal government does not lower the standard of review for a racial preferencing program, as even a well-intentioned preference may exacerbate racial prejudice.[70] The Court disputed the notion that strict scrutiny is "strict in theory, but fatal in fact" and suggested that racial classifica-

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[62] *See Metro Broad.*, 497 U.S. at 568.

[63] *See id.* The Court also relied on Justice O'Connor's opinion in *Wygant*, which left open the possibility that the Court may find other compelling governmental interests. *See id.* at n.15; Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) (O'Connor, J., concurring).

[64] *See* 497 U.S. at 600–01.

[65] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995), *on remand*, 965 F. Supp. 1556 (D. Colo. 1997) (finding racial preferencing program not narrowly tailored and thus unconstitutional), *vacated*, Adarand Constructors, Inc. v. Slater, 169 F.3d 1292 (10th Cir. 1999).

[66] *See Adarand*, 515 U.S. at 205–06. Federal law provided that "socially and economically disadvantaged individuals," include African Americans, Hispanic Americans, Native Americans, Asian- Pacific Americans, and other minorities or any other individual found to be disadvantaged by the Small Business Administration pursuant to section 8(a) of the Small Business Act. *See id.*

[67] *See id.*

[68] *See id.*

[69] *See id.* at 204.

[70] *See Adarand*, 515 U.S. at 228–29.

tions can sometimes be sustained.[71] Nevertheless, the Court held that all racial classifications, whether imposed by federal, state or local actors, must be analyzed under strict scrutiny.[72] The Court remanded the case to determine whether the federal program satisfied strict scrutiny.[73]

II. Affirmative Action Policies in the Education Context: Recent U.S. Courts of Appeals and District Court Decisions

A. *The opinion in* Hopwood v. Texas

In the last decade, the United States Circuit Courts of Appeals have attempted to interpret the meaning of the *Bakke, Wygant, Croson* and *Adarand* opinions in order to determine whether diversity may serve a compelling state interest in the education context.[74] In 1996, in *Hopwood v. Texas*, the United States Court of Appeals for the Fifth Circuit held that the University of Texas School of Law's racial preferencing admissions policy violated the Equal Protection Clause of the Fourteenth Amendment.[75] The law school based its initial admissions decisions on an applicant's "Texas Index" ("TI"), a composite of undergraduate grade point average and Law School Admissions Test ("LSAT") score.[76] The law school placed the typical applicant in one of three categories: "presumptive admit," "presumptive deny" or a middle "discretionary zone."[77] An applicant's TI category determined how extensive a review his or her application would receive.[78] African Americans and Mexican Americans, however, were treated differently from other candidates.[79] Compared to whites and non-preferred mi-

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[71] *See id.* at 237.

[72] *See id.* at 237–39.

[73] *See id.*

[74] *See id.* at 200, 257–58 (Stevens and Ginsburg, J.J., dissenting); City of Richmond v. Croson, 488 U.S. 469, 511 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273–74 (1986); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 270 (1978).

[75] *See* 78 F.3d 932, 948 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996).

[76] *See id.* at 935.

[77] *See id.* In March, 1992, a TI of 199 or above fell within the "presumptive admit" category. *See id.* at 936. A TI of 193–98 fell within the "discretionary zone" for white applicants. *See id.* The presumptive deny score for whites and non-preferred minorities was 192. *See Hopwood*, 78 F.3d at 936.

[78] *See id.* Applicants in the middle range—the "discretionary zone"—received the most extensive scrutiny. *See id.*

[79] *See id.* at 936–38. African Americans and Mexican Americans were the only minority categories granted preferential treatment in admissions, because only African Americans and

norities, the TI ranges that were used to place African Americans and Mexican Americans into the three admissions categories were lowered to allow the law school to consider and admit more members of these groups.[80] For example, an African-American or Mexican-American candidate with a TI of 189 or above almost certainly would be admitted, even though his or her score was considerably below the level at which a white candidate almost certainly would be rejected.[81] In addition to maintaining separate presumptive TI levels for minorities and whites, the law school ran a segregated application evaluation process: African Americans' and Mexican Americans' applications were reviewed by a subcommittee of three that met and discussed every minority candidate.[82]

Plaintiffs Cheryl Hopwood, Douglas Carvell, Kenneth Elliott and David Rogers applied for admission to the 1992 entering law school class at the University of Texas.[83] All four were white residents of Texas, all were "discretionary zone candidates" and all four plaintiffs were denied admission.[84] The plaintiffs brought suit under the Equal Protection Clause of the Fourteenth Amendment, claiming that the law school discriminated against them unconstitutionally.[85]

The Fifth Circuit held that diversity is not a compelling state interest, reasoning that because Justice Powell wrote alone in *Bakke* and no other justice joined in the part of his opinion discussing diversity as a compelling state interest, the diversity rationale is not binding precedent.[86] In addition, the Fifth Circuit found that recent Supreme Court precedent indicated diversity will not satisfy the strict

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Mexican Americans received the benefit of a separate admissions track. *See id.* at 936 n.4. Native Americans, Asian Americans, and non-Mexican Hispanic Americans did not receive preferential treatment in admissions. *See Hopwood*, 78 F.3d at 936 n.4.

[80] *See id.* at 936. While the presumptive TI admission score for resident whites and non-preferred minorities was 199, Mexican Americans and African Americans needed a TI of only 189 to be presumptively admitted. *See id.* In addition, while the presumptive deny score for whites and non-preferred minorities was 192, the presumptive deny score for African Americans and Mexican Americans was 179. *See id.*

[81] *See id.* at 936–37.

[82] *See Hopwood*, 78 F.3d at 937.

[83] *See id.* at 938.

[84] *See id.* Each plaintiff scored just below the "presumptive admit" category for resident white applicants, which was a TI of 199 or above. *See id.* at 936–38. Three plaintiffs scored a 197 and one plaintiff, Hopwood, scored a 199. *See id.* at 938.

[85] *See Hopwood*, 78 F.3d at 938.

[86] *See id.* at 944. Although Justices Brennan, White, Marshall, and Blackmun concurred in the part of Justice Powell's opinion in which he held that a university should be able to take race into account as part of an admissions policy, the Brennan Four wrote in their concurring opinion not of diversity as a compelling state interest, but of the use of race to remedy the disadvantages cast on minorities by past racial prejudice when findings are made. *See Bakke*, 438 U.S. at 325.

scrutiny standard of review.[87] The *Hopwood* court reasoned that aside from remedying effects of prior discrimination, the Supreme Court has recognized no other compelling state interest as sufficient to withstand strict scrutiny.[88] Thus, finding that the University was not remedying effects of prior discrimination, the court declared the law school's admissions policy unconstitutional.[89]

B. *The History of* Wessmann v. Gittens: *The U.S. Court of Appeals for the First Circuit and the U.S. District Court Decisions*

In 1998, two years after the Fifth Circuit considered the constitutionality of affirmative action in higher education, the United States Court of Appeals for the First Circuit addressed the issue of whether diversity may serve a compelling state interest in the public high school context.[90] In *Wessmann v. Boston School Committee* ("*Wessmann I*"), the Federal District Court for the District of Massachusetts upheld the racially-sensitive admissions program of Boston Latin School ("BLS"), holding that the achievement of a diverse student body is a compelling state interest in public intermediate and secondary school education.[91] In November of the same year, the United States Court of Appeals for the First Circuit struck down the BLS admissions policy as unconstitutional in *Wessmann v. Gittens* ("*Wessmann II*").[92]

Plaintiff Sara Wessmann ranked ninety-first among applicants to BLS's ninety-seat ninth grade class for the 1997–98 academic year.[93] If straight composite score rank order and student preference had been applied to all ninety seats, students ranking between one and ninety-

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[87] *See Bakke*, 438 U.S. at 344–45. The Fifth Circuit relied on Justice O'Connor's opinion in *Croson*, which stated that unless reserved for remedial settings, racial preferencing may in fact promote notions of racial inferiority and lead to politics of racial hostility. *See id.*; *Croson*, 488 U.S. at 493–94.

[88] *See Hopwood*, 78 F.3d at 944–45. The court further relied on Justice O'Connor's dissent in *Metro Broadcasting*, in which she states that diversity of broadcast viewpoints is clearly not a compelling interest. *See id.* at 945; Metro Broad. v. FCC, 497 U.S. 547, 612 (1990) (O'Connor, J., dissenting). The *Hopwood* court also read *Adarand* to have overruled *Metro Broadcasting*, not only by announcing that the correct form of review for racial classification is always strict scrutiny, but also by casting doubt as to the precedential value of *Metro Broadcasting*, which held that the diversity interest was "important" under an "intermediate standard" of review. *See Hopwood*, 78 F.3d at 945; Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 238–39 (1995).

[89] *See Hopwood*, 78 F.3d at 948.

[90] *See id.*; Wessmann v. Gittens, 160 F.3d 790, 799–800 (1st Cir. 1998) [hereinafter "*Wessmann II*"].

[91] *See* 996 F. Supp. 120, 132 (D. Mass. 1998), *rev'd sub nom. Wessman II*, 160 F.3d at 800 [hereinafter "*Wessman I*"].

[92] *See* 160 F.3d at 808–09.

[93] *See Wessmann I*, 996 F. Supp. at 127.

eight, including Wessmann, would have been admitted.[94] Wessmann was denied admission even though her composite score was higher than eight African-American students, three Hispanic students, and one Asian student who were admitted to BLS because of an admissions policy that allowed for flexible racial/ethnic considerations.[95] Wessmann challenged the constitutionality of BLS's admissions policy under the Equal Protection Clause.[96]

Under the BLS admissions policy, half of the class was admitted based solely on the composite exam score ranking, while half of the students were admitted on the basis of a composite score ranking in conjunction with flexible racial/ethnic guidelines.[97] In order to be eligible for the exam school, a student had to rank in the top half of the overall applicant pool.[98] After the first half of the class was admitted based on their exam scores alone, the remaining seats were allocated according to composite score rank, in proportion to the racial/ethnic composition of the school's "Remaining Qualified Applicant Pool."[99] The flexible nature of the policy was designed to provide BLS with a student body that reflects the racial and ethnic diversity of the "Remaining Qualified Applicant Pool."[100] Thus, the policy had no fixed set-aside because the ethnic mix of the "Remaining Qualified Applicant Pool" would vary from year to year, and so too would the racial/ethnic composition of each admitted class.[101]

In *Wessmann I*, the court distinguished the unique context at issue, emphasizing that the particular litigation was not about the value of diversity in the workplace, the marketplace or in graduate education, but about diversity in a public high school.[102] The court reasoned that more than any other public institution, public schools awaken children to cultural values and practices of civility that lead to tolerance and understanding of divergent political, religious and social convictions.[103]

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[94] *See id.* Composite score exam ranking is a combination of results on the ISEE examination and the student's grade point average. *See id.* at 125. Seven students with scores higher than Sara's designated exam schools other than Boston Latin as their first choice. *See id.* at 127.

[95] *See id.*

[96] *See Wessman I*, 996 F. Supp. at 121.

[97] *See id.* at 125–26.

[98] *See id.* at 125. Students who rank in the top half of the Total Applicant Pool are designated as the "Qualified Applicant Pool." *See id.*

[99] *See id.* at 126. Students in the "Qualified Applicant Pool" who do not make the initial 50% admissions cut-off, based solely on exam score, at any examination school are designated as the school's "Remaining Qualified Applicant Pool." *See Wessman I*, 996 F. Supp. at 126.

[100] *See id.*

[101] *See id.* at 126 n.6.

[102] *See id.* at 127–28.

[103] *See id.* at 128.

Specifically, the court attempted to distinguish *Wessmann I* from *Hopwood* by citing to *McLaughlin v. Boston School Committee.* In *McLaughlin,* the court recognized a fundamental distinction between an urban public school, such as Boston Latin, and the University of Texas School of Law, "where the educational mission is so obviously different from that of a public secondary school in a racially diverse municipality."[104] In addition, the court distinguished *Wessmann I* from recent United States Supreme Court decisions dealing with affirmative action in the marketplace because those cases dealt with regulations awarding municipal and federal construction contracts, and not with "the authority of a school committee to make student assignments on the combined criteria of academic achievement and racial/ethnic sensitivity."[105] By distinguishing the unique factual context in *Wessmann I,* the court concluded it was not bound by the U.S. Supreme Court case law regarding affirmative action in the marketplace, nor was it bound by *Hopwood.*[106]

The court further adopted Justice Powell's reasoning in *Bakke* that an otherwise qualified student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a school experiences, outlooks and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital services to humanity.[107] The court emphasized that no Supreme Court decision has held that diversity is *not* a compelling state interest[108] in the context of intermediate and secon-

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[104] *See Wessman I,* 996 F. Supp. at 128; McLaughlin v. Boston Sch. Comm. 938 F. Supp. 1001, 1009 (D. Mass. 1996). In *McLaughlin,* the plaintiff Julia McLaughlin challenged the Boston School Committee's admissions policy, which set aside 35% of seats available at the three public exam schools for African-American and Hispanic students, on equal protection grounds. *See* 938 F. Supp. at 1018. The court struck down the Boston School Committee's admissions policy on Equal Protection grounds, finding the policy was not narrowly tailored, and granted Julia McLaughlin admission to BLS. *See id.*

[105] *See Wessmann I,* 996 F. Supp. at 130; *see also* City of Richmond v. Croson, 488 U.S. 469, 493–94 (1989); Adarand Constructors v. Pena, 515 U.S. 200, 238–39 (1995).

[106] The *Wessmann I* court declined to adopt the Fifth Circuit's reasoning and attacked the *Hopwood* holding, relying on criticism of *Hopwood*'s conclusion that diversity may never be considered a compelling governmental interest. *See* Hopwood v. Texas, 78 F.3d 932, 963–65 (5th Cir. 1996) (Wiener, J., specially concurring); *Wessman I,* 996 F. Supp. at 130; *see also* Hopwood v. Texas, 84 F.3d 720, 722–23 (5th Cir. 1996) (en banc) (Politz, C.J. King, Wiener, Benavides, Stewart, Parker, Denise, JJ., dissenting from the failure to grant rehearing en banc).

[107] *See Wessmann I,* 996 F. Supp. at 129; *see also* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 311–17 (1978).

[108] *See Wessmann I,* 996 F. Supp. at 129, citing Hunter v. Regents of Univ. of Cal., 971 F. Supp. 1316, 1325 (C.D. Cal. 1997) ("[N]o majority of the [Supreme] Court has ever explicitly held that remedial action may constitute the only valid compelling state interest."). In addition, the court cited to Justice O'Connor's concurring opinion in *Wygant,* which allowed for the possibility of

dary education. Thus, the court in *Wessmann I* upheld BLS's consideration of race and ethnicity as part of its admissions policy.[109]

In November of 1998, the United States Court of Appeals for the First Circuit reversed the district court's decision in *Wessman I*.[110] In *Wessmann II*, the First Circuit found that while *Bakke* remains good law and "diversity" might be sufficiently compelling in specific circumstances to justify race-conscious actions, the Boston School Committee's "abstract" and "generalized" diversity justification was not sufficient to withstand constitutional muster.[111] The First Circuit determined that it must look beyond the School Committee's "recital of theoretical benefits of diversity" and inquire whether the concrete workings of the policy merit constitutional sanction.[112] The court further noted that only by particularized attention to specific details would it be possible to ascertain whether the BLS policy bears any necessary relation to the "noble ends it espouses."[113]

The First Circuit found the policy's exclusive focus on racial and ethnic diversity ran afoul of *Bakke*'s guidance, which allows for diversity policies that encompass a broad array of qualifications and characteristics, of which racial or ethnic origin is but a single element.[114] Instead, the First Circuit regarded BLS's policy as a means for racial balancing, rather than a means of attaining diversity in a constitutionally relevant sense, because the policy promoted groups over individuals.[115] By taking "race" and "ethnicity" into consideration, the First Circuit reasoned that the policy was at odds with Justice Powell's understanding of the manner in which a diverse student body may be attained.[116]

Finding that a "particularly strong showing of necessity" would be required to justify racial preferencing, the First Circuit found that the Committee failed to submit compelling evidence supporting the need for or importance of racial balancing.[117] Finding that the Committee

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recognizing diversity as a compelling state interest. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 288 (1986) (O'Connor, J., concurring).

[109] *See Wessmann I*, 996 F. Supp. at 132.

[110] *See Wessmann II*, 160 F.3d at 809.

[111] *See id.* at 796–98.

[112] *See id.* at 797–98.

[113] *Id.* at 798 (noting that "the devil is in the details").

[114] *See id.* at 797–98, 800. The BLS policy only took into consideration five groups: African Americans, whites, Latino/as, Asian Americans, and Native Americans. *See Wessmann II*, 160 F.3d at 798.

[115] *See id.* at 798.

[116] *See id.* at 799.

[117] *See id.* The court assumes, "albeit with considerable skepticism," that there may be circum-

relied on broad generalizations constituting "rank speculation," the First Circuit reasoned that the School Committee failed to show solid and compelling evidence that the proportional representation promoted by their policy was tied to "the vigorous exchange of ideas" lauded in *Bakke*.[118] Specifically, the First Circuit found that the Committee failed to demonstrate how the policy significantly affected students' capacity and willingness to learn.[119] Concluding that the Committee's policy did not meet the *Bakke* standard and that the concept of diversity promoted by BLS did not justify a race-based preferencing program, the U.S. Court of Appeals for the First Circuit struck down the racially-sensitive BLS admissions policy.[120]

C. *Additional District Court Cases Addressing the Issue of Diversity in Public Education*

Although the First Circuit recently struck down BLS's racially-sensitive admissions policy, other U.S. District Courts have recognized that the achievement of diversity may serve a compelling state interest in the public education context.[121] In *Hunter v. Regents of the University of California*, a 1997 decision, the United States District Court for the Central District of California held that the use of race-based admissions criteria served a compelling state interest in operating a laboratory elementary school at the University of California, Los Angeles ("UCLA"). In that case, UCLA was charged with the task of conducting research relevant to the improvement of the state's public education system.[122] The mission of the Urban Elementary School ("UES"), a laboratory elementary school composed of 460 children ages four to twelve, was to conduct research relevant to urban educational experience and to work with teachers, communities and schools to disseminate research and foster a more effective system for urban elementary students.[123] As part of its admissions policy, UES considered an applicant's race and ethnicity in an attempt to obtain an adequate cross-sample of the general population for the purpose of maintaining the scientific credi-

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stances under which a form of racial preferencing could be justified by concerns for attaining goals articulated by the policy. *See id.* at 799–800.

[118] *See Wessmann II*, 160 F.3d at 799–800; *see also Bakke*, 438 U.S. at 312.

[119] *See Wessmann II*, 160 F.3d at 799–800.

[120] *See id.* at 809.

[121] *See e.g.*, Eisenberg v. Montgomery County Pub. Sch., 19 F. Supp. 2d 449, 453–55 (D. Md. 1998); Hunter v. Regents of Univ. of Cal., 971 F. Supp. 1316, 1327–30 (C.D. Cal. 1997).

[122] *See* 971 F. Supp. at 1319–20, 1327–30.

[123] *See id.* at 1319. The UES was run by the Graduate School of Education and Information Studies at UCLA. *See id.* at 1318–19.

bility of its educational studies.[124] For the 1995–96 school year, UES sorted applicants into six racial and ethnic categories—African American, Asian American, Native American, Latino/a, Caucasian and Other—and determined a target number from each racial/ethnic group to be admitted.[125] Selection from within these groupings was accomplished by computer-generated random numbers.[126] Plaintiff Keeley Tatsuyo Hunter brought suit challenging the constitutionality of UES's admissions policy after she applied to UES for the 1995–96 school year and was denied admission.[127]

The court found the defendant's interest in operating a lab elementary school was analogous to the use of racial quotas to remedy effects of past discrimination because both categorizations are necessary to achieve a beneficial societal goal—improved urban education.[128] The court found strong evidence to show that continued research would lead to a greater understanding of the complex issues surrounding California's urban elementary school system even if defendants could not guarantee improvement from the results of each individual study.[129] The court recognized a significant state interest in maintaining and improving the public education system.[130] Furthermore, the *Hunter* court recognized that no majority of the United States Supreme Court has held explicitly that remedial action is the only valid compelling state interest.[131] Finding a substantial nexus between UES's race-based admissions policy and the school's goal of researching effective urban education strategies and understanding the complex issues surrounding California's urban elementary school system, the court held diversity to be a compelling state interest in the UES elementary school context.[132]

In 1998, one year after *Hunter*, the Federal District Court for the District of Maryland upheld a school district's consideration of race when deciding whether to approve a student's voluntary transfer request among schools in *Eisenberg v. Montgomery County Public Schools*.[133] The Montgomery County Public Schools administered a number of

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[124] *See id.* at 1320.

[125] *See id.* at 1320–21.

[126] *See Hunter*, 971 F. Supp. at 1321 n.8.

[127] *See id.* at 1319. Plaintiff was identified as Asian-American (Japanese and Caucasian). *See id.* at 1318.

[128] *See id.* at 1327.

[129] *See id.* at 1330.

[130] *See Hunter*, 971 F. Supp. at 1328.

[131] *See id.* at 1325.

[132] *See id.* at 1328–30.

[133] *See* 19 F. Supp. 2d at 451, 453–54. The U.S. District Court for the Western District of New

magnet programs in various schools for, among other purposes, the achievement of racial diversity in the schools.[134] When deciding whether to permit a transfer among its schools, the School Board considered four factors: school stability, use/enrollment, diversity profile, and the reason for the request.[135]

Based on his residence, plaintiff Jacob Eisenberg was scheduled to attend Glen Haven Elementary School.[136] In March, 1998, Eisenberg, a white student, submitted a transfer request within the school district to Rosemary Hills Elementary School and his transfer request was denied.[137] The only reason provided for the denial of his request was "impact on diversity." The school district listed white students at Glen Haven under the category "no transfers out, transfers in permitted."[138] Eisenberg brought suit against the Montgomery County Public Schools claiming a violation of his constitutional rights and seeking admission to Rosemary Hills Elementary School.[139]

Finding diversity to be a compelling state interest in the public elementary school context, the *Eisenberg* court relied on Justice Powell's diversity rationale in *Bakke* as well as the reasoning in *Wessmann I*.[140] The court pointed out that although Justice Powell's diversity rationale in *Bakke* was not joined by any other Justice, his view has not been ignored, but in fact cited by other Justices in later United States Supreme Court opinions.[141] As in *Wessmann I*, the *Eisenberg* court also declined to adopt the *Hopwood* decision and upheld the school dis-

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York declined to follow *Eisenberg* in Brewer v. West Irondequoit Cent. Sch. Dist., 32 F. Supp. 2d 619, 635 (W.D.N.Y. 1999) (holding school district's denial of student transfer from city to suburban school on basis of race a violation of Equal Protection). *Eisenberg* is currently on appeal to the U.S. Court of Appeals for the Fourth Circuit. *See id.* at 632 n.4. Oral arguments were scheduled for June 1999.

[134] *See Eisenberg*, 19 F. Supp. 2d at 451; see *supra* note 2 for a definition of "magnet schools."

[135] *See Eisenberg*, 19 F. Supp. 2d at 451.

[136] *See id.*

[137] *See id.*

[138] *See id.* The racial composition of Glen Haven was 24.1% white, 40.5% African American, 25% Hispanic and 10.1% Asian compared to a county-wide enrollment of 53.4% white, 20.3% African American, 13.2% Hispanic and 12.7% Asian. *See id.* The white enrollment at Glen Haven dropped from 38.9% in 1994–95 to 24.1% in 1997–98. *See Eisenberg*, 19 F. Supp. 2d at 451.

[139] *See id.*

[140] *See id.* at 453–54.

[141] *See id.* at 453; Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 315 (1986) (Stevens, J., dissenting) ("[I]n the context of public education, it is quite obvious that a school board may reasonably conclude that an integrated faculty may be able to provide benefits to the student body that could not be provided by a [non-diverse] faculty."); *see also id.* at 286 (O'Connor, J., concurring) ("a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest"); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978).

trict's consideration of race when deciding whether to approve a student's voluntary transfer request between schools.[142]

III. Analysis

A. *The Status of* Bakke *and the Diversity Rationale: Still Good Law?*

Although the United States Supreme Court has never squarely addressed the issue of diversity in the context of K–12 public education, the Court has left room for holding that the achievement of diversity is a compelling state interest.[143] Indeed, no Supreme Court decision has held that local school authorities may *not* consider race in order to obtain a diverse student body in public schools.[144] Justice Powell's opinion in *Bakke* has been regarded as the cornerstone of affirmative action in university admissions.[145] Since *Bakke,* the United States Supreme Court has not squarely affirmed or rejected Justice Powell's diversity rationale.[146]

The fact that the United States Supreme Court has cited to Justice Powell's diversity rationale in *Bakke* in subsequent decisions indicates that this aspect of the *Bakke* decision is good law.[147] The *Wygant* Court left open the possibility of recognizing a compelling state interest in the promotion of racial diversity.[148] Justice Stevens suggested the im-

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[142] *See Eisenberg,* 19 F. Supp. 2d at 453–54.

[143] *See, e.g.,* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) (O'Connor, J., concurring).

[144] Since *Bakke,* there has been no other indication from the United States Supreme Court as to whether a state interest in diversity constitutes a compelling justification for race-based classifications used by public educational institutions. To date, the Supreme Court has not reviewed the issue of diversity as a compelling state interest in the context of public K-12 education. Fearing possible damage to school desegregation efforts nationwide, the Boston School Committee decided *not* to ask the United States Supreme Court to rule on the constitutionality of the city's admissions policy, following the November, 1998, *Wessmann v. Gittens* decision of the United States Court of Appeals for the First Circuit. *See* Wessmann v. Gittens, 160 F.3d 790, 800 (1st Cir. 1998). In particular, the National Association for the Advancement of Colored People and the U.S. Department of Education believed the case would lose before the current U.S. Supreme Court, leaving school systems throughout the U.S. vulnerable to challenges from those who disfavor race-based student assignment of any kind. *See* Beth Daley & Andy Dabilis, *In Switch, City Won't Appeal the Latin Case,* Boston Globe, Feb. 4, 1999, at A1.

[145] *See* Lackland H. Bloom, Jr., *Hopwood, Bakke and the Future of the Diversity Justification,* 29 Tex. Tech L. Rev. 1, 8 (1998).

[146] *See* Hunter v. Regents of Univ. of Cal., 971 F. Supp. 1316, 1325 (C.D. Cal. 1997).

[147] The *Metro Broadcasting* Court relied on Justice Powell's diversity rationale in *Bakke. See* Metro Broad., Inc. v. FCC, 497 U.S. 547, 568 (1990); *Wygant,* 476 U.S. at 286.

[148] *See Wygant,* 476 U.S. at 286 (O'Connor, J., concurring). Justice O'Connor suggested that although the school board relied on an interest in providing African-American teachers to serve as role models for African-American students, that interest should not be confused with the very

portance of diversity to the learning process of *all* students, including white students, in the public school setting.[149] In his *Wygant* dissent, Justice Stevens reasoned that one of the most important lessons American public schools teach is that diverse ethnic, cultural and national backgrounds brought together in our famous "melting pot" do not identify essential differences among human beings that inhabit our land.[150] He further reasoned "[i]t 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."[151]

In addition to *Wygant*, the *Metro Broadcasting* Court relied on *Bakke*'s diversity rationale to sustain the FCC's use of racial preferencing programs.[152] Despite the fact that *Adarand* overruled *Metro Broadcasting*, in their dissenting opinion in *Adarand*, Justices Stevens and Ginsburg point out that the *Metro Broadcasting* holding does not foreclose the prospect of recognizing diversity as a compelling state interest.[153] The Justices reasoned that the proposition that fostering diversity may provide sufficient interest to justify such a program was not inconsistent with *Adarand*'s holding; indeed, the question was not present in the case.[154] Thus, the *Adarand* dissent emphasized that the majority's opinion did not diminish the diversity aspect of the decision in *Metro Broadcasting*.[155] In addition to the Supreme Court, many lower courts have cited to Justice Powell's opinion in *Bakke* as precedent on the issue of diversity as a compelling interest in educational institutions.[156]

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different goal of promoting racial diversity among the faculty. *See id.* at 288 (O'Connor, J., concurring). Because the school board has not relied on a diversity interest, Justice O'Connor concluded it was not necessary to discuss the magnitude of that interest or its application in this case. *See id.* (O'Connor, J., concurring).

[149] *See id.* at 315 (Stevens, J., dissenting).

[150] *See id.*

[151] *Wygand*, 476 U.S. at 315 (Stevens, J., dissenting).

[152] *See Metro Broadcasting*, 497 U.S. at 568.

[153] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 257–58 (1995) (Stevens & Ginsburg, JJ., dissenting).

[154] *See id.* at 258.

[155] *See id.*

[156] *See* Davis v. Halpern, 768 F. Supp. 968, 975–76 (E.D.N.Y. 1991) (invoking Justice Powell's opinion in *Bakke* to hold that a university's obtaining benefits which flow from selecting a diverse student body is a "compelling interest" under strict scrutiny); DeRonde v. Regents of Univ. of Cal., 625 P.2d 220, 224–25 (Cal. 1981) (upholding a law school admissions policy that considered "ethnic minority status" as an admissions factor in part on grounds that it passed federal constitutional muster under the standards prescribed by Powell in *Bakke*); McDonald v. Hogness, 598 P.2d 707, 713 (Wash. 1979) (en banc) (invoking *Bakke* to find a medical school goal of promoting student diversity to be "a compelling state interest permitting consideration of race" in admissions

The *Hopwood* court's reasoning that Justice Powell's diversity rationale in *Bakke* is not binding precedent received a fair amount of criticism from members of the Fifth Circuit Court of Appeals both when it was decided and following denial of rehearing en banc.[157] Judge Wiener of the Fifth Circuit stated that if *Bakke* is to be declared dead, the Supreme Court, not a three-judge panel of a circuit court, should make that pronouncement.[158] Conceding that only Justice Powell discussed diversity in *Bakke*, Wiener reasoned that although *Bakke* left things unresolved, it should not be read as an order to throw out *Bakke*, "bath, water, baby and all."[159]

Seven judges on the Fifth Circuit reasoned that part V(C) of Justice Powell's opinion in *Bakke*, which endorsed the competitive consideration of race and ethnic origin in admissions decisions, had the explicit support of four other Justices, thus making "the Supreme Court's disposition precedential."[160] Thus, not only is *Hopwood*'s treatment of *Bakke* not binding outside the Fifth Circuit, but the court's reasoning has also received much criticism within the Fifth Circuit.[161] Outside of the Fifth Circuit, the diversity rationale in *Bakke* is still good law.[162] In addition, the United States Court of Appeals for the First Circuit in *Wessmann II* assumed *Bakke* was still good law and that some "iterations" of diversity might be sufficiently compelling in specific circumstances to justify race-conscious actions.[163]

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process); *see also supra* notes 88–140 and accompanying text; Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 381, 442 n.41 (1998).

[157] *See* Hopwood v. Texas, 84 F.3d 720, 723–24 (5th Cir. 1996) (Politz, C.J., King, Wiener, Benavides, Stewart, Parker, Dennis, JJ., dissenting from the failure to grant rehearing en banc); 78 F.3d 932, 963–65 (Wiener, J., specially concurring).

[158] *See Bakke*, 78 F.3d at 963.

[159] *Id.* at 964 n.18. Justice Weiner noted that *Bakke* comprised multiple opinions and divergent analyses and no Justice, other than Justice Powell, discussed diversity. *See id.* at 963.

[160] *See Hopwood*, 84 F.3d at 722–23. Politz, C.J., and King, Wiener, Benavides, Stewart, Parker and Dennis, JJ., dissented from the *Hopwood* judgment to deny rehearing en banc. *See id.* The seven judges also argued that lower federal courts are compelled to follow faithfully a directly controlling Supreme Court precedent unless and until the Supreme Court itself determines to overrule it. *See id.* at 722.

[161] *See id.*

[162] *See id.* at 722–23.

[163] *See Wessmann II*, 160 F.3d 790, 796–98 (1st Cir. 1998).

B. *The* Croson *and* Adarand *Decisions Are Not Binding Precedent in the Education Context*

Not only is the diversity rationale in *Bakke* still good law, but also the Court did not foreclose the opportunity for the argument that diversity is a compelling state interest in a public educational setting in either *Croson* or *Adarand*.[164] In examining the line of case law addressing the constitutionality of racial preferencing in the marketplace, no majority of the Supreme Court has held explicitly that remedial action constitutes the *only* valid compelling state interest.[165]

While concurring in the judgment in *Croson*, Justice Stevens wrote separately to express the belief that remedial motivations are not the only legitimate form of a compelling state interest which might justify the use of racial preferencing.[166] Justice Stevens reasoned that the Court's approach would give unwarranted deference to race-based legislative action that purports to serve a purely remedial goal and would overlook the potential value of race-based determinations that serve other purposes.[167] Restating the language from his *Wygant* dissent regarding the importance of diversity to the ongoing learning process in public education, Justice Stevens seemed to suggest in *Croson* that racial preferencing may have a place in the educational context.[168] Additionally, Justice Kennedy did not support whole-heartedly the view that remedial measures are the *only* legitimate compelling state interest in *Croson*.[169] Justice Kennedy reasoned that, because the rule of automatic invalidity for racial preferences in almost every case would be a significant break with precedents that require a case-by-case test, the Court need not adopt such a rule of automatic invalidity at that point.[170]

In light of Justice Kennedy's endorsement of a case-by-case analysis rather than a rule of "automatic invalidity," it is significant that the facts of *Croson* are substantially different from those found in the public education context.[171] While the impact of diversity may not be

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[164] *See id.*; City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 511 n.1 (1989) (Stevens, J., concurring); *Adarand*, 515 U.S. at 258 (Stevens & Ginsburg, JJ., dissenting).

[165] *See Croson*, 488 U.S. at 511 n.1 (Stevens, J., concurring).

[166] *See id.* (Stevens, J., concurring) ("I . . . do not agree with the premise that seems to underlie today's decision . . . that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong.").

[167] *See id.* at 511 n.1 (Stevens, J., concurring).

[168] *See id.* at 512 n.2.

[169] *See id.* at 519 (Kennedy, J., concurring).

[170] *See Croson*, 488 U.S. at 519 (Kennedy, J. concurring).

[171] *See id.*

compelling in the marketplace context of government contracting, diversity of students in an educational setting can have a profound impact on student learning and development.[172] In addition, the *Croson* Court's apprehension that racial classifications may lead to stigmatic harm, notions of racial inferiority and racial hostility is specific to the context of government contracting; in contracting, there is natural animosity and competition, since one enterprise will be awarded a bid over others.[173] Certainly this type of hostility or animosity may be present in student competition for admission to a prestigious exam school. The education context, however, is distinct from the marketplace setting, as the District Court in *Wessmann I* recognized, because teachers and students may address and resolve cultural conflicts in an educational setting so that students learn to appreciate differences.[174]

Pedagogical theory and research stands in sharp contrast to the notion that racial preferencing may promote racial hostility and stigmatic harm in the classroom.[175] In the unique education context, racial stereotypes may be dispelled through student discussion and interaction.[176] Students have the opportunity to discover and appreciate the specific kind of knowledge and experience that an African-American student might bring to the classroom, and feelings of hostility are diffused more easily.[177] Recent studies further support this argument,

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[172] *See id.*

[173] *See Croson*, 488 U.S. at 493–94.

[174] *See Wessmann I*, 996 F. Supp. at 128, 130. The U.S. District Court in *Wessmann I* distinguished the educational context from that of *Croson* and *Adarand*, which dealt with regulations awarding municipal and federal construction contracts, reasoning that more than any other institution, public schools awaken children to cultural values and practices of civility that lead to tolerance and understanding of divergent political, religious and social convictions. *See id.* Thus, the *Wessmann I* court reasoned it was not bound by the *Croson* and *Adarand* decisions. *See id.* at 130.

[175] *See, e.g.*, Bloom, *supra* note 145, 44–45.

> To suggest that the diversity justification is based on an assumption that a person's race controls point of view is an overstatement . . . . The fact that a person's race, like economic, geographic, or employment background, will lead to experiences that will occasionally provide a different perspective on the discussion of issues is enough . . . . [A] black person may offer a distinct perspective on the treatment of blacks by police . . . based not on a stereotypical black point of view but rather on personal experience . . . . Moreover, a person's perspective is based, not on some overreaching stereotype but rather on the individual's unique life experiences . . . . [F]ocusing on the distinct perspectives a black person may offer would be more consistent with the individualistic approach to equal protection the Court favors.

Id.

[176] *See* Jane Ward Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary School Students*, *in* HANDBOOK OF RESEARCH ON MULTI-CULTURAL EDUCATION 597, 605, 607–10 (James Banks & Cherry A. McGee Banks, eds., 1995).

[177] *See id.*

indicating that white students who have increased contact with African-American and Mexican-American peers in desegregated schools develop a more positive attitude towards members of these groups.[178] A recent *Boston Globe* article described how, after spending a night at each others' homes, a METCO student from Boston and a student from the Lincoln-Sudbury area found they shared "common ground": both girls considered being doctors, both received early acceptances to college and both were trying to decide whom to ask to the prom.[179] The desegregation program further functions to dispel suburban students' incorrect notions regarding life in the city. One Sudbury student related: "[y]ou have to go back and tell them that [the danger of being shot] is just not true. The city is a safe place; my family is like your family."[180]

Thus, the Court's concern in *Croson* that racial classifications may in fact promote notions of racial inferiority and lead to racial hostility are not applicable in the educational setting in which teachers and educational programming can foster students' understanding and appreciation of cultural differences.[181] In fact, educators have found that while in the past schools played a central role in perpetuating institutional racism, schools can play an equal role in combating racism.[182] For example, studies have found that the presence of significant numbers of children of color hastens the implementation of processes that bring issues and assumptions to the surface, creating a forum to address and dissect stereotypes and tension.[183] Thus, by breaking cycles of racial hostility and segregation, classroom desegregation has proven

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[178] *See id.* at 608–09.

[179] *See* Doreen Iudica Vigue, *Metco Role Reversal is a Real Eye-Opener*, BOSTON GLOBE, Mar. 21, 1999, at A1. For a definition of METCO, see *supra* note 1. The article describes a program in which seven METCO students at Lincoln-Sudbury High School invited six classmates and five teachers to spend five days and four nights in their Boston homes. *See id.*

[180] *See id.* at A26. In addition, the *Boston Globe* recently featured an article which described the friendship between a Lynnfield High School student, Adam Polansky, and Harold Roy, a METCO student from East Boston; Roy occasionally stays with the Polansky family overnight and on weekends. The friends say they've become "brothers"—brought together by a program that they claim ended their biases and created a lasting friendship. *See* Doreen Iudica Vigue, *Lynnfield Students Unite to Back Metco*, BOSTON GLOBE, Mar. 3, 1999, at A13.

[181] *See supra* notes 169–72 and accompanying text.

[182] *See* Kathy Greeley & Linda Mizell, *One Step Among Many: Affirming Identity in Anti-Racist Schools*, *in* FOSTERING MULTICULTERAL EDUCATION 215.

[183] *See id.* at 216–17. For example, at Graham and Parks Alternative K–8 Public School in Cambridge, Massachusetts, 51% of the students are students of color and 49% are white (a third are Haitian). *See id.* at 217. The school is committed to multi-cultural education and has seen little overt racism and few fights, with even fewer fights motivated by race. *See id.*

to have positive effects in stark contrast to the Court's concern in *Croson*.[184]

As in *Croson*, the marketplace context of *Adarand* would not lend itself readily to the benefits of diversity in the same way as an educational setting.[185] While the Court in *Adarand* reasoned that even a well-intentioned preference may exacerbate racial prejudice, this phenomena would be far more likely in the competitive context of a government's awarding highway contracts than it would be in an educational setting in which teachers worked to dispel notions of prejudice and foster a community of tolerance and appreciation for students' differences.[186] Pedagogical research further supports this proposition: short-term educational benefits of a desegregated high school experience include improvement in race relations and gains on achievement tests and level of educational attainment (for minority students).[187] Long-term benefits for all students include a significantly enhanced likelihood of working in a desegregated environment.[188] Thus, because of significant contextual distinctions, it is questionable whether the line of United States Supreme Court cases addressing the constitutionality of racial preferencing in the marketplace binds the lower courts on the issue of racial preferencing in the education context.[189]

C. *Proving the Empirical Value of Diversity in the Education Context: "The Devil Is in the Details"*

Recognizing that *Bakke* remains good law and some iterations of diversity may be sufficiently compelling in the education context, *Wessmann II* indicates that a public school's racial preferencing program might survive strict scrutiny upon a finding of concrete, specific evidence that indicates a substantial nexus between the stated educational goals and the school's admissions policy.[190] The current judicial trend

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[184] *See Croson*, 488 U.S. at 493–94.

[185] *See* Adarand Constructors Inc. v. Pena, 515 U.S. 200, 228–29 (1995).

[186] *See id.*

[187] *See* Schofield, *supra* note 176, at 605.

[188] *See id.*

[189] *See, e.g., Croson*, 488 U.S. at 512 n.2 (Stevens, J. concurring); *Adarand*, 458 U.S. at 228–29. Despite the fact that the *Hopwood* court faced the issue of racial preferencing in the educational context, the court relied on affirmative action case law in the marketplace context (*Croson, Metro-Broadcasting* and *Adarand*) to reach its holding that diversity is not a compelling interest to justify racial preferencing in the educational context. *See* Hopwood v. Texas, 78 F.3d 932, 945 (5th Cir. 1996). The court's reliance on this line of case law is misplaced. *See id.*

[190] *See Wessmann II*, 160 F.3d at 796–800. Although the "narrow tailoring" prong of the strict scrutiny review is beyond the scope of this Note, the First Circuit made clear in *Wessmann II* that the Boston School Committee's particular admissions program must be narrowly tailored in order

seems to favor the "nexus" analysis as applied by the court in *Hunter*, a recent U.S. District Court decision which relied on finding a substantial nexus between the educational goal—a compelling state interest—and the school admissions policy.[191] Similar to the *Hunter* court's approach, the First Circuit in *Wessmann II* suggested that the value of diversity must be shown concretely and specifically, noting that it is too abstract to say that diversity "nourishes the intellect" or "furthers mutual understanding and respect."[192] To persuade the court that diversity may be compelling, the court in *Wessmann II* reasoned, school officials must give "substance to the word . . . [o]nly by such particularized attention can we ascertain whether the Policy bears any necessary relation to the noble ends it espouses. In short, the devil is in the

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to survive strict scrutiny. *See id.* at 797–99, 800. The First Circuit struck down the admissions policy in *Wessmann II* in part because the policy was not modeled in the spirit of Justice Powell's diversity rationale in *Bakke*. *See id.* In *Bakke*, Justice Powell describes the Harvard admissions policy as an example of a plan that might meet the narrow tailoring prong of strict scrutiny review. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 316–19, 323 (1978). Some speculate whether the Boston School Committee's admissions policy would have survived if the policy had simply stated it considered the applicants' exam score and "other factors"—without explicitly mentioning racial or ethnic preferencing. *See Wessmann II*, 160 F.3d at 797–99, 800.

Nevertheless, it is important to note that there is no other legitimate means of achieving racial/ethnic diversity without considering race in the admissions/transfer process. *See* Geoffrey Fowler, *Alternative Action*, DIVERSITY & DISTINCTION MAG., Nov. 1998, at 19. Professor William Julius Wilson, a scholar on the dynamics of race and class, believes that class-based affirmative action programs cannot be a substitute for race-based affirmative action programs if the goal is to maintain the kind of diversity that is currently in place, especially among African Americans and Latino/as. *See id.* The most recent research indicates that class-based affirmative action programs would primarily benefit low-income white and Asian Americans, resulting in a small number of low income African Americans and Latinos attending college, while excluding many middle class African Americans. *See id.* According to Wilson, this occurs because standardized tests often are not sensitive to what Wilson calls "the cumulative experience of race": effects of living in a segregated neighborhood, attending disadvantaged schools and other forms of cultural experience. *See id.* Thus, policies which consider only socio-economic class often end up accepting low-income white students and do not achieve the kind of racial and ethnic diversity that most schools desire to create. *See id.* For additional arguments in support of the use of race as a factor in admissions policies, see Akhil Reed Amar and Neal Kumar Katyal, *Bakke's Fate*, 43 U.C.L.A. L. REV. 1745, 1772–73 (1996); Frederick A. Morton, Jr., *Class-Based Affirmative Action: Another Illustration of America Denying The Impact of Race*, 45 RUTGERS L. REV. 1089 (1991); Robert Kuttner, *From Equal Opportunity to Equal Indifference*, BOSTON GLOBE, Mar. 28, 1999, at D7; *but see* Richard D. Kahlenberg, *Class-based Affirmative Action*, BOSTON GLOBE, Jan. 19, 1999, at A11.

[191] *See* Hunter v. Regents of the Univ. of California, 971 F. Supp. 1316, 1327–30 (C.D. Cal. 1997). Goodwin Liu reads *Bakke*, *Wygant* and *Croson* to suggest that the "compelling interest test" is actually two tests in one: (1) whether the government interest is sufficient as a substantive matter and (2) whether the government actor has produced sufficient evidence to substantiate its alleged interest. *See* Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 381, 401 (1998).

[192] *See Wessmann II*, 160 F.3d at 796–98.

details."[193] While in *Hunter* the school's goal was to research urban educational strategies, other educational goals such as fostering anti-racist education, increasing student achievement over the long-term and breaking the cycle of racial segregation are likewise compelling. Recent longitudinal research indicates a strong nexus between a diverse, desegregated classroom and the achievement of goals such as breaking the cycle of racial segregation in workplaces and neighborhoods, promoting positive intergroup relations, and increasing student achievement over the short term and the long term.[194]

1. The Beneficial Long-Term Effects of Students' Exposure to Diversity in Public Schools

A substantial body of recent research indicates that a desegregated K-12 education has concrete, beneficial effects over the long term for students of all races and ethnicities.[195] The findings from numerous studies indicate that diverse, desegregated schools often serve as vehicles for breaking the cycle of racial segregation later in life.[196] Amy Stuart Wells and Robert L. Crain assembled findings from twenty-one of the most substantial studies of the long-term effects of school desegregation.[197] Due to the ambiguous findings of the research on short-term effects of school desegregation, Wells and Crain believe researchers and policymakers should look beyond short-term effects and focus more on long-term social and economic outcomes.[198] According to Wells and Crain, school desegregation should do more than

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[193] *See id.*; The First Circuit decision, requiring "details" and "concrete evidence," is similar to the reasoning in O'Connor's opinion in *Croson*, that rejected racial preferencing policies which are "amorphous and over-expansive," such as remedying general societal discrimination. *See id.*; City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 507–08 (1989).

[194] *See infra* notes 193–256 and accompanying text.

[195] *See* Schofield, *supra* note 176, at 605. Desegregation may have long-term social and economic consequences for minorities by (1) providing access to useful social networks of job information, contacts and sponsorship; (2) promoting socialization for aspirations and entrance into non-traditional career lines with higher income returns; (3) developing of interpersonal skills useful in interracial contexts; (4) reducing social inertia-increased tolerance and willingness to participate in desegregated environments; and (5) avoiding negative attributions often associated with African-American institutions. *See id.*

[196] *See* Amy Stuart Wells and Robert L. Crain, *Perpetuation Theory and the Longterm Effects of School Desegregation*, 64 REV. OF EDUC. RES. 531, 532 (1994).

[197] *See id.* Much of the research was published from the mid-1980s to 1990s as the long-term effects of desegregation plans implemented in the late 1960s and 1970s became more apparent. *See id.*

[198] *See id.* at 532–33. Short-term effects include achievement test scores, intergroup relations and self-esteem of black students. *See id.*

just raise test scores—it must break the cycle of racial segregation that leaves whites and African Americans worlds apart.[199]

Wells and Crain have described the cycle of racial segregation as the "perpetuation theory," the concept that segregation tends to repeat itself across stages of the life cycle and institutions when individuals have not had sustained experiences in desegregated settings earlier in life.[200] Wells and Crain found that minority students who have not experienced the realities of desegregation regularly may overestimate the degree of overt hostility they will encounter or underestimate their skill at coping with strains in interracial situations.[201] These segregated students will most likely make choices that maintain their physical segregation when they become adults because they have never tested their racial beliefs.[202]

There is evidence that African Americans who attended desegregated schools are more likely to report living in integrated neighborhoods and having white social contacts later in life.[203] A 1990 study found a positive relation between years of desegregated schooling and acceptance of residential integration for white high school seniors.[204] There is a documented tendency for all students who attend desegregated schools to be much more likely to settle in interracial neighborhoods.[205] In sum, many studies indicate that students who have experienced desegregated schooling are more likely to continue to choose desegregated contexts, both in school and in other spheres of their lives.[206]

In addition to breaking cycles of racial segregation, the desegregated school experience develops students' ability to work effectively

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[199] See Wells and Crain, *supra* note 196, at 533.

[200] *See id.* Perpetuation theory focuses on how individuals adjust their behavior to accommodate and thus perpetuate constraints to racial integration and how exposure to integrated settings can change this behavior. *See id.*

[201] *See id.* at 533.

[202] *See id.*

[203] *See* Schofield, *supra* note 176, at 610.

[204] *See id.*

[205] *See* GARY ORFIELD ET AL., DISMANTLING DESEGREGATION 106 (1996).

[206] *See* William T. Trent, *Outcomes of School Desegregation: Findings from Longitudinal Research*, 66 J. NEGRO EDUC. 255, 257 (1997); Schofield, *supra* note 176, at 610. Trent's findings were derived from the National Survey of 1980 High School Sophomores and Seniors, known as High School and Beyond ("HS&B"), a national probability sampling of over 58,000 individuals who were high school seniors and sophomores in 1980; the National Longitudinal Survey of Youth Labor Force Participation, a survey of 12,686 young persons throughout the U.S. sponsored by the U.S. Departments of Labor and Defense from 1979–85; and the National Longitudinal Survey of the High School Class of 1972—Employer Survey, a probability sample of 4,078 employers of young adult workers who participated in the earlier longitudinal study. *See* Trent, *supra*, at 255.

in the context of cultural diversity. Current population trends make the acquisition of this skill an increasingly compelling aspect of children's education.[207]

In their 1984 paper, Jomills Henry Braddock II, Robert L. Crain and James M. McPartland summarize the results of several national surveys and conclude that African Americans, Latino/as and white students who attended desegregated schools are more likely to work in racially-mixed workplaces than their peers who attended segregated schools.[208] Additional support for this conclusion comes from Dr. William Trent's 1991 examination of data from the 1979 cohort of the National Longitudinal Survey of Labor Force Behavior Youth Survey.[209] Trent found that desegregated schooling may not only affect one's propensity to work in racially mixed settings, but also one's reaction to the experience.[210] Specifically, Trent concluded that African-American, Latino/a, and white graduates of segregated schools perceive racially-mixed work groups as less friendly than racially-homogeneous ones, while respondents from desegregated schools make much less of a distinction.[211] This suggests, Trent concluded, that a desegregated school experience can have far-reaching effects in a number of different contexts.[212] For example, in the employment arena, a desegregated school experience can reduce negative feelings toward co-workers of other ethnic groups.[213]

A study conducted by Braddock and McPartland further suggests that high school desegregation appears to promote more positive perceptions and social contacts among African Americans and whites in racially heterogeneous work groups.[214] Braddock and McPartland found that earlier experiences of African Americans in desegregated settings, such as those in schools, help to break down social barriers by creating more accurate and positive expectations of white reactions, by building confidence in one's ability to succeed in racially-mixed environments and by providing practice to deal with the strains caused

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[207] *See* Schofield, *supra* note 174, at 608. This skill has also been recognized as one of the basic competencies required to perform effectively in the U.S. labor force. *See id.*

[208] *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).

[209] *See* Trent, *supra* note 206, at 257.

[210] *See id.*

[211] *See* Schofield, *supra* note 176, at 610.

[212] *See id.*

[213] *See id.*

[214] *See* Braddock and McPartland, *supra* note 208, at 284.

by cross-racial contacts.[215] Because of this early experience in a desegregated setting, one would expect less avoidance or withdrawal from desegregated experiences later in life.[216] Thus, if cross-racial relationships in desegregated schools reduce white students' negative racial stereotypes and fears of hostile reactions in interracial situations, then these white students will be less resistant to admitting African Americans into co-worker friendship groups as adults.[217]

Regarding the long-term impact of desegregation on white students, two studies demonstrated that the racial composition of students' high school or college influences the likelihood that they will work in a desegregated setting later in life.[218] This finding may stem from the fact that whites in desegregated schools frequently show a decrease in their often initially high levels of fear and avoidance of African Americans, and an increasing willingness and ability to work with African Americans.[219] With regard to African Americans in predominantly white work settings, the higher the percentage of white students in their high schools, the more they considered their white co-workers to be friendly.[220]

In addition to positive occupational outcomes, a substantial body of research suggests that desegregation tends to lead to more positive intergroup attitudes.[221] Because of the pervasive residential segregation in our society, students often have their first relatively extended interracial experiences in school.[222] The growth or decrease of hostility and stereotyping may be influenced particularly by circumstances occurring at school; whether schools consciously try to influence intergroup relations, schools are extremely likely to do so in one way or another.[223]

Studies have found that social barriers to interracial contact among white adults may be broken down by experiences in cross-racial situations earlier in life.[224] Research suggests that white students who have increased contact with African-American and Mexican American peers in desegregated schools develop more positive attitudes towards

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[215] *See id.* at 284–85.

[216] *See id.*

[217] *See id.*

[218] *See* Schofield, *supra* note 176, at 610.

[219] *See id.*

[220] *See id.*

[221] *See id.* at 608–10.

[222] *See id.* at 608. This assumes the school is racially integrated—an often untrue assumption to make of suburban schools.

[223] *See* Schofield, *supra* note 176, at 608.

[224] *See id.* at 610.

members of these groups.[225] A National Opinion Research Center Survey in 1979 found that white students in desegregated school situations were more likely to report having a close African-American friend and having had African-American friends visit their homes.[226]

Furthermore, a wide body of research suggests that desegregated classrooms have a positive impact on the academic achievement of students of all races and ethnicities.[227] Robert L. Crain, a desegregation expert at Columbia University, describes student achievement gains as a result of desegregation to be significant.[228] In a study with Rita Mahard, Crain found that desegregation that started at the beginning of elementary school and lasted throughout the school years had the greatest benefits in terms of student achievement, as did access of minority students to suburban schools.[229] Jane Schofield conducted the most recent major summary of research literature, finding that there were significant but relatively modest test score gains, especially in reading and English, for students from desegregated classrooms.[230]

Fifty-two social scientists attested to findings that desegregation is generally associated with significant gains in the achievement of African-American students in an amicus brief submitted to the United States Supreme Court in 1992.[231] Similarly, Susan Eaton and Christina Meldrum examined student performance on the Iowa Test of Basic Skills between 1989 and 1993.[232] They found that performance gaps between African-American students in segregated schools and those in better-integrated schools had become wider.[233] Gaps between African-American third graders in segregated schools and those in better-integrated schools increased from four points in 1990 to ten points in 1993. By grade four, the gaps increased from one point in 1989 to twelve points in 1993.[234] Further, scores for African-American students in integrated schools, although still below the national average, have remained relatively constant while scores for African Americans in

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[225] *See id.*

[226] *See id.*

[227] *See id.* at 605–06.

[228] *See* Schofield, *supra* note 176, at 610.

[229] *See id.* at 605.

[230] *See id.* at 610–11.

[231] *See* Brief of the NAACP, DeKalb County, Georgia, Branch of NAACP et al., as Amici Curiae in Support of Respondents app. at 7a, 8a, Freeman v. Pitts, 503 U.S. 467 (1992) (No. 89–1290); Bradley W. Joondeph, *Skepticism and School Desegregation*, 76 WASH. U. L.Q. 161, 162 (1998).

[232] *See* ORFIELD ET AL., *supra* note 205, at 132.

[233] *See id.*

[234] *See id.*

segregated schools have declined.[235] Results from basic literacy tests reveal a sizable gap between the percentage of students passing in segregated schools and that of students in integrated schools.[236] In all subjects at every grade level, all students in segregated schools scored far worse, on average, on state-required tests, than their counterparts in integrated schools.[237] Thus, based on their findings, the researchers concluded that desegregated schools have a positive impact on students' academic achievement.[238]

In an effort to determine the effects of school desegregation in St. Louis under a 1984 consent decree, William Trent examined the graduation rates of African-American students who had transferred to desegregated county (suburban) schools or who were enrolled in the city's desegregated magnet schools as compared to the graduation rate of African-American students in segregated city schools.[239] Trent concluded that although many African-American students in desegregated schools were poor, their graduation rate far exceeded those of students in segregated schools.[240] Gary Orfield, an expert in school desegregation research, also studied the effects of school desegregation in St. Louis following the 1984 consent decree.[241] Orfield found that programs like the interdistrict transfer program in St. Louis, can lead to positive results for disadvantaged students by affording them access to "practical know-how," contacts and counseling that can help students become more aware of opportunities about which they might not otherwise learn.[242]

Orfield's findings form part of the most coherent body of evidence supporting school desegregation, which rests on an entirely different way of defining the achievement gains resulting from desegregation: desegregation may alter the life chances for minority students by allowing them entrance into an opportunity system more likely to lead to success in American society.[243] In work dating back to the late 1970s, a group of researchers at Johns Hopkins University including

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[235] *See id.*

[236] *See id.* at 133.

[237] *See* ORFIELD ET AL., *supra* note 205, at 133.

[238] *See id.* at 132–33.

[239] *See* William L. Taylor, *The Role of Social Science in School Desegregation Efforts*, 66 J. NEGRO EDUC. 196, 198–99 (1997).

[240] *See id.* at 199.

[241] *See id.* at 201.

[242] *See id.* Under the St. Louis consent decree, the city operated the largest "[i]nterdistrict transfer program" in the nation, under which 13,000 African-American students in the city were enrolled in desegregated schools in 16 districts in St. Louis County. *See id.* at 198.

[243] *See* ORFIELD ET AL., *supra* note 205, at 103–06.

Braddock, McPartland and Crain concluded that test scores were an inadequate measure of the benefits of desegregation.[244] The real goal of desegregation for minority students, they concluded, was to change their life chances by moving them into an opportunity system more likely to lead to success in American society.[245] Segregation meant isolation from mainstream opportunities for African Americans—"a life-long, self-perpetuating process with intergenerational effects that institutionalize inequality."[246] Integration was a means of breaking out of this isolation into a full range of middle class opportunities affecting higher education, employment and choice of community in which to live and raise children.[247] Because there was ample evidence that test scores and grades in school do not explain much of the variance in later income or status, it became very important to study the effects directly.[248]

As Orfield declined to focus solely on test scores and grades as indicators of academic achievement, Wells and Crain also analyzed twenty-one studies which produced abundant evidence supporting the view that desegregation connects students to a network tied to greater life-long opportunity.[249] "Network analysis," a theory developed by Wells and Crain, is the structural argument that segregation is perpetuated across generations because African Americans and Latino/as lack access to informal networks that provide information about, and entrance to, desegregated institutions and employment.[250] Less formal interpersonal networks, such as acquaintances or friends of friends, have a strong impact on the diffusion of influence, mobility opportunities and information.[251] The knowledge students need concerning association between education and occupational attainment is usually transmitted through the interaction of students, school personnel and certain persons outside the school system, especially parents, and it is more prevalent within environments linked to the dominant white community (i.e. the predominantly white school).[252] School desegregation helps to break the cycle of segregation by alleviating one of the mechanisms that perpetuates racial isolation: African Americans' lack

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[244] *See id.* at 105.
[245] *See id.*
[246] *See id.*
[247] *See id.*
[248] *See* ORFIELD ET AL., *supra* note 205, at 105–06.
[249] *See id.* at 106.
[250] *See* Wells and Crain, *supra* note 196, at 533.
[251] *See id.*
[252] *See id.* at 538.

of information concerning educational opportunities and methods of attaining specific goals.[253]

Furthermore, the findings indicate that desegregated African-American students set their occupational aspirations higher than do segregated African-American students.[254] In addition, desegregated African-American students' occupational aspirations are more realistically related to their educational aspirations and attainment than those of segregated African-American students.[255] There was also marked difference in college success among students who graduated from desegregated schools.[256]

William Trent found that desegregated schooling also has important long-term benefits for minority students, especially in terms of its ability to open up economic opportunities for them.[257] Parents who attended desegregated schools are more likely to have attended college, have better jobs, and live in desegregated neighborhoods.[258]

2. Criticism of School Desegregation

Opponents of school desegregation have questioned the value of desegregation, contending it has increased the rate of "white flight" from urban school districts and undermined efforts to improve the quality of education in predominantly African-American schools.[259] Christine Rossell, a professor of political science at Boston University, asserts that desegregation often leads to white flight.[260] Virtually all research on school desegregation and white flight indicates that school

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[253] *See id.*

[254] *See id.* at 540.

[255] *See* Wells and Crain, *supra* note 196, at 540.

[256] *See* ORFIELD ET AL., *supra* note 205, at 106.

[257] *See* Trent, *supra* note 206, at 257.

[258] *See id.*

[259] *See* Joondeph, *supra* note 231, at 161. The term "white flight" was used originally to characterize the phenomenon of middle-class, white suburbanization that has occurred since the 1950s. The white flight trend is a function of "pull" factors such as greater space, greenery, lower-cost family housing, low tax rates and changes in production and transportation in the suburbs, and "push" factors such as central city crime. *See* Christine H. Rossell and Willis D. Hawley, *Understanding White Flight and Doing Something About It, in* EFFECTIVE SCHOOL DESEGREGATION 157–58 (Willis D. Hawley, ed. 1981).

[260] *See* Christine H. Rossell, *An Analysis of the Court Decisions in Sheff v. O'Neill and Possible Remedies for Racial Isolation*, 29 CONN. L. REV. 1187, 1210–17 (1997). Rossell bases her theory on white flight in part on surveys conducted by the Attorney General's Office of Connecticut in 1991 and 1992 that indicated 51% of white parents in Hartford would withdraw their child from public school if their child were reassigned to a formerly minority school. The estimated actual white no-show rate is only 45% because it is adjusted downward by a six-point difference between survey no-show rate and actual no-show rate resulting from a similar survey in Los Angeles. *See id.*

desegregation significantly accelerates white flight in most school districts in the year of implementation if the desegregation plan involves mandatory school reassignments.[261] Rossell and Hawley found that the busing of whites to formerly African-American schools accelerated white flight more than "one-way busing," and white flight was greater in districts with more than thirty-five percent minority students.[262] Yet research concerning long-term annual changes in white enrollment found no long-term negative effect in most districts; that is, short-term implementation losses of white students appeared to be compensated for by less than normal post-implementation losses of white students.[263] Rossell and Hawley further recognize that there are a number of initiatives that could be taken by government to reduce the exodus of white and middle-class students from public schools.[264]

Rossell recognizes that the term "white flight" has been used most recently and erroneously to describe the decline in central-city white public school enrollment and that desegregation does not always or inevitably lead to long-term changes in the racial composition of communities.[265] Most research demonstrates that "white flight" is largely unrelated to school desegregation; the trend of white migration from cities to suburbs began in the 1940s, well before the implementation of school desegregation.[266] In addition, studies reveal that the declining percentage of whites in city school districts is the product of declining white birth rates and white out-migration attributable primarily to increasing crime rates and fears related to an increasing percentage of minority residents.[267] Gary Orfield states that one of the biggest problems with "white flight" evidence currently being used in courts is that

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[261] *See* Rossell and Hawley, *supra* note 259, at 165. In 1978–79, racial tolerance was found to have progressed so that African-American reassignments into white schools did not increase white flight from the receiving school district significantly. *See id.* at 166. In addition, Rossell and Hawley note that minimizing busing distances will probably reduce implementation-year white flight in those districts where flight is likely to be greatest. *See id.* at 173.

[262] *See id.* at 169. "One-way busing" was a term used to describe African-American reassignments to white schools. *See id.* at 166.

[263] *See* Rossell and Hawley, *supra* note 259, at 170. This research used cross-sectional multiple regression to analyze annual post-implementation changes in white enrollment. *See id.* The problem with these analyses is that they average effects across school districts. *See id.* Rossell found that big city school districts with minority white school populations were the least likely to make up implementation-year losses by less than normal post-implementation losses. *See id.*

[264] *See id.* at 182. Such initiatives may include voluntary plans, mandatory plans with a voluntary magnet school component, implementation timing, busing distance minimization, subdistricting, providing incentives for housing desegregation and public information. *See id.* at 171–74.

[265] *See* Rossell and Hawley, *supra* note 259, at 158, 182.

[266] *See* Joondeph, *supra* note 257, at 163; ORFIELD ET AL., *supra* note 205, at 315–17.

[267] *See* ORFIELD ET AL., *supra* note 205, at 315–17. School desegregation was not the sole cause

most evidence is drawn from experience with the type of desegregation plans, such as pure mandatory reassignment plans, that have not been ordered for fifteen years.[268] In contrast, recent plans tend to provide new educational options, and choice is a major component.[269]

Another effect of school desegregation is the movement toward neighborhood and Afro-centric schools.[270] In school districts which have operated under mandatory desegregation plans for years, the sentiment of some African-American parents has shifted considerably in recent years from supporting integration efforts to asserting a preference to return to neighborhood schools and Afro-centric schools.[271] The rise of Afro-centric schools and voluntary self-segregation began when African Americans began rethinking the "unfulfilled promise of integration" and turned inward to pursue a self-imposed "resegregation" designed to foster self-help and "black pride."[272] Many African-American parents assert that traditional public schools often leave their children lacking in pride and self-esteem.[273] Afro-centric schools are lauded for fostering a communal feel and promoting cultural solvency.[274] Angela Paige Cook, founder of the privately-run, predominantly African American Paige Academy in Roxbury, Massachusetts, states that segregated schools may be rich in certain ways, such as providing positive role models for kids within the community.[275] Reverend Raymond Hammond, president of the Ten-Point Coalition, an organization of Boston ministers, pointed out that while no African-American leader favors a return to legally-mandated separate-but-equal status, he favors black nationalism and believes a community works best economically, educationally and socially if it stays together.[276] Even

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of white enrollment decline, yet most agree that some desegregation plans, such as plans mandating busing many white students into central cities with high minority populations, accelerate the decline of white enrollment. *See id.* at 316.

[268] *See id.* at 317.

[269] *See id.*

[270] *See* Joondeph, *supra* note 231, at 161–62; John Yemma, *The New Segregation Black Community Reexamining School Busing*, BOSTON GLOBE, Sept. 15, 1997, at A1; Wil Haygood, *On Schools, Many Blacks Return to Roots*, BOSTON GLOBE, Nov. 16, 1997, at A1.

[271] *See* Haygood, *supra* note 270, at A1. Afrocentric schools are African-centered secondary schools. Courts have held that public schools can be African-centered as long as they are open to all students. *See id.* In 1997, there were about 400 African-centered schools in the United States and from 1992–97, the number of African-centered schools increased by 30%. *See id.* In Detroit, 12 of the public schools are now African-centered; they are located in virtually all-black neighborhoods. *See id.*

[272] *See id.*

[273] *See* Haygood, *supra* note 270, at A1.

[274] *See id.*

[275] *See* Yemma, *supra* note 270, at A1.

[276] *See id.*

staunch integrationists such as Hubie Jones, of the University of Massachusetts, believe "some separation is essential" to allow people to "psychologically and spiritually regroup."[277]

A third criticism of school desegregation has been directed at the problems resulting from students being bused to locations far from their homes.[278] Many opponents of busing prefer neighborhood schools not for the sake of attending schools with people of the same race, but because they believe it is more comfortable to attend school with people one is "used to being around."[279] John Henderson, president of the Tulsa, Oklahoma branch of the NAACP, criticized busing, stating: "[O]ur kids were bused to schools and teachers who didn't care about them. The kids were treated like cattle."[280] Others blame busing for a "brain drain" that harmed black neighborhoods.[281]

Yet because of the stark racial inequalities that remain and the empirical research revealing desegregation's potential, many commentators have called the Court's abandonment of desegregation premature, unwarranted and unjust.[282] Derrick Z. Jackson refuted arguments made against desegregative busing in his January, 1999, Boston Globe op-ed piece, writing about his childhood experience with METCO busing to attend suburban schools:

> It was about exposure and confidence. I was friends with sons of furriers as well as factory workers. I had white and black bowling partners . . . . The interracial friendships taught me about individual humanity in a racist country . . . . Busing is not ideal. But until society treat[s] [sic] schools equally, it has no right to vilify it or any other way black parents secure a

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[277] *See id.*

[278] *See id.* For example, many of Boston's METCO students must wake up at 5:15 a.m. to embark on a one-hour bus ride to their assigned suburban school. *See* Vigue, *supra* note 179, at A26.

[279] *See* Yemma, *supra* note 270, at A1.

[280] *Id.*

[281] *See* Jackson, *supra* note 1, at A19.

[282] *See* Joondeph, *supra* note 231, at 166. In recent years, the U.S. Supreme Court has manifested an intent to end an era of court-enforced desegregation. *See generally* Missouri v. Jenkins, 515 U.S. 70 (1995) (holding that a federal court could not order salary increases and remedial education programs, despite the fact that student achievement in the Kansas City school district was still at or below the national norm at many grade levels, because these programs were too far removed from the goal of eliminating racial segregation); Freeman v. Pitts, 503 U.S. 467 (1992) (upholding the District Court's finding that racial imbalance in DeKalb County schools was a function of demographic changes and not a vestige of a prior dual system and finding partial dismissal of desegregation decree appropriate); Board of Educ. v. Dowell, 498 U.S. 237 (1991) (remanding the case to determine whether school should be released from desegregation order because of good faith compliance with desegregation plan).

> good school. Until quality education comes back to the black neighborhood, it makes the critics rather transparent. They hate busing so because they know those yellow buses, those great, glowing chariots, put a lot of black children like me on the road to a golden life.[283]

Thus, despite the criticism it has received, school desegregation most often has been praised for the numerous documented beneficial effects it has on the education and development of all students.[284]

3. Public Opinion Supports Integrated Classrooms

American public opinion favors desegregated public classrooms and seems to recognize the beneficial effects of an integrated school environment on student development and achievement.[285] In a 1994 National Gallup Poll, sixty-five percent of the general public and seventy percent of African Americans found that integration improved the quality of education for African Americans and forty-two percent of all Americans believed integration improved the quality of education for whites.[286] A 1993 Connecticut poll indicated that sixty-three percent of Connecticut voters believed that children who go to one-race schools will be at a disadvantage when they grow up and must confront the multicultural society in which they work and live.[287] A recent *Boston Globe* poll found that sixty-two percent of African Americans and forty-nine percent of whites felt that, in light of the nationwide trend toward returning to neighborhood schools, it was bad for schools to be made up of people of the same race.[288] Seventy-six percent of African Americans and seventy-three percent of whites answered that "full integration" would be better for race relations in America.[289]

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[283] Jackson, *supra* note 1.

[284] *See supra* notes 193–256 and accompanying text.

[285] *See* ORFIELD ET AL., *supra* note 205, at 108.

[286] *See id.*

[287] *See id.*

[288] *See* Globe Poll, *Views on Race in America* (visited Feb. 24, 1999) <http://www.boston.com/globe/nation/packa....nking_integration/vies_on_race_poll.html>.

[289] *See id.*

4. The United States Department of Education Recognizes Diversity as a Compelling State Interest

Perhaps in recognition of the strong public opinion in support of school desegregation, the United States Department of Education recently reaffirmed that public school districts not under desegregation orders nonetheless may have a compelling interest in promoting diverse student bodies.[290] The Magnet School Assistance Program, administered by the Department of Education, which Congress designated to address the elimination, reduction or prevention of minority group isolation in elementary and secondary schools, makes funds available to school districts implementing voluntary plans to promote diverse student enrollments as well as those under desegregation orders.[291] The statute states that the Department should fund schools that are "designed to bring students from different social, economic, ethnic, and racial backgrounds together."[292] In its Magnet Schools Assistance Program Notice for Fiscal Year 1998, the Department affirmed that the elimination, reduction, or prevention of minority group isolation and the creation of diverse student enrollments are compelling governmental interests, even in a school district that is not remedying the effects of prior discrimination.[293] Department of Education reports in 1997 and 1998 recognized that along with diversity comes rich, new learning opportunities for students, and that a school's learning environment is enhanced by a diverse student population.[294]

D. *The Importance of Diversity in the Public Education Context: Looking Back to* Brown

Instead of looking to marketplace affirmative action cases, the Court should follow its reasoning in *McLaurin v. Oklahoma State Regents, Brown v. Board of Education* and *Washington v. Seattle School District*—the case law that eliminated segregation in public schools—in order to determine the compelling interests that racial preferencing programs serve in public K-12 education.[295] Legal scholars propose that

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[290] *See* 20 U.S.C. § 7202 (1998); 34 C.F.R. § 280.1 (1998).

[291] *See* 20 U.S.C. § 7205 (1998); 34 C.F.R. § 280.2 (1998).

[292] *See* 20 U.S.C. § 7203 (1998).

[293] *See* 34 C.F.R. Part 280, 63 Fed. Reg. 8020–8029 (Feb. 17, 1998).

[294] *See* Department of Education, *The Condition of Education 1998* (visited Feb. 24, 1999) <http://nces.ed.gov/NCES/pubs98/condition98/c98sece.html>; Department of Education, *The Condition of Education 1997* (visited Feb. 24, 1999) <http://nces.ed.gov/nces/pubs/ce/c97sece.html>.

[295] *See* McLaurin v. Oklahoma State Regents, 339 U.S. 637, 642 (1950) (holding that segre-

Bakke builds "squarely on the rock of *Brown*."[296] In addition, the U.S. District Court for the District of Massachusetts adopted the reasoning of *Brown* in *Wessmann I*, emphasizing the importance of public schools as the principal instrument in awakening the child to cultural values and in helping him adjust normally to his environment.[297]

In 1950, the U.S. Supreme Court recognized the compelling educational value of student interaction in *McLaurin*; the value of interchange among students applies with added force today.[298] The *McLaurin* Court found the African-American plaintiff's interaction with other students was essential to his educational experience and thus struck down the segregative university policies.[299] Specifically, the Court found that setting McLaurin apart from other students handicapped his pursuit of education, by impairing and inhibiting his ability to study, engage in discussion and exchange views with other students.[300] The *McLaurin* Court's reasoning applies with substantial force today, as recent research underscores the value of interaction that occurs at integrated public schools.[301] Extensive pedagogical research supports the view that desegregation connects students to a network that provides greater lifelong opportunities.[302]

Segregation is perpetuated across generations in part because African Americans and Latino/as often lack access to informal networks that provide information about and entrance to desegregated institutions and employment.[303] The knowledge students need regarding occupational opportunities is usually transmitted through the interaction of students, school personnel and people outside the school system, especially parents. This knowledge has been found to be more prevalent within environments linked to the dominant white commu-

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gated conditions under which an African American was required to receive his education violated the Fourteenth Amendment of the United States Constitution); Brown v. Board of Educ., 347 U.S. 483, 495–96 (1954) (finding that segregation according to race in public schools constituted a denial of the equal protection of the laws); Washington v. Seattle Sch. Dist., 458 U.S. 457, 487 (1982) (holding that the initiative which banned mandatory use of busing for racial integration in Washington public schools is violative of the Equal Protection Clause of the Constitution).

[296] *See* Amar and Katyal, *supra* note 190, at 1745, 1775.

[297] *See Wessmann I*, 996 F. Supp. 120, 128 (D. Mass. 1998); *supra* note 6.

[298] *See* 339 U.S. at 641.

[299] *See id.*

[300] *See id.*

[301] *See* ORFIELD ET AL., *supra* note 205, at 106.

[302] *See id.*

[303] *See* Wells and Crain, *supra* note 196, at 532–33. Less formal interpersonal networks, such as acquaintances or friends of friends, have a strong impact on the diffusion of influence, information and mobility opportunities. *See id.*

nity (i.e., the predominantly white school).[304] Thus, research indicates that school desegregation will help break the cycle of segregation by alleviating one of the mechanisms that perpetuates racial isolation: African Americans' and Latino/as' lack of information concerning educational opportunities and methods of attaining specific goals.[305]

Recent educational research further suggests that interactions with students from other backgrounds is beneficial not only for African Americans, as *McLaurin* recognized, but for students of all races, backgrounds and ethnicities, including white students.[306] Numerous studies suggest that desegregation tends to lead to more positive intergroup attitudes.[307] As a result of the pervasive residential segregation in our society, students often have their first relatively extended interracial experiences in school; the growth or decrease of hostility and stereotyping may be critically influenced by circumstances occurring at school.[308] Regardless of whether schools consciously try to influence intergroup relations, schools are extremely likely to do so in one way or another.[309] Thus, there exists a positive connection between a school admissions policy designed to achieve student diversity and a "vigorous exchange of ideas."[310]

Finally, the long-term benefits of students' early and continued interaction with children of a variety of backgrounds can be traced to the occupational environment.[311] Research indicates that African Americans, Latino/as and white students who attend desegregated schools are more likely to work in racially-mixed workplaces.[312] With regard to African Americans in work settings with a greater number of whites, the higher the percentage of white students in these African Americans' high school, the more they considered their white co-workers to be friendly.[313] While African-American, Latino/a, and white graduates of segregated schools perceive racially-mixed work groups as less

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[304] *See id.* at 533.

[305] *See id.*

[306] *See* Schofield, *supra* note 176, at 610.

[307] *See id.*

[308] *See id.* at 608.

[309] *See id.*

[310] *See Bakke*, 438 U.S. at 312; Schofield, *supra* note 176, at 608. The ability to work effectively with people from diverse backgrounds is an important skill for both majority and minority groups in a pluralistic society. *See* Schofield, *supra* note 176, at 608. A report commissioned by the U.S. Department of Labor in 1991 concluded that the ability to work effectively in a context of cultural diversity is one of the basic competencies required to perform effectively in the U.S. labor force. *See id.*

[311] *See* Trent, *supra* note 206, at 257.

[312] *See id.*

[313] *See id.*

friendly than racially-homogeneous ones, respondents from desegregated schools make much less of a distinction.[314] Thus, the desegregated school experience can reduce negative feelings toward co-workers of other ethnic groups.[315] Another study suggests that high school desegregation appears to promote more positive perceptions and social contacts among African Americans and whites in racially heterogeneous work groups.[316] Earlier experiences of African Americans in desegregated settings, such as those in school, help to break down social barriers by creating more accurate and positive expectations of white reactions, by building confidence in one's ability to succeed in racially-mixed environments and by providing practice to deal with the strains of cross-racial contacts.[317]

Similarly, social barriers among white adults to interracial contact may be broken down by experiences in cross-racial situations earlier in life.[318] When cross-racial relationships in desegregated schools reduce white students' negative racial stereotypes and fears of hostile reactions in interracial situations, these white students as adults will be less resistant to admitting African Americans into co-worker friendship groups.[319] Recent tabulations of racial attitude questions from national surveys of African-American and white students further suggest that school desegregation creates more positive reactions, among African Americans and whites, to future interracial situations.[320] Thus, while *McLaurin* only began to recognize the importance of interaction with white students to the African American's educational experience, there is now ample evidence to support the notion that interaction with a diverse group of students has beneficial effects for all students over the long term.[321]

As the U.S. Supreme Court in *Brown* evaluated the effect of segregation itself on public education, the Court should evaluate the documented long-term effects of diversity and desegregation on public education in order to determine just how diversity serves a compelling state interest.[322] While the Court in *Brown* reasoned that integration

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[314] *See* Schofield, *supra* note 176, at 610.

[315] *See id.*

[316] *See* Braddock and McPartland, *supra* note 208, at 284.

[317] *See id.* at 285.

[318] *See id.*

[319] *See id.*

[320] *See id.*

[321] *See McLaurin*, 339 U.S. at 642.

[322] *See Brown*, 347 U.S. at 493–95 (holding that segregation according to race in public schools is a denial of the equal protection of the laws).

was necessary because modern educational and psychological data indicated that segregation caused the minority school children to feel inferior, diversity in schools is compelling for an almost opposite reason—so that students of "dominant" cultures do not develop a false sense of superiority.[323] Scholars have found that students from "dominant" cultures need multicultural education more than others, for they are often the most miseducated about diversity in our society.[324] White students often feel that their way of living, believing and acting are simply the only possibilities and anything else is "ethnic" and "exotic."[325] These children are prone to develop unrealistic views of the world and their place in it.[326] Thus, a classroom devoid of diversity may intentionally or unintentionally give white children a false sense of superiority which later may lead to prejudice or racism.[327]

As the Court in *Brown* found, segregation has a tendency to inhibit the educational and mental development of African-American children and to deprive them of some of the benefits they would receive in a racially integrated school; a classroom devoid of diversity may also retard the educational and mental development of white students.[328] Moreover, the U.S. Supreme Court in *Seattle School District* recognized that white as well as African-American children benefit from exposure to ethnic and racial diversity in the classroom.[329] The *Seattle School District* Court found that when an educational environment is largely shaped by members of different racial and ethnic groups, minority children can achieve their full measure of success only if they learn to function in—and are fully accepted by—the larger community.[330] The Court further recognized that attending an ethnically diverse school may help accomplish this goal by preparing minority children for citizenship in our pluralistic society.[331] Consistent with the reasoning employed in *Seattle School District*, educators have found that when

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[323] *See id.* at 494–95. "Dominant cultures" are those groups that historically have not been the subject of government discrimination. The *Brown* Court stated its findings regarding the psychological effects of segregation on school children were "amply supported by modern authority," including the work of Kenneth Clark and other notable social scientists. *See id.* at 494 & n.11.

[324] *See* GLORIA BOUTTE, MULTI-CULTURAL EDUCATION, 112–13 (1999). "Scholars have found students from 'dominant' cultures need multi-cultural education more than others." *See id.*

[325] *See id.*

[326] *See id.*

[327] *See id.*

[328] *See Brown*, 347 U.S. at 494.

[329] *See* 458 U.S. at 472 (initiative which banned mandatory use of busing for racial integration in Washington public schools struck down as violative of the Equal Protection Clause of the Constitution).

[330] *See id.* at 472–73.

[331] *See id.*

white children are denied the richness of music, literature, lifestyles, values and perspectives of other ethnic groups, their potential understanding is limited.[332] Thus, the achievement of a diverse classroom serves the compelling interest of ensuring that all students, including white mainstream students, develop skills for living in a pluralistic society.[333]

Recent research demonstrates the positive effects of school desegregation on inter-group relations, especially interracial attitudes, further supporting the reasoning in *Seattle School District*.[334] Research suggests that white students who have increased contact with African-American and Mexican-American peers in desegregated schools develop more positive attitudes toward members of these groups.[335] A National Opinion Research Center survey in 1979 found that desegregated white students were more likely to report having a close African-American friend and having had African-American friends visit their homes.[336]

Recognizing that education is "the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment," the Court in *Brown* reasoned that considerations found in *McLaurin*, including the ability to engage in discussions and exchange views with other students, applied with added force to children in grade and high schools.[337] Similarly, research indicates that desegregation which started at the beginning of elementary school and lasted throughout the school years had larger benefits.[338] Recent research also supports the view that earlier experiences of African Americans in desegregated settings, such as those in school, help to break down social barriers by creating more accurate and positive expectations of white reactions, by building confidence in one's ability to succeed in racially-mixed environments and by providing practice dealing with the strains of cross-racial contacts.[339]

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[332] *See* BOUTTE, *supra* note 324, at 112.

[333] *See id.* The issue of cultural diversity is a human problem, not an African American, Native American, or Latino/a problem; as demographics of society continue to change, all students will need to know how to effectively work with other ethnicities. *See id.* In 1990, the population was primarily (76%) Anglo-American, but statistics predict that by 2050 the Anglo-American population will decrease to 52%. *See id.* at 111.

[334] *See* Schofield, *supra* note 176, at 608–09.

[335] *See id.* at 610.

[336] *See id.*

[337] *Brown*, 347 U.S. at 493–94.

[338] *See* ORFIELD ET AL., *supra* note 205, at 105.

[339] *See* Braddock and McPartland, *supra* note 208, at 285.

Although the *Brown* Court was criticized in 1954 for its reliance on "the shifting sands of sociological knowledge rather than on constitutional principles," since *Brown*, the Court has continued to give deference to educational research findings.[340] More than four decades after *Brown*, federal courts have continued to hear testimony from educators and social scientists on issues related to remedying segregation.[341] Moreover, education experts hope to narrow the gap that exists between the world of academic research and the world of legal policy.[342]

CONCLUSION

The breadth of research explored in this Note provides concrete evidence supporting a correlation between school desegregation and breaking the cycle of racial segregation, promoting tolerance and increasing student achievement and opportunity over the long term.[343] The First Circuit in *Wessmann II* found that there may be circumstances under which a form of racial preferencing may be justified by concerns for attaining goals articulated by the policy.[344] Thus, if a public school admissions policy seeks to achieve student diversity in order to significantly affect students' capacity and willingness to learn, the findings explored in this Note support the potential attainment of that goal and the First Circuit's criteria laid out in *Wessmann II*.[345]

In order to successfully defend their racially-sensitive admissions policy before the U.S. Supreme Court, a school committee must create a powerful, compelling record to defend a racial-preferencing policy, relying not only on the testimony of administrators, but working in concert with researchers, educators and civil rights activists to compile and present the best possible evidence that affirmative action policies are essential remedies to the continuing impact of discrimination.[346] The courts have continued to reject arguments for affirmative action

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[340] *See Brown*, 347 U.S. at 493–94; Taylor, *supra* note 239, at 196.

[341] *See* Taylor, *supra* note 239, at 198. For example, in a 1996 hearing before Federal District Judge George Gunn in Missouri to determine the fate of a major school desegregation plan operating in St. Louis since 1984, the court heard from numerous education/desegregation experts including Gary Orfield and Dr. William Trent in order to determine the effects of school desegregration under a 1984 consent decree. *See id.*

[342] *See id.* at 201. Educators and researchers are often reluctant to enter a courtroom or other legal forum because of their fear that the legal process may not respect their need to be independent and maintain academic integrity. *See id.*

[343] *See id.*

[344] *See* 160 F.3d 790, 796–98 (1st Cir. 1998).

[345] *See id.* at 796–800.

[346] Gary Orfield, *Boston Needs to Strengthen Its Case for Diversity at Latin School*, BOSTON GLOBE, Jan. 11, 1999, at A15; Daley and Dabilis, *supra* note 144, at A1.

because of the conservative notion that problems of racial discrimination have been solved and race-conscious policies are no longer justifiable.[347] Yet the newest research, much of which is outlined in this Note, indicates that multiracial, academically demanding schools provide essential educational and social benefits for all students. Thus, the prevailing research stands in sharp contrast to the conclusions being made by the courts.[348]

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[347] *See* Orfield, *supra* note 346, at A15.

[348] Critics of the First Circuit's ruling in *Wessmann II* argue that the courts are breaking with precedent and moving into a domain in which educators were previously considered the experts. *See* Zernike, *supra* note 5, at B6.