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Kimberly J. Robinson

University of Richmond, krbins2@richmond.edu

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AN EVIDENTIARY FRAMEWORK FOR DIVERSITY AS A COMPELLING INTEREST IN HIGHER EDUCATION

I. INTRODUCTION

Affirmative action is on trial in America.¹ Across the nation, private citizens and government bodies are debating its effectiveness, benefits, and fairness, especially in the context of higher education.² Many colleges and universities have implemented affirmative action policies³ not only to remedy past discrimination, but also to achieve a racially and ethnically diverse student body.⁴ The pursuit of diversity⁵ in higher education has engendered considerable controversy.⁶ Proponents of affirmative action policies that pursue diversity argue that the educational, moral, and social benefits of diversity in the academic context are compelling and that narrowly tailored affirmative action

¹ See, e.g., Howard Fineman, *Affirmative Action, Race & Rage: When Preferences Work — And Don't*, NEWSWEEK, Apr. 3, 1995, at 22, 24 (discussing the affirmative action debate).

² For example, this spring Congress is scheduled to consider a bill that would forbid institutions receiving federal funding from implementing affirmative action programs based on race, color, national origin, or gender. See Kate Zernike, *Tuning in to Congress: High School Students Debate Affirmative Action Via Satellite*, BOSTON GLOBE, Mar. 1, 1996, at 17, 20.

³ Higher education has employed a variety of race-conscious programs and strategies to recruit minority students, including race-conscious financial aid and the recognition of racial background as a plus factor in admissions. See William T. Trent, *Student Affirmative Action in Higher Education: Addressing Underrepresentation*, in THE RACIAL CRISIS IN AMERICAN HIGHER EDUCATION 107, 108–09 (Philip G. Altbach & Kofi Lomotey eds., 1991). This Note focuses on the use of race-conscious decisionmaking in admissions decisions.

⁴ See, e.g., *Hopwood v. Texas*, 861 F. Supp. 551, 569–73 (W.D. Tex. 1994) (observing that the University of Texas School of Law's affirmative action policy was adopted, among other reasons, to remedy past discrimination and to achieve a diverse student body), *rev'd*, No. 94–50664, 1996 WL 120235 (5th Cir. Mar. 18, 1996). The Fifth Circuit handed down its decision in *Hopwood* as this issue was going to press. Therefore this Note does not specifically address the Fifth Circuit's opinion.

⁵ "Diversity" has encompassed a variety of meanings in a variety of contexts. In higher education, diversity has taken on four meanings: inclusion of underrepresented minorities; institutional climate and responses to intolerance, including student retention, isolation, and harassment; mission, i.e., educating students for participation in a diverse society and work environment; and transformation, a new understanding of education, teaching, learning, and scholarship informed by the inclusion of diverse populations. See Daryl G. Smith, *Organizational Implications of Diversity in Higher Education*, in DIVERSITY IN ORGANIZATIONS: NEW PERSPECTIVES FOR A CHANGING WORKPLACE 220, 222–28 (Martin M. Chemers, Stuart Oskamp & Mark A. Costanzo eds., 1995). The notion of diversity includes a variety of characteristics and traits, such as race, gender, class, culture, physical disability, and age. See JOAN P. SHAPIRO, TREVOR E. SEWELL & JOSEPH P. DUCETTE, *REFRAMING DIVERSITY IN EDUCATION* 1–3 (William J. Bailey ed., 1995). As the meaning of the term evolved, "affirmative action and a focus on representation and numbers became and have remained a fundamental core of the topic of diversity." Smith, *supra*, at 223. This Note concentrates on the representational aspect of racial diversity.

⁶ See, e.g., ALEXANDER W. ASTIN, *WHAT MATTERS IN COLLEGE?: FOUR CRITICAL YEARS REVISITED* 429 (1993).

policies seeking diversity are therefore constitutional.⁷ Opponents contend that, because the benefits of such policies are not compelling,⁸ the policies violate Title VI of the Civil Rights Act of 1964⁹ and the Fourteenth Amendment.¹⁰ Although Justice Powell's opinion in *Regents of the University of California v. Bakke*¹¹ declared "the attainment of a diverse student body" to be "clearly . . . a constitutionally permissible goal for an institution of higher education,"¹² a majority of the Court did not endorse this determination. A majority of the Justices did hold, however, that race may be used as a factor in a university's admissions program.¹³ Justice Powell's opinion in *Bakke* continues to be the guiding opinion for lower courts, and they have accordingly treated diversity in the academic context as compelling as a matter of law,¹⁴ but the approach of the Supreme Court to such nonremedial affirmative action and to Justice Powell's opinion in *Bakke* has been ambivalent.¹⁵

This Note argues that if courts choose to reexamine evidence on the value of diversity in higher education, they should not apply the evidentiary requirements that the Supreme Court has applied to cases involving questions of past discrimination. Rather, courts should consider the unique nature of diversity in higher education and the protection afforded the academic context in which the evidence is considered and modify their review of the evidence presented accordingly. Furthermore, this Note argues that the interest of an institution of higher education¹⁶ in diversity is "compelling" in light of the evi-

⁷ See, e.g., Martin Michaelson, *Building a Comprehensive Defense of Affirmative-Action Programs*, CHRON. OF HIGHER EDUC., July 28, 1995, at A56.

⁸ See, e.g., Kirk A. Kennedy, *Race-Exclusive Scholarships: Constitutional Vel Non*, 30 WAKE FOREST L. REV. 759, 773 (1995).

⁹ 42 U.S.C. § 2000(d) (1988).

¹⁰ U.S. CONST. amend. XIV, § 1; see, e.g., *Davis v. Halpern*, 768 F. Supp. 968, 970 (E.D.N.Y. 1991).

¹¹ 438 U.S. 265 (1978).

¹² *Id.* at 311-12 (opinion of Powell, J.).

¹³ See *id.* at 320; *id.* at 326 (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part).

¹⁴ See *Davis*, 768 F. Supp. at 975 (holding that a racial classification adopted for the purpose of achieving diversity is constitutional). But see *Hopwood v. Texas*, No. 94-50664, 1996 WL 120235, at *10 (5th Cir. Mar. 18, 1996).

¹⁵ Compare *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring in part and concurring in the judgment) ("[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.") with *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 497 U.S. 547, 612 (1990) (O'Connor, J., dissenting) ("Modern equal protection doctrine has recognized only one [compelling] interest: remedying the effects of racial discrimination."), *overruled by Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995).

¹⁶ This Note focuses on the policies of colleges and universities. However, it relies upon cases involving challenges to affirmative action policies at the graduate level because these cases are the

dence that a racially diverse student body furthers learning.¹⁷ Courts should therefore continue to treat diversity as compelling as a matter of law.

Part II reviews the Supreme Court's constitutional framework for analyzing affirmative action programs. Part III argues that the evidentiary requirements the Court has developed in determining whether an entity has presented sufficient evidence of past discrimination to warrant a race-conscious remedy should not be applied to universities that adopt affirmative action to achieve diversity. Part IV examines the influence of race on experience and discusses some of the recent evidence of the benefits of diversity in higher education.

II. THE CURRENT CONSTITUTIONAL FRAMEWORK FOR AFFIRMATIVE ACTION POLICIES

The Supreme Court's recent decision in *Adarand Constructors, Inc. v. Peña*¹⁸ unequivocally stated that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."¹⁹ Because the many private colleges and universities that receive federal funding are regulated by Title VI,²⁰ and state colleges and universities are regulated as state actors by the Fourteenth Amendment, these institutions are subject to constitutional limitations in enacting race-conscious classifications.²¹

In examining the purpose of a racial classification, the Court has scrutinized the evidence in support of the classification under a heightened evidentiary standard. In *Wygant v. Jackson Board of Education*,²² the plurality applied strict scrutiny to a preferential layoff provision in a collective bargaining agreement under which the school

only ones to date in which educational institutions have defended their affirmative action policies by noting their compelling interest in diversity.

¹⁷ Racial diversity in higher education also serves numerous additional interests, including the national interest in reducing the disparities in educational attainment between whites and America's rapidly growing minority population. See THE COMM'N ON MINORITY PARTICIPATION IN EDUC. AND AM. LIFE, AMERICAN COUNCIL ON EDUC., ONE-THIRD OF A NATION 1-6 (1988).

¹⁸ 115 S. Ct. 2097 (1995).

¹⁹ *Id.* at 2113.

²⁰ Title VI forbids recipients of federal funding from discriminating on the basis of race, color, or national origin. See 42 U.S.C. § 2000(d) (1988).

²¹ The Court has interpreted Title VI to allow affirmative action policies that use racial and ethnic classifications if those classifications are permissible under the Equal Protection Clause. See *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 610-11 (1983) (Powell, J., concurring in the judgment); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978) (opinion of Powell, J.); *id.* at 352 (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part).

²² 476 U.S. 267 (1986).

board laid off nonminority teachers before minority teachers with less seniority.²³ The Court did not consider the school district's goal of reducing the effects of societal discrimination by providing role models for minority students to be a compelling interest.²⁴ Furthermore, the Court concluded that the school board's preferential layoff policy could not survive equal protection analysis unless the lower court found that the school district "had a *strong basis in evidence* for its conclusion that remedial action was necessary."²⁵

The Court applied this "strong basis in evidence" standard in *City of Richmond v. J.A. Croson Co.*,²⁶ in which Richmond argued that it had adopted its race-based set-aside in order to remedy past discrimination against minority subcontractors.²⁷ In holding the program unconstitutional, the Court rejected the city's evidentiary showing of past discrimination on the grounds that the evidence failed to show particularized past discrimination by the city itself and thus left uncertain the scope of the proper local remedy.²⁸ The Court noted that the testimony of the plan's proponents about racial discrimination inflicted in the "area, and the State, and around the nation" and congressional findings of "nationwide discrimination in the construction industry" were insufficiently probative of discrimination in Richmond.²⁹ Finally, the Court strongly eschewed as "unprecedented" Justice Marshall's suggestion that findings of discrimination could be adopted from other jurisdictions.³⁰

The Court thus appears committed to scrutinizing the evidence presented in support of racial classifications closely and requiring, at least when the goal of the affirmative action scheme is remedial, a "strong basis in evidence." In light of these evidentiary requirements, how should courts review evidence of a university's interest in diversity?

III. THE PROPER EVIDENTIARY FRAMEWORK FOR REVIEWING THE COMPELLING NATURE OF DIVERSITY IN HIGHER EDUCATION

In applying the "strong basis in evidence" standard for establishing past discrimination, the Court has adopted two requirements: the institution must make a particularized showing of past discrimination (which demonstrates the necessity for remedial action), and this show-

²³ See *id.* at 270-73 (plurality opinion).

²⁴ See *id.* at 274-76.

²⁵ *Id.* at 277 (emphasis added). The Court did not reach the question whether the school district had a strong basis in evidence for its past discrimination. See *id.* at 278-84.

²⁶ 488 U.S. 469 (1989).

²⁷ See *id.* at 498-500.

²⁸ See *id.* at 498, 505.

²⁹ *Id.* at 500, 504.

³⁰ See *id.* at 505.

ing must establish a limit to the scope and duration of race-conscious decisionmaking.³¹

These evidentiary requirements should not be applied to universities that seek to achieve the future benefits of a diverse student body. Certainly, "[t]he point of carefully examining the interest asserted by the government in support of a racial classification, and the evidence offered to show that the classification is needed, is precisely to distinguish legitimate from illegitimate uses of race in governmental decisionmaking."³² Nevertheless, the application of the Court's evidentiary requirements for present effects of past discrimination is not necessary to guarantee careful examination of the proffered interest.

If the Court's adoption of strict scrutiny is not to be "strict in theory but fatal in fact,"³³ the Court's evidentiary requirements must be sensitive to the nature of the interest considered. The benefits of diversity are the result of interactions between individuals. Although the educational community has heralded diversity's benefits, current social science methods do not provide definitive measurements. Therefore, if courts did require universities to prove that diversity furthers learning, courts would be making a substantive choice that higher educational institutions cannot pursue diversity.

Rather than preventing universities from seeking the educational benefits of diversity, courts should find the testimony of educators sufficient to establish these benefits. Educators have sufficient day-to-day interaction with the educational process to provide the careful examination the Court seeks. Their testimony is particularly vital and persuasive in light of the Court's protection of academic freedom. "The courts should intrude no further into the educational process, of which admissions is an integral part, than is absolutely necessary in order to assure that constitutional principles are guaranteed."³⁴ Therefore, in the context of diversity in higher education, a court's interpretive framework for the application of the "strong basis in evidence" standard³⁵ should be informed by the nature of diversity and the First Amendment interest in academic freedom.

³¹ See *id.* at 497-505.

³² *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2113 (1995).

³³ *Id.* at 2117 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring)).

³⁴ Winton W. Manning, *The Pursuit of Fairness in Admissions to Higher Education*, in *THE CARNEGIE COUNCIL ON POLICY STUDIES IN HIGHER EDUCATION: A SUMMARY OF REPORTS AND RECOMMENDATIONS* 381, 384 (1980) [hereinafter *THE CARNEGIE COUNCIL ON POLICY STUDIES IN HIGHER EDUCATION*].

³⁵ In light of the Court's application of strict scrutiny to all racial classifications and its indication that a careful examination of the interest asserted is necessary to distinguish legitimate and illegitimate uses of race-conscious decisionmaking, the Court is likely to apply this evidentiary standard to all race-conscious measures.

A. *The Nature of Diversity*

The nature of a university's interest in a diverse student body renders the Court's evidentiary requirements for demonstrating past discrimination inapposite to affirmative action admissions policies instituted in pursuit of diversity. The benefits of diversity are the result of interpersonal interactions that cannot be quantified or verified by scientific proof. Such benefits do not accrue every day to every student and may even go undetected by the students and participants involved. Therefore, a university would face insurmountable obstacles if it had to "prove" the benefits of diversity using current methodologies. For example, sociologists confront tremendous difficulties in evaluating the impact of any factor, including diversity, on students in higher education.³⁶ These difficulties include the problem of separating the influence of students' backgrounds from the impact of college experiences on college outcomes.³⁷ Although researchers can draw "causal inferences" from correlational data, studies cannot *prove* that any one college experience or environmental factor causes a particular result.³⁸ Therefore, although research demonstrates a positive correlation between diversity and learning,³⁹ research cannot prove that diversity furthers learning.

B. *A Particularized Showing*

Unlike the defenders of affirmative action policies that attempt to remedy past discrimination, a university should not be required to make a particularized showing that diversity furthers learning⁴⁰ at its institution.⁴¹ First, whereas the necessity for a remedy addressing the present effects of past discrimination by an institution may depend on the extent of that discrimination, the value of diversity is not dependent upon the unique behavior of particular individuals at an institution. Rather, the increased learning that occurs through diversity is

³⁶ See, e.g., ALEXANDER W. ASTIN, *ASSESSMENT FOR EXCELLENCE: THE PHILOSOPHY AND PRACTICE OF ASSESSMENT AND EVALUATION IN HIGHER EDUCATION* 81 (1993); HOWARD R. BOWEN, *INVESTMENT IN LEARNING: THE INDIVIDUAL AND SOCIAL VALUE OF AMERICAN HIGHER EDUCATION* 22-29 (1977); ERNEST T. PASCARELLA & PATRICK T. TEREZINI, *HOW COLLEGE AFFECTS STUDENTS: FINDINGS AND INSIGHTS FROM TWENTY YEARS OF RESEARCH* 565-66, 657-91 (1991).

³⁷ See PASCARELLA & TEREZINI, *supra* note 36, at 658-59.

³⁸ ASTIN, *supra* note 6, at xv-xvi; see also KENNETH A. FELDMAN & THEODORE M. NEWCOMB, *THE IMPACT OF COLLEGE ON STUDENTS* 48-49 (1994) ("College impacts have not been documented directly but only inferred from observed freshman-senior differences.").

³⁹ See *infra* p. 1373.

⁴⁰ However, a court will inquire whether the university in fact seeks to attain the benefits of a diverse student body. See, e.g., *McDonald v. Hogness*, 598 P.2d 707, 713 n.8 (Wash. 1979).

⁴¹ In a nonuniversity context, the Fourth Circuit required Charlotte, North Carolina, to demonstrate that it had a particularized need for diversity. See *Hayes v. North State Law Enforcement Officers Ass'n*, 10 F.3d 207, 214-15 (4th Cir. 1993).

rooted in the overall interaction of individuals across differences.⁴² Second, a particularized showing requirement could produce anomalous results. Some universities might be unable to pursue diversity simply because they lack sufficient resources to prove that diversity furthers learning.⁴³ Also, the requirement of a particularized showing would inappropriately divert the scarce resources of our nation's educational institutions⁴⁴ to proving the benefits of diversity. Finally, if a court required an institution to produce particularized evidence of the benefits of diversity, the very empirical studies produced as a result might be unreliable. The commencement of such studies in connection with affirmative action litigation is likely to distort the results. Educational specialists have noted that "[r]esearch on diversity is by its nature sensitive, prone to undetected bias, and open to multiple interpretations."⁴⁵ Therefore, the Court's present refusal to rely on evidentiary findings drawn from other jurisdictions⁴⁶ is inappropriate in a case concerning diversity in higher education.

C. *Limited in Scope and Duration*

The Court has also required that institutions use particularized findings of past discrimination to limit the scope and duration of race-conscious decisionmaking.⁴⁷ This requirement ensures that the relief adopted seeks to redress the precise injury complained of rather than to justify race-conscious decisionmaking "limitless in scope and duration."⁴⁸ Although the Court has sought to limit the scope of remedial affirmative action programs, a university's interest in racial diversity should embrace the interaction of all races. Therefore, a university should exclude from its affirmative action program only those applicants whose race is adequately represented without affirmative action.

⁴² Justice Powell implicitly recognized this fact in *Bakke*, in which he drew upon statements from educators at different institutions. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 316-18 (1978) (opinion of Powell, J.). Similarly, in *Hopwood* the district court accepted testimony from deans of various law schools on the institutional value of a diverse student body. See *Hopwood v. Texas*, 861 F. Supp. 551, 571 (W.D. Tex. 1994), *rev'd*, No. 94-50664, 1996 WL 120235 (5th Cir. Mar. 18, 1996).

⁴³ Furthermore, "[i]nstitutions find it difficult to invest scarce time and resources on such volatile and agonizing issues at any time and especially now when the fundamental instruction, research, and public services of colleges and universities are being challenged." Marsha J. Hirano-Nakanishi, *Methodological Issues in the Study of Diversity in Higher Education*, in *STUDYING DIVERSITY IN HIGHER EDUCATION* 63, 65 (Daryl G. Smith, Lisa E. Wolf & Thomas Levitan eds., 1994) [hereinafter *STUDYING DIVERSITY*].

⁴⁴ See Patrick M. Callan, *Government and Higher Education*, in *HIGHER LEARNING IN AMERICA: 1980-2000*, at 3, 11-13 (Arthur Levine ed., 1993) [hereinafter *HIGHER LEARNING IN AMERICA*].

⁴⁵ Daryl G. Smith, Lisa E. Wolf & Thomas Levitan, *Introduction to Studying Diversity: Lessons From the Field*, in *STUDYING DIVERSITY*, *supra* note 43, at 1, 5.

⁴⁶ See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989).

⁴⁷ See *id.* at 497-98.

⁴⁸ *Id.* at 498.

In addition, a university's pursuit of learning is everlasting; therefore, if the Court accepts the opinion of educators that diversity furthers learning, race-conscious decisionmaking should be permitted as long as race-blind decisionmaking is not achieving diversity. The pursuit of diversity would remain a compelling interest until race is no longer a powerful influence on individual experiences (or is no longer sufficiently salient that its inclusion in education furthers learning). Clearly this day has not arrived.⁴⁹

D. *The Testimony of Educators*

Because diversity in higher education is not susceptible to direct proof, courts must rely on the testimony of educators regarding the benefits of diversity. Educators have witnessed firsthand the benefits that diverse student bodies bring to their educational institutions over time. Such individuals are extremely knowledgeable about the learning process and the complexity of its functioning inside and outside of the classroom.

The Court's protection of academic freedom recognizes the experience and expertise of educators on academic matters and the corresponding deference due their opinions. Academic freedom in higher education protects two distinct, and sometimes conflicting, interests. First, academic freedom encompasses the First Amendment rights of "teachers and students [who] must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding."⁵⁰ Second, academic freedom protects "autonomous decisionmaking by the academy itself."⁵¹ Although these two theories of academic freedom are often in conflict, the intimate connection between them is evident in Justice Powell's oft-quoted discussion in *Bakke* of the "four essential freedoms' of a university — to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."⁵² In recognizing both forms of academic freedom, the Court has attempted to protect "the atmosphere of 'speculation, experiment and creation' . . . so essential to the quality of higher education."⁵³ Individual and institutional academic freedom are closely related because interference in institutional

⁴⁹ Although many would argue that this day will never arrive, *see, e.g.*, MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S*, at 5 (2d. ed. 1994) ("Race will *always* be at the center of the American experience."), or should never arrive, *see, e.g.*, T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1062 (1991), a judicial declaration of its arrival is not inconceivable.

⁵⁰ *Keyishian v. Board of Regents of the Univ. of N.Y.*, 385 U.S. 589, 603 (1967) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)).

⁵¹ *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985).

⁵² *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.) (quoting *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring in the result)).

⁵³ *Id.* at 312 (quoting *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring in the result)).

academic freedom could impair individuals' ability to engage in protected intellectual pursuits.

However, this "principle of respect for legitimate academic decisionmaking"⁵⁴ is not absolute. As Justice Powell admonished in *Bakke*, "[a]lthough a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded."⁵⁵ For example, in *University of Pennsylvania v. Equal Employment Opportunity Commission*,⁵⁶ the Court rejected the University of Pennsylvania's assertion in a Title VII case that academic freedom necessitated the continued confidentiality of peer review materials.⁵⁷

Nevertheless, the Court has repeatedly stated that it will not interfere in those decisions it considers "academic." For instance, even as it rejected the University of Pennsylvania's academic freedom claim, the Court took pains to underscore the "principle of respect for legitimate academic decisionmaking."⁵⁸ The Court noted that, unlike the University of California in *Bakke*, the University of Pennsylvania did not claim that considerations of race, sex, and national origin constituted "academic grounds" for choosing professors.⁵⁹

Since *Bakke*, the Supreme Court has emphasized that academic decisions are subject only to a "narrow avenue of judicial review."⁶⁰ Although academic institutions' disciplinary decisions are properly subject to judicial review,⁶¹ the Court has noted that judges must remain cognizant of the "importance of avoiding second-guessing of legitimate academic judgments."⁶² Judges are not equipped to second-guess the substance of academic decisions because such decisions "require 'an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking.'"⁶³

A university's admissions decision is an example of such an academic decision. Students are admitted on the basis of the university's assessment of their ability to contribute to the fulfillment of the institution's mission.⁶⁴ Such decisions consider a variety of objective and nonobjective factors, including test scores, intellectual pursuits, and

⁵⁴ *University of Pa. v. EEOC*, 493 U.S. 182, 199 (1990) (emphasis omitted).

⁵⁵ *Bakke*, 438 U.S. at 314 (opinion of Powell, J.).

⁵⁶ 493 U.S. 182 (1990).

⁵⁷ *See id.* at 199-201.

⁵⁸ *Id.* at 199.

⁵⁹ *Id.* at 198 n.7.

⁶⁰ *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 227 (1985).

⁶¹ *See Board of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 85-91 (1978).

⁶² *University of Pa.*, 493 U.S. at 199.

⁶³ *Ewing*, 474 U.S. at 226 (quoting *Horowitz*, 435 U.S. at 90).

⁶⁴ *See* BOWEN, *supra* note 36, at 15; Richard H. Fallon, Jr., *To Each According to His Ability, From None According to His Race: The Concept of Merit in the Law of Antidiscrimination*, 60 B.U. L. REV. 815, 872 (1980).

potential contributions to society. The complexity and subjectivity of the admissions process thus require academic judgments to which courts should defer.⁶⁵

IV. THE CONTRIBUTION OF RACIAL DIVERSITY TO HIGHER EDUCATION

In light of the evidentiary framework that courts should use when considering whether diversity is a compelling interest in higher education, what contribution does racial diversity make to higher education? To answer this question, this Part examines the influence of race on experience and perspective to demonstrate how racial diversity contributes to the mission of higher education.

A. *The Impact of Race on Experience and Perspective*

In American society, race⁶⁶ powerfully influences an individual's life experiences.⁶⁷ Career attainment,⁶⁸ neighborhood composition,⁶⁹ family structure,⁷⁰ and personal associations⁷¹ vary across different

⁶⁵ One repeated objection to this academic freedom argument is that, taken to its extreme, it could be employed by an institution arguing for homogeneity. See Kent Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 CAL. L. REV. 87, 124-25 (1979). If certain institutions with nondiverse student bodies, such as all women's colleges, further "the robust exchange of ideas," whether these institutions could successfully invoke academic freedom to protect the pursuit of such student body compositions remains an open question. See, e.g., Julius Stone, *Equal Protection in Special Admissions Programs: Forward from Bakke*, 6 HASTINGS CONST. L.Q. 719, 747-48 (1979) (arguing that only admissions policies that seek diversity as a means to promote the "robust exchange" of ideas are protected by the First Amendment).

⁶⁶ An exploration of the meaning of race is beyond the scope of this Note; however, numerous sources have addressed this issue. See, e.g., *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (holding that 42 U.S.C. § 1981 prohibits discrimination against a person "because he or she is genetically part of an ethnically and physiognomically distinctive sub-grouping of *homo sapiens*"); *United States v. Bhagat Singh Thind*, 261 U.S. 204, 215 (1923) (asserting that the physical characteristics of Hindus readily distinguish them from whites and that "the great body of our people instinctively . . . reject the thought of their assimilation"); Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. L. REV. 1231, 1239-40 (1994) (explaining the indeterminacy of racial classifications).

⁶⁷ See, e.g., Aleinikoff, *supra* note 49, at 1066-72; Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 862 (1995).

⁶⁸ See, e.g., THE ASIAN AMERICAN ALMANAC: A REFERENCE WORK ON ASIANS IN THE UNITED STATES 507 (Susan Gall ed., 1995); FEDERAL GLASS CEILING COMM'N, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL 19 (1995) (reporting that executives, managers, and administrators in business services are disproportionately white).

⁶⁹ See Robert D. Bullard & Charles Lee, *Racism and American Apartheid*, in RESIDENTIAL APARTHEID: THE AMERICAN LEGACY 1, 1 (Robert D. Bullard, J. Eugene Grigsby, III & Charles Lee eds., 1994).

⁷⁰ See FRANK D. BEAN & MARTA TIENDA, THE HISPANIC POPULATION OF THE UNITED STATES 203 (1987); ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 241 (Ballantine Books 1995) (1992); Cardell K. Jacobson, *Introduction and Overview*, in AMERICAN FAMILIES: ISSUES IN RACE AND ETHNICITY 1, 3 (Cardell K. Jacobson ed., 1995).

⁷¹ See Glenn Loury, *The Saliency of Race*, in SECOND THOUGHTS ABOUT RACE IN AMERICA 75, 75 (Peter Collier & David Horowitz eds., 1991) ("And, in our own lives, in the sphere of

racess. "[A]t the level of experience, of everyday life, race is an almost indissoluble part of our identities."⁷² The abundant testimony of individuals⁷³ and numerous studies have documented this reality. For example, a 1991 study of the purchase prices obtained at retail car dealerships revealed that, even after controlling for bargaining patterns, black females paid three times the markup charged to white males and black men paid more than twice the markup charged to white males.⁷⁴ The results of this experiment and others "illuminate the minute, day-to-day interactions within which racial dynamics are played out in individual lives."⁷⁵

The influence of race on experience is not confined to racial minorities — it extends to whites as well.⁷⁶ Whites often underestimate the impact of their race and the race of others.⁷⁷ "To be born white is to be free from confronting race on a daily, personal, interaction-by-interaction basis."⁷⁸ The experiences of whites in America are qualitatively different from those of nonwhites.⁷⁹ For example, whites and blacks generally view race relations in America in very different terms: whites point to the continuing decline of racial discrimination, whereas blacks continue to be dismayed by racial barriers.⁸⁰ The positive value of

associations that define our personal identities, in our own social behavior, we make racial distinctions readily, daily, in terms of whom we befriend and whom we embrace."

⁷² Michael Omi & Howard Winant, *On the Theoretical Concept of Race*, in RACE, IDENTITY AND REPRESENTATION IN EDUCATION 3, 5 (Cameron McCarthy & Warren Crichlow eds., 1993); see also HACKER, *supra* note 70, at 53 (noting that for blacks in America "[t]he day-to-day aggravations and humiliations add up bit by bitter bit"); PASCARELLA & TEREZINI, *supra* note 36, at 166-68 (discussing recent research on black identity development).

⁷³ See, e.g., PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* 56-57 (1991).

⁷⁴ See Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 823-24, 828 (1991).

⁷⁵ JENNIFER L. HOCHSCHILD, *RACE, CLASS, AND THE SOUL OF THE NATION: FACING UP TO THE AMERICAN DREAM* 116-17 (1995) (summarizing experiments demonstrating that race often determines how individuals interact).

⁷⁶ Because most white ethnics do not have readily distinguishable traits, they have been able to assimilate into the mainstream population. See, e.g., *United States v. Bhagat Singh Thind*, 261 U.S. 204, 215 (1923) ("The children of English, French, German, Italian, Scandinavian, and other European parentage, quickly merge into the mass of our population and lose the distinctive hallmarks of their European origin.").

⁷⁷ See HACKER, *supra* note 70, at 10.

⁷⁸ Aleinikoff, *supra* note 49, at 1066.

⁷⁹ See AMERICAN COMMITMENTS INITIATIVE, ASSOCIATION OF AM. COLLEGES AND UNIVS., *AMERICAN PLURALISM AND THE COLLEGE CURRICULUM: HIGHER EDUCATION IN A DIVERSE DEMOCRACY* 4 (1995) [hereinafter AMERICAN PLURALISM] ("Those marked out by racial, ethnic, economic, or other forms of marginalized diversity have not had the same kinds of experience with United States society as those who identify with and are readily accepted by the dominant European-American cultural and socioeconomic communities."); see also Roger Wilkins, *Racism Has Its Privileges*, THE NATION, Mar. 27, 1995, at 409, 410 ("Blacks and whites experience America very differently. Though we often inhabit the same space, we operate in very different psychic spheres.").

⁸⁰ See HOCHSCHILD, *supra* note 75, at 60, 68.

whiteness to whites is demonstrated by the statements of white students who maintained that they would have to be compensated \$1 million dollars a year to give up their racial identities and become African-Americans for fifty years.⁸¹

Some argue that the influence of race on experience is predominantly a phenomenon of the past. When individual experiences and interests do diverge, the argument goes, they tend to differ more along class lines than racial lines.⁸² Although powerful differences exist within races along class lines,⁸³ prosperity does not erase the impact of race in individuals' lives.⁸⁴ Members of the black middle and upper class repeatedly testify to the continuing impact of race.⁸⁵ "The Black elite experience race on an individual level . . . Despite their statuses, privileges, and successes, they [are] still Black in a racist society,"⁸⁶ and must confront the daily realities of glass ceilings, alienation and isolation, and negative perceptions about blacks that delay or prevent professional progress.⁸⁷ Consequently, the black professional class exists "as a group that has no real home — abandoned or ostracized by other blacks and resented or rejected by whites."⁸⁸ Therefore, although individuals of any race may achieve economic success, "legal reforms brought about by the civil rights movement have not solved the problem of the color line."⁸⁹

⁸¹ See HACKER, *supra* note 70, at 35–36.

⁸² See, e.g., DINESH D'SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* 231 (First Vintage Books 1992) (1991) ("[M]ost American students seem to display striking agreement on all the basic questions of life."); Richard A. Posner, *The Bakke Case and the Future of "Affirmative Action"*, 67 CAL. L. REV. 171, 181 (1979) ("A light-skinned black of upper middle-class background may resemble a Southern European more than the latter resembles a Swede; more important, he may have experiences, values, aspirations, tastes, speech, and manners that are substantially the same as those of his white peers.")

⁸³ See HOCHSCHILD, *supra* note 75, at 60.

⁸⁴ See DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 6–7 (1992) ("[N]either professional status nor relatively high income protects even accomplished blacks from capricious acts of discrimination that may reflect either individual 'preference' or an institution's bias.")

⁸⁵ See, e.g., HOCHSCHILD, *supra* note 75, at 93 ("Unlike whites, for whom socioeconomic status is closely associated with subjective quality of life, blacks do not express greater happiness or more satisfaction with their life as their economic position improves."); WILLIAMS, *supra* note 73, at 44–51 (1991) (describing how the author was barred from entering a clothing store in New York because she was black).

⁸⁶ LOIS BENJAMIN, *THE BLACK ELITE: FACING THE COLOR LINE IN THE TWILIGHT OF THE TWENTIETH CENTURY* at xxiv (1991).

⁸⁷ See *id.* at 13–14, 96–111.

⁸⁸ LAWRENCE O. GRAHAM, *MEMBER OF THE CLUB: REFLECTIONS ON LIFE IN A RACIALLY POLARIZED WORLD* at xiv (1995).

⁸⁹ Evelyn Hu-DeHart, *Rethinking America: The Practice and Politics of Multiculturalism in Higher Education*, in *BEYOND A DREAM DEFERRED: MULTICULTURAL EDUCATION AND THE POLITICS OF EXCELLENCE* 3, 6 (Becky W. Thompson & Sangeeta Tyagi eds., 1993) [hereinafter *BEYOND A DREAM DEFERRED*].

Race also affects perspective. "[O]ne's own particular inheritances and experiences form an interpretive framework both for the construction of identity and for all further learning."⁹⁰ Numerous studies of jury behavior have illustrated that race influences jurors' viewpoints: "their life experiences condition their view of the evidence, and that view in turn influences their verdict."⁹¹ The O.J. Simpson trial is a recent example of the influence of race on interpretive framework. Blacks were more likely to believe the evidence of police misconduct, tampering, and racism presented in the O.J. Simpson trial.⁹² This trial is only one of many examples of the influence of race on individual perceptions.⁹³

B. *The Contribution of Racial Diversity to Higher Education*

In their selection processes, most universities seek to identify and enroll students "whose traits will be compatible with the programs and purposes of the institution."⁹⁴ American colleges and universities serve a variety of functions, including teaching, research, and public service,⁹⁵ but the pursuit of these goals is united by a common process — learning.⁹⁶ To determine who will best contribute to this common process, institutions dealing with a large volume of applications often use proxies. "Inevitably, applicants for admission must be treated as partial persons, as repositories of formal credentials."⁹⁷ Most colleges seek to evaluate applicants on the basis of numerous factors, such as standardized test scores, character, and social responsibility.⁹⁸ After an admissions committee identifies candidates who meet the minimal

⁹⁰ AMERICAN PLURALISM, *supra* note 79, at 21; see also ALAN M. DERSHOWITZ, REASONABLE DOUBTS 111 (1996) ("All people — white, black, Hispanic, Asian, Jewish, male, female, gay, heterosexual — view the world through the prism of their experiences.")

⁹¹ DERSHOWITZ, *supra* note 90, at 113.

⁹² See *id.* at 113-14.

⁹³ Some commentators argue that race does not further diversity because race is not a good proxy for different viewpoints. See Kennedy, *supra* note 8, at 775. However, proponents of diversity do not argue that racial minorities contribute a particular position on a particular issue; rather, they claim that individuals from different races contribute a viewpoint informed by a variety of racial experiences.

⁹⁴ BOWEN, *supra* note 36, at 15.

⁹⁵ See ASSOCIATION OF AM. COLLEGES, INTEGRITY IN THE COLLEGE CURRICULUM 4 (1985); BOWEN, *supra* note 36, at 7-8; ERNEST L. BOYER & FRED M. HECHINGER, HIGHER LEARNING IN THE NATION'S SERVICE 13 (1981); Kenneth D. Benne, *The Idea of a University in 1965*, in THE UNIVERSITY IN THE AMERICAN FUTURE 1, 8 (Thomas B. Stroup ed., 1966); Calvin B.T. Lee, *Whose Goals for American Higher Education?*, in WHOSE GOALS FOR AMERICAN HIGHER EDUCATION? 1, 4 (Charles G. Dobbins & Calvin B.T. Lee eds., 1968).

⁹⁶ See BOWEN, *supra* note 36, at 8; NATHAN M. PUSEY, THE AGE OF THE SCHOLAR: OBSERVATIONS ON EDUCATION IN A TROUBLED DECADE 165 (1963); RUDOLPH H. WEINGARTNER, UNDERGRADUATE EDUCATION: GOALS AND MEANS 101 (1993).

⁹⁷ Vincent Blasi, *Bakke as Precedent: Does Mr. Justice Powell Have a Theory?*, 67 CAL. L. REV. 21, 55 (1979).

⁹⁸ See JOHN A. BLACKBURN, ASSESSMENT AND EVALUATION IN ADMISSION 13-14, 17-18 (1990).

standards for admission, information on the race of an applicant can assist an admissions committee in creating a student body that will best serve the goals of the institution.⁹⁹ A report published by the Carnegie Council on Policy Studies in Higher Education explains that "[r]ace is relevant [in admissions] because it represents not mere skin color, but the consequences of the minority racial experience in America."¹⁰⁰

In the classroom, professors can use the backgrounds and experiences of other students as a learning tool.¹⁰¹ Students "come to 'understand' primarily on the basis of their own reflecting experience, into which they seek to incorporate the new ideas they encounter in their courses."¹⁰² Because their experiences determine their frame of reference, minority students bring the influence of these experiences to

⁹⁹ See *Selective Admissions in Higher Education: Public Policy and Academic Policy*, in THE CARNEGIE COUNCIL ON POLICY STUDIES IN HIGHER EDUCATION, *supra* note 34, at 114, 116-17.

Although some may argue that institutional efforts to increase diversity subvert meritocratic principles, this argument incorrectly assumes that, apart from race, university admissions focus solely on academic achievement. However, "[a]dmissions policies of institutions of higher education have always reflected different levels of preparation between students." Daryl G. Smith, *The Challenge of Diversity: Implications for Institutional Research*, in THE EFFECT OF ASSESSMENT ON MINORITY STUDENT PARTICIPATION 53, 63 (Michael T. Nettles ed., 1990). For example, athletes and the children of alumni are often given preferential treatment. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 404 (1978) (opinion of Blackmun, J.) (noting that higher educational institutions have given preferences to athletes, the children of alumni, the affluent, and those connected with celebrities and the powerful); Fallon, *supra* note 64, at 870. In fact, "far more" white students have entered the top ten elite colleges and universities through alumni preferences than the total of all African-Americans and Chicanos who have gained admission through affirmative action. See Troy Duster, *The Diversity of California at Berkeley: An Emerging Reformulation of "Competence" in an Increasingly Multicultural World*, in BEYOND A DREAM DEFERRED, *supra* note 89, at 231, 245. In addition, although universities undoubtedly consider prior academic performance and test scores, the concept of merit in higher education has most often focused on the ability of a student to contribute to the fulfillment of the institution's mission rather than simply on "objective" factors. See Fallon, *supra* note 64, at 872. Therefore, if an institution seeks to attain the benefits of a diverse student body, consideration of an applicant's race, along with other factors, is in fact a consideration of merit.

¹⁰⁰ Manning, *supra* note 34, at 383; see also Blasi, *supra* note 97, at 43-46 ("[R]ace is distinctive in one respect: members of minority races add an important element that would otherwise be almost totally missing, and that is not the case for applicants who are . . . Southerners, in their thirties, or poor."). Justice Powell referred to the Winton Manning essay in *Bakke*. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 n.50 (1978) (opinion of Powell, J.).

For a discussion of which differences should matter and why, see Brest & Oshige, *supra* note 67, at 877-98, and Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of "Diversity"*, 1996 Wis. L. REV. 105, 138-142, 153-61.

¹⁰¹ See Pat Hutchings & Allen Wutzdorff, *Experiential Learning Across the Curriculum: Assumptions and Principles*, in KNOWING AND DOING: LEARNING THROUGH EXPERIENCE 5, 10 (Pat Hutchings & Allen Wutzdorff eds., 1988); Kenneth Keniston & Mark Gerzon, *Human and Social Benefits*, in UNIVERSAL HIGHER EDUCATION: COSTS AND BENEFITS 37, 41 (American Council on Educ. ed., 1971) (noting that professors can teach students by "expos[ing] students to multiple and conflicting perspectives on themselves and their society").

¹⁰² JOHN D. WILSON, *STUDENT LEARNING IN HIGHER EDUCATION* 29 (1981); see also CHARLES W. ANDERSON, *PRESCRIBING THE LIFE OF THE MIND* 80 (1993) ("[W]e all see things from a particular point of view and for a particular purpose.").

assignments and discussions. Student "encounter[s] with contemporaries [who have] different backgrounds . . . and values can . . . lead to challenge, self-questioning and informal learning which promotes moral and intellectual development."¹⁰³ Although professors may not expect all students to reach the same conclusions, "[i]n any field, there is no other way to teach adjudicational reasoning than to confront students with dilemmas and predicaments, with diverse theories and perspectives, and ask them which should prevail, and why."¹⁰⁴ Consequently, students become both recipients of an education and contributors to the education of their fellow students.¹⁰⁵

The learning process also extends beyond the confines of the classroom.¹⁰⁶ When a student arrives on campus, he "interacts with his fellow students, exerting influence upon them and they upon him. Through such interplay, a student subculture evolves that becomes an influential source of change for all the individuals who are inducted into it."¹⁰⁷ The diverse experiences of minority students contribute to the learning process because "all students stand to benefit from the chance to live and work with classmates of other races who can offer differing attitudes and experiences that will challenge and inform others."¹⁰⁸ This type of interaction is one important means through which students learn and reorient their beliefs.¹⁰⁹

¹⁰³ WILSON, *supra* note 102, at 85 (citing WILLIAM G. PERRY, FORMS OF INTELLECTUAL AND ETHICAL DEVELOPMENT IN THE COLLEGE YEARS: A SCHEME (1970), and D.H. HEATH, THE REASONABLE ADVENTURER (1964)); *see also* ELIZABETH K. MINNICH, AMERICAN COMMITMENTS NAT'L PANEL, LIBERAL LEARNING AND THE ARTS OF CONNECTION FOR THE NEW ACADEMY 33 (1995) (noting that individuals improve their thinking abilities when they consider possibilities beyond their own communities).

¹⁰⁴ ANDERSON, *supra* note 102, at 111.

¹⁰⁵ As professors adapt to teaching diverse populations, increased instructional flexibility will provide more effective teaching, "increasing the likelihood of matching learning differences for all students." Linda S. Marchesani & Maurianne Adams, *Dynamics of Diversity in the Teaching-Learning Process: A Faculty Development Model for Analysis and Action*, in PROMOTING DIVERSITY IN COLLEGE CLASSROOMS: INNOVATIVE RESPONSES FOR THE CURRICULUM, FACULTY AND INSTITUTIONS 9, 17 (Maurianne Adams ed., 1992); *see also* James A. Anderson & Maurianne Adams, *Acknowledging the Learning Styles of Diverse Student Populations: Implications for Instructional Design*, in TEACHING FOR DIVERSITY 19, 31 (Laura L.B. Border & Nancy Van Note Chism eds., 1992) (noting that as institutions focus on maximizing performance for diverse students both traditional and nontraditional students will benefit).

¹⁰⁶ *See* DEREK BOK, BEYOND THE IVORY TOWER: SOCIAL RESPONSIBILITIES OF THE MODERN UNIVERSITY 97 (1982) ("Surveys of graduating classes have repeatedly shown that seniors believe that they have benefited as much from contact with one another as they have from their readings and lectures.").

¹⁰⁷ BOWEN, *supra* note 36, at 13.

¹⁰⁸ BOK, *supra* note 106, at 98-99.

¹⁰⁹ *See* FELDMAN & NEWCOMB, *supra* note 38, at 248 ("Individual students are influenced by the total body of their campus peers, which provides both standards for self-judgment and norms of 'proper' attitudes and behavior."); PASCARELLA & TEREZINI, *supra* note 36, at 270-83, 328 (discussing the findings of many studies demonstrating the significant impact of attending college on student values and attitudes and noting that relationships with faculty and other students appear to have a greater influence than a student's academic major); Benne, *supra* note 95, at 38

Educators have recognized the educational contributions of racial diversity.¹¹⁰ For example, the President of Dartmouth College, James Freedman, recently defined diversity on university campuses as “a richness of people coming together from a variety of backgrounds, bringing to the environment of the college points of view that necessarily are different because of the differences in the backgrounds of the members of the student body.”¹¹¹ Moreover, Freedman explained that “[w]e need a greater variety of people on our campuses, from a greater variety of backgrounds, coming together from their differences in order to help each of them to educate others.”¹¹² Similarly, Harvard University’s President, Neil Rudenstine, recently issued a report tracing the history of diversity at Harvard and discussing the contribution of diversity to learning:¹¹³

[T]he “measure of a class” consists largely in “how much its members are likely to learn from each other — the real beginning of learning, both intellectually and emotionally.” The range of undergraduate “interests, talents, backgrounds and career goals affects importantly the educational experience of our students,” because “a diverse student body is an educational resource of coordinate importance with our faculty and our library, laboratory and housing arrangements.”¹¹⁴

Rudenstine also explained that “[s]uch diversity is not an end in itself, or a pleasant but dispensable accessory. It is the substance from which much human learning, understanding, and wisdom derive. It offers one of the most powerful ways of creating the intellectual energy

(“[T]he important reorientations in our own lives took place through interpersonal encounters. New values grew through significant new associations with people who were different from ourselves in some way and who were willing to grant us access to their inner worlds.”); cf. Philip G. Altbach, *Students: Interests, Culture and Activism*, in *HIGHER LEARNING IN AMERICA*, *supra* note 44, at 203, 212–13 (noting that student organizations may often have more influence on student values than the curriculum or professors).

Some commentators suggest that because minority students are isolated on campus, *see, e.g.*, D’SOUZA, *supra* note 82, at 233–34, increased learning through diversity does not occur in practice. There are three responses to this argument. First, even if students never interact outside of the classroom, students do interact in the classroom. *See* Robert M. O’Neil, Bakke in *Balance: Some Preliminary Thoughts*, 67 CAL. L. REV. 143, 160 (1979). Second, students often underestimate the amount of interaction between races outside of the classroom. *See* Arthur Levine, *Diversity on Campus*, in *HIGHER LEARNING IN AMERICA*, *supra* note 44, at 333, 336. Finally, if racial groups do become polarized because of controversial events, the presence of opposing opinions can increase learning as students work together to resolve their differences. *See* Smith, *supra* note 99, at 63.

¹¹⁰ *See, e.g.*, Smith, *supra* note 99, at 65 (noting the institutional benefits of organizing institutions for diversity).

¹¹¹ James O. Freedman *On Diversity & Dartmouth*, CHANGE, Sept./Oct. 1991, at 25, 25 (interview with James O. Freedman, President of Dartmouth College).

¹¹² *Id.*

¹¹³ *See* NEIL L. RUDENSTINE, HARVARD UNIV., THE PRESIDENT’S REPORT 1993–1995: DIVERSITY AND LEARNING (1995).

¹¹⁴ *Id.* at 32–33 (internal citations omitted).

and robustness that lead to greater knowledge"¹¹⁵ Therefore, affirmative action admissions policies contribute to educational values at the core of the mission of higher education institutions.¹¹⁶

Although many educators have recognized the relationship between diversity and quality in education, only recently has a study attempted to document that relationship. In *What Matters in College*,¹¹⁷ Professor Alexander W. Astin¹¹⁸ examined the impact of diversity on the educational experience.¹¹⁹ He analyzed institutional diversity factors including universities' emphasis on diversity, research, and course offerings and investigated student experiences such as participation in racial and cultural awareness workshops and social interaction with students from other racial groups.¹²⁰ The results of the study indicate that "all these institutional and individual environmental experiences were associated with greater self-reported gains in cognitive and affective development (especially increased cultural awareness), with increased satisfaction in most areas of the college experience, and with increased commitment to promoting racial understanding."¹²¹ Indeed, according to Professor Astin, the study demonstrates that "the actual effects on student development of emphasizing diversity and of student participation in diversity activities are overwhelmingly positive."¹²²

¹¹⁵ *Id.* at 53; see also Yolanda T. Moses, *Quality, Excellence, and Diversity, in STUDYING DIVERSITY*, *supra* note 43, at 9, 11 (noting the former chancellor of the University of Wisconsin's statement that "we cannot have first-class universities without diverse student bodies and staffs" (internal quotation marks omitted)).

¹¹⁶ See RUDENSTINE, *supra* note 113, at 44. Princeton University President Harold Shapiro likewise recognizes the contribution to learning of diverse backgrounds and perspectives. See Harold T. Shapiro, *Affirmative Action: A Continuing Discussion — A Continuing Commitment*, PRINCETON WEEKLY BULL., Oct. 16, 1995, at 3, 6 ("Princeton increasingly recognized the educational value of a learning environment that included students from different backgrounds and perspectives.").

¹¹⁷ ASTIN, *supra* note 6.

¹¹⁸ Astin, a professor of higher education and director of the Higher Education Research Institute at UCLA, is a well-respected expert on higher education. A 1990 survey found that he was the most cited author in higher education literature. See John M. Budd, *Higher Education Literature: Characteristics of Citation Patterns*, 61 J. OF HIGHER EDUC. 84, 94 tbls. 5 & 6 (1990).

¹¹⁹ Astin's study examined 82 outcome measures for approximately 25,000 students at 217 institutions who entered college in 1985 and were followed up four years later in 1989. See ASTIN, *supra* note 6, at 21-23; Alexander W. Astin, *Diversity and Multiculturalism on the Campus: How Are Students Affected?*, CHANGE, Mar./Apr. 1993, at 44, 44. This study corrected some of the methodological problems encountered in previous studies by obtaining multi-institutional data and isolating student inputs from environmental factors. See ASTIN, *supra* note 6, at 2-16.

¹²⁰ See ASTIN, *supra* note 6, at 431.

¹²¹ *Id.*

¹²² *Id.* Some institutions, including Berkeley and Stanford, have found that improved institutional and student involvement is necessary to realize the benefits of the presence of diverse populations. The Diversity Project, a study by the Institute of Social Change at Berkeley, discovered that many students had decided to attend Berkeley because of its history and reputation for diversity. See INSTITUTE FOR THE STUDY OF SOCIAL CHANGE, THE DIVERSITY PROJECT: FINAL REPORT 36-37 (1991). The report also noted that most students desired greater interaction with students of other races and supported the idea of diversity. See *id.* at 13; Duster, *supra* note 99,

V. CONCLUSION

Courts dealing with diversity in higher education face a difficult task; they must simultaneously protect academic freedom and ensure that educational institutions do not use this freedom to disguise racial discrimination. This Note has argued that if a court decides to consider evidence on an institution's interest in diversity, the court should not blindly apply the evidentiary requirements that the Supreme Court has developed in the context of past discrimination cases. Rather, a court should consider the unique nature of diversity in higher education and the protection afforded academic decisions. This Note has also argued that, in light of the evidence that diversity furthers learning, courts should treat diversity in higher education as a compelling interest.

This Note has only begun to examine the legality of affirmative action programs that seek to achieve diversity in higher education. In addition to pursuing a compelling interest, such programs must be narrowly tailored to achieve diversity.¹²³ However, courts should realize that admitting a racially diverse student body is often a powerful and effective way for a university to fulfill its academic mission. Ultimately, diversity's contribution to higher education is clear: "dialogue across diversity can, in the end, nourish wisdom, understanding and the increase of justice."¹²⁴

at 240, 242. However, students did have ambivalent reactions to affirmative action. *See* Duster, *supra* note 99, at 241. The report also found that, although some positive interaction and collective problem-solving occurred between different races, the present student population was experiencing substantial self-segregation. The Diversity Project concluded that greater institutional efforts would be required to reap the full educational benefits of the diverse student body. *See id.* at 236-38. Similarly, a report issued by Stanford's University Committee on Minority Issues noted that "[w]ithin the University, minority undergraduates and graduate students directly influence our intellectual vigor. The viewpoints and backgrounds brought by different social, racial, and ethnic groups create a wealth of diversity simply not found on a homogeneous campus." UNIVERSITY COMM. ON MINORITY ISSUES, STANFORD UNIV., BUILDING A MULTIRACIAL, MULTICULTURAL UNIVERSITY COMMUNITY 55 (1989). However, the Committee also noted the need for additional institutional efforts to achieve a more interactive dynamic. *See id.* at 1-3.

¹²³ To determine if a program is narrowly tailored, a court must consider "the necessity for relief and the efficacy of alternative remedies; the flexibility and duration of the relief[.] . . . the relationship of the numerical goals to the relevant . . . market; and the impact of the relief on the rights of third parties." *United States v. Paradise*, 480 U.S. 149, 171 (1987).

¹²⁴ AMERICAN PLURALISM, *supra* note 79, at xvii.