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Comment

Strict in Theory, but Not Fatal in Fact:
Hunter v. Regents of the University of California
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Jason Walbourn*

Not unlike other urban school districts throughout our nation, the Los Angeles Unified School District faces substantial obstacles in providing a quality education for its communities' children.\(^1\) High drop-out rates, crime and an influx of non-English speaking students create constant impediments to quality public education.\(^2\) In response to these types of problems the Graduate School of Education and Informational Studies (GSE & IS) at the University of California at Los Angeles (UCLA) operates the Corinne A. Seeds University Elementary School (UES).\(^3\) UES is a laboratory school, intended

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1. During the 1995-96 school year the Los Angeles Unified School District had a drop-out rate of 8.8% as compared with 5.4% for Los Angeles County and 3.9% for the entire State of California. Almost 50% of the students in the district spoke a language other than English as their primary language, while statewide only about 25% of students were categorized as "Limited English Proficiency." See California Department of Education, California Department of Education Website, (visited February 1, 1998) <http://www.cde.ca.gov>.

2. See supra note 1 (discussing drop-out rates and language statistics). Additionally, during the 1996-97 school year there were losses totaling more than $8,000,000 in the Los Angeles County schools as a result of crime. There were 546 assaults with a deadly weapon, 518 cases of robbery or extortion, 3 homicides, 8,402 property crimes, and 251 sex offenses in the Los Angeles County schools. See California Department of Education, California Department of Education Website, (visited August 15, 1998) <http://www.cde.ca.gov>. It should be noted, however, that from the 1995-96 school year to the 1996-97 year overall crime in the Los Angeles County schools remained the same or dropped in 6 of the 8 recorded categories. See id.

3. Although UES is located physically within the Los Angeles Unified School District, it is a privately-run school and is not affiliated with the dis-
to "conduct research relevant to the urban educational experience and to work with teachers, communities and schools to disseminate that research to foster a more effective educational system primarily for urban elementary students."  

In December of 1994, Gina F. Brandt and James K.T. Hunter submitted an application for admission to UES for their daughter, Keeley Tatsuyo Hunter. On this application Ms. Brandt and Mr. Hunter identified Keeley's ethnic identity as "Asian-American." Applicants are asked to identify their racial/ethnic identity because admissions decisions are based primarily on race. The purpose of such a system is to ensure a student body representative of an urban school population. On March 11, 1995, the school notified Keeley's parents that she had not been accepted for admission to UES and would have to attend another public school in the area. Keeley's mother, on behalf of her daughter, brought a suit against UCLA claiming that the UES admissions program discriminated against her on the basis of race.

In Hunter v. Regents of the University of California, the District Court for the Central District of California held that the educational research conducted by UES was a sufficiently compelling justification to warrant the use of a race-conscious admissions process. This decision is particularly significant

UES has a student enrollment of approximately 460 children in pre-kindergarten through sixth grade, ranging in age from four to twelve. See Hunter v. Regents of the Univ. of Cal., 971 F. Supp. 1316, 1319 (C.D. Cal. 1997).

4. Id.

5. Keeley's parents hoped to enroll their daughter in the 1995-96 Early Childhood (EC-1) Program at UES, a pre-kindergarten class for four-year-olds.

6. Although the question was optional, the application provided the following list of racial/ethnic groups on the application under the heading "Child's Ethnic Identity": African-American, Asian-American, Caucasian, Latino, Native American, Other (Mixed Race). See id. at 1321. Keeley is one-quarter Asian-American and three-quarters Caucasian. See id. at 1318.

7. See id. at 1319.

8. More specifically, the plaintiff brought the action against defendants The Regents of the University of California and Theodore R. Mitchell, Dean of the GSE & IS as well as Vice Chancellor of Academic Planning and Budget at UCLA. See id. at 1318.


because the racial classifications were used for a non-remedial purpose. The Supreme Court, in contrast, has yet to identify a situation in which the non-remedial use of a racial classification or a race-conscious program is justified.\textsuperscript{11} Acceptance of the \textit{Hunter} decision by appellate courts could have serious implications for the future of race-based jurisprudence. Not only did the \textit{Hunter} court articulate a heretofore unidentified compelling interest, but it also opened the door for the potentially greater use of non-remedial race-based classifications. In an area fraught with volatile rhetoric, the \textit{Hunter} case provides a new avenue for dialogue and discussion.

Part I of this Comment focuses on the history of the Fourteenth Amendment in the context of affirmative action, and more specifically examines those interests that the Supreme Court has found compelling and those it has rejected. Part II details the facts of the \textit{Hunter} case and the reasoning used by the district court to conclude that educational research is a compelling interest sufficiently narrowly tailored to overcome strict judicial scrutiny. Part III analyzes the court's reasoning and argues that the court correctly concluded from both a legal and a policy perspective that educational research is a compelling state interest. Additionally, this Comment posits that educational research compares favorably to other compelling interests that have been accepted by the Supreme Court as justifications for race-conscious programs.

I. THE EMERGENCE OF STRICT SCRUTINY IN EQUAL PROTECTION JURISPRUDENCE

A. THE HISTORY AND DEVELOPMENT OF EQUAL PROTECTION JURISPRUDENCE

Enacted in 1868, the Fourteenth Amendment provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."\textsuperscript{12} This seemingly simple

\textsuperscript{11} See infra Part I.B. (discussing those justifications that have been found sufficiently compelling to warrant the use of racial classifications).


Some scholars have noted, however, that this notion of a color-blind law
and straightforward principle has spawned an immense and complex body of law. The security actually afforded by the Equal Protection Clause is not nearly as far reaching as its language may originally intimate or as may be commonly perceived. 13 Fourteenth Amendment protection does not prohibit

need be read in the context of the sentences preceding Harlan's famous quote:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens.


Scholars and commentators also disagree as to the intent of the Fourteenth Amendment and the other Reconstruction Amendments. The language of the Supreme Court in Plessy v. Ferguson indicates that the Fourteenth Amendment was enacted in order to provide newly freed slaves equal treatment under the law. See Plessy, 163 U.S. at 544 ("The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law."). For a cogent discussion concerning the intent and understanding of the Fourteenth Amendment, see JOHN H. GARVEY & T. ALEXANDER ALEINKOFF, MODERN CONSTITUTIONAL THEORY: A READER, 438-48 (3d ed. 1994) (containing excerpts from writings of Raoul Berger and Michael J. Perry); Carl E. Brody, Jr., A Historical Review of Affirmative Action and the Interpretations of its Legislative Intent by the Supreme Court, 29 AKRON L. REV. 291, 294-300 (1996) (discussing the legislative history of the Freedman's Bureau Bills and the Fourteenth Amendment); Eric Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment, 71 VA. L. REV. 753, 755-88 (1985) (reviewing in detail the legislative history of various race-conscious Reconstruction measures, including the Freedman's Bureau Bills and the Fourteenth Amendment).

13. The Fourteenth Amendment only protects individuals from state action. See Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) (stating that the Fourteenth Amendment acts as a constraint on the states). It should also be noted, however, that the Court has found the Fifth and Fourteenth Amendments to be congruent, so that the rights contained in the Fourteenth Amendment are applicable to the federal government through the Due Proc-
all classifications, only those classifications made by the government that create distinctions between similarly situated individuals.

Over time the courts have developed a two-tier equal protection analysis. Classifications that categorize by race or

...
ethnicity\textsuperscript{17} or implicate a "fundamental right"\textsuperscript{18} are immediately suspect, while all other classifications receive more deferential treatment.\textsuperscript{19} Classifications that are immediately suspect receive strict judicial scrutiny.\textsuperscript{20} Under the strict scrutiny standard, the government must show: (1) that the classification

\begin{enumerate}
\item The Court first noted that racial classifications might be subject to a heightened level of scrutiny in Justice Stone's opinion in United States v. Carolene Products. Footnote four stated that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938). As a result, "more searching judicial inquiry" may be necessary. \textit{Id. See} Korematsu v. United States, 323 U.S. 214, 216 (1944) (finding that "[a]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect"); Hirabayashi v. United States, 320 U.S. 81, 100 (1943) (noting that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality").


The Court's approach to education has been varied and inconsistent. While the Court has held that education is not a fundamental right in the context of equal protection analysis, the Court has consistently paid lip service to the vital importance of education. \textit{See} San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-39 (1973) (concluding that because the right to education is not explicitly or implicitly guaranteed by the Constitution, it is not a fundamental right). But see Plyler, 457 U.S. at 223-24 (applying a heightened level of scrutiny even though the court explicitly reaffirms Rodriguez).

\item Classifications other than race and national origin/ethnicity receive either intermediate scrutiny or rational basis review. Rational basis review requires only that the state show a legitimate government interest that is rationally related to its objective. Intermediate scrutiny requires that an important government interest be shown that is substantially related to the objective. Most classifications will receive rational basis review unless they fall into one of the following categories, in which case they receive intermediate scrutiny: gender classifications, alienage, and illegitimacy. \textit{See} Clark v. Jeter, 486 U.S. 456, 461 (1988) (illegitimacy); Craig v. Boren, 429 U.S. 190, 197-99 (1976) (gender); Sugarman v. Doughall, 413 U.S. 634, 642, 646-49 (1973) (alienage). \textit{But see} United States v. Virginia, 518 U.S. 515, 531 (1996) (indicating that gender classifications may receive a level of scrutiny higher than intermediate scrutiny by requiring an "exceedingly persuasive justification" for gender-based government action); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312-14 (1976) (holding that age classifications receive rational basis review); \textit{Rodriguez}, 411 U.S. at 19, 28-29 (holding that wealth classifications are subject to rational basis review).

\item See, e.g., Korematsu, 323 U.S. at 216 ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect.... [C]ourts must subject them to the most rigid scrutiny.").
\end{enumerate}
is necessary to further a "compelling interest" and (2) that the use of the classification is "narrowly tailored" to serve that "compelling interest." Racial classifications facing this exacting standard have regularly been invalidated.

The real challenge in this area has been posed by affirmative action cases—those in which a government entity has created a race-based classification for the express purpose of benefiting a racial minority. The Supreme Court heard its first affirmative action case in 1977. In a series of affirmative action decisions over the course of the next two decades, the Court charted a somewhat confused path of equal protection jurisprudence. In 1978, only Justice Powell applied strict scrutiny to a college admissions program that utilized racial classifications. It was not until 1995 that a majority of the Court agreed that strict scrutiny was the appropriate standard of review applicable to all racial classifications made by the government. Throughout this period, the Supreme Court has continually struggled with the question of what government interests qualify as "compelling" and are thus sufficient to justify the use of racial classifications.

21. The notion of a "compelling interest" was first used by Justice Frankfurter in a concurring opinion in *Sweezy v. New Hampshire*, 354 U.S. 234, 265 (1957), and by the Court in *NAACP v. Alabama*, 357 U.S. 449, 463 (1958). See Sanford Levinson, *Tiers of Scrutiny—From Strict Through Rational Bases—and the Future of Interests: Commentary on Fiss and Linde*, 55 ALB. L. REV. 745, 758 (1992); K.G. Jan Pillai, *Phantom of the Strict Scrutiny*, 31 NEW ENG. L. REV. 397, 420 (1997). Pillai also noted correctly that "[t]he Court's descriptions of 'compelling state interest' during the past three decades or more have not been enlightening, and at times were contradictory." *Id.*

22. For an articulation of the strict scrutiny test, including both the "compelling interest" and the "narrowly tailored" prongs, see Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995); Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 632 (1969); Shapiro v. Thompson, 394 U.S. 618, 634 (1969). The burden of proof is on the government to prove both prongs of the strict scrutiny test once a classification is identified as differentiating on the basis of race or ethnicity or as impinging on a fundamental right.


25. *See* Bakke, 438 U.S. at 290 (noting that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination").

B. THE EVOLUTION OF COMPPELLING GOVERNMENTAL INTERESTS IN THE CONTEXT OF RACE-BASED GOVERNMENTAL PROGRAMS

Over the course of the last twenty years, the Supreme Court has had the opportunity to review a number of cases involving racial classifications and to define those interests that it finds "compelling." The Court first addressed an affirmative action program in a higher education setting in *Regents of the University of California v. Bakke.* Alan Bakke, a white applicant to the medical school of the University of California at Davis, filed suit claiming that the school had excluded him on the basis of race, thus violating his right to equal protection. He was twice passed over for admission while less "numerically" qualified minority applicants were admitted. The Court held that the race-conscious admissions program was invalid. However, a majority of the Justices also agreed

28. See id. at 277-78.
29. Bakke applied to the Medical School in both 1973 and 1974 and was rejected both years. See id. at 276-77.
30. The Davis Medical School used two different admissions programs when evaluating its applicants. See id. at 273-74. The regular admissions program screened applications as they were received and offered interviews to approximately one out of every six applicants. See id. Candidates who received personal interviews in 1973 were evaluated by five different committee members on a scale of 1 to 100 following their interviews, and by six committee members in 1974. See id. at 274. The candidates were ranked according to their overall GPA, their GPA in science classes, their MCAT scores, letters of recommendation, extracurricular activities, other biographical data, and their interviewers' summaries. See id. In 1973 Bakke's score was 468 out of a possible 500 and in 1974 his score was 549 out of a possible 600. See id. at 276-77.

In comparison, the special admissions program consisted of a separate committee who received only those applications that were marked "economically and/or educationally disadvantaged" in 1973, or that wished to be considered a member of a "minority group" in 1974. See id. at 274. The special committee, after evaluating candidates in a similar manner as the general committee, presented its top choices to the general committee, where they could be rejected, but where they were not compared to those candidates ranked by the general committee. See id. at 275. The special committee recommended candidates until eight or sixteen of their recommendations had been accepted, the prescribed numbers for 1973 and 1974, respectively. See id. "In both years, applicants were admitted under the special program with grade point averages, MCAT scores, and benchmark scores significantly lower than Bakke's." Id. at 277.

31. Four justices found that the Davis plan was invalid because it did not comply with Title VI. See id. at 418, 421 (Stevens, J., concurring in part and dissenting in part; joined by Burger, C.J., Stewart & Rehnquist, JJ.). Justice
that admissions programs could take race into consideration in certain instances. Those five Justices indicated that racial classifications would be permissible if used to remedy the effects of past discrimination at Davis Medical School. Additionally, Justice Powell concluded that in the context of higher education the goal of diversity, by itself, could be a compelling state interest. Thus, in its first examination of an affirmative action program, the Court made an important distinction between societal discrimination, which cannot be pinpointed to a specific actor or group, and institutional discrimination by a particular private entity or governmental unit.

Seven years later, in Wygant v. Jackson Board of Education, the Court addressed whether a collective bargaining agreement that provided protection from layoffs to minority employees, but not to non-minority employees, was prohibited by the Fourteenth Amendment. In an opinion authored by Justice Powell, a plurality of the Court applied a strict scrutiny analysis and concluded that the Mississippi plan violated the

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32. Justice Powell believed that race could be used as a “plus factor” in admissions programs. See id. at 317. Justices Brennan, White, Marshall, and Blackmun agreed with Justice Powell that admissions programs such as that at Harvard would be permissible as long as the plan was necessary to remedy the effects of past discrimination. See id. at 326 n.1.

33. Justices Brennan, White, Marshall, and Blackmun explained that “[g]overnment may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice.” Id. at 325. Justice Powell noted in his opinion that the state has a “substantial interest” in eliminating the identified effects of past discrimination. See id. at 307. Justice Powell, however, also made it clear that remedying societal discrimination was not a valid justification for an affirmative action program. See id. at 307-10.

34. See id. at 312, 315-16 (asserting that the goal of attaining a diverse student body is a compelling state interest in the context of higher education).

35. Institutional discrimination refers to a situation in which a particular institution has perpetuated discrimination by its own acts or policies and the effects of those policies continue to be visible. Societal discrimination refers instead to a broader conception of discrimination that cannot be pinpointed to a specific actor or institution.

36. 476 U.S. 267 (1986). Minority teachers were protected from the agreement’s general rule of seniority-based layoffs to the extent that the seniority rule would decrease the current percentage of minority personnel employed. See id. at 270-71.

37. See id. at 270-72.

38. See id. at 273-74. After articulating the traditional two-pronged strict scrutiny analysis, Justice Powell wrote: “[W]e must decide whether the layoff provision is supported by a compelling state purpose and whether the means
Equal Protection Clause.\textsuperscript{39} The Jackson school board had argued that minority teachers acted as role models for minority students, helping to remedy the effects of past societal discrimination.\textsuperscript{40} The Court concluded that the layoff plan was not sufficiently narrowly tailored to pass strict scrutiny review.\textsuperscript{41} It also made clear, as it did in \textit{Bakke}, that remedying societal discrimination, without more, is not a valid justification for the use of racial classifications.\textsuperscript{42} A valid justification, the Court asserted, would require a factual determination that there was a strong basis in evidence that remedial action was necessary to remedy institutional discrimination.\textsuperscript{43}

Having failed to marshal a majority on the proper standard of review for local governmental classifications, the Court next addressed the appropriate level of scrutiny for congressionally mandated racial classifications. In \textit{Metro Broadcasting, Inc. v. FCC}, a case that has since been overruled,\textsuperscript{44} the Court for the first time upheld a non-remedial justification for a race-based classification. \textit{Metro Broadcasting} involved FCC-sponsored minority preference policies.\textsuperscript{45} The Court employed the less rigorous intermediate level of scrutiny\textsuperscript{46} and found that

\textit{chosen to accomplish that purpose are narrowly tailored." Id. at 274. The Court was still unable to fashion a majority on the issue of the proper standard of review with only three justices joining Justice Powell in Part II of the opinion, which articulated strict scrutiny as the appropriate standard of review. See id. at 269.}

\textsuperscript{39} See id. at 283-84.

\textsuperscript{40} See id. at 274.

\textsuperscript{41} See id. at 283, 294.

\textsuperscript{42} See id. at 276.

\textsuperscript{43} See id. at 277-78 (noting that "[t]he trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary"). The Court used a similar formulation of the "strong basis in evidence" standard in \textit{Shaw v. Hunt}, reasoning that to rise to the level of a compelling interest there must be "identified discrimination" and a "strong basis in evidence' to conclude that remedial action [is] necessary." Shaw v. Hunt, 517 U.S. 899, 909-10 (1996).

\textsuperscript{44} 497 U.S. 547 (1990), overruled by \textit{Adarand Constructors, Inc. v. Pena}, 515 U.S. 200 (1995).

\textsuperscript{45} See id. at 552 (briefly describing the two policies in question).

\textsuperscript{46} The Court applied intermediate scrutiny to programs mandated by Congress, holding that "benign race-conscious measures mandated by Congress . . . are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives." \textit{Id.} at 564-65. Thus, according to the Court's opinion in \textit{Metro Broadcasting}, strict scrutiny was applied to state and local governmental classifications while intermediate scrutiny applied to federally-mandated classifications.
in the context of broadcasting, the promotion of program diversity was an important governmental objective.47

In Adarand Constructors, Inc. v. Pena,48 the Court overruled Metro Broadcasting49 and held that all racial classifications, whether imposed by a federal, state, or local government, are to be analyzed using strict judicial scrutiny.50 Adarand involved a federal program that provided an incentive for contractors working on government projects to hire "socially and economically disadvantaged individuals" for subcontracts.51 The Court did not reach the issues of whether the governmental interests were compelling or the means narrowly tailored, and remanded the case for consideration of those issues.52

Over twenty years have passed since the Supreme Court heard its first affirmative action case. It took nearly the full twenty years for the Court to decide that all racial classifications are subject to strict scrutiny.53 Thus far, the only interest that the Court has recognized as "compelling" is that of reme-

47. See id. at 566.
49. The Court maintained that its decision in Metro Broadcasting, applying intermediate scrutiny to a federal affirmative action program, had departed from previous precedent. See id. at 225-27.
50. See id. at 224. Justice O'Connor wrote for the majority that "we hold today 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." Id. at 227. The Court asserted that three propositions should be followed when dealing with racial classifications: skepticism, consistency, and congruence. See id. at 223-24.
51. Id. at 204. Under the federal program, African-Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities were presumed to be "socially and economically disadvantaged." See id. at 205.
52. See id. at 237.
53. The Court's first majority opinion regarding the standard of review for a race-based governmental program occurred in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). In Croson, the Court invalidated an affirmative action program in the construction industry, agreeing that state and local government racial classifications are subject to strict scrutiny. See id. at 493-94 (adhering to the strict scrutiny standard of review as described in Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986)) (O'Connor, J., joined by Rehnquist, C.J., and White & Kennedy, JJ.); id. at 520 ("I agree... with Justice O'Connor's conclusion that strict scrutiny must be applied to all governmental classification by race.") (Scalia, J., concurring). The Court did not, however, address the proper standard of review for congressionally-mandated affirmative action programs.
dying institutional discrimination. A majority of the Court has yet to find any non-remedial justification compelling.

In the wake of Adarand, lower courts and commentators have been quick to put their own spin on the Court's opinion. One of the most recent cases addressing the issue of race-based classifications in the higher education setting is Hopwood v. Texas. In Hopwood, the Fifth Circuit held that the University of Texas Law School's admissions program was unconstitutional because it used racial classifications to achieve a diverse student body. Noting that Justice Powell's opinion in Bakke was not controlling, the Fifth Circuit stated that "any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment." The strong language of the Hopwood opinion has led more than one law school to amend its admissions program and has caused apprehension that Hopwood could signal the demise of affirmative action programs in higher education.

56. 78 F.3d 932 (5th Cir.), cert. denied, 518 U.S. 1033 (1996).
57. See id. at 934.
58. See id. at 944. The court maintained that Justice Powell's opinion is not binding precedent because no other justice joined in the section of the opinion discussing the diversity rationale. See id. The court also reasoned that there have been no cases since Bakke that have found diversity to be a compelling state interest and that "Supreme Court precedent shows that the diversity interest will not satisfy strict scrutiny." Id. The court went on to speculate that the only compelling state interest to justify race-based classification is the remedying of past discrimination. See id.
59. Id. at 944.
60. The Attorneys General of Colorado and Georgia have urged public colleges in their states to dismantle racial preferences. See Patrick Healy, California Colleges Will Stop Designing Some Classes for Specific Ethnic Groups, CHRON. OF HIGHER EDUC., July 21, 1996, at A26 (Colorado Attorney General urging end to affirmative action in state higher education); Georgia Colleges Ordered to Drop Racial Preferences, WASH. POST, April 10, 1996, at A20. Additionally, the University of Houston Law Center, Texas Tech University Law School and the University of Mississippi have also adjusted their admissions programs in response to Hopwood. See Roscoe C. Howard, Jr., Getting It Wrong: Hopwood v. Texas and Its Implications for Racial Diversity in Legal Education and Practice, 31 NEW ENG. L. REV. 831, 884-85 n.226 (1997).
II. HUNTER V. REGENTS OF THE UNIVERSITY OF CALIFORNIA

In Hunter v. Regents of the University of California, the United States District Court for the Central District of California upheld the use of racial and ethnic criteria in the University Elementary School's admissions program. Employing the traditional strict scrutiny standard of review, the court found that the UES program was "narrowly tailored to serve the purpose of a compelling state interest." Thus, the court concluded, the race-conscious admissions program used by UES did not violate the Fourteenth Amendment rights of the plaintiff, Keeley Tatsuyo Hunter.

The admissions program at issue did not focus on test scores or personal interviews as a typical admissions program might, but did consider the ethnic and racial identity of its applicants. In doing so it attempted to achieve a racially and ethnically diverse class that would further its educational research. In essence, UES used racial classifications in order to formulate a class that would act as a "sample" population for its research and that would mirror a typical class in an urban school. Applicants were asked to identify their child's ethnic identity on the application form, although the question was optional. The admissions committee then set a target for the number of students to be admitted from each racial or ethnic group. Next, the committee used randomly selected lists of

62. See infra notes 65-70 and accompanying text (explaining in detail the UES admissions program).
63. Hunter, 971 F. Supp. at 1332.
64. See id. The plaintiff claimed that the defendants illegally and unconstitutionally discriminated against her on the basis of her race pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 1983. See supra note 9 and accompanying text.
65. See Hunter, 971 F. Supp. at 1320.
66. See id.
67. The application provided the following list of racial or ethnic groups: African-American, Asian-American, Caucasian, Latino, Native American, Other (Mixed Race). See id. at 1321.
68. The UES admissions committee was made up of three UES teachers and two GSE & IS faculty members, one of whom serves as committee chairperson. See id. at 1320.
69. See id. The eventual demographic breakdown of the 1995-96 EC-1 class was the following: 10 Latinos (21.7%); 6 African-Americans (13%); 4 Asians (8.7%); 18 Caucasians (39.1%); and 8 mixed race (17.4%). See id. at 1321.
students from each racial/ethnic group to fill the appropriate number of seats allocated to each group.\textsuperscript{70}

A. UNEQUAL TREATMENT OF APPLICANTS

The court first determined that the admissions program employed by UES warranted strict scrutiny review because it treated similarly situated students differently.\textsuperscript{71} The court reasoned that the admissions committee's original act of sorting the applications by race and ethnicity constituted a differentiation of the students.\textsuperscript{72} From the moment of classification, a child's opportunity for admission was automatically and necessarily either benefitted or harmed, depending on the racial category into which the application was placed.\textsuperscript{73} Based on its finding that similarly situated applicants were treated differently on account of their race or ethnicity, the Court determined that the UES program "must withstand strict scrutiny."\textsuperscript{74}

B. A COMPELLING GOVERNMENTAL INTEREST: EDUCATIONAL RESEARCH

After the initial determination that the admissions program warranted strict scrutiny review, the court turned to the

\textsuperscript{70} See id. at 1320. It should be noted that before the admissions committee sorted and selected candidates based on their racial/ethnic group, they admitted certain candidates for other reasons. The committee first identified and admitted the siblings of current UES students who had applied for admission. The committee also admitted dominant Spanish-speaking applicants in order to create a larger sample of students for bilingual research. Finally, the committee sorted the candidates to ensure adequate gender and income group balances. Additionally, the Dean of GSE & IS was allowed to admit a certain number of applicants each year at his discretion for such purposes as faculty and staff recruiting. See id. at 1320-21.

\textsuperscript{71} See id. at 1323.

\textsuperscript{72} See id. (noting that "the Admissions Committee's employment of a lottery system does not negate its initial disparate treatment of similarly situated persons as a result of having first divided the applicants by their race and ethnicity").

\textsuperscript{73} See id. at 1323.

\textsuperscript{74} Id. The court noted that the Regents and UES failed to distinguish its program procedurally from the admissions program in Bakke, even though they were able to prove that the programs were substantively different. See id. at 1324 n.14. Additionally, the court compared the two admissions programs, concluding that in each case the plaintiff's chance of admission was impacted by the number of other students within the same racial category. See id. at 1324. The court concluded that "[f]or this reason, UES's admission policy cannot be shielded from strict scrutiny." Id.
first prong of the strict scrutiny analysis: did the admissions program further a compelling state interest? The Board of Regents asserted there were two compelling interests for the UES program. First, it argued that the state had a compelling interest in the procurement and dissemination of educational research concerning urban educational strategies. Second, the Regents argued that there was a compelling state interest in promoting academic freedom. Hunter countered that the program should be struck down because it did not attempt to remedy past or present discrimination, and that as a matter of law, no other interest could rise to the level of a “compelling interest.”

The court rejected Hunter's argument that every asserted state interest that is not an attempt to remedy past or present discrimination is per se invalid. Relying primarily on opinions by Justices O'Connor and Stevens, Judge Kenyon wrote, “this Court cannot conclude that the only constitutional form of race-conscious decisionmaking must remedy past discrimination.” In rejecting the plaintiff's argument the court also refused to “conform its ruling to those non-mandatory decisions already reached by other Circuit Courts.” The court reasoned that the unique nature of Hunter's case distinguished it from

75. See id. at 1324.
76. See id.
77. See id.
78. See id.
79. See id. The plaintiff also argued that both justifications provided by the Regents were too amorphous and lacked the evidentiary support necessary to withstand strict scrutiny review. See id.
80. See id. at 1327.
81. Id. The plaintiff had based its argument for this proposition primarily on the plurality opinion in Croson. See id. at 1324-25. After quoting directly from Justice Stevens's opinion in Croson regarding the potential value of race-based classifications for non-remedial purposes, the court noted that “[a]s far as this Court may ascertain, no majority of the Court has ever explicitly held that remedial action may constitute the only valid compelling state interest.” Id. at 1325. The court also referred to concurrences from both Justice O'Connor in Wygant and Justice Stevens in Metro Broadcasting as support for its position. See id. Judge Kenyon then pointed out that the non-remedial interest of racial diversity in Metro Broadcasting was not explicitly overruled in Adarand. See id. at 1326. Adarand only overruled Metro Broadcasting with respect to the standard of review to be applied to racial classifications. See id.
82. Id. at 1326. The court noted its concern with decisions by the Third, Fourth, Fifth, and Seventh Circuits in prominent Fourteenth Amendment cases. See id. at 1326-27.
recent equal protection cases decided in other jurisdictions.\textsuperscript{83} In support of its decision the court noted that "[u]nfortunately, this case raises many issues which prevent it from fitting neatly in line with one of the Supreme Court's prior rulings, or other circuit courts' interpretations of those rulings."\textsuperscript{84}

The court then turned specifically to the interests asserted by the Regents and concluded that although academic freedom was not a compelling state interest, educational research intended to benefit society at large was, in fact, a compelling interest.\textsuperscript{85} In reaching this conclusion, the court found that the Regents offered sufficient evidence to carry the dual burden of "(1) identifying a substantial and worthwhile need to maintain the research conducted at UES; and (2) providing a strong basis in evidence that the use of racial classifications in the UES admission policy is necessary."\textsuperscript{86} The court, noting earlier Supreme Court decisions, held that the maintenance and improvement of the public school system was a substantial state interest.\textsuperscript{87} Further, the court explained, the school's mission to disseminate its research to the broader educational community provided additional support to satisfy the first prong of the analysis—identifying a substantial and worthwhile need to maintain the research conducted at UES.\textsuperscript{88}

Addressing the "strong basis in evidence" prong of its test, the court explained that although UES did not need to prove that the research conducted at the school will necessarily

\begin{itemize}
  \item \textsuperscript{84} \textit{Hunter}, 971 F. Supp. at 1327.
  \item \textsuperscript{85} See \textit{id.} at 1324, 1328.
  \item \textsuperscript{86} \textit{id.} at 1328.
  \item \textsuperscript{87} See \textit{id.} The court justified its conclusion by relying on \textit{Plyler v. Doe}, 457 U.S. 202 (1982), \textit{Ambach v. Norwich}, 441 U.S. 68 (1979), and \textit{Brown v. Board of Educ.}, 347 U.S. 483, 493 (1954) for the proposition that "[t]he judiciary has long-recognized that a state's need to provide its citizenry with a quality education is compelling." \textit{Hunter}, 971 F. Supp. at 1328.
  \item \textsuperscript{88} See \textit{Hunter}, 971 F. Supp. at 1328-29.
\end{itemize}
guarantee improvement in elementary education, “strong evidence exists that the research performed at UCLA will help effectuate meaningful change in urban elementary schooling.”

In order to effectuate such change and carry out its mission of disseminating such information, the court determined that the school “must be permitted to admit a student population that presents similar issues and challenges that arise in the ethnically diverse student population now present in the urban school community.”

C. THE UES PROGRAM IS SUFFICIENTLY NARROWLY TAILORED

After announcing its finding that educational research was a compelling state interest, the court then moved to a discussion of whether the particular admissions program employed by UES was sufficiently narrowly tailored to serve that interest. It concluded that the admissions program was adequately tailored and rejected several specific alternatives proposed by the plaintiff. It first determined that it was neither reasonable nor possible for UES to achieve a racially diverse student population by using a random sampling technique or other alternative means. The court rejected Hunter's assertion that increased use of outreach programs or the use of actual urban public schools were adequate alternatives to the race-conscious admissions program.

The court also rejected Hunter's argument that the percentage of minorities admitted by UES must correlate exactly with the demographics of Californian urban schools. Moreover, the court declined to force UES to base its percentage of minority enrollees on a “typical” urban school. The court main-

89. *Id.* at 1329. The court relied on the testimony of several experts who testified during the trial to the necessity of such an admissions program. *See id.* The court once again distinguished the program in this case from the one in *Bakke*. The court argued that all research necessarily carries with it the possibility of failure, but that the defendants showed a sufficient nexus in this case between the research and the educational problems in California's urban schools. In contrast, there existed no nexus between the reserved class spaces and improved minority health care. *See id.* at 1329-30.

90. *Id.* at 1328.
91. *See id.* at 1330.
92. *See id.*
93. *See id.* at 1330-32.
94. *See id.* at 1330.
95. *See id.* at 1330-31.
96. *See id.* at 1331.
tained that it was not clear whether or not a "typical" urban school setting exists. Finally, the court found that attempting to implement a similar research program in the state's existing urban schools would not be feasible, due in large part to the need for close parental involvement and support. It noted that the "laboratory" school provides a unique environment that can be closely controlled, enabling research that would be difficult to administer in a public school setting.

Accordingly, the Hunter court entered judgment for the Regents and Dean Mitchell and vacated the preliminary injunction that had been entered in September of 1995. The court concluded that "the defendants have successfully proven that the use of racial and ethnic identity criteria in UES's admission policy is narrowly tailored to serve the purpose of a compelling state interest."

III. A NEW COMPELLING GOVERNMENTAL INTEREST: EDUCATIONAL RESEARCH

The Hunter court determined that educational research was a compelling state interest and that the UES admissions program was sufficiently narrowly tailored to overcome strict scrutiny. The court reached the correct result, basing its decision on sufficient legal precedent and important public policy considerations. It correctly focused its analysis on UES's primary function as a research institution rather than on the educational aspect of the school. Additionally, the interest in educational research asserted by the state compares favorably with other interests that have been asserted in support of racial classifications.

A. HUNTER V. REGENTS OF THE UNIVERSITY OF CALIFORNIA IS NOT AN AFFIRMATIVE ACTION CASE

One of the primary difficulties with the Hunter case is that it is unlike any other case involving racial classifications. Bakke and its progeny have dealt primarily with race-based programs designed directly to remedy the effects of discrimina-

97. See id.
98. See id. at 1332.
99. See id.
100. See id.
101. Id.
tion, usually in either an educational or workplace setting. The paradigmatic affirmative action case involves a post-secondary educational institution that uses racial classifications in order to further the goal of diversity or to remedy the present effects of institutional discrimination.

The California Board of Regents in *Hunter*, however, did not assert a remedial justification, nor did it implement an affirmative action program. As a result, it created a situation where the application of Supreme Court precedent is forced and unnatural. Wisely, the *Hunter* court opted for a flexible application of the law rather than attempting to force this case into a rigid and inapplicable framework. The unique nature of this case prompted the court to expand the analytic framework of equal protection jurisprudence to include a non-remedial justification for a race-conscious program.

There are several reasons why *Hunter* is not properly labeled an affirmative action case. Perhaps the most important is that the racial classifications used by UES do not attempt to further the diversity of the school or to remedy some type of past institutional or societal discrimination, but instead are employed solely to provide an adequate scientific sample for the research performed at UES. The findings of fact issued by the *Hunter* court make clear that the race-conscious admissions program of UES is not used as a part of a larger affirmative action program.

Further evidence lies in the fact that the school makes admissions decisions based almost entirely on the race of the applicant. The program does not use race as one factor

102. See supra Part I.B. (identifying the major affirmative action cases decided by the Supreme Court, all involving affirmative action programs in an educational or employment context).

103. There have also been a number of cases involving affirmative action programs in the contracting setting. However, because *Hunter* is logically more similar to affirmative action programs implemented in an educational setting, a comparison between *Hunter* and contracting cases is excluded.

104. See supra notes 76-78 and accompanying text (discussing the justifications provided by the Board of Regents in *Hunter*).

105. See *Hunter*, 971 F. Supp. at 1327 ("Unlike Bakke, Wygant, Croson, Metro Broadcasting, Shaw I, Adarand, and Shaw II, this Court need not concern itself with a proffered compelling state interest of remedying the effects of past or present discrimination. Nor do defendants assert a need to admit a multicultural student body for the sole reason that racial diversity ... satisfies a compelling state interest.").

106. See id. at 1320.

107. See supra notes 65-70 and accompanying text (discussing the admis-
among many in admitting applicants, but instead admits students based on predetermined percentages for each racial category.108 Race is not used as a proxy, but is itself one of the most important factors in the admission decision. It seems unlikely that any school adhering to such a blatantly race-conscious policy would claim to be administering an affirmative action program, especially in light of Supreme Court precedent. It strains credulity to maintain that such an admissions policy could pass constitutional muster as an affirmative action program. As Supreme Court precedent has indicated, only affirmative action programs that use race as one factor in the admissions decision are legitimate, not programs that base admission entirely on the race of the applicant.109

Furthermore, unlike previous racial classification cases, Hunter does not fit neatly into the normal educational context. While UES fits into the generic rubric of education, it differs from the types of institutions typically associated with an educational setting. Although UES is intended to operate just as any other elementary school, the ultimate purpose110 of the school is to conduct educational research and to disseminate the results of that research to other schools throughout California and the country.111 That unique mission makes UES

108. See Hunter, 971 F. Supp. at 1320 (finding that “the Admissions Committee . . . formulated a target number for each racial/ethnic group to be admitted”). The only other factors that are evaluated in the admissions program are whether the applicant’s sibling attends the school and whether the applicant speaks a second language. See supra note 70 and accompanying text.

109. See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 316 (1979) (describing the Harvard admissions program as an example of a plan that does not adhere to rigid quotas but instead uses race as a plus factor in admissions decisions).

110. See supra text accompanying note 4 (quoting the stated mission of the UES).

111. One of the UES admissions brochures describes the school in the following manner:

As a laboratory school, its primary functions are research on effective educational strategies and dissemination of new knowledge about educational practice to teachers and administrators throughout the state and nation. . . . Seeds UES is also a center for the education and training of teachers and educational leaders.

Hunter, 971 F. Supp. at 1328 (quoting UES’s Fall 1995 admissions brochure). Additionally, parents are required to sign a consent form when submitting applications for their children that contains the following language discussing the function of the school:

The Seeds University Elementary School serves, in its central function, as an official University laboratory for research and inquiry in
distinct from any other school in the country and demonstrates that the primary function of the UES is research, not education. This is underscored by the Hunter court's own language: "Students enrolled at UES are research subjects and are covered by all federal, state and university guidelines, rules and policies regarding the treatment of human subjects." Thus, the UES is more accurately labeled a research institution than an educational institution. The application of affirmative action case law, therefore, becomes quite problematic.

The Hunter court was correct in recognizing the unique nature of this case and in avoiding the traditional analysis that would normally accompany a race-conscious admissions program used in an educational setting. The court seemed cognizant of the fact that previous case law did not contemplate the unique facts of the admissions program at UES and that as a result, a more creative and flexible framework was necessary in order to adequately determine whether educational research was a compelling state interest.

B. THE HUNTER COURT CONSTRUCTED AN APPROPRIATE TEST FOR DETERMINING WHETHER EDUCATIONAL RESEARCH CONSTITUTES A COMPPELLING STATE INTEREST

The Hunter court created a workable and effective test for determining whether a non-remedial justification for a racial classification constitutes a compelling state interest. The Supreme Court's two part "compelling interest test," initially articulated in Wygant and used in both Croson and Shaw v.

education. In seeking admission of your child to the University Elementary School, you express your acceptance of the fact that your child, if admitted, will be enrolled in an experimental school, in which teaching methods, curriculum, school organization, and children's learning and development will be continually under study.

112. Id. at 1320 (emphasis added).
113. Of course, the UES also functions as an educational institution, as its very name makes clear. Even if the UES were merely a "school," however, and not primarily a research institution, Hunter would still have been a unique case, by virtue of the age of the students involved. The use of racial classifications in educational settings has traditionally been limited almost exclusively to postsecondary institutions.
114. Id. at 1327.
115. See Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986) (requiring the finding of "prior discrimination" and "a strong basis in evidence for conclusion that remedial action was necessary").
Hunt, is inapplicable to a situation in which a non-remedial justification is offered for a racial classification. The Supreme Court's test assumes that the justification offered to support the racial classification is remedial and thus cannot be appropriately applied to the facts of Hunter where the justification offered for the program is non-remedial in nature.

Realizing that the test articulated by the Supreme Court in Shaw and Croson was inapplicable to the facts of Hunter, the Hunter court formulated its own two-pronged test, a test based on the one provided in Croson but adapted to a non-remedial setting. The court found it necessary for the government to carry the dual burden of "(1) identifying a substantial and worthwhile need to maintain the research conducted at UES; and (2) providing a strong basis in evidence that the use of racial classifications in the UES admissions policy is necessary."119

Although the court's adaptation of the Croson test might, at first glance, seem to break with Supreme Court precedent, after a close analysis the court's reformulation appears legitimate. The Supreme Court stated explicitly after its decision in Croson that it "has never set forth a general test to determine what constitutes a compelling state interest."120 This implies that although the two-pronged test used in both Croson and Shaw might be required for any case in which a remedial justification is asserted, that test is not binding in other areas, including a non-remedial justification for a racial classification. Additionally, the Hunter court still required a "strong basis in evidence" in order to uphold the use of the racial classifications in the admissions program.121 It seems that the "strong basis in evidence" language was the vital part of the test in the eyes of the Supreme Court.122 The Hunter court was therefore suc-

118. The test assumes a remedial justification because it requires a finding of discrimination in order to satisfy the first prong of the test. Without a finding of institutional discrimination the test is inapplicable.
119. Hunter, 971 F. Supp. at 1328 (citation omitted).
121. See Hunter, 971 F. Supp. at 1328.
122. In Croson the Court stated: "None of these 'findings,' singly or together, provide the city of Richmond with a 'strong basis in evidence for its conclusion that remedial action was necessary.' 488 U.S. 469, 500 (1989). The Court went on to discuss the "findings" at length before concluding: "In sum, none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry." Id. at 505; see also Wy-
cessful in formulating a test which preserved the Supreme Court's intention of holding the use of racial classifications to high evidentiary standards, while at the same time providing an opportunity to move away from a traditional affirmative action analysis and instead focus on the unique research aspect of UES. Acceptance by other courts of the modified test employed by the Hunter court would provide the potential for more widespread acceptance of non-remedial justifications for race-conscious programs.

C. EDUCATION ALONE IS NOT SUFFICIENTLY COMPELLING TO JUSTIFY THE USE OF A RACE-CONSCIOUS ADMISSIONS PROGRAM

The Hunter court focused a substantial part of its analysis on the fact that UES was primarily a research institution rather than simply an elementary school. In doing so, the court shifted its analysis away from the question of whether the state's interest in providing a quality education alone was sufficient to uphold the admissions program and instead reasoned persuasively and correctly that the unique research aspect of the school tipped the scales in favor of finding a compelling state interest. Had the court analyzed the case according to the validity of providing a quality education as the lone compelling state interest, it would have been forced to strike down the program.

This case could easily have been framed solely as an education case. In fact, the court began its analysis by noting that "[t]he judiciary has long-recognized that a state's need to provide its citizenry with a quality education is compelling." By
gant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986) ("[A] public employer . . . must ensure that . . . it has convincing evidence that remedial action is warranted.").

123. In its analysis the court stated that:

[T]he principal purpose of the UES laboratory school is not simply to educate its own student population. As previously discussed, UES's primary mission as a program associated with the UCLA GSE & IS is to conduct research and disseminate information regarding potential innovations in urban elementary educational methods.

Hunter, 971 F.Supp at 1328.

124. Id. In support of this proposition the court provided the following citations: Plyler v. Doe, 457 U.S. 202, 221 (1982) (recognizing "public schools as a most vital civic institution for the preservation of a democratic system of government"); Ambach v. Norwich, 441 U.S. 68, 76 (1979) (noting that "public education . . . fulfills a most fundamental obligation of government to its constituency"); Brown v. Board of Educ., 347 U.S. 483, 493 (1954) ("Education is perhaps the most important function of state and local govern-
making such a statement the court placed itself in a curious position. Assuming, arguendo, that a state's interest in providing a quality education to its citizens is a compelling state interest, it would be unnecessary for the court to continue the analysis any further. After finding a compelling state interest it could simply move on to the narrow tailoring prong of the strict scrutiny test. However, the court did not take this approach, but instead engaged in a lengthy discussion of the importance of the research aspect of UES.

The court was correct in refocusing its analysis on the research aspect of UES and realizing its importance in the ultimate determination of whether a compelling interest was present. The discussion was an integral part of the court's analysis because the interest in providing a quality education does not, by itself, support the use of racial classifications, despite the court's claim that it is a compelling state interest. While it is clear that quality public education serves a vital role in our society and is a primary function of our government, a state's interest in providing education has only been found to be a compelling state interest for the purpose of the strict scrutiny test in a few limited situations, situations that are inapplicable to the facts of Hunter.

Although courts at all levels have paid lip service to the notion that the state's interest in providing a quality education is compelling, in reality the interests they have found suffi-
cient to outweigh other constitutional rights have been much narrower. To say generally that there is a compelling interest in providing a quality education is overbroad. In fact, in the three cases cited by the Hunter court for the proposition that providing a quality education is a compelling state interest, never once is the phrase "compelling interest" used.\textsuperscript{129} Instead, those cases deal primarily with the importance of educational institutions in furthering democratic principles and in transmitting values from one generation to the next. In \textit{Plyler v. Doe}, the Supreme Court held that the state of Texas could not deny public education to the children of illegal aliens.\textsuperscript{130} In that case the Court cited a number of previous cases in support of the general proposition that education is of paramount importance to our society.\textsuperscript{131} In \textit{Ambach v. Norwich}, the Court focused on the function of schools in inculcating values to uphold a citizenship requirement for New York state public school teachers.\textsuperscript{132} Finally, in \textit{Brown v. Board of Education}, the Court stressed the vital role of education in finding segregation to be inherently unequal.\textsuperscript{133} It is not clear, therefore, from the cases cited by the Hunter court that a state's general interest in providing a quality education has been found to be sufficiently compelling to subordinate other constitutionally mandated rights. The instances in which the courts have found educational interests to be compelling for the purposes of the strict scrutiny test have been defined in very narrow terms, such as the interest in a safe classroom environment,\textsuperscript{134} and the interest in prohibiting the use of vulgar and offensive language in
public discourse.\textsuperscript{135} It is therefore unclear that a general interest in providing a quality education is alone sufficiently compelling to subordinate equal protection rights.

Furthermore, if the state's interest in providing a quality public education alone were a compelling state interest, a case such as \textit{Bakke} would not pose a particularly difficult issue. Under the facts of \textit{Bakke},\textsuperscript{136} the state could have asserted that its admissions program was an attempt to improve the quality of education provided to the Davis medical students by ensuring a more diverse student body and as a result a more vibrant academic climate and healthier learning environment. Such a claim, supported by a strong basis in evidence and given the necessary deference for legitimate academic judgements,\textsuperscript{137} would have defeated Bakke's equal protection claim.\textsuperscript{138} If the general interest in providing a quality education were alone a compelling state interest, affirmative action programs in higher education would seemingly face much less of a legal challenge.

Thus, although the \textit{Hunter} court stated that providing a quality education was a compelling state interest, alone it was not sufficient to justify the use of racial classifications. The findings of compelling interests in the area of education have been very limited and do not apply to the facts of \textit{Hunter}. This does not, however, render the remaining part of the \textit{Hunter} court's analysis invalid.

\textbf{D. THE HUNTER COURT CORRECTLY RELIED ON THE RESEARCH ASPECT OF THE UES TO CONCLUDE THAT EDUCATIONAL RESEARCH IS A COMPELLING STATE INTEREST}

Although the \textit{Hunter} court made the error of stating that the state's interest in providing a quality education was compelling, the court did not rely completely on that finding to co-

\textsuperscript{135} See Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) (finding that prohibiting vulgar and offensive language is an appropriate school function).

\textsuperscript{136} See supra notes 27-34 and accompanying text.

\textsuperscript{137} See University of Pa. v. EEOC, 493 U.S. 182, 199 (1990) ("[C]ourts have stressed the importance of avoiding second-guessing of legitimate academic judgments. This Court itself has cautioned that 'judges . . . asked to review the substance of a genuinely academic decision . . . should show great respect for the faculty's professional judgment.'") (citation omitted).

\textsuperscript{138} The narrow tailoring prong of the strict scrutiny analysis would, of course, also need to be satisfied. See supra notes 22 and 125 and accompanying text.
clude that educational research was a compelling state interest.\textsuperscript{139} The court correctly refocused the emphasis of its analysis on the research aspect of UES. In doing so, the court astutely recognized that the research aspect of UES was critical in finding that educational research was a compelling state interest.

The research component of UES is of primary importance because of its potentially far-reaching implications. As with other research projects, although its immediate impact may be felt only by a small population, it has the potential to produce widespread benefits.\textsuperscript{140} It is this unique characteristic that justifies the special treatment of research. In this case, while the improvement of urban education in the Los Angeles area may be the primary goal of the UES, the research has the potential to benefit schools and children throughout the nation.\textsuperscript{141} This, along with the serious nature of the problems in the nation's urban schools,\textsuperscript{142} provides a strong justification for the court's finding that educational research is a compelling interest.

By shifting its focus from the educational aspect of the state's justification to the research aspect of UES, the court was also able to avoid the problems of a \textit{Hopwood}-type challenge to the program. In \textit{Hopwood}, the court concluded that the only legitimate justification for an affirmative action program in an educational institution is that of remedying past institutional discrimination.\textsuperscript{143} The \textit{Hopwood} court stated that the non-remedial justification of diversity supported by Justice Powell in \textit{Bakke} did not act as controlling precedent.\textsuperscript{144} In striking down the University of Texas Law School's admission program, the Fifth Circuit maintained that the opinions issued by the Supreme Court following \textit{Bakke} require a finding of past discrimination before any affirmative action program may be justified.\textsuperscript{145} Educational research, although distinct from di-

\textsuperscript{139} See \textit{Hunter}, 971 F. Supp. at 1328-30.

\textsuperscript{140} See supra note 4 and accompanying text (quoting the mission of the UES).

\textsuperscript{141} See \textit{Hunter}, 971 F. Supp. at 1328 (noting that "UES's primary mission... is to conduct research and disseminate information regarding potential innovations in urban elementary education methods").

\textsuperscript{142} See supra notes 1-2 and accompanying text.

\textsuperscript{143} See supra notes 57-59 and accompanying text (describing the holding and legal reasoning of the \textit{Hopwood} Court).

\textsuperscript{144} See supra note 58 and accompanying text (noting that only Justice Powell supported the diversity rationale).

\textsuperscript{145} See \textit{Hopwood v. Texas}, 78 F.3d 932, 944 (5th Cir. 1996) (observing
versity, would probably suffer the same defeat when analyzed within the framework of *Hopwood*.

However, by classifying the UES's race-based admission policy as a research tool rather than an affirmative action program, the *Hunter* court avoided any conflict with *Hopwood*.

E. AN ALTERNATIVE CONSTRUCTION OF EDUCATIONAL RESEARCH AS A COMPELLING INTEREST: A COMPARISON OF ATTRIBUTES

Although *Hunter* should not be viewed as an affirmative action case, the court was forced to compare *Hunter* to other cases in which race-conscious programs have been used. The cases most closely analogous, therefore, are affirmative action cases. The justifications used in those cases are instructive in attempting to determine what factors the Supreme Court finds convincing when attempting to determine whether a compelling interest exists.

By evaluating the attributes of justifications that have been upheld in previous cases, it is possible to discern criteria that the Supreme Court deems legitimate as

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146. See supra notes 56-58 and accompanying text (explaining that past institutional discrimination is a prerequisite for taking affirmative action).

147. This is not to say, however, that *Hopwood* was correctly decided. As many others have argued, the *Hopwood* ruling is indefensible on both prece-dential and policy grounds. See generally Laura Scanlan, *Hopwood v. Texas: A Backward Look at Affirmative Action in Education*, 71 N.Y.U. L. REV. 1580 (1996); Roscoe C. Howard, Jr., *Getting it Wrong: Hopwood v. Texas and its Implications for Racial Diversity in Legal Education and Practice*, 31 NEW. ENG. L. REV. 831 (1997). The Supreme Court's denial of certiorari has left the decision intact. As a result, the decision has had a widespread effect on affirmative action programs at colleges and universities throughout the country. See supra note 60 and accompanying text.

148. The Supreme Court has provided little guidance to lower courts on the issue of compelling interests. As recently as 1994, the Court noted that there is no specific test to be used in determining compelling state interests. See supra note 120 and accompanying text. Commentators have been critical of the Court's reluctance to clarify this issue. For example, Stephen Gottlieb has written that "while decisions of the Supreme Court and opinions of various members of the Court have frequently described or treated governmental interests as compelling, few have explained why." Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 932 (1988). Sanford Levinson has written that "anyone who actually teaches constitutional law knows that few things are less clear than the operation of the compelling interest doctrine." Sanford Levinson, *Identifying the Compelling State Interest: On 'Due Process of Lawmaking' and the Professional Responsibility of the Public Lawyer*, 45 HASTINGS L.J. 1035, 1036 (1994).
well as its rationales for dismissing other interests as not sufficiently compelling. Comparing those attributes to the interest of educational research provides further justification for finding that educational research is a compelling government interest.

The Supreme Court has been reluctant to accept any non-remedial justifications for race-based classifications because of their tendency to be limitless in both time and scope. There is no concrete ending point or sunset to a program that uses role models or diversity as its justification. The same can be said of remediying past societal discrimination. The Supreme Court is wary of permitting remedies that cannot be mapped out on a definable time line. The Court has expressed its uneasiness by rejecting justifications that it claims are too "amorphous." This concern seems to stem from the fact that the Court views racial classifications and affirmative action programs as deviations from the broader goal of equal protection.

Diversity in an educational setting has not been proffered as a justification for an affirmative action program at the Supreme Court level since Bakke. Although Justice Powell found diversity to be compelling, diversity has been rejected as a justification because it promotes the use of stereotypes and has the potential to fuel further racial hostility.

149. The Wygant Court rejected the justification of societal discrimination, warning that "[i]n the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future." Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986). The Court made a similar point in Croson: "Like the 'role model' theory employed in Wygant, a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It 'has no logical stopping point.'" City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498 (1989) (citing Wygant, 476 U.S. at 275).

150. See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) (referring to past societal discrimination as "an amorphous concept of injury that may be ageless in its reach into the past").

151. See Croson, 488 U.S. at 510 (emphasizing that "findings serve to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself").

152. Program diversity, however, was asserted as a compelling state interest in Metro Broadcasting. See supra notes 46-47 and accompanying text.

153. See supra note 34 and accompanying text.

154. See Croson, 488 U.S. at 493 (warning that "[u]nless [racial classifications] are strictly reserved for remedial settings, they may in fact promote no-
larly, the use of any racial classifications, even if used to promote diversity, may cause stigmatization and do more harm than good for minority students. Additionally, opponents claim that using racial classifications to promote diversity is itself stereotyping. They argue that in order to achieve true diversity, an institution should look not only at race and ethnicity but at all of the characteristics of an applicant.

The Supreme Court’s rejection of societal discrimination as a justification for racial classifications has stemmed from the worry that if the door is opened for remedying past societal wrongs for one group, the Court would be forced to open it for all groups. Specifically, the Court has seemed to worry that allowing such a justification to stand would permit competing claims of remedial relief to be asserted by every group that has been disadvantaged in the past. This would place the Court into the difficult situation of evaluating the past discrimination suffered by every group of minorities and making decisions about which group’s claims deserved remedial action. Societal discrimination has also been rejected as a viable justification because of the lack of definite state action. The goal of the Fourteenth Amendment is to end racially motivated state action as opposed to the racially motivated actions of individuals. It is very difficult to identify a specific state actor or state action when asserting the broad

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155. See id.; Bakke, 438 U.S. at 298 (suggesting that “preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth”).

156. See Hopwood v. Texas, 78 F.3d 932, 945 (5th Cir. 1996) (stating that “[diversity] may further remedial purposes but, just as likely, may promote improper racial stereotypes, thus fueling racial hostility”).

157. See Croson, 488 U.S. at 505 (concluding that “to accept Richmond’s claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for ‘remedial relief’ for every disadvantaged group”).

158. See Bakke, 438 U.S. at 296-97 (“Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications . . . .”).

159. See, e.g., Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 288 (1986) (“I agree with the plurality that a governmental agency’s interest in remedying ‘societal’ discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny.”).

160. See supra notes 13-14 and accompanying text (explaining that private discrimination is not covered under the Fourteenth Amendment).
claim of societal discrimination, and consequently the Court has been unwilling to recognize it as a valid justification for the use of racial classifications or an affirmative action program.\textsuperscript{161}

In contrast, remedying past institutional discrimination is currently the only validated justification for the use of race-conscious programs in higher education or in employment.\textsuperscript{162} The Court has accepted this rationale for a number of reasons. First and foremost, it is viewed as legitimate because the present effects of past discrimination are both identifiable and quantifiable.\textsuperscript{163} Consequently, the remedy is limited in scope and can be monitored on a definite timetable.\textsuperscript{164} When the effects of past discrimination are no longer visible, the justification for the program no longer exists. Thus, the remedy has a concrete ending point and a discrete timeline. Additionally, the state action that is lacking in the case of societal discrimination is clear in the case of institutional discrimination. The institution originally responsible for the discrimination is the one attempting to remedy it by the use of affirmative action. The race-conscious remedy can therefore be focused on specific prior harmful state action, and any possible negative consequences of the classification system are minimized.

Educational research compares favorably with the asserted compelling state interests that the Supreme Court has evaluated in the past and also promotes other unique values that warrant the finding of a compelling interest. In \textit{Hunter}, racial classifications were used in one school in the state of California, a school whose primary purpose is research. Thus, the potential for a broad or unlimited scope of application does not enter into this case as it has with other non-remedial justifications.\textsuperscript{165} In the cases of diversity\textsuperscript{166} and role models\textsuperscript{167} the

\textsuperscript{161} This is of course not meant to indicate that past societal discrimination is not a legitimate concern or that its effects do not still permeate our society, only that it is often difficult to link such a pervasive problem back to a single state actor or action.

\textsuperscript{162} \textit{See supra} notes 33 and 43 and accompanying text (discussing the finding that the remedying of past discrimination is a compelling interest).

\textsuperscript{163} \textit{See, e.g.}, \textit{City of Richmond v. J.A. Croson Co.}, 488 U.S. 469, 510 (1989) (explaining that "proper findings . . . are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects").

\textsuperscript{164} \textit{See, e.g.}, \textit{id.} (underscoring the temporary nature of remedial matters).

\textsuperscript{165} \textit{See supra} notes 149-151 and accompanying text (discussing the problems of time and scope usually associated with non-remedial justifications).

\textsuperscript{166} \textit{See supra} note 34 and accompanying text (asserting diversity as a valid justification in \textit{Bakke}).
potential use of racial classifications was virtually unlimited. Any school with a minority population could institute a program using either rationale, a situation the Supreme Court was unwilling to encourage. In the case of educational research the potential for unlimited use of racial classifications is much less likely.

Additionally, research entails a high degree of objectivity, a quality that is important in an area as volatile as that of race. As a result of the research philosophy of the school, UES is not at all involved in evaluating discrimination or crafting a plan that is intended to remedy past wrongs. The research at issue in this case avoids these problematic value judgments and instead focuses entirely on the issue of how to improve the quality of urban education. In that sense the research maintains an antiseptic quality and avoids problems of determining who deserves remedies. Because courts seem wary of placing themselves in situations where they are forced to make value judgments concerning which groups warrant remedies, the type of plan used by the UES should be a welcomed relief.

The concern about stigmatic harm and increased racial animosity resulting from racial classifications also does not apply to the UES program. First, the program does not deal with college and graduate school students who are capable of making sophisticated judgments concerning the use and utility of racial classifications. While it is likely that college students may make value judgments concerning the validity of another student's qualifications based on his or her race, such problems are unlikely to occur in an elementary school setting. Four-year-old students are not likely to understand distinctions based on race, especially in a community where there is such a great amount of racial diversity. Additionally, even if the students were able to make such racial determinations at such

167. See supra note 40 and accompanying text (asserting a state interest in providing role models to minority students in Wygant).

168. See Hunter, 971 F. Supp. at 1320 (insisting that “the Admissions Committee does not consider race or ethnic background as a remedy for past societal discrimination”).

169. See supra notes 159-160 and accompanying text (discussing the Court's concerns about evaluating claims of societal discrimination).

170. See supra notes 154-155 and accompanying text (describing the court's concern over the potential of racial classifications being counterproductive).

171. See supra note 1 and accompanying text (demographics of Los Angeles Unified School District).
a young age, it is not clear that the UES program would result in the stigmatic harm that can occur with other types of racial classifications. UES does not set different standards for minorities and non-minorities, nor does it offer preferences to one group over another. It simply sets target sample populations for different racial and ethnic groups in order to mirror the demographic percentages in the general population and selects randomly from self-identified racial groups to meet these specified targets.\textsuperscript{172} The likelihood of stigmatic harm or increased racial hostility as a result of such a program is highly unlikely where no merit considerations enter into the decisionmaking process.

Affirmative action programs that use diversity as their rationale attempt to recruit a diverse student body in order to foster a more dynamic learning environment. That is not the goal of the UES program. Instead, UES's goal is to achieve a sample population that mirrors the demographic diversity of the general population.\textsuperscript{173} There is no claim that diversity is intended to offer the students of UES a better learning environment. Therefore, the concerns that have been raised in other diversity contexts are inapplicable to the situation presented in \textit{Hunter}.

Finally, the research conducted by UES can be likened to the justification of past institutional discrimination. Both justifications are used, in a sense, to overcome institutional problems. The need for doing the type of research performed at UES is evidence itself of institutional problems. This is made clear by the language of the \textit{Hunter} court: "Given the nature of the problems currently plaguing the urban public school system, especially in the Los Angeles Unified School District, it would be presumptuous to assume that the State already possessed the answers to all of the complex questions about teaching and learning methods."\textsuperscript{174} The educational research is remedial in nature because it is an attempt to discover and solve the problems that exist in California's educational system, and more specifically the problems faced by urban schools in the Los Angeles Unified District. Although the Board of Re-

\begin{enumerate}
\item \textsuperscript{172} See \textit{supra} notes 65-70 and accompanying text (discussing the UES admissions program).
\item \textsuperscript{173} See \textit{Hunter}, 971 F. Supp. at 1320 ("UES considers its applicants' race and ethnic identities only in an attempt to obtain an adequate crosssample of the general population . . . .").
\item \textsuperscript{174} \textit{Id.} at 1329.
\end{enumerate}
gents may not be responsible for all of the problems that occur in the Los Angeles Unified District, the government of which it is a part is ultimately responsible for the performance of the schools in that district and the education of the state's children.

F. POLICY CONSIDERATIONS FAVOR THE FINDING THAT EDUCATIONAL RESEARCH IS A COMPELLING GOVERNMENTAL INTEREST

In addition to the legal justifications for finding a compelling state interest in educational research, significant policy considerations weigh in favor of finding a compelling interest. To find an equal protection violation in this case would lead to the possibility of absurd results in other areas of scientific research.

A decision in favor of Keeley Hunter would essentially give her the right to become part of a scientific research project. A similar decision in a case involving more traditional research would produce an absurd result. Assume that the Medical School at the University of Minnesota was interested in performing research on the effects of sickle cell anemia in African-American men. Assume further that the University took out an advertisement in the local paper to attract African-American men to participate in the study. If the University, clearly a state actor, chose to limit its pool of research subjects solely to African-American men, a white man interested in being part of the research project would seemingly have a valid equal protection claim under the argument advanced by Hunter. Few would argue that the white man would have a legitimate claim, because it is clear that in this type of situation the racial classification is not only appropriate, but necessary to effectuate the goals of the research.

175. The Hunter court was "convinced that without a racially and ethnically diverse student population, the benefits to be gained by these innovations and studies would be lost. The defendants' practical purpose of operating a laboratory school... would be further jeopardized by a marked decrease in the credibility of future studies conducted at UES should the school fail to maintain a student population reflective of the urban environment." Id.

Clearly, there is a substantial state interest in legitimate scientific research, whether it is for education or sickle cell anemia. Although there may be very few situations where the use of government-sponsored racial classifications are appropriate, this is one of those situations. If research is to continue to provide society with the benefits to which we have grown accustomed, courts must avoid interpreting the Constitution in such a way as to unduly restrict legitimate and routine exercises of discretion by researchers.

CONCLUSION

Hunter v. Regents of the University of California posed the unique question of whether educational research should be considered a compelling state interest for the purpose of strict scrutiny analysis. While the Supreme Court has never upheld the non-remedial use of racial classifications, the Hunter court correctly determined that educational research is a compelling state interest. By shifting the focus of its analysis from the educational to the research aspect of the laboratory school, the court was able to employ a flexible but persuasive argument for finding a compelling state interest. This Comment suggests that comparing educational research to other asserted justifications for racial classifications provides further support for the court's conclusion. Although the court expanded the traditional framework used for analyzing race-conscious programs, it relied on sound legal and policy justifications in reaching its ultimate decision.