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WHEN THE CLASSROOM SPEAKS:  
A PUBLIC UNIVERSITY'S FIRST AMENDMENT RIGHT TO A RACE-CONSCIOUS ADMISSIONS POLICY 

Alfred B. Gordon* 

The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues.'

I. INTRODUCTION 

The above quotation has become a guiding principle in higher education; and accordingly, universities have crafted student bodies that reflect the array of social, religious, racial, and economic constituents of contemporary society. To safeguard this basic tenet of education and its benefits in the classroom, in Regents of the University of California v. Bakke, Justice Lewis Powell recognized the selection of a diverse student body as a "special concern of the First Amendment." This recognition of a university's First Amendment

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2. See Roscoe J. Howard, Getting It Wrong: Hopwood v. Texas and Its Implication for Racial Diversity in Legal Education and Practice, 31 NEW ENG. L REV. 831, 838 (1997) (observing that after Bakke universities redesigned their admissions policies to bring diversity to classroom).


4. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 311-15 (1978) (Powell, J.) (recognizing First Amendment protection of race-conscious admissions policies to achieve diverse student bodies). In Bakke, the Supreme Court considered the validity of a medical school's admissions program that set aside a certain number of seats solely for minority applicants. Id. at 272-76. According to Justice Powell's opinion, for the court, the purpose of attaining a diverse student body was constitutionally permissible because of the First Amendment rights of academic institutions. Id. at 311-12. However, the medical school's admissions program violated the Constitution. Id. at 319-20. The reservation of a specified number of seats for minority applicants was not the least restrictive means available to attain a diverse student body. Id. at 315-16. The Supreme Court determined that a university must evaluate each applicant as an individual for all the available seats. Id. at 319-20. An admissions program that considered race as one factor among many was an acceptable race-conscious program. Id. at 315-18. By considering race as a positive factor, the school could account for race to achieve diversity and still not insulate the applicant from comparison with all other applicants for admission. Id. at 317. Because the admission program did not compare all applicants and consider all available factors to achieve a diverse student body, the Court held the program unconstitutional. Id. at 320. See also U.S. CONST. amend. I. ("Congress shall make no law . . . abridging the freedom of speech . . . or the right of people peaceably to assemble . . .").
interest assured constitutional protection for narrowly tailored race-conscious admissions policies. For years, public universities across America have instituted admissions policies modeled on this diversity rationale, and lower courts have recognized that the First Amendment protects these policies.

Nevertheless, ambiguity has replaced the once-settled First Amendment protection granted such a consideration of race. In 1996, the United States Court of Appeals for the Fifth Circuit found the diversity rationale unconstitutional, and some states have outlawed race-conscious policies by legislative means. Many other states and courts, however, continue to recognize the First Amendment protection enunciated in Bakke. As recently as 1998, the United States Court of Appeals for the First Circuit recognized the

5. See Bakke, 438 U.S. at271-72 (Powell, J.) (holding University of California School of Medicine's admissions program unconstitutional but recognizing narrowly tailored consideration of race as constitutional).


7. See generally Tuttle v. Arlington County Sch. Bd., 195 F.3d 698 (4th Cir. 1999) (recognizing diversity rationale as compelling state interest); Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998) (recognizing First Amendment protection of narrowly tailored race-conscious admissions policy); McDonald v. Hogness, 598 P.2d 707 (Wash. 1979) (recognizing First Amendment right of university to diverse student body).

8. See Steve France, Recess for Diversity?, A.B.A. J., Mar. 1999, at 30 (noting that affirmative action and diversity rationale are under attack); Sedler, supra note 7, at 1162 (noting uncertain constitutionality of race-conscious admissions policies in circuits other than Fifth Circuit).

9. See Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) (finding race-conscious admissions policy unconstitutional); See Sedler, supra note 7, at 1162 (acknowledging that Hopwood may "spark a spate of constitutional challenges to racially preferential admissions programs").


First Amendment interest implicated by the consideration of race to achieve a diverse student body.\(^{12}\)

This Article argues that the First Amendment continues to protect a public university's narrow consideration of race when that consideration contributes to diversity in the classroom. In finding otherwise, the Fifth Circuit mistakenly relied on employment discrimination jurisprudence.\(^{13}\) Nevertheless, education and academic freedom represent a unique context to which First Amendment protection extends.\(^{14}\) Because a racially diverse student body contributes to a classroom's speech, the limited consideration of race in admissions decisions remains a First Amendment interest of academic freedom.\(^{15}\)

II. THE BAKKE DECISION

In an effort to ensure the admission of racial minorities, the Medical School of the University of California at Davis utilized an admissions program that reserved sixteen out of 100 seats for racial minorities.\(^{16}\) Allan Bakke, a white applicant, applied for admission to the medical school in 1973 and 1974.\(^{17}\) In both years, the medical school denied his applications even though it admitted minority applicants with grade point averages and MCAT scores significantly lower than Bakke's scores.\(^{18}\) Bakke filed suit, claiming that the medical school's race-conscious admissions policy violated his rights under the Equal Protection Clause of the Fourteenth Amendment.\(^{19}\) The California Supreme Court declared the program unlawful, prohibited the consideration of race in admissions decisions, and ordered the admission of Bakke to the medical school.\(^{20}\) The medical school appealed the case to the United States Supreme Court.\(^{21}\)

\(^{12}\) See Wessmann v. Gittens, 160 F.3d 790, 808 (1st Cir. 1998) (refusing to reject Bakke's diversity rationale).

\(^{13}\) See infra Part IV.B.

\(^{14}\) See Wessmann, 160 F.3d at 798.

\(^{15}\) See infra Part IV.C.


\(^{17}\) See id. at 276 (Powell, J.) (describing Bakke's credentials).

\(^{18}\) See id. at 276-78 (Powell, J.) (noting discrepancy between Bakke's scores and scores of accepted minority applicants).

\(^{19}\) See U.S. CONST. amend. XIV, §1 ("No State Shall ... deny to any person within its jurisdiction the equal protection of the laws."); see Bakke, 438 U.S. at 277-78 (Powell, J.) (explaining grounds for Bakke's lawsuit).

\(^{20}\) See 438 U.S. at 280-81 (Powell, J.) (explaining California Supreme Court's disposition of case).

\(^{21}\) See id. at 280-81 (Powell, J.) (discussing Supreme Court's grant of certiorari).
The Supreme Court did not issue a majority opinion in Bakke. Four Justices found that the medical school's admissions policy was constitutional.\textsuperscript{22} Four other Justices found that federal statutes prohibited the admissions policy and that it was unnecessary to determine whether such a consideration of race was constitutional.\textsuperscript{23} Justice Powell, announcing the judgment of the Court, established a position between the extremes and found that some race-conscious admissions policies are constitutional,\textsuperscript{24} but that the medical school's admissions program was unconstitutional because it was not narrowly tailored to achieve a diverse student body.\textsuperscript{25} Though no other Justice concurred with Justice Powell's entire opinion, five Justices of the United States Supreme Court affirmed the constitutionality of race-conscious admissions policies.\textsuperscript{26}

In his opinion, Justice Powell examined the history of the Court's equal protection jurisprudence\textsuperscript{27} and found that all racial classifications are subject to strict scrutiny.\textsuperscript{28} Strict scrutiny requires the governmental actor to assert a compelling state interest for the racial classification and to demonstrate the use of a means narrowly tailored to achieve that interest.\textsuperscript{29} Because the medical school based part of its admissions policy on race, it needed to show that the classification served a compelling purpose and that the classification was narrowly tailored to achieve that purpose.\textsuperscript{30}

\textsuperscript{22} See id. at 325-26 (Brennan, J., concurring in part and dissenting in part) (stating that "government may take race into account when it acts not to demean or insult any racial group").

\textsuperscript{23} See id. at 411 (Stevens, J., concurring in judgment in part and dissenting in part) (finding that use of race as admissions factor was not before Court).

\textsuperscript{24} See id. at 310-14 (Powell, J.) (recognizing race-conscious admissions policy as constitutional when used to achieve diverse student body).

\textsuperscript{25} See id. at 315-20 (Powell, J.) (finding medical school's admissions policy unconstitutional because not narrowly tailored).

\textsuperscript{26} See id. at 325-26 (Brennan, J., concurring in part) (observing that "five votes reverse[e] the judgment below insofar as it prohibits the University from establishing race-conscious programs in the future"); see also Benjamin L. Hooks, Affirmative Action: A Needed Remedy, 21 Ga. L. Rev. 1043, 1044 n.5 (1987) (noting that Justice Powell's diversity rationale "together with the Brennan group's finding that Davis' special admissions program did not violate the Constitution, showed the Court's willingness to consider race as a factor in admissions decisions").

\textsuperscript{27} See Bakke, 438 U.S. at 288-95 (Powell, J.) (discussing expansion of Equal Protection Clause's application from solely African-Americans to other minorities).

\textsuperscript{28} See id. at 291 (Powell, J.) (establishing strict scrutiny as appropriate standard of review for racial classifications).

\textsuperscript{29} See id. at 291-300 (Powell, J.) (explaining strict scrutiny review of racial classifications).

\textsuperscript{30} See id. at 305 (Powell, J.) (setting forth strict scrutiny standard that medical school must meet to sustain its race-conscious admissions policy). The medical school advanced four purposes to justify the classification: (1) to increase the number of minority students, (2) to counter societal discrimination, (3) to increase the number of doctors willing to serve minority communities, and (4) to achieve an ethnically diverse student body. Id. at 306. Justice Powell found the first three reasons unconstitutional. Id. at 307-10. However, he found that the attainment of a diverse student body was a compelling governmental interest in support of a racial classification. Id. at 311-15.
Justice Powell found that the attainment of a diverse student body constituted a compelling interest served by a race-conscious admissions policy. In so doing, he recognized the selection of a student body as an essential part of a university's freedom to make educational decisions, and stated that "[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment." Relying on prior Supreme Court decisions, Justice Powell found that the medical school advanced a countervailing constitutional right of academic freedom in response to Bakke's equal protection claim. Nevertheless, to satisfy strict scrutiny, the Equal Protection Clause required that the Davis admissions policy consider numerous individual characteristics in addition to race.

Justice Powell found the medical school's admissions program unconstitutional because it set aside a predetermined number of seats for racial minorities and because it used race as the sole factor to achieve diversity. The medical school's ethnic set-aside system failed to achieve genuine diversity because the policy did not consider the individual characteristics, other than race, that applicants offered the student body. In contrast to the medical school's overly broad policy, Justice Powell cited the Harvard admissions plan as an alternative to reserving a fixed number of seats for minority applicants. The Harvard Plan considered ethnic background as a "plus" for an applicant in its admissions decisions. The "plus" factor

31. See id. at 312-14 (Powell, J.) (recognizing achievement of diverse student body to be compelling governmental interest).
32. See id. (Powell, J.) (noting four essential freedoms of academic freedom). In Bakke, Justice Powell stated that:

   It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university--to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.

   Id. at 312 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (emphasis added)).
33. Id. at 312 (Powell, J.).
34. See id. at 312-14 (Powell, J.) (recognizing that graduate schools possess interest in diverse student bodies); see also Keyishian v. Board of Regents of Univ. of N.Y., 385 U.S. 589, 603 (1967) (discussing advantages that diverse perspectives bring to classroom and First Amendment protection).
36. See id. at 315-17 (Powell, J.) (disapproving of medical school's policy because it only considered race).
37. See id. (Powell, J.) (explaining why medical school's policy was unconstitutional).
38. See id. at 316-17 (Powell, J.) (proposing Harvard Plan as example of narrowly tailored means to achieve diversity in admissions).
39. See id. at 321-24 (Powell, J.) (discussing Harvard admissions plan). Justice Powell included the following excerpt as an appendix to his opinion:

   The belief that diversity adds an essential ingredient to the educational process has long been a tenet of Harvard College. . . . In recent years Harvard College has expanded the concept of
approach ensures that the university compares all applicants for all available seats. Under this plan, a university considers geographic diversity, athletic ability, musical talent, and ethnic diversity to achieve a genuinely diverse student body. Justice Powell determined that admissions policies, such as the Harvard Plan, are constitutional because they compare each applicant with all other applicants as individuals.

In *Bakke*, the Supreme Court’s most direct statement on the validity of race-conscious admissions policies, a majority of the Court found that an appropriate consideration of race was constitutional. Moreover, in his oft-cited opinion, Justice Powell announced that the attainment of a diverse student body was a compelling governmental interest and that the diversity to include students from disadvantaged economic, racial and ethnic groups. Harvard College recruits not only Californians or Louisianans but also blacks and Chicanos and other minority students. In practice, this new definition of diversity has meant that race has been a factor in some admission decisions. The race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates’ cases. The quality of the educational experience of all the students in Harvard College depends in part on these differences in the background and outlook that students bring with them.

Id. at 322-23.

The amicus brief filed by Columbia University, Harvard University, Stanford University, and the University of Pennsylvania was the original source of this excerpt. Id. at 321 n.55.

40. See id. at 317-18 (Powell, J.) (expressing support for “plus” factor approach to consider race in admissions decisions).

41. See id. at 317-18 (Powell, J.) (requiring consideration of numerous factors to achieve genuine diversity).

42. See id. at 318 (Powell, J.) (observing that university should compare each applicant with all other applicants for admission). In *Bakke*, Justice Powell stated: The applicant who loses out on the last available seat to another candidate receiving a ‘plus’ on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.

Id. See also Sedler, supra note 7, at 1162 (explaining that universities across country are adopting “whole person” approach to admissions that weighs all circumstances of applicant’s life with applicant’s grades and test scores).

43. See Jim Chen, *Diversity and Damnation*, 43 U.C.L.A. L. REV. 1839, 1863 (1996) (noting that *Bakke* was only speech-related affirmative action case in university setting that Supreme Court has heard).

44. See Regents of Univ. of Cal. v. *Bakke*, 438 U.S. 265, 325-26 (Brennan, J., concurring in part) (noting that five votes upheld use of race in admissions decisions); see also DeRonde v. Regents of Univ. of Cal., 625 P.2d 220, 222 (Cal. 1981) (stating that in *Bakke* “a separate but clear majority of the high court (namely, Powell, Brennan, White, Marshall, and Blackmun, JJ.) indicated approval of race conscious admissions programs”); 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 18.10, at 179 (3d ed. 1999) (“A program of admissions to an institution of higher education that allows admissions officers to consider race as an affirmative factor without using clear racial preferences will be held to violate neither the equal protection clause nor Title VI because a different alignment of five justices voted to uphold such programs.”).

45. See *Bakke*, 438 U.S. at 312-14 (Powell, J.) (finding that diversity rationale was compelling justification for race-conscious admissions policy).
When the Classroom Speaks

consideration of race as a "plus" factor was a means narrowly tailored to serve that interest. Hence, as a First Amendment right, the narrow consideration of race to achieve a diverse student body is a constitutional exercise of a university's academic freedom.

III. THE FIRST AMENDMENT PROTECTS RACE-CONSCIOUS ADMISSIONS POLICIES AS AN EXERCISE OF ACADEMIC FREEDOM

A. Public Universities Possess a First Amendment Right to Academic Freedom

A long tradition in American jurisprudence supports Justice Powell's claim that public universities possess a First Amendment right to academic freedom. Establishing this First Amendment interest in Sweezy v. New Hampshire, Chief Justice Warren noted that an encroachment on academic freedom would have a devastating impact on education in this country, and

46. See id. at 318 (Powell, J.) (stating that "plus" factor approach was narrowly tailored to achieve diverse student body).
47. See J. Peter Byrne, Academic Freedom: A 'Special Concern of the First Amendment,' 99 YALE L.J. 251, 311 (1989) (recognizing First Amendment right of academic freedom). Byrne argues that a tradition of academic freedom arose from a history of autonomy for state universities and that the mere fact that public funds supported a university did not relieve state authorities from affording public universities academic freedom. Id. at 329. See also Robert A. Sedler, The Unconstitutionality of Campus Bans on 'Racist Speech': The View from Without and Within, 53 U. PITTS. L. REV. 631, 679 (1992) (stating that First Amendment protects "the freedom of a university to make its own judgments as to education") (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (Powell, J.)); David M. Rabban, A Functional Analysis of 'Individual' and 'Institutional' Academic Freedom Under the First Amendment, 53 LAW & CONTEMP. PROBS., Summer 1990, at 227, 235-41 (discussing Supreme Court's early incorporation of academic freedom into First Amendment).

49. See Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (emphasizing nation's need for academic freedom). In Sweezy, the Supreme Court considered whether a state attorney general could question a college professor about the political content of his lectures and his political views under the threat of prosecution for contempt. Id. at 235, 238, 243-44. The New Hampshire Attorney General summoned Sweezy to testify in an investigation under an anti-subversive activities statute. Id. at 236-37. Sweezy refused to answer several questions concerning the content of one of his lectures and his knowledge of various political parties. Id. at 242-44. The attorney general petitioned the court to find Sweezy in contempt and to commit him to county jail. Id. at 244-45. The Supreme Court found the statute's definition of subversive persons and activities too vague and overbroad. Id. at 246-48. Moreover, the Court recognized
Justice Frankfurter recognized that government must not intrude into a university's fundamental academic decisions.50 Such fundamental decisions include a university's choice of curriculum, selection of faculty, and admission of students.51 Following Sweezy, several Supreme Court opinions echoed this First Amendment protection of academic freedom.52

In *Keyishian v. Board of Regents of the University of New York*, 53 the Supreme Court again recognized that a university possesses a First Amendment interest in academic freedom.54 *Keyishian* struck down New York’s statutory requirement mandating that faculty members of state universities attest that they did not possess ties to the Communist Party.55 Four faculty members refused to so attest; and in accordance with the statute, the university threatened to terminate their employment.56 The *Keyishian* Court recognized that the statute infringed upon the university’s academic freedom that the government should enter reluctantly areas of academic freedom and that the actions of the state legislature and attorney general encroached upon Sweezy’s academic freedom. *Id.* at 250. The Supreme Court held that New Hampshire lacked the power to compel disclosures of the content of Sweezy’s lecture and political affiliations. *Id.* at 235.

50. See *id.* at 263 (Frankfurter, J., concurring) (noting four pillars of academic freedom as freedom to choose faculty, curriculum, students, and methods). See also Rabban, *supra* note 48, at 256 (recognizing that in *Sweezy* both Chief Justice Warren and Justice Frankfurter constitutionalized academic freedom by tying First Amendment values to independence of universities).

51. See *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring) (recognizing aspects of academic freedom).

52. See *University of Penn. v. EEOC*, 493 U.S. 182, 199 (1990) (“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.’” (quoting *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985)); Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271, 294 (1984) (Marshall, J., concurring) (“[I]n general, colleges and universities are most likely to fulfill their crucial roles in our society if they are allowed to operate free of outside interference.”); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J.) (recognizing that academic freedom is special concern of First Amendment). See also Rabban, *supra* note 48, at 266 (“Cases since *Sweezy* have reinforced without significantly elaborating its indication that first amendment academic freedom applies to universities . . . .”).


54. See *Keyishian v. Board of Regents of Univ. of N.Y.*, 385 U.S. 589, 603 (1967) (stating that academic freedom “is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom”). In *Keyishian*, the Supreme Court considered whether employment at a state university conditioned upon compliance with a state plan to prevent the employment of subversive individuals was constitutional. *Id.* at 591, 592. The defendants in this action were employees of a state university, and each refused to sign the state-mandated certificate attesting that he was not a communist. *Id.* at 591-92. Due to refusal to sign the certificate, one individual resigned, the school refused to renew another individual’s contract, and the university notified the other faculty members that the school would not renew their current contracts. *Id.* at 592. The Supreme Court considered the subversive activities statute, the progenitor of the certificate, too vague. *Id.* at 599-609. Moreover, the Court found that the imprecision of the law was most offensive in that it encroached upon the academic freedom of the individuals involved. *Id.* at 603-04. The Supreme Court invalidated the statute because it prohibited mere membership in the Communist party without a showing of specific intent to further the unlawful aims of the Communist party. *Id.* at 609-10.

55. See *id.* at 592, 609-10 (describing attestation provision at issue and Court’s holding).

56. See *id.* at 592 (describing consequences to four individuals who refused to sign required certificate).
to determine the composition of its own faculty. Writing for the Court, Justice Brennan observed that "our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us . . . That freedom is therefore a special concern of the First Amendment."

The Supreme Court also found that the First Amendment protects the selection of a university’s student body. In *Regents of the University of Michigan v. Ewing*, a post-Bakke decision, the Court again recognized a university’s First Amendment right to academic freedom. In *Ewing*, a student challenged, on due process grounds, his dismissal from the University of Michigan School of Medicine. The Supreme Court found that the university had met due process requirements and noted the First Amendment interest implicated by the dismissal of students as an exercise of academic freedom. In reaching its decision, the *Ewing* Court stated that "academic freedom thrives . . . on autonomous decision making by the academy itself.

As recently as 1990, in *University of Pennsylvania v. EEOC*, the Court reiterated the constitutional protection of a university’s academic freedom.

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57. See id. at 601, 603-04 (noting that statute created in terrorem mechanism in university).
58. See id. at 603 (recognizing constitutional protection of academic freedom).
61. See Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 226 (1985) (indicating that courts should exercise restraint when addressing university’s academic freedom). In *Ewing*, the Supreme Court considered whether the University of Michigan denied a student due process when the university dismissed the student after failing the first part of a national medical examination. Id. at 215-16. Prior to Ewing’s failure, the university allowed every medical student who failed the examination to retake it. Id. at 219. The university denied Ewing this opportunity. Id. The Court recognized that the university followed fair procedures in every respect. Id. at 224-25. The university gave careful deliberation and consideration to Ewing’s entire academic career. Id. at 225. The Supreme Court also recognized that the university’s First Amendment interest in academic freedom included decisions as to the admission and dismissal of students. Id. at 225-26. The Supreme Court determined that the university afforded Ewing all the process that he was due. Id. at 215.
62. See id. at 215 (discussing dismissal of Ewing).
63. See id. at 225-26 (recognizing that academic freedom is “special concern of the First Amendment”).
64. Id. at 226 n.12.
66. See University of Penn. v. EEOC, 493 U.S. 182, 198 n.6 (1990) (observing that when “government attempts to direct the content of speech at public educational institutions, complicated First Amendment issues are presented because government is simultaneously both speaker and regulator”). In *University of Pennsylvania*, the Supreme Court considered whether a university could withhold confidential tenure evaluations from the Equal Employment Opportunity Commission (EEOC) under either a common law privilege or as an academic freedom protected by the First Amendment. Id. at 184, 186. The university denied tenure to a female professor who subsequently filed charges claiming that her superior sexually harassed her. Id. at 185. The EEOC commenced an investigation and issued a subpoena seeking the professor’s tenure review file. Id. at 186. The university refused to provide the peer review material in the file and claimed that a common-law privilege protected the integrity of the peer review process as central to the functioning of colleges and universities. Id. at 186-89. The Court recognized that this peer review process did not sufficiently promote important interests outweighing the need for probative evidence. Id. at 189. The Court dismissed the university’s academic freedom argument because the subpoenas were not an attempt to direct the content of the university’s speech. Id. at 197-99. The Supreme Court determined
In *University of Pennsylvania*, the university withheld a tenure review file from the Equal Employment Opportunity Commission (EEOC). The university argued that tenure review was directly linked to the selection of faculty and, therefore, that academic freedom prevented disclosure of tenure review files. The Supreme Court rejected this argument, but recognized the university’s First Amendment right to select freely its faculty.

Lower federal courts and state courts also have recognized the First Amendment’s protection of academic freedom. In *McDonald v. Hogness*, the Supreme Court of Washington addressed the University of Washington School of Medicine’s denial of admission to a nonminority applicant under a race-conscious admissions policy. The medical school’s admissions policy considered race as a “positive” factor in its admissions decisions. While finding the medical school’s admissions policy constitutional, the Washington Supreme Court observed that the creation of a diverse student body implicated First Amendment academic freedom. In reaching this conclusion, the Washington Supreme Court accepted the First Amendment underpinnings of academic freedom.

that the subpoena did not violate a common law privilege or the academic freedom of the university. *Id.* at 194-95, 201-02.

67. See *id.* at 186 (stating that University of Pennsylvania refused to provide tenure review files).

68. See *id.* at 196-97 (stating university’s claim that academic freedom prevented disclosure of tenure review file).

69. See *id.* at 197 (recognizing academic freedom to select faculty but finding right inapplicable to case).

70. See *supra* note 12.

71. 598 P.2d 707 (Wash. 1979).

72. See *McDonald v. Hogness*, 598 P.2d 707, 709 (Wash. 1979) (addressing whether First Amendment academic freedom protected race-conscious admissions policy). In *McDonald*, the Supreme Court of Washington confronted the issue of whether a race-conscious admissions policy violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 709. McDonald was a nonminority applicant denied admission to the University of Washington School of Medicine. *Id.* at 709-11. The medical school used race as a positive factor in its admissions policy. *Id.* at 710. Relying on the Supreme Court’s decision in *Bakke*, the Washington court ruled that this use of race did not violate the Equal Protection Clause and recognized that the attainment of a diverse student body was a compelling state interest. *Id.* at 711-12, 715. The medical school’s admissions policy considered race as only one factor in its admissions decision; therefore, it was narrowly tailored to achieve a compelling interest in a diverse student body. *Id.* at 714-15. The Washington Supreme Court held that the medical school’s consideration of race did not violate the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 715.

73. See *id.* at 709-10 (explaining medical school’s consideration of race as “plus” factor).

74. See *id.* at 712-13 (“We agree that in seeking diversity, the University of Washington medical school must be viewed as ‘seeking to achieve a goal that is of paramount importance to the fulfillment of its mission.’” (citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1978))).

75. See *id.* at 712 (relying on First Amendment academic freedom to justify consideration of race in admissions decisions).
B. Academic Freedom Includes Admissions Decisions

As an exercise of academic freedom, a university may diversify its speech through the composition of its student body. It was for this freedom that Justice Powell recognized First Amendment protection. However, his observation was not novel. In *Sweezy*, Justice Frankfurter articulated the university’s parallel First Amendment rights to determine “who may be admitted to study” and to determine “who may teach.” The Supreme Court’s treatment of these parallel rights demonstrates the First Amendment protection afforded admissions decisions.

In *University of Pennsylvania*, the Supreme Court indicated that attempting to influence a university’s selection of faculty would impermissibly infringe upon academic freedom because that action would direct the content of the school’s speech. Similarly, by restricting a university’s process for admitting students, the government infringes upon the content of the school’s speech as reflected in the composition of its student body. In *Ewing*, the Supreme Court recognized that academic freedom included the right to choose the members of a student body, and Justice Powell noted in his concurrence that because of academic freedom, “[j]udicial review of academic decisions, including those with respect to the admission or dismissal of students, is rarely appropriate.” These precedents demonstrate the Supreme Court’s recognition that academic freedom includes the composition of a university’s student body.

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77. See Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (Powell, J.) (recognizing that academic freedom includes admissions decisions).
78. See Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (“It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail the four essential freedoms of a university - to determine for itself on academic grounds who may teach, what may be taught, how is shall be taught, and who may be admitted to study.” (internal citation omitted)).
79. See Sweezy, 354 U.S. at 263 (Frankfurter, J., concurring) (discussing four pillars of academic freedom).
80. See Rabban, *supra* note 48, at 266 (stating that fundamental academic decisions, including admissions decisions, recognized by Justice Frankfurter in *Sweezy* “apparently have achieved doctrinal status through repeated citation in subsequent opinions”).
81. See University of Penn. v. EEOC, 493 U.S. 182, 197 (1990) (distinguishing subpoena for tenure evaluations from academic freedom cases and noting that *Keyishian* illustrated governmental attempt to alter schools speech by substituting its employment criteria for university’s criteria).
82. See id. (distinguishing academic freedom cases by government attempts to control or direct content of school’s speech); Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 225 n.11 (1983) (noting that academic freedom encompasses admission decisions).
83. See *Ewing*, 474 U.S. at 225-26 (discussing academic freedom to control composition of student body).
84. See id. at 230 (Powell, J., concurring) (emphasis added).
85. See University of Penn. v. EEOC, 493 U.S. 192, 197(1990) (noting that faculty selection implicated academic freedom); *Ewing*, 474 U.S. at 225 n.11 (indicating that university possessed broad
C. Academic Freedom Includes Race-Conscious Admissions Policies

The consideration of race in an admissions policy is vital to a classroom that reflects the many perspectives prevalent in society.66 By referring to the classroom as the "marketplace of ideas," the Supreme Court has recognized a university's First Amendment right to introduce students to various points of view.67 In Keyishian, the Court recognized that by limiting which teachers had access to the classroom, the state impermissibly infringed upon the academic freedom of the university to introduce diverse perspectives to its students.68 Similarly, by limiting which students may compose an optimally diverse student body, the state impermissibly restricts the exercise of academic freedom.69 The refusal to allow a school to foster varying perspectives in the classroom through a diverse student body reduces the breadth of knowledge and understanding essential to the academic mind.70 Because a diverse student body is important to a university's speech, the Supreme Court has recognized that the First Amendment protects a race-conscious admissions policy.71 Ultimately, the narrow consideration of race to achieve diversity in the classroom compliments the educational mission of universities to reflect the many perspectives prevalent in society.72

Despite the First Amendment implications of academic freedom, any consideration of race is subject to strict scrutiny and, therefore, must be

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67. See Keyishian v. Board of Regents of Univ. of N.Y., 385 U.S. 589, 603 (1967) ("The classroom is peculiarly the 'marketplace of ideas.'"). See also Sedler, supra note 48, at 679 (stating that First Amendment "permits [public universities] to affirmatively promote the values of equality and diversity in [their] educational programs").
68. See Keyishian, 385 U.S. at 607 (noting stifling effect from limiting association through faculty composition).
69. See Byrne v. Regents of Univ. of Cal., 971 F. Supp. 1316, 1324 (C.D. Cal. 1997) (recognizing that in context of experimental elementary school the "state's interest in maintaining academic freedom offers significant support for the . . . argument that the Court should afford deference to the necessity of racial diversity") aff'd by 190 F.3d 1061 (9th Cir. 1999).
70. See Byrne, supra note 48, at 314-15 (discussing importance of different views in education). Keyishian implies that many of the elements of diversity are important "because [they] express an invaluable sense of what kind of society we, as a people, desire." Id. at 296. Byrne observed that diversity "serves the academic values of humanism and democracy" and gives the student a perspective that "challeng[es] easy ethnocentrism." Id. at 315.
71. See Bakke, 438 U.S. at 311-12 (Powell, J.) (recognizing First Amendment protection for race-conscious admissions policies).
72. See Sweatt v. Painter, 339 U.S. 629, 634 (1950) ("[A] law school . . . cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and exchange of views with which the law is concerned.").
narrowly tailored to a compelling state interest. To satisfy strict scrutiny, a university must consider the various characteristics that applicants will bring to a classroom, not solely race or ethnicity, in developing a constitutional admissions policy. This consideration of a variety of factors constitutes a narrowly tailored means of achieving a diverse student body. In the decades following Bakke, several Supreme Court Justices have reiterated that this narrow consideration of race is within the ambit of First Amendment protection.

IV. Bakke's Diversity Rationale Remains a Compelling State Interest

Since Bakke, the United States Courts of Appeals have disagreed on whether diversity remains a compelling state interest. In 1996, the Fifth Circuit concluded that post-Bakke Supreme Court decisions rejected the diversity rationale and established a remedial purpose as the only constitutional justification for a racial classification. However, in reaching this conclusion, the Fifth Circuit relied on employment discrimination cases, rather than racial classifications that implicate First Amendment academic freedom. Contrary to the Fifth Circuit's finding, the First Circuit has refused to prohibit the consideration of race when the consideration is narrowly tailored to achieve a diverse student body. Despite this differential treatment, Justice Powell's

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93. See Bakke, 438 U.S. at 291, 299 (stating that racial distinctions are subject to strict scrutiny to determine if those distinctions are precisely tailored to serve compelling governmental interest).
94. See id. at 316-19 (Powell, J.) (noting that admissions policy must consider factors other than race to achieve diverse student body).
95. See id. at 318 (Powell, J.) (noting that competitive consideration of race makes race-conscious policy narrowly tailored).
96. See Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) ("[A] state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education."); id. at 306 (Marshall J., dissenting) (finding racial classification by school board to achieve diversity satisfied "the demands of the Constitution"); id. at 315 (Stevens, J., dissenting) (recognizing validity of diversity rationale).
98. See Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996) (asserting that remedying institutional discrimination is only permissible justification for racial classifications).
100. See Weissmann v. Gittens, 160 F.3d 790, 796 (1st Cir. 1998) (assuming diversity rationale was compelling interest to support race-conscious admissions policy).
opinion in *Bakke* remains the clearest indication from the Supreme Court that the narrow consideration of race to achieve a diverse student body is constitutional.\(^{101}\)

**A. The Hopwood Decision**

In *Hopwood v. Texas*,\(^ {102}\) the United States Court of Appeals for the Fifth Circuit found that educational diversity was not a compelling governmental interest.\(^ {103}\) The University of Texas School of Law’s admissions policy treated Mexican-Americans and African-Americans differently than other applicants.\(^ {104}\) The law school maintained two separate admissions files and two separate admissions committees to give minority applicants with lower scores preference over nonminority applicants with higher scores.\(^ {105}\)

Pursuant to its admissions policy, the law school denied admission to four plaintiffs, who were nonminority applicants.\(^ {106}\) The plaintiffs claimed that the law school’s admissions policy discriminated against them on the basis of race

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\(^{101}\) See Tuttle, 195 F.3d at 705 (“Although no other Justice joined the diversity portion of Powell’s concurrence, nothing in *Bakke* or subsequent Supreme Court decisions clearly forecloses the possibility that diversity may be a compelling interest.”); McLaughlin v. Boston Sch. Comm., 938 F. Supp. 1001, 1014-15 (D. Mass. 1996) (“The strongest Supreme Court authority suggesting an affirmative answer [to whether diversity is a compelling interest] remains Justice Powell’s judgment-announcing opinion in *Bakke*.”).

\(^{102}\) 78 F.3d 932 (5th Cir. 1996).

\(^{103}\) See *Hopwood v. Texas*, 78 F.3d 932, 934 (5th Cir. 1996) (holding that Fourteenth Amendment prohibits use of race-conscious admissions policies to achieve diverse student bodies). In *Hopwood*, the United States Court of Appeals for the Fifth Circuit considered whether the University of Texas School of Law could prefer certain racial minorities in its admissions policy. *Id.* at 934. In making admissions decisions, a separate minority subcommittee evaluated minority applicants who fell within the discretionary zone of students for admission. *Id.* at 937. To maintain a pool of potentially acceptable minority applicants, the law school maintained a separate waiting list for minority students. *Id.* at 938. The plaintiffs were white applicants who fell within the nonminority discretionary zone of admittance. *Id.* They filed suit alleging that the law school’s admissions policy violated the Equal Protection Clause. *Id.* The court, applying strict scrutiny, required the school to demonstrate a compelling governmental interest and narrowly tailored means to justify the use of the racial classification. *Id.* at 940. The court concluded that the Supreme Court has recognized only the use of race to remedy past institutional discrimination as a compelling governmental interest. *Id.* at 944. Therefore, race-conscious admissions policies based upon diversity violated the Fourteenth Amendment. *Id.* at 945-48. In conclusion, the court rejected the justifications put forth by Texas that the race-conscious admissions policy achieved a diverse student body, quelled a hostile environment at the law school, improved the school’s reputation, or eliminated past or present discrimination by actors other than the law school. *Id.* at 962.

\(^{104}\) See *id.* at 936 (describing admissions policy that treated Mexican-Americans and African-Americans in middle range of applications differently than nonminority applicants).

\(^{105}\) See *id.* at 936-37 (discussing University of Texas School of Law’s admissions policy). First, the law school’s admissions policy allowed minority applicants with lower test scores to fall within the presumptive or discretionary zones for admission, and the school evaluated applications for minority and nonminority students separately. *Id.* A minority sub-committee recommended minority applicants in the discretionary zone for admission, and the law school nearly always accepted the subcommittee’s recommendations. *Id.* at 937.

\(^{106}\) See *id.* at 938.
and thereby denied them equal protection of the laws.\textsuperscript{107} The district court found that the law school provided two compelling governmental interests: (1) achieving the benefits of a diverse student body and (2) compensating for past discrimination.\textsuperscript{108} In examining the second justification, the district court looked at the past discrimination of the entire Texas higher educational system, not just the past discrimination of the law school.\textsuperscript{109} The district court found that sufficient effects of past discrimination existed to justify the remedial use of the racial classification.\textsuperscript{110} However, the district court found that the law school’s differential treatment of test scores based on race did not consider race as a “plus” factor to achieve a diverse student body.\textsuperscript{111} Therefore, the district court found the law school’s admissions policy unconstitutional because the separate minority admissions committee prevented the comparison of minority and nonminority applicants during the admissions process.\textsuperscript{112}

On appeal, the Fifth Circuit reviewed the admissions policy under the applicable strict scrutiny standard.\textsuperscript{113} In the majority opinion, the Fifth Circuit examined the constitutionality of the district court’s two compelling interests – diversity and remedying past discrimination.\textsuperscript{114} The court of appeals recognized that Justice Powell’s opinion in \textit{Bakke} was the impetus for the diversity rationale.\textsuperscript{115} Nevertheless, the Fifth Circuit ruled that the consideration of race to achieve a diverse student body was not a compelling governmental interest.\textsuperscript{116} It based this decision on the assumption that only Justice Powell supported the diversity rationale.\textsuperscript{117} Moreover, relying on other affirmative action decisions, the court of appeals assumed that the Supreme Court had dismissed the diversity rationale since \textit{Bakke}.\textsuperscript{118}

The \textit{Hopwood} panel also considered the law school’s interest in remedying the past discrimination of the Texas system of higher education.\textsuperscript{119} The Fifth Circuit found that the district court’s analysis of the proper state actor was too

\begin{itemize}
  \item \textsuperscript{107} See id.
  \item \textsuperscript{108} See id.
  \item \textsuperscript{109} See id. at 938-39.
  \item \textsuperscript{110} See id.
  \item \textsuperscript{111} See id. (noting district court’s finding that differences in treatment based on race were valid use of “plus” factor).
  \item \textsuperscript{112} See id. (noting district court’s finding that admissions policy was unconstitutional because school never compared all eligible applicants).
  \item \textsuperscript{113} See id. at 940-41 (discussing strict scrutiny standard).
  \item \textsuperscript{114} See id. at 941 (acknowledging district court’s findings that diversity and remedying past discrimination by Texas system of higher education were constitutional justifications for racial classifications).
  \item \textsuperscript{115} See id. (acknowledging that Justice Powell was original proponent of diversity rationale).
  \item \textsuperscript{116} See id. at 934 (finding that consideration of race for diversity is unconstitutional).
  \item \textsuperscript{117} See id. at 944 (dismissing diversity rationale).
  \item \textsuperscript{118} See id. at 944-45 (discussing Supreme Court decisions subsequent to \textit{Bakke} concerning racial classifications).
  \item \textsuperscript{119} See id. at 948-52 (discussing law school’s asserted remedial justification).
\end{itemize}
broad because it included all public colleges and universities in Texas. The district court should have addressed the past discrimination of the law school, specifically, not the Texas higher educational system generally. In considering the law school's past discrimination, the court of appeals found a lack of sufficient evidence of past discrimination to justify the racial classification. After rejecting the diversity interest and the remedial interest, the Fifth Circuit concluded that the University of Texas School of Law could not consider race as a factor in its admissions policy because it lacked a compelling state interest.

Judge Wiener, who concurred in *Hopwood*, agreed that the admissions policy was unconstitutional. However, Judge Wiener disagreed with the majority on the issue of diversity. He found that diversity was a compelling governmental interest for a public university. He therefore counseled the panel to take a narrower path and find the law school's admissions policy unconstitutional for failing to be narrowly tailored in its legitimate pursuit of a diverse student body.

Judge Wiener, commenting on the majority's dismissal of the diversity rationale, argued that predicting the future law on racial classifications was both unjustifiable and unnecessary to the disposition of the case. Judge Wiener stated three reasons for not following the majority's reasoning on the invalidity of the diversity interest. First, he found that it is the province of the Supreme Court, not a circuit court panel, to declare the diversity rationale of *Bakke* invalid. Second, Judge Wiener observed that affirmative action had survived recent challenges, especially in the context of diversity and a university's admissions policy. Third, he found it unnecessary to decide this case on the legitimacy of the diversity rationale because the law school's

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120. See *id.* at 950-51 (finding that remedying discrimination of all public education in Texas was without necessary limit).
121. See *id.* at 951-52 (finding that past discrimination remedied had to be that of law school).
122. See *id.* at 952-55 (noting lack of evidence of past discrimination by law school).
123. See *id.* at 962 (holding that law school could not consider race as factor in admissions).
124. See *id.* at 962 (Wiener, J., concurring) (agreeing with majority that law school's admissions policy was unconstitutional).
125. See *id.* (Wiener, J., concurring) (disagreeing with majority's ruling on diversity justification).
126. See *id.* (Wiener, J., concurring) (finding diversity could suffice as valid governmental interest in admissions policy of public graduate school).
127. See *id.* (Wiener, J., concurring) (assuming arguendo that diversity is compelling governmental interest and finding that law school's admissions process was not narrowly tailored).
128. See *id.* at 963 (Wiener, J., concurring) (noting that majority's position "remains an extension of the law . . . [that] is both overly broad and unnecessary to the disposition of this case").
129. See *id.* at 963-64 (Wiener, J., concurring).
130. See *id.* at 963 (Wiener, J., concurring) (noting that it is for Supreme Court to overrule *Bakke*, not panel of circuit court).
131. See *id.* at 963-64 (Wiener, J., concurring) (stating that diversity rationale in context of public graduate schools survived Supreme Court decisions limiting affirmative action).
admissions program was not narrowly tailored.¹³²

In addition to Judge Wiener’s observations, the majority opinion in Hopwood misread post-Bakke cases as rejecting the First Amendment diversity rationale in two other key respects. First, the majority concluded that Justice Powell was the only vote in support of the diversity rationale.¹³³ However, Justice Brennan’s opinion implicitly accepted diversity as a constitutional justification for the consideration of race in university admissions.¹³⁴ Second, in a footnote, the Hopwood majority observed that universities are state institutions and that the First Amendment “generally protects citizens from the actions of government, not government from its citizens.”¹³⁵ While the First Amendment does protect citizens, it also protects some derivative institutions of the state.¹³⁶ The academic freedom of a university is one instance in which the First Amendment protects the rights of governmental institutions.¹³⁷ For these reasons and those enunciated by Judge Wiener, courts and universities should not rely on Hopwood as an accurate reading of the law on race-conscious admissions policies. Moreover, since Bakke, several Supreme Court Justices have recognized that the diversity rationale is a compelling state interest¹³⁸ and that the educational context is treated differently than affirmative action in the workplace.¹³⁹

B. Post-Bakke Affirmative Action Cases

In reaching its conclusion in Hopwood, the Fifth Circuit rejected Justice Powell’s diversity rationale and relied instead on subsequent Supreme Court

¹³² See id. at 964 (Wiener, J., concurring) (noting that it was unnecessary to address validity of diversity rationale).
¹³³ See id. at 944.
¹³⁴ See Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 326 n.1 (Brennan, J., concurring in judgment in part and dissenting in part) (“We also agree with Mr. Justice Powell that a plan like the ‘Harvard’ plan ... is constitutional under our approach.”). The Brennan opinion in Bakke upheld the use of race in an admissions policy on broader grounds than the diversity justification. Moreover, Justice Brennan recognized the constitutionality of the Harvard plan, which embodied that rationale. Id. See also Sedler, supra note 7, at 1161 (noting that Justice Brennan’s opinion agreed with diversity rational and constituted agreement of five justices that diversity was compelling governmental interest).
¹³⁵ Hopwood, 78 F.3d at 943 n.25.
¹³⁶ See Keyishian v. Board of Regents of Univ. of N.Y., 385 U.S. 589, 603 (1967) (finding that First Amendment protects universities’ academic freedom). See also Rabban, supra note 48, at 236, 268 (emphasizing that in context of public universities “the Supreme Court has observed, the state is the speaker as well as the regulator” and that Supreme Court opinions “identified academic freedom as a distinctive right within the first amendment and applied the concept to both individuals and institutions”).
¹³⁷ See Rabban, supra note 48, at 268 (describing First Amendment protection of universities’ academic freedom).
¹³⁸ See supra note 98.
¹³⁹ See Wygant, 476 U.S. at 286 (O’Connor, J. concurring) (recognizing diversity in education as compelling interest).
affirmative action decisions. The cases involved public employment programs that considered race as a factor in retaining or hiring certain individuals or government contractors. In each of the cases, the Supreme Court recognized that a racial classification to remedy institutional discrimination justified an incidental infringement on nonminorities' equal protection rights. However, the Hopwood panel misinterpreted this support of the remedial justification as a statement that a remedial purpose was the only legitimate governmental interest that could support a racial classification. The following section distinguishes these cases from the context of education and the diversity rationale.

In City of Richmond v. J.A. Croson Company, the Supreme Court addressed the constitutionality of Richmond's requirement that general contractors who engage in work for the city subcontract at least thirty percent of the dollar amount of each contract to minority businesses. The city invited bids on a project to install plumbing fixtures in the county jail. After Richmond awarded Croson the contract, Croson was unable to secure a minority-owned business to supply the fixtures and, therefore, was unable to satisfy the subcontracting provision. After the city re-bid the project, Croson filed suit claiming that the subcontracting provision impermissibly

140. See Hopwood v. Texas, 78 F.3d 982, 944-45 (5th Cir. 1996) (finding that Supreme Court decisions on affirmative action dismissed diversity justification).
141. See id. 146-85 and accompanying text (discussing primary post-Bakke affirmative action cases).
142. See Hopwood, 78 F.3d at 944, 949-52 (interpreting affirmative action cases to limit compelling interest for racial classification to only remedying past institutional discrimination).
143. See Hopwood, 78 F.3d at 944, 949-52 (interpreting affirmative action cases to limit compelling interest for racial classification to only remedying past institutional discrimination).
145. See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 477-78 (1989) (addressing minority set-aside program City of Richmond adopted concerning public contracting). In Croson, the Richmond City Council required all prime contractors awarded city construction contracts to subcontract at least 30% of the contract's value to minority businesses. Id. at 477. After the adoption of this minority set-aside contracting plan, the city invited bids on a project to install plumbing fixtures in the county jail. Id. at 481. After being denied the contract, J.A. Croson filed suit challenging the constitutionality of the minority set-aside program. Id. at 483. Addressing the city's authority to remedy past discrimination, the Court stated that political subdivisions are not necessarily permitted to redress the effects of societal discrimination, even though Congress has such power. Id. at 490. The Court concluded that the city could only remedy past racial discrimination that the city itself had caused. Id. at 491-92. The Court reviewed the city's plan under strict scrutiny. Id. at 493-94. The city asserted that its justification for the minority set-aside policy was to remedy past discrimination in the construction industry. Id. at 498. The Court found that a general claim of past discrimination in a specific industry does not justify a racial quota. Id. at 499. The Court held that the city failed to show a compelling interest in using race to apportion public contracting opportunities. Id. at 505. Societal discrimination alone was an insufficient justification and there was insufficient evidence of discrimination in the construction industry. Id. The city did not seem to use any race-neutral means to increase minority participation in the city's construction industry. Id. at 507. Moreover, the thirty-percent quota did not seem to have any justification other than racial balancing. Id.
146. See id. at 481 (describing city's invitation for bids on plumbing contract).
147. See id. at 481-82 (explaining Croson's inability to subcontract with minority-owned business).
discriminated on the basis of race. Richmond claimed that the city required the subcontracting provision to remedy past discrimination in the construction industry as a whole, not merely past discrimination by the city. The Court found that this broad remedial purpose did not justify the use of a racial classification. The majority opinion acknowledged that to justify a racial classification on remedial grounds, the governmental unit involved must have participated in the past discrimination.

The majority in Hopwood relied on Croson as precedent for the Supreme Court's rejection of the diversity rationale. However, as Judge Wiener stated in his Hopwood concurrence, Croson is inapplicable to race-conscious admissions policies. In Croson, Richmond asserted only a remedial justification for its racial quota. Therefore, Richmond's contracting provision did not confront the Supreme Court with the diversity justification and its First Amendment implications. Specifically, Croson concerned minority quotas in government contracting, not minority preferences in a university admissions program and the First Amendment right of academic freedom. In light of these fundamental differences between Croson and Bakke, the Fifth Circuit extended its interpretation of Croson too far when it concluded that the Supreme Court had rejected the diversity rationale.

Similarly, in Adarand Constructors, Inc. v. Pena, the Supreme Court addressed a subcontracting provision in federal government contracts that preferred minority businesses over nonminority businesses. In Adarand, the

148. See id. at 483 (stating Croson's claim that subcontracting provision violated Equal Protection Clause).
149. See id. at 498 (finding that city's justification was to compensate for small number of minority businesses participating in local construction industry due to past discrimination).
150. See id. at 499 (finding that remedying past societal discrimination did not justify racial classification).
151. See id. at 499-500 (requiring showing that government caused past discrimination to remedy such discrimination with consideration of race).
152. See Hopwood v. Texas, 78 F.3d 932, 945-48 (5th Cir. 1996) (interpreting Croson as rejecting diversity justification).
153. See Hopwood, 78 F.3d at 964-65 (Wiener, J., concurring) (noting that post-Bakke affirmative action cases did not dismiss diversity rationale as compelling governmental interest).
155. See id. at 477-78 (describing Richmond's race-based classification in awarding construction contracts).
157. See Hopwood, 78 F.3d at 962-64 & n.16 (Wiener, J., concurring) (finding that differences between Croson and Bakke distinguish cases).
159. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 204 (1995) (addressing federal government practice of preferring minority-owned subcontractors). In Adarand, the Supreme Court addressed the standard of review that a court should use to review the federal government's use of race based presumptions. Id. at 204. In 1989, a subdivision of the United States Department of Transportation
United States Department of Transportation awarded a highway construction contract to Mountain Gravel & Construction Company (Mountain Gravel). Thereafter, Mountain Gravel solicited bids from subcontractors to complete the guardrail portion of the contract. Adarand Constructors (Adarand) submitted the low bid; and Gonzales Construction Company (Gonzales), a minority-owned business, submitted a higher bid. Federal law required the prime contract to include a provision authorizing additional compensation to a general contractor who subcontracted with socially or economically disadvantaged individuals. The federal law presumed that minority individuals were economically deprived for purposes of the subcontracting provision. Mountain Gravel awarded the guardrail contract to Gonzales because of the subcontracting provision favoring minority-owned businesses. Adarand challenged the presumption favoring minorities as a violation of the Equal Protection Clause. The lower court upheld the presumption by applying an intermediate scrutiny standard to the federal race-based action. The Supreme Court, however, determined that federal programs using racial classifications must meet the demands of strict scrutiny to sustain their validity.

The Fifth Circuit relied on Adarand, as well as Croson, in dismissing the diversity rationale. Adarand also is inapplicable to the validity of the awarded a highway construction project to Mountain Gravel & Construction Company. Id. at 205. In turn, Mountain Gravel solicited bids from subcontractors to provide the guardrails for the project. Id. Adarand submitted the low bid and Gonzalez Construction Company, a minority-owned business, submitted a higher bid. Id. Federal law required that the federal agency contract provide the general contractor with additional compensation if it subcontracted with "socially and economically disadvantaged individuals." Id. The federal law presumed that minorities are economically disadvantaged. Id. Despite Adarand's low bid, Mountain Gravel subcontracted with Gonzales because Adarand was not a minority-owned business. Id. Adarand claimed that the presumption based on race violated the Fifth Amendment because it denied equal protection of the laws. Id. at 205-06. The Supreme Court determined that remedial-based racial classifications by the federal government are subject to strict scrutiny review. Id. at 235.

160. See id. at 205 (discussing award of construction contract to Mountain Gravel).
161. See id. discussing solicitation of bids for guardrail portion of contract.
162. See id. describing bids submitted by Gonzales and Adarand.
163. See id. describing subcontracting provision required by federal law.
164. See id. describing presumption that Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities were socially and economically disadvantaged for purposes of subcontracting provision.
165. See id. explaining that Mountain Gravel awarded contract to Gonzales, and not Adarand, only because Gonzales was minority-owned business.
166. See id. at 205-06 (stating Adarand's claim that presumption in favor of minorities violated equal protection of laws); U.S. CONST. amend. XIV, § 1 ("No State Shall ... deny to any person within its jurisdiction the equal protection of the laws.").
167. See id. at 210 (noting that lower courts applied intermediate scrutiny standard to federal racial classifications).
168. See id. at 213-35 (recognizing that federal race-based actions are subject to same strict scrutiny as state race-based actions because equal protection under Fifth and Fourteenth Amendments is coextensive).
diversity rationale because it addressed only a remedial justification in the context of government contracting. Therefore, a court cannot legitimately interpret either Croson or Adarand as overruling a university's First Amendment interest in a diverse student body. Additionally, Adarand never determined the validity of the asserted governmental interests because the case merely decided that federal race-based actions were subject to strict scrutiny. Hence, Adarand is distinguishable from Bakke in that it did not involve education—a context that invokes the protection of the First Amendment.

In dismissing the diversity rationale, the Fifth Circuit also relied on Wygant v. Jackson Board of Education. Wygant was a similar case to Bakke because it presented a race-conscious policy in an educational context. The Jackson Board of Education amended a provision of its collective bargaining agreement with its teachers' union. The amended agreement stated that the school board would implement faculty layoffs in reverse order of seniority. However, the amendment added that at no time could the layoffs decrease the percentage of minority teachers employed by the school district. When nonminority teachers challenged this bargaining agreement, the Jackson Board of Education asserted that it had designed the race-conscious layoff policy to remedy past societal discrimination and to provide role models for minority students. The Supreme Court struck down the policy because the two interests served by the policy were unconstitutional.

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170. See Adarand Constructors, Inc., 515 U.S. at 205-10 (addressing only remedial use of minority preference in construction contracts).
171. See id. at 235 (finding race-based actions subject to strict scrutiny).
174. See Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 269-70 (1985) (noting that case involved collective bargaining agreement between teachers' union and school board). In Wygant, the Supreme Court considered the validity of a collective bargaining agreement that granted minority teachers preferential protection from layoffs. Id. at 269-70. Nonminority teachers sued alleging that the school board violated the Equal Protection Clause. Id. at 272. The Court reviewed the issue under strict scrutiny. Id. at 273-74. This level of analysis required a showing that the racial classification supported a compelling governmental interest and that the Board chose narrowly tailored means to achieve that goal. Id. at 274. The Board of Education argued that the purpose of the policy was to remedy prior discrimination by the school district. Id. at 277. However, the Court concluded that the Board did not narrowly tailor its layoff provision to achieve the compelling purpose. Id. at 278. The layoff provisions were too broad because they placed "the entire burden of achieving racial equality on particular individuals." Id. at 283.
175. See Wygant, 476 U.S. at 270 (describing racial tension as reason for amending agreement with teachers' union).
176. See id. (describing collective bargaining agreement).
177. See id. (describing collective bargaining agreement's protective provision for minority faculty).
178. See id. at 274-78 (recognizing school board's justification to provide role models for minority students and to remedy past societal discrimination).
179. See id. at 283.
Nonetheless, *Wygant* did not repudiate the diversity rationale because it addressed only the limits of the remedial justification in an employment context and did not raise a First Amendment interest of academic freedom. Moreover, three Justices specifically recognized the validity of diversity as a consideration in fundamental academic decisions. Although the school board did not make the diversity argument, Justice O’Connor’s concurring opinion referred to the validity of the diversity justification. Furthermore, in his dissent, Justice Stevens recognized that diversity, as a component of academic freedom, would have been a possible justification for the school board’s policy. A close examination of post-*Bakke* affirmative action cases demonstrates that they have not discredited the diversity rationale. In these cases, the Supreme Court merely established that an interest in remedying past *societal* discrimination was unconstitutional. The post-*Bakke* decisions did not abolish a university’s compelling interest in a diverse student body because the cases did not involve this countervailing constitutional right. In *Croson* and *Adarand*, the government could not have asserted the First Amendment as a countervailing constitutional right because no speech interest was at stake. Furthermore, Justice O’Connor, concurring in *Wygant*, recognized that the First Amendment protects a university’s exercise of academic freedom to create a diverse classroom. Consequently, *Croson*, *Adarand*, and *Wygant* did not affect the First Amendment’s protection of race-conscious admissions policies.

180. See *id.* at 278-79 (invalidating minority-preference layoff policy because policy attempted to remedy effects of societal discrimination).

181. See *id.* at 286 (O’Connor, J., concurring in part) (recognizing university’s interest in diversity as compelling); *id.* at 306 (Marshall, J., dissenting) (same); *id.* at 315-17 (Stevens, J., dissenting) (same).

182. See *id.* at 286 (O’Connor, J., concurring in part) (noting that “although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently ‘compelling,’ at least in the context of higher education, to support the use of racial classifications in furthering that interest”).

183. See *id.* at 315 (Stevens, J., dissenting) (“For one of the most important lessons that the American public schools teach is that the diverse ethnic, cultural, and national backgrounds that have been brought together in our famous ‘melting pot’ do not identify essential differences among the human beings that inhabit our land.”).

184. See *id.* at 288 (O’Connor, J., concurring in part) (stating that “a governmental agency’s interest in remedying ‘societal’ discrimination, that is, discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny”).

185. See Chen, supra note 44, at 1860 (acknowledging that diversity rationale remains compelling governmental interest in context of higher education).

186. See Chen, supra note 44, at 1862 (explaining that in non-education affirmative action cases “government can claim no significant diversity interest”).


188. See Chen, supra note 44, at 1862 (noting that outside context of education “most other affirmative action programs have no real connection to diversity of speech and expression”).
C. The Wessmann Decision

In November 1998, the United States Circuit Court of Appeals for the First Circuit in Wessmann v. Gittens addressed whether Boston's prestigious examination schools impermissibly considered race in their admissions policies. Pursuant to policy, the Boston Latin School's admissions committee filled the first half of its available seats on the basis of the applicants' test scores and grade point averages. To fill the second half of its available seats, the committee proportionately admitted applicants on the basis of race. The Boston Latin School denied Sarah Wessmann, a nonminority applicant, admission as a result of this race-conscious admissions policy. In defense of its racial classification, the school committee asserted that it designed its policy to achieve a diverse student body and to remedy the effects of past discrimination in the Boston public school system. The district court accepted these compelling interests and found that the magnet schools narrowly tailored their racial classifications to achieve these purposes.

On appeal, the First Circuit assumed that the consideration of race to achieve a diverse student body was a compelling state interest. Noting that Hopwood is the only appellate decision to dismiss the diversity rationale, the

189. 160 F.3d 790 (1st Cir. 1998).
190. See Wessmann v. Gittens, 160 F.3d 790, 791-92 (1st Cir. 1998) (discussing Boston's three magnet schools' race-conscious admissions policies). In Wessmann, the United States Circuit Court of Appeals for the First Circuit addressed the constitutional permissibility of Boston's three examination schools' race-conscious admissions policies. Id. at 792. A school ranked all applicants by a composite score composed of an applicant's standardized test score and grade point average. Id. at 793. The city filled the first half of the seats for the examination schools based strictly on this ranking. Id. The city filled the remaining seats by order of rank; however, the number of students accepted from each specified racial/ethnic group had to match the proportion of that racial/ethnic group in the remaining qualified applicant pool. Id. The Boston Latin School passed over Sarah Wessmann, a nonminority applicant, due to this race-conscious policy. Id. at 793-94. The district court found that the School Committee had asserted compelling interests in achieving a diverse student body and in remedying the effects of past racial discrimination and that the policy was narrowly tailored to achieve those objectives. Id. at 794. Applying strict scrutiny to the racial classification, the First Circuit assumed arguendo that Bakke's diversity rationale was still good precedent. Id. at 796. However, the court of appeals found that the race-conscious policy was intended to achieve racial balancing, not diversity. Id. at 798. Therefore, the policy failed the Bakke standard of diversity. Id. at 800. The First Circuit also concluded that the Committee did not show the necessary nexus between the race-conscious policy and the effects of past discrimination. Id. at 808. Thus, the First Circuit struck down the admissions policy as a violation of the Equal Protection Clause. Id. at 809.
191. See id. at 793 (explaining admissions policy for Boston examination schools).
192. See id. (explaining race-conscious aspect of admissions policy for Boston examination schools).
193. See id. at 793-94 (explaining reasons for Wessmann's denial of admission).
194. See id. at 792-93 (explaining compelling interests asserted by school committee).
195. See id. at 794 (summarizing findings of district court).
196. See id. at 795 (noting that diversity often is a compelling interest).
197. See id. at 795-96 (noting that Hopwood is only appellate decision finding diversity rationale to not be compelling).
First Circuit emphasized that the *Hopwood* ruling met with substantial dissent from several of the circuit judges in the Fifth Circuit. 198 Rejecting the Fifth Circuit's approach, the First Circuit refused to dismiss the diversity rationale and observed that several Supreme Court Justices have specifically approved of the diversity rationale in the context of education. 199 Consequently, the First Circuit analyzed the school's admissions policy under the assumption that the diversity rationale remained a compelling governmental interest. 200

Though the Boston Latin School asserted a diversity interest, the policy focused exclusively on racial diversity and did not consider the other characteristics of applicants that would contribute to a student body diverse in its perspectives. 201 Therefore, the court of appeals found that the racial classification was not designed to achieve a diverse student body but rather to achieve racial balancing — an unconstitutional purpose. 202 Because the policy foreclosed minority and nonminority candidates from direct comparison for all the available seats, 203 the First Circuit found that the admissions policy was not narrowly tailored to achieve diversity and thereby was unconstitutional. 204 Despite this ultimate holding, the First Circuit acknowledged the school's First Amendment interest in a diverse student body. 205

*Hopwood* and *Wessmann* represent a disagreement among the federal circuit courts of appeals on the validity of the diversity rationale. 206 The First Circuit and Judge Wiener accurately recognized that the *Hopwood* majority erroneously interpreted Supreme Court decisions on racial classifications in the employment context. 207 The First Circuit correctly assumed that the use of a racial classification to achieve a diverse student body was a compelling First Amendment interest of public schools. 208 However, beyond these legal

198. See id. (noting vigorous dissent in Fifth Circuit to denial of rehearing en banc of *Hopwood*).
199. See id. at 796 (recognizing approval of diversity rationale by individual Justices).
200. See id. (assuming that diversity rationale remained sufficiently compelling to justify racial classifications in context of education).
201. See id. at 798 (observing that Boston's admissions policy considered only racial and ethnic diversity).
202. See id. at 800 (finding that school intended proportional representation to achieve racial balancing, not diversity).
203. See id. at 800 (explaining that Boston's admissions policy foreclosed comparison among applicants for all available seats).
204. See id. (concluding that Boston Latin School's concept of diversity did not meet *Bakke* standard of diversity). The First Circuit also found insufficient evidence that the racial classification was necessary to remedy the effects of past discrimination in Boston's public schools. *Id.* at 806-07. Mere evidence of an achievement gap between minorities and non-minorities did not prove vestiges of past discrimination. *Id.* at 804-07.
205. See id. at 794.
206. See supra note 98.
207. See Wessmann, 160 F.3d at 795-96 (recognizing validity of diversity rationale and that *Hopwood* represents minority view on issue); Hopwood v. Texas, 78 F.3d 932, 962-65 (5th Cir. 1996) (Wiener, J., concurring) (arguing that majority was wrong to dismiss diversity rationale).
208. See Wessmann, 160 F.3d at 796 (assuming that diversity remained compelling state interest).
rationales, society must embrace the educational benefits that a diverse student body brings to the classroom.

V. DIVERSITY'S BENEFIT TO THE CLASSROOM

University classrooms play a special role in fostering students' understanding of racial and societal differences; and diversity within the classroom is an invaluable tool for introducing students to these varied cultural values. To fulfill this goal, university classrooms depend upon the interaction of students with unique perspectives. To some extent, race molds the perspectives that students bring to the classroom. Therefore, through a racially diverse student body, these different life experiences and viewpoints contribute to the education that universities afford all students. As a result, a racially diverse student body counters racial prejudice by

209. See McLaurin v. Oklahoma State Regents for Higher Educ., 339 U.S. 637, 641 (1950) (finding that effective education requires exchange of different views between students). In McLaurin, the Supreme Court addressed a separate-but-equal policy at the University of Oklahoma. Id. at 638. The university required an African American student to sit at an assigned desk in the classroom, separate table in the library, and a separate table in the cafeteria. Id. at 640. The Supreme Court found that denying the African American student interaction with other students hindered his pursuit of an effective education. Id. at 641. The Court recognized that society's increasing complexity required the classroom to reflect these complexities. Id. See also Charles R. Calleros, Training a Diverse Student Body for a Multicultural Society, 8 LA RAZA L.J. 140, 141-47 (1995) (observing that diverse perspectives encourage students to identify with different elements of society).

210. See Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 472-73 (1982) ("When [a student's] environment is largely shaped by members of different racial and cultural groups, minority children can achieve their full measure of success only if they learn to function in -- and are fully accepted by -- the larger community. Attending an ethnically diverse school may help accomplish this goal by preparing minority children "for citizenship in our pluralistic society."" (quoting Estes v. Metropolitan Branches of Dallas NAACP, 444 U.S. 437, 451 (1980) (Powell, J., dissenting)); Brown v. Board of Educ., 347 U.S. 483, 493 (1954) ("Today, education is perhaps the most important function of state and local governments . . . [and] is a principal instrument in awakening the child to cultural values."). See also Timothy L. Hull, Educational Diversity: Viewpoints and Proxities, 59 OHIO ST. L.J. 551, 586 (1998) (observing that diversity in student body is essential to quality legal education).

211. See Brest & Oshige, supra note 87, at 863 (recognizing that classroom presents rare opportunity to explore different cultures); Robert N. Davis, Diversity: The Emerging Modern Separate but Equal Doctrine, 1 WM. & MARY J. WOMEN & L. 11, 28 (1994) (noting that "students with diverse backgrounds and interests bring different perspectives to the classroom debate").

212. See Brest & Oshige, supra note 87, at 862 (noting that racial and ethnic diversity affects individuals' relations with other individuals).

213. See id. (observing that differing relations that occur because of race cause people to possess different views about society); Okianer Christian Dark, Incorporating Issues of Race, Gender, Class, Sexual Orientation, and Diversity into Law School Teaching, 32 WILLAMETTE L. REV. 541, 564-70 (1996) (arguing that teachers should introduce diversity issues into classroom because many students possess little experience with these issues).
fostering exchanges between students of different racial and ethnic backgrounds in a cooperative learning environment.\textsuperscript{214}

Unfortunately, \textit{Hopwood} has denied the universities in the Fifth Circuit the advantages of a diverse classroom.\textsuperscript{215} Likewise, California's recent prohibition of the consideration of race in university admissions illustrates the devastating effects that result from denying universities the academic freedom to compose racially diverse student bodies. California's prohibition\textsuperscript{216} has dramatically decreased the number of minority students in California's public universities.\textsuperscript{217} For example, the freshman minority enrollment at the University of California at Berkeley dropped by half due to the discontinuance of race-conscious admissions policies.\textsuperscript{218} Similarly, universities in the Fifth Circuit lack the benefits that racial diversity brings to the classroom.\textsuperscript{219} Despite the decisions made in California and the Fifth Circuit, a university's narrow consideration of race to achieve diversity in the classroom remains constitutional as an exercise of a First Amendment interest in academic freedom.


\textsuperscript{215} See Shepard, \textit{Colleges Ponder Criteria for Merit}, \textit{Orange County Register}, June 7, 1998, at A37 (reporting 5% fewer minorities in 1998 freshman class at University of Texas than in pre-\textit{Hopwood} 1996 freshman class); \textit{Hopwood Decision a Time-Warp to Pre-Affirmative Action Days, Some Say}, \textit{Dallas Morning News}, July 7, 1997, at A7 (noting fear that Fifth Circuit's ruling would "leave the University of Texas Law School with its smallest minority enrollment since 1970s").

\textsuperscript{216} See \textit{CAL. CONST. art. I, § 31(a) (1999) (prohibiting consideration of race in public university and college admission decisions).}

\textsuperscript{217} See Shepard, \textit{supra} note 216, at A37 (noting that 1998 freshman class at California's most selective universities had far fewer minorities than before adoption of constitutional amendment prohibiting consideration of race in admissions decisions). In 1997, the University of California at Berkley had 21.9% non-Asian minority freshman students. \textit{Id.} However, in 1998, the Berkley campus had only 10.5% non-Asian minority freshman. \textit{Id.} In 1997, the University of California at Los Angeles enrolled 21.8% minority students in its freshman class. \textit{Id.} In 1998, the number of minority students enrolled as freshman at UCLA dropped to only 14.1%. \textit{Id.}

\textsuperscript{218} See \textit{id.} (noting that after Proposition 209 Berkley campus' minority enrollment dropped by half).

\textsuperscript{219} See Jonathan R. Alger, \textit{Unfinished Homework for Universities: Making the Case for Affirmative Action}, 54 WASH. U.J. URB. & CONTEMP. L. 73, 80 (1998) ("[D]iversity in the classroom is the most effective of all weapons in challenging stereotypical preconceptions."); \textit{see also} Rodney Ellis, \textit{Outlook, Tide of Academic Apartheid Threatens Texas' Future}, \textit{Hous. Chron.}, Apr. 28, 1998, at 17 (noting that minority enrollment at Texas universities had dropped since \textit{Hopwood}). Texas State Senator Rodney Ellis observed that, since the Fifth Circuit's \textit{Hopwood} ruling, "[e]nrollment by African-American freshman at the University of Texas at Austin has fallen 14 percent, while at Texas A&M it has crashed by 23 percent; Hispanic enrollment at UT and A&M fell 13 percent and 15 percent respectively." \textit{Id.} Even more astonishing, Ellis found that at the University of Texas School of Law, the number of African-American students dropped 87 percent and Hispanic enrollment dropped by 46 percent. \textit{Id.}
VI. BAKKE'S DIVERSITY RATIONALE PASSES STRICT SCRUTINY

In Bakke, Justice Powell recognized that racial classifications inherently conflict with the Equal Protection Clause because these classifications treat citizens differently on the basis of race. Therefore, courts review racial classifications under strict scrutiny to determine the permissibility of an incidental infringement on equal protection rights. This standard consists of two components. First, the government must assert that the racial classification serves a compelling governmental interest—a diverse student body. Second, the means chosen—the racial classification—must be narrowly tailored to that compelling interest.

A. Diversity Is a Compelling Governmental Interest

The narrowly tailored consideration of an applicant’s race to achieve a diverse student body is constitutional despite an incidental infringement on another applicant’s equal protection rights. Over the years, diversity has emerged as one of the few justifications for a racial classification that has survived strict scrutiny analysis. Despite the diversity rationale’s incidental infringement on equal protection rights, the Supreme Court has upheld the constitutionality of race-conscious admissions policies because of the First Amendment interest in academic freedom.

Moreover, the Supreme Court has never repudiated the diversity rationale. In fact, very few Supreme Court cases have addressed diversity

220. See U.S. CONST. amend. XIV, § 1 (“No State Shall... deny to any person within its jurisdiction the equal protection of the laws.”).
221. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (holding that racial classifications are subject to strict scrutiny review because such classifications inherently implicate equal protection issues).
222. See id. (finding that race, as suspect classification, is always subject to strict scrutiny).
223. See Adarand Constructors, Inc., 515 U.S. at 235 (discussing strict scrutiny standard).
224. See id. (noting first prong of strict scrutiny standard).
225. See id. at 238-38 (discussing second prong of strict scrutiny standard).
226. See Chen, supra note 44, at 1855 (noting that case law recognizes diversity as viable rationale for racial classifications).
227. See id. at 1860 (acknowledging that “[t]he legitimacy of diversity as a governmental objective remains one of the few fixed points in the Supreme Court’s shifting case law on affirmative action”).
228. See id. at 1861 (noting tension between Equal Protection Clause and First Amendment under diversity rationale).
230. See Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 705 (4th Cir. 1999) (recognizing that no Supreme Court decision suggests that diversity is not compelling state interest).
as a justification for racial classifications. The post-\textit{Bakke} cases, such as \textit{Croson}, \textit{Adarand}, and \textit{Wygant}, involving racial classifications have primarily concerned the employment context and have not implicated the First Amendment right to academic freedom. \textit{Bakke} is the only instance in which the Supreme Court has addressed the diversity rationale within the context of higher education. In that case, Justice Powell was the only Justice to analyze the constitutionality of a race-conscious admissions policy under strict scrutiny. In so doing, he found a university's First Amendment interest in diversity compelling. To date, Justice Powell's opinion remains the clearest statement from the Supreme Court on the validity of the diversity rationale.

\textbf{B. Consideration of Race as a "Plus" Factor Is Narrowly Tailored to Achieve a Diverse Student Body}

In addition to the identification of a compelling governmental interest, strict scrutiny requires that the government narrowly tailor its means to achieve that interest. In \textit{Bakke}, Justice Powell recognized that any consideration of race was suspect and that the element of race-consciousness in an admissions policy must be narrowly tailored to achieve the governmental objective of a diverse student body. Justice Powell endorsed the Harvard Plan as an example of a narrowly tailored admissions policy because it considered a wide variety of factors to achieve a diverse student body.

Because the composition of a diverse student body depends on more than race alone, the university's admissions policy must consider the sundry characteristics that students bring to the academy. In other words, every

\begin{itemize}
\item \textbullet 231. See \textit{Chen}, \textit{supra} note 44, at 1860 (observing that following \textit{Bakke}, "the Supreme Court decided at least thirteen affirmative action cases, excluding voting rights cases. No more than three . . . presented a colorable interest in diversity").
\item \textbullet 232. See id. at 1862-63 (recognizing that racial classification cases before Supreme Court arise in employment discrimination context, not in realm of education).
\item \textbullet 233. See id. (noting that "the bulk of the Court's affirmative action docket has focused on 'the work of the manual laborer'" and not on education).
\item \textbullet 234. See id. at 1863 ("Only once has the Court examined affirmative action in a university setting (\textit{Bakke}).").
\item \textbullet 236. See id. at 312-14 (finding interest in diverse student body compelling).
\item \textbullet 238. See \textit{Adarand Constructors, Inc. v. Pena}, 515 U.S. 200, 235 (1995) (finding strict scrutiny review necessary for all racial classifications).
\item \textbullet 239. See \textit{Bakke}, 438 U.S. at 315-18 (Powell, J.) (discussing "plus" factor consideration of race as narrowly tailored).
\item \textbullet 240. See id. at 316-18 (Powell, J.) (describing Harvard Plan as example of narrowly tailored consideration of race).
\item \textbullet 241. See id. at 317-18 (Powell, J.) (discussing consideration of characteristics other than race).
\end{itemize}
applicant possesses numerous characteristics that an admissions committee may consider in developing a genuinely diverse student body. A one such characteristic is an applicant's race. A narrowly tailored race-conscious admissions policy must compare all applicants with all other applicants for all of the available seats. Under such a comparative policy, the consideration of race as a "plus" factor is narrowly tailored because that approach does not focus solely on race. Therefore, the limited consideration of race in a university's admissions policy is constitutional.

VII. CONCLUSION

The First Amendment protects a university's narrow consideration of an applicant's race to achieve a diverse student body. Some commentators have heralded Bakke as the salvation of affirmative action. Others have decried it as the death of equal protection. Regardless of these opinions, Bakke reaffirmed a public university's First Amendment right to compose a diverse student body within the confines of the Fourteenth Amendment. Since 1978, the vast majority of courts have recognized this relationship between the First and Fourteenth Amendments as binding precedent. Future courts should continue to respect the Bakke decision, not only as precedent, but because the diversity of America's classrooms is essential to the future of the nation.

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242. See id. at 318-20 (Powell, J.) (discussing need to consider all relevant factors of all applicants).
243. See id. at 311-15 (Powell, J.) (finding race to be legitimate consideration to achieve diverse student body).
244. See id. at 316-20 (Powell, J.) (finding narrowly tailored admissions policy considers all applicants for all available seats).
245. See id. at 319-20 (Powell, J.) (stating that narrowly tailored admissions policies only consider race as "plus" factor).
246. See id. (Powell, J.) (recognizing narrowly tailored race-conscious admissions policies as constitutional).
247. See Brest & Oshige, supra note 87, at 857-59 (discussing virtues of race-conscious admissions policies and Bakke's diversity justification).
248. See Chen, supra note 44, at 1867-80 (arguing that diversity justification brings more problems than solutions).
250. See Wessmann v. Gittens, 160 F.3d 790, 795-96 (1st. Cir. 1998) (recognizing that Hopwood is in minority on issue of whether diversity is compelling governmental interest).
251. See Keyishian v. Board of Regents of Univ. of N.H., 385 U.S. 589, 603 (1967) ("The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues.").