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ARTICLE

Affirmative Action and the First Amendment: The Attainment of a Diverse Student Body Is a Permissible Exercise of Institutional Autonomy

Darlene C. Goring

I suspect that it would be impossible to arrange an affirmative-action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy.1

I. INTRODUCTION

As we prepare to enter the next millennium, issues of race and class remain at the forefront of America’s seemingly never-ending struggle to reconcile the goal of equality with the social, political, and economic realities of modern society. As we look forward, unanswered questions from the past continue to haunt us. The constitutional viability of race-based affirmative action programs is such a question. Although this question was brought before the United States Supreme Court twenty years ago in Regents of the University of California v. Bakke,2 a definitive answer continues to elude us.

In 1978, Allan Bakke and the University of California looked to the Supreme Court to determine the role that race-based preferences would play in the allocation of educational opportunities.3 The challenge of balancing the competing interests of racial minority groups with the preservation of equality under the law did not present a novel challenge.

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2. Id.; see also infra text accompanying note 8.
3. See Bakke, 438 U.S. at 276 (opinion of Powell, J.); see also infra text accompanying note 8.
Since 1886, the Supreme Court has addressed similar issues in a number of cases, including *Plessy v. Ferguson,*4 *Yick Wo v. Hopkins,*5 *Korematsu v. United States,*6 and *Brown v. Board of Education.*7 But this time, the Court in *Bakke* fragmented into three distinct factions,8 leaving no definitive answer, little guidance, and twenty years of controversy regarding the constitutional permissibility of race-based admissions programs.

During the past twenty years, and in the face of continued silence on this issue from the Court,9 the primary source of guidance has been...

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4. 163 U.S. 537 (1896). In *Plessy,* the Supreme Court’s analysis of the protections afforded to blacks pursuant to the Fourteenth Amendment reinforced the constitutional permissibility of racial segregation. Justice Brown concluded that

> [The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.]

*Id.* at 544.

5. 118 U.S. 356, 369 (1886) (“These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.”).

6. 323 U.S. 214, 219 (1944) (upholding the exclusion of persons of Japanese ancestry from designated military areas as a valid exercise of congressional war powers during World War II).

7. 347 U.S. 483, 495 (1954) (“[I]n the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”).

8. In *Bakke,* the Justices split into three primary factions. Justice Powell wrote a the court’s opinion. See 438 U.S. at 269. Justices Brennan, White, Marshall, and Blackmun concurred in the judgment in part and dissented in part. See *id.* at 324 (arguing that application of the strict scrutiny test to evaluate the constitutionality of the University’s admissions program was inappropriate because no fundamental right or suspect classification was at issue in the case). Justices Stevens, Stewart, Rehnquist, and Chief Justice Burger concurred in the judgment in part and dissented in part. See *id.* at 408 (concluding that the University’s admissions program violated Title VI of the Civil Rights Act of 1964).

9. The Supreme Court refused to hear arguments in *Hopwood v. Texas,* 78 F.3d 932 (5th Cir. 1996), cert. denied, 518 U.S. 1033 (1996), in which the plaintiffs challenged the race-based admissions program at the University of Texas School of Law. A similar challenge was raised in *Taxman v. Board of Education,* 91 F.3d 1547 (3rd Cir. 1996), cert. granted, 117 S. Ct. 2506 (1997), cert. dismissed, 118 S. Ct. 595 (1997). However, fearing a possible adverse decision and in reaction to the Clinton administration’s withdrawal of support, this case was settled for $433,500 in December 1997, prior to a decision from the Supreme Court. See Melinda Henneberger, *On Race: an Optimist in an Unlikely Place,* N.Y. TIMES, Dec. 14, 1997, at NJ5; see also Jan Crawford Greenburg, *Civil Rights Groups Pay Teacher to Avoid Court: Coalition Feared Adverse Ruling by High Court Would Damage Affirmative Action,* CHI. TRIB., Nov. 22, 1997, at A1. For a discussion of the reasons underlying the *Taxman* settlement, see Nicholas deB. Katzenbach & Burke Marshall, *Not Color Blind: Just Blind,* N.Y. TIMES, Feb. 22, 1998, at 6 (Magazine), at 42.
Justice Powell's opinion. In *Bakke*, Justice Powell accepted as constitutionally permissible the idea that the attainment of diversity can serve as a compelling justification for the use of race-based preferences in admissions decision-making. In so doing, he circumvented the Equal Protection Clause of the Fourteenth Amendment and used the countervailing guarantee of academic freedom provided by the First Amendment to cloak educational institutions in the warm blanket of "institutional autonomy." The opinion thus provides educational institutions the right to label decisions about "who may teach, what may be taught, how it shall be taught, and who may be admitted" as academic decisions insulated by the constitutionally protected doctrine of academic freedom.

Justice Powell, and the few courts that have followed his lead, however, have failed to establish a nexus between the exercise of institutional autonomy and the academic nature of admissions decisions that are undertaken with the goal of attaining a diverse student body. The absence of an academic basis for the use of race or ethnicity in this context raises legitimate concerns that "affirmative action in the name of diversity is content-based regulation of speech" that infringes upon First

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that it creates a zero-sum game in which there is a loser for every winner and that the game is won and lost on the basis of race. Thus it obscures the larger goal of finding and preserving room for blacks in all aspects—economic, political, educational, social—and at all levels of society.

*Id.* 438 U.S. at 311-15.


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

*Id.*

11. U.S. *CONST.* amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

12. The definition of "institutional autonomy" is an evolving amalgam of thoughts and ideas. Professor Matthew Finkin has described this concept as "a desire in search of a legal theory." Matthew Finkin, *On "Institutional" Academic Freedom*, 61 *TEX. L. REV.* 817, 856 (1983). He continues:

The institutional desire is to be left alone. It calls to mind the condition von Humbolt sought for the German university . . . freedom and solitude. It also reminds us that, at certain points, university autonomy is a necessary condition for freedom of teaching and inquiry . . . [a]nd the elemental infirmity in the theory of "institutional" academic freedom lies in its refusal to admit of distinctions. The desire is laudable—but the theory claims too much.

*Id.* at 856-57.


Amendment rights of other students and faculty within the academy. This Article provides an analytic framework for this nexus, and posits constitutionally permissible justifications for applying the First Amendment to insulate the admissions decision-making process.

Part II of this Article examines the expansion of the academic freedom doctrine, as safeguarded by the First Amendment, to protect decisions made by educational institutions, and the extent to which the Court has recognized the rights of institutions to act autonomously. Included is a discussion of whether the attainment of diversity is a constitutionally permissible justification for using race-based classifications in academic decision-making.

Part III explores whether the admissions decision-making process falls within the realm of academic decisions traditionally protected by the First Amendment. The Court has never articulated a standard for determining whether the decision-making engaged in by educational institutions is academic and thus protected by the First Amendment or whether it is unprotected administrative decision-making. I propose a restrictive two-prong standard that focuses on the expertise of the decision-maker as well as the unique nature of academic decisions. Through the use of experiential narratives, I then establish a nexus between the attainment of diversity and the pedagogical goals of teaching, inquiry, research, and publication. The use of such anecdotal evidence to establish the impact of diversity in the classroom is both functional and necessary. These anecdotes provide a first-hand look into the classroom setting, and recount the actual experiences of students and faculty in ways that are not conveyed by reading factual case summaries. The use of anecdotal

16. See id. at 1875. Professor Chen states:

When a public university admits students or hires or promotes faculty members according to a diversity-inspired affirmative action plan, it is acting simultaneously as speaker and regulator. Unless it claims that race or ethnicity per se constitutes "academic" grounds for favoring a particular student or professor, a university has no legitimate "academic freedom" defense against rules that proscribe or circumscribe race-based decision-making. Rather, if a university is using affirmative action more loosely to enhance its general intellectual profile, the diffuse value of any incremental diversity achieved by the university at large is vastly outweighed by the potential impact on the speech of individual students and professors.

Id. (citations omitted).


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

Id.
evidence to examine the impact of diversity in the classroom is necessary because of the absence of empirical studies of this area.18

Part IV acknowledges that institutional autonomy does not insulate all decisions made by educational institutions from constitutional scrutiny. In Part IV, I explore the question left unanswered by Justice Powell's opinion in *Bakke*; that is, how far can educational institutions go in the exercise of their right to select a diverse student body before infringing on the equal protection guarantees of the Fourteenth Amendment? I conclude this analysis by relying upon a strict interpretation of the idea of diversity as conceptualized by Justice Powell, and note ultimately that diversity cannot be realistically achieved without the consideration of race and ethnicity as factors in the admissions decision-making process.

II. JUSTICE POWELL'S ADVOCACY OF INSTITUTIONAL AUTONOMY TO ACHIEVE STUDENT BODY DIVERSITY

Academic freedom is traditionally viewed as a right asserted by individuals, such as students and faculty, in the exercise of their educational pursuits.19 There is no dispute that First Amendment protection is warranted in this regard. Institutional autonomy, on the other hand, expands the notion of academic freedom, and with it the protections of the First Amendment, by recognizing the right of educational institutions to engage in decision-making regarding academic matters with limited judicial scrutiny. This doctrine serves as the cornerstone for Justice Powell's conclusion in *Bakke* that a university's decision-making

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A debate has emerged in recent years over the impact of social difference on law school education. Studies and anecdotal accounts have suggested that women are disadvantaged in law school classrooms because of differential patterns of participation and inclusion, and because of gendered reactions to distinctively legal styles of discourse. Although far less systematic attention has been paid to the effects of race, class, or school status on students' experience in law schools, there have been accounts suggesting that students of color also feel excluded.

Id.

process regarding the "selection of its student body" is a valid exercise of its right to academic freedom. In this section, I deconstruct the doctrine of institutional autonomy. Following an examination of the interplay between the First Amendment and the diversity rationale as set forth by Justice Powell in Bakke, I explore the development of institutional autonomy as an extension of traditional notions of academic freedom. Embedded within this analytical framework is a discussion of judicial deference to the decision-making authority of educational institutions that is the derivative result of extending First Amendment protections to institutional decision-making. This section concludes with a discussion of judicial recognition of the doctrine of institutional autonomy to insulate educational institutions from constitutional scrutiny when the institutions utilize race-based criteria to select a diverse student body.

The facts of Bakke are all too familiar. Allen Bakke, a white male medical school applicant, was denied admission to the Medical School of the University of California at Davis. As a result, he challenged the constitutionality of the University's race-based affirmative action program. In accordance with the rule set forth in Korematsu v. United States, the use of race-based classifications is considered suspect by the Court, and triggers the application of the strict scrutiny test to evaluate compliance with the Equal Protection Clause. Notwithstanding the benign nature of a classification, the Court noted that "[t]he guarantees of equal protection . . . are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of

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21. See id. at 277.
22. See id.
23. 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.").
24. See id.; see also Bakke, 438 U.S. at 289-90 (opinion of Powell, J.).
25. Justice Powell rejected the University's argument that "discrimination against members of the white 'majority' cannot be suspect if its purpose can be characterized as 'benign.'" Id. at 294. The basis for this rejection was multifaceted. First, Justice Powell dismissed the premise that the guarantee of equal protection of the laws can have a different application depending on the racial or ethnic group alleging discrimination. See id. at 295. Such a practice would, according to Justice Powell, create an artificial "two-class theory" that is repugnant to the fundamental purpose underlying the Fourteenth Amendment. Id. Second, there would be definitional and administrative problems associated with "varying the level of judicial review according to a perceived 'preferred' status of a particular racial or ethnic minority." Id. Finally, the Court questioned the "benign" nature of any preference because "[n]othing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups." Id. at 298.
race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.”

In order to justify the use of a race-based classification, the strict scrutiny test demands a “judicial determination that the burden [borne] on that basis is precisely tailored to serve a compelling governmental interest.” The University proffered several justifications for the program, including “improving the delivery of health-care services to communities currently underserved,” attaining “a diverse student body,” “countering the effects of societal discrimination,” and

26. Id. at 293 (quoting Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)).
27. Id. at 299. The Court also stated that “in order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is "necessary . . . to the accomplishment" of its purpose or the safeguarding of its interest.” Id. at 305 (quoting In re Griffiths, 413 U.S. 717, 721-22 (1973)).
28. Id. at 310. Justice Powell rejected this argument because the University failed to establish that the “special admissions program [was] either needed or geared to promote” the goal of improving the delivery of health care services to underserved communities. Id.
29. Id. at 311.
30. Id. at 306. The Court rejected this justification because remedial programs, such as the one used by the University, could not justify the use of race-based criteria “in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.” Id. at 307. Justice Powell concluded that to hold otherwise “imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.” Id. at 310.

Professor Charles R. Lawrence III, criticizes Justice Powell's position, arguing that by defining diversity within the paradigm of First Amendment jurisprudence, we are forced to ignore the remedial nature of affirmative action programs. See Charles R. Lawrence III, Each Other's Harvest: Diversity's Deeper Meaning, 31 U.S.F. L. REV. 757, 766-68 (1997). This construct, he asserts, does not further the true goal of diversity—the elimination of racism and subordination—but only serves to “maintain the status quo and [protect] the power of those who are currently privileged.” Id. at 777. He states that

[this argument constitutionalizes the power of a privileged educational establishment to determine what learning shall be valued and who shall be taught. University faculties, administrations, and boards of trustees continue to be dominated by white males. Under Justice Powell’s analysis, these white males have a constitutional right to determine, based on ideas and values widely shared by that privileged group, who will gain access to knowledge and power. Thus, a racially diverse student body is a compelling interest for only as long as those who run the school think it so. Powell’s reasoning could as easily justify an all white school as one that is racially diverse.

Id. at 770-71.

As discussed in Part IV below, I agree with Professor Lawrence that there certainly is a possibility that racial or ethnic minorities could be excluded from a revised and exclusionary definition of diversity. See infra Part IV. However, in light of the impact of Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), cert. denied, 518 U.S. 1033 (1996), and Proposition 209, see CAL. CONST. ART. I, § 31(a)1 we must recognize that in the absence of constitutionally permissible justifications for the use of race-based selection criteria, minorities will be excluded from educational opportunities. We will not only be “in danger of losing sight” of affirmative action’s “true purpose: anti-racism,” we will be faced with the more immediate danger of a return to the days of Sweatt v. Painter, 339 U.S. 629
"reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession."

Justice Powell determined that the University's only constitutionally permissible goal was the attainment of a diverse student body. He viewed the attainment of a diverse student body as an academic decision deserving of judicial deference because it fell within the University's right to academic freedom. Justice Powell noted that "[t]he freedom of a university to make its own judgments as to education includes the selection of its student body." As a result, the Court permitted the

(1950), and McLaurin v. Oklahoma State Regents for Higher Education, 339 U.S. 637 (1950). Lawrence, supra, at 772. In fact, the Supreme Court already has rejected the use of race-based affirmative action as a means of remedying past societal discrimination or curing the continuing effects of racism within American society. See, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (holding that all governmental classifications based on race are subject to strict scrutiny); Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94 (1988) (holding that the standard of review for racial classifications should be strict scrutiny); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) (opinion of Powell J.) ("[R]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examinations."). As a result, we are left with the slender thread of Justice Powell's First Amendment argument. It is important that we develop the definition of diversity within that argument if Bakke is to have relevance in the future.

31. Bakke, 438 U.S. at 306. The Court rejected this justification as facially invalid because "[p]refer members of any one group for no reason other than race or ethnic origin is discrimination for its own sake." Id. at 307.

32. See id. at 311-12. In his biography of Justice Powell, John C. Jeffries, Jr., discusses the origins of the Bakke opinion and the conflict that led to Justice Powell's reconciling the use of race-based preferences with the guarantees of the Equal Protection Clause. See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR., AND THE ERA OF JUDICIAL BALANCE 475-76 (1994). Jeffries gained insight from Bob Comfort, Justice Powell's law clerk, who contributed research and insight on the Bakke opinion. In discussing the constitutional permissibility of diversity as a compelling state interest, Jeffries notes that

[a]s a justification for minority preferences, Comfort argued, diversity was better than compensation—better, because more limited. Compensation implied that all groups hurt in the past could now claim offsetting preferences. Diversity reached only those who currently remained unrepresented. Diversity cut against affirmative action for Asians or others who had made it on their own. Also, Comfort favored diversity because of the flexible way that such concerns traditionally had been dealt with: "When Harvard College receives applications from Idaho farmboys, it does not establish a separate admissions track for them. It does not insulate them from comparison with other applicants and guarantee them a number of safe seats. Instead, it takes the fact of geographical origin as one factor weighing in the farmboy's favor when he is compared against all other applicants. . . ." Race should be handled the same way. Since race was "simply one ingredient of educational diversity," it was "unnecessary to isolate racial minorities from comparison with other applicants." This, said Comfort, was the crucial defect in the Davis program. It was not that Allen Bakke fell short when compared to the minority admits. "Rather, Bakke was not compared with them at all."

Id.

33. See Bakke, 438 U.S. at 311-12.

34. Id. at 312.
University, as a separate autonomous entity, to rely on countervailing First Amendment guarantees of academic freedom to protect its right to make admissions decisions. Justice Powell stated that "[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment." Citing

35. See id. at 313. For a criticism of this view, see Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of "Diversity,"* 1993 Wis. L. Rev. 105. Professor Foster criticizes Justice Powell's reliance on the First Amendment as justification for the use of race-based criteria within the context of a "speech paradigm," which she defines as "whether First Amendment values are sufficiently promoted by the policies to justify the affirmative inclusion of historically excluded individuals." Id. at 121. She argues that this framework is flawed because it "ignores the broader equality concerns underlying the enactment of the policy at issue in that [Bakke] case." Id. at 122. As further explanation for her position, she notes:

Powell could find no principled way, under a speech paradigm, that an institution could value one person's viewpoints or ideas over another person's viewpoints or ideas. Diversity, under a speech paradigm, is purely forward-looking in that the exclusive goal is to multiply the variety of viewpoints and ideas brought into an institutional setting. Unlike the traditional equality paradigm [which is defined as "whether past inequities, and their present effects, justify affirmative attention to differences such as race in the distribution of societal benefits and burdens"], a speech paradigm fails to acknowledge the social context in which differences, and viewpoints, exist. Hence, it does not take into account past inequities toward certain differences, and their present effects on persons possessing those differences, and thus on their viewpoints. Thus, a speech paradigm cannot justify differential treatment on the basis of characteristics such as race in distributing scarce social goods.

Id. Professor Foster favors the alternative analysis set forth by the majority opinion in *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547 (1990), which also used First Amendment principles to justify the need for diversity. Professor Foster argues:

The majority, under the equality paradigm predominant in its other equal protection cases, retained its focus on historical inequities, and their present effects, in concluding that diversity was a sufficient justification for the race-conscious FCC policies at issue. What was clearly of paramount importance in justifying the FCC policies in *Metro Broadcasting* was that minority beneficiaries of the policies, and hence their viewpoints, were significantly under-represented because of historical exclusion of minorities in the broadcasting industry.

Foster, *supra,* at 123.

36. *Bakke,* 438 U.S. at 312. In his examination of Justice Powell's *Bakke* opinion, Professor Carl Cohen rejects the criticism that Justice Powell was either "naive" or "confused" in his recognition of the importance of diversity in the admissions process for professional school students. Carl Cohen, *Equality, Diversity, and Good Faith,* 26 Wayne L. Rev. 1261, 1272 (1980). Professor Cohen writes:

[Justice Powell] is fully aware that the need for diversity may vary with context. He believes—and as former President of the American Bar Association he can be said to have some understanding of the needs of the professional schools—that diversity of students in the class is a desideratum as important in medical and legal education as in the liberal arts. Reasonable persons may differ on this question. Powell's point, however, is that if race is to be a factor in professional school admissions it may be a factor for no other reasons.

Id.
Justice Frankfurter's four essential freedoms from *Sweezy v. New Hampshire*, 37 Justice Powell emphasized that "[t]he atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body." 38

The troublesome aspect of this reasoning is that it fails to set forth the analytic paradigm relied upon by Justice Powell to develop a nexus between diversity and traditional definitions of academic freedom. Specifically, Justice Powell merely cites *Keyishian v. Board of Regents* 39 for the proposition that diversity serves an academic interest because "the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." 40 Justice Powell's opinion in *Bakke* does not offer any additional guidance. 41 Instead, it cautions that this discretion is not absolute, but must yield to "constitutional limitations protecting individual rights." 42

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37. 354 U.S. 234 (1957). The four essential freedoms of a university are the right "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 263 (Frankfurter, J. concurring) (citation omitted).


In the course of Justice Powell's exposition, one can hear echoes of Mill's insistence on "robust" exchanges, or Eliot's commitment to educating future leaders of a heterogeneous democratic society. Indeed, Justice Powell's pivotal opinion in *Bakke* has its roots in a long tradition of thought . . . [that] preceded, by more than a century, the advent of affirmative action programs and the passage of the Civil Rights Act of 1964. It is a tradition that is still vital, and still crucial to our nation's future.

*Id.*


41. Professor J. Peter Byrne notes that Justice Powell failed to articulate a justification for the use of the First Amendment to insulate administrative activities somewhat removed from teaching and scholarship from the scrutiny of the Equal Protection Clause. See J. Peter Byrne, *Academic Freedom: A 'Special Concern of the First Amendment,'* 99 YALE L.J. 251, 257 (1989).

42. *Bakke*, 438 U.S. at 314.
A. Judicial Recognition of Institutional Autonomy

1. Expansion of Academic Freedom to Educational Institutions

The origins of institutional autonomy are found in the Supreme Court's broad interpretation and application of the academic freedom doctrine.43 The Supreme Court's decisions in *Sweezy v. New Hampshire*,44 more specifically, Justice Frankfurter's concurring opinion,45 and later in *Keyishian v. Board of Regents*46 serve as the foundation upon which the constitutional guarantee of institutional autonomy is constructed.47 In

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43. The concept of academic freedom has varying definitions and interpretations. See generally Ralph F. Fuchs, *Academic Freedom—Its Basic Philosophy, Function, and History*, 28 LAW & CONTEMP. PROBS. 431 (1963). Fuchs states:

> Academic freedom is that freedom of members of the academic community, assembled in colleges and universities, which underlies the effective performance of their functions of teaching, learning, practice of the arts, and research. The right to academic freedom is recognized in order to enable faculty members and students to carry on their roles.


> Traditionally, academic institutions were relatively free of outside constraints in managing their internal affairs. Decisions regarding who to hire and fire, who to promote, who to admit as students, which research to pursue and under what conditions, were matters left wholly to the discretion of trustees, administrators, and faculties. The management of an institution's internal affairs was jealously guarded and, in large measure, insulated from legislative and even judicial intrusion by the halo of "academic freedom." There is no single, universally accepted definition of "academic freedom" but the following admirably captures the concept:

> "Academic freedom is that aspect of intellectual liberty concerned with the peculiar institutional needs of the academic community. The claim that scholars are entitled to particular immunity from ideological coercion is premised on a conception of the university as a community of scholars engaged in the pursuit of knowledge, collectively and individually, both within the classroom and without, and on the pragmatic conviction that the invaluable service rendered by the university to society can be performed only in an atmosphere entirely free from administrative, political, or ecclesiastical constraints on thought and expression."

Id. (footnote omitted). The following definition of academic freedom by Professor Chen is also useful:

> When properly entrusted to thinkers rather than administrators, academic freedom fuels the discovery of truth "out of a multitude of tongues, rather than through any kind of authoritative selection." Defenders of educational affirmative action are likely to dispute this account of academic freedom. From their perspective, academic freedom lies not in the expressive liberty of individual professors and students, but in the university's ability to implement affirmative action without fear of judicial review.

See Chen, supra note 15, 1874 (citations omitted).

44. 354 U.S. 234 (1957).

45. See id. at 255 (Frankfurter, J., concurring).

46. 385 U.S. 589 (1967).

47. See Metzger, *Profession and Constitution*, supra note 19, at 1315 (arguing that the origins of institutional autonomy predate the *Sweezy* decision).
both cases, the Court determined the extent that an individual faculty member, not an institution, may utilize the First Amendment's protection of academic freedom. In both opinions, however, the Justices also discussed the broader implications of applying the academic freedom doctrine to the entire educational sphere.48

In *Sweezy*, the Supreme Court found the New Hampshire Attorney General's exercise of his authority to compel Paul Sweezy to disclose his knowledge of subversive activities violative of Sweezy's due process rights under the Fourteenth Amendment.49 Sweezy, who had on several occasions delivered lectures to humanities classes at the University of New Hampshire,50 refused to cooperate with the Attorney General's investigation of subversive activities, citing infringement of his First Amendment rights.51 In response, the Attorney General utilized the assistance of the state Superior Court, which was authorized to "find recalcitrant witnesses in contempt of court."52 The court found Sweezy in contempt and jailed him for refusing to disclose the requested information.53 The Supreme Court, however, held that the Attorney General's activities were not related to any state interest that would warrant interference with Sweezy's due process rights.54

This decision, issued by Chief Justice Warren, was the Court's first extension of the constitutional protection of the First Amendment to academic freedom.55 Chief Justice Warren concluded that "there unquestionably was an invasion of [Sweezy's] liberties in the areas of academic freedom and political expression—areas in which government

48. See also Justice Douglas's statement in *Griswold v. Connecticut*, in which he interpreted the First Amendment to include protection for academic freedom:
In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach—indeed the freedom of the entire university community. Without those peripheral rights the specific rights would be less secure.

381 U.S. 479, 482-83 (1965) (citations omitted).


50. *See id.* at 234.

51. Specifically, Sweezy refused to "disclose his knowledge of the Progressive Party in New Hampshire or of persons with whom he was acquainted in that organization." *Id.* at 241-42.

52. *Id.* at 238.

53. *See id.* at 244-45.

54. *See id.* at 254.

55. Although Chief Justice Warren did not expressly refer to the First Amendment when discussing this issue, he recognized that Sweezy's rights to be free from invasions of his liberties "in the areas of academic freedom and political expression" were "safeguarded by the Bill of Rights and the Fourteenth Amendment." *Id.* at 250.
should be extremely reticent to tread." He examined the parameters of
the protection afforded by academic freedom further when he explained
that

[the essentiality of freedom in the community of American universities is
almost self-evident. No one should underestimate the vital role in a democracy
that is played by those who guide and train our youth. To impose any strait
jacket upon the intellectual leaders in our colleges and universities would
imperil the future of our Nation. No field of education is so thoroughly
comprehended by man that new discoveries cannot yet be made. Particularly
is that true in the social sciences, where few, if any, principles are accepted as
absolutes. Scholarship cannot flourish in an atmosphere of suspicion and
distrust. Teachers and students must always remain free to inquire, to study and
to evaluate, to gain new maturity and understanding; otherwise our civilization
will stagnate and die."

In his concurring opinion, Justice Frankfurter echoed the Chief
Justice's arguments on this issue, and added that additional constitutional
protection should be afforded to Sweezy as a member of the academic
community. This opinion focused on the detrimental effects of
governmental intervention into this unique area of society. Justice
Frankfurter noted that a free society depends on free universities:
"This means the exclusion of governmental intervention in the intellectual life
of a university." Justice Frankfurter further cited with approval the
language of a South African remonstrance policy identifying "the four
essential freedoms" necessary to foster an academic atmosphere "most
conducive to speculation, experiment and creation."
The now oft-cited
language provides that a university must have the authority "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." It is important
to note, however, that this authority is not absolute.

In 1967, the United States Supreme Court was asked once again to
interpret the legitimacy of a state's attempt to root out subversive activity
within an academic community. In Keyishian v. Board of Regents," several faculty members at the State University of New York refused to

56. Id.
57. Id.
58. See id. at 261-63 (Frankfurter, J., concurring).
59. See id. at 262.
60. See id.
61. Id. ("It matters little whether such intervention occurs avowedly or through action that
inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so
indispensable for fruitful academic labor.").
62. Id. at 263.
63. Id.
64. See infra Part IV.
sign certificates attesting that they were not Communists. As a result of their subsequent dismissal, the faculty members sought declaratory and injunctive relief citing various federal constitutional violations. The Supreme Court found the statutory certification requirement unconstitutionally vague and not narrowly tailored. Although the Court recognized the state’s compelling interest in “keeping subversives out of the teaching ranks,” the Court noted that the interests of faculty members in preserving their right to academic freedom as protected by the First Amendment also must be considered.

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." 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, (rather) than through any kind of authoritative selection.”

There are dicta from the Supreme Court’s decisions in *Sweezy* and *Keyishian* suggesting that the guarantee of academic freedom is not limited to faculty members and students. More importantly, these decisions indicate the Court’s willingness to expand this protection to other areas of the educational arena. By protecting the integrity of the classroom, the Supreme Court acknowledged that some areas of society must not be subjected to excessive governmental interference in order to ensure that they function properly and achieve their goals.

*Sweezy*, *Keyishian*, and *Bakke* provide the framework for developing the doctrine of institutional autonomy. A majority of the Supreme Court, however, has yet to adopt this doctrine into established First Amendment

66. See id. at 592.
67. The Feinberg law provided procedures for the removal or disqualification of individuals in the public school system for engaging in subversive conduct. See id. at 594-95.
68. See id. at 597-99.
69. Id. at 602.
70. See id. at 603.
71. Id. (citation omitted).
72. See *ROBERT K. POCHE, ACADEMIC FREEDOM IN AMERICAN HIGHER EDUCATION: RIGHTS, RESPONSIBILITIES AND LIMITATIONS, 1993 ASHE-ERIC HIGHER EDUCATION REPORT NO. 4* (1993). Poch notes that in addition to recognizing the academic rights of faculty, the courts recognize also the rights of colleges and universities to set and maintain pedagogical standards, see that appropriate course subject matter is taught by the faculty, and ensure that faculty are not engaged in the use of unprotected speech in the classroom. The classroom is . . . the arena where institutional authority is greatest and courts are most hesitant to enter.

*Id.* at 29.
By the same token, the Court has not rejected it. Professor J. Peter Byrne acknowledges that the doctrine of institutional autonomy represents an “abrupt departure from the academic tradition of academic freedom.” But Professor Byrne also concludes that the protection of institutional autonomy has become necessary in order to respond to “[s]ignificant changes in the social function of the university and in its legal status.” In addition, permitting an educational institution to function as an independent entity serves as recognition of the unique level of administrative and pedagogical expertise necessary to manage an educational institution. Finally, expansion of the academic freedom in this context is entirely consistent with Chief Justice Warren’s statement in Sweezy that “[n]o field of education is so thoroughly comprehended by man that new discoveries cannot yet be made.” The recognition that educational institutions are entitled to constitutional protection for academic decision-making is a much needed judicial discovery.

2. Judicial Recognition of Institutional Autonomy

a. Administrative Decisions

The aforementioned decisions do not stand alone in their willingness to expand First Amendment protections to educational institutions. These decisions, and several Supreme Court and lower court decisions, recognize the doctrine of institutional autonomy in a variety of administrative and academic contexts. For example, with respect to administrative decisions, Justice Stevens, concurring with the Supreme Court’s decision in Widmar v. Vincent, noted that judgments regarding the

73. See generally Rabban, supra note 19.
74. Byrne, supra note 41, at 312. Byrne states:
The Court’s new elaboration of institutional academic freedom does contain anomalies. The First Amendment rarely protects institutional decision-making so indirectly related to expression as student admissions or faculty hiring. It may be hard to identify what speech (or even point of view) the university expresses as an institution, distinct from those of individual faculty, students, or administrators. Moreover, while the right to institutional academic freedom has risen at the time in our history when universities have been most subject to federal regulation, no federal regulation has been invalidated under the right. As in Sweezy and Keyishian, the new turn in academic freedom has flowered in dicta and rhetoric more than in holdings and rules.

Id.

75. Id.
77. 454 U.S. 263, 277-81 (1981) (Stevens, J., concurring). Justice Stevens stated:
In this case, I agree with the Court that the university has not established a sufficient justification for its refusal to allow the Cornerstone group to engage in religious worship on the campus. The primary reason advanced for the discriminatory treatment is the University’s fear of violating the Establishment Clause. But since the record discloses no
allocation of a university's limited resources should be made "by academicians, not by federal judges," without courts subjecting the institutions to the exacting scrutiny required for a showing of a "compelling state interest."78

In Widmar, the Court was asked to determine whether the University of Missouri at Kansas City, a state university, violated the First Amendment rights to freedom of speech and association of an evangelical religious Christian student group by prohibiting the group’s continued use of University facilities for meetings.79 This case arose from the University's interpretation of a regulation that “prohibit[ed] the use of University buildings or grounds 'for purposes of religious worship or religious teaching.'”80 The University argued, pursuant to the regulation, that giving the group access to its facilities would violate the Establishment Clause.81 Applying the strict scrutiny test,82 Justice Powell initially focused on the administrative nature of the University's regulation.83 He noted that the purpose of the University was to "provide a forum in which students can exchange ideas."84 As such, the use of the forum for religious speech would neither advance nor inhibit the group's religious activities.85 Further, he concluded that continued access to the University’s facilities would not contribute to "an excessive government entanglement with religion."86 As a result, Justice Powell concluded that the University would not violate the Establishment Clause by giving the group continued access to its facilities.87

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Id. at 280-81.
78. Id. at 279.
79. See id. at 265.
80. Id. at 265.
81. See id. at 270-71. The Establishment Clause of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I.
82. See Widmar, 454 U.S. at 269-70. In order to justify discriminatory exclusion from a public forum based on the religious content of a group’s intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.
83. See id. at 270-75.
84. Id. at 271 n.10.
85. See id. at 271-72 n.10.
86. Id. at 271 (quoting Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (citations omitted)).
87. See id.
Justice Stevens concurred with the majority’s decision in *Widmar* because the University failed to offer any legitimate reasons why the use of University facilities by a religious student group would trigger a possible infringement of the Establishment Clause by the University; however, he clearly acknowledged that “every university must ‘make academic judgments as to how best to allocate scarce resources.’” Routine administrative decisions regarding “the use of the time and space that is available for extracurricular activities” should be insulated from the Court’s exacting scrutiny.

b. Academic Decisions

With respect to decisions made in an academic context, there is a growing line of cases evidencing the judiciary’s willingness to apply the standard adopted by the Court in *Regents of the University of Michigan v. Ewing*, and thus to defer to the decision-making authority of

88. See id. at 280-81 (Stevens, J., concurring). Professor William W. Van Alstyne writes: A concurring opinion in *Widmar* by Justice Stevens makes a point not in disagreement with Powell’s majority opinion, but qualifying it in a manner anticipating his own applied usage of “academic freedom” in *Ewing*. Stevens expressly referred to “academic freedom” to disallow intrusive judicial review of institutional procedures for handling disputes in allocating university space. In Stevens’ view, the first amendment may shelter on-campus free speech and meeting rights of students at public institutions. Even so, he insisted, where such groups seek use of facilities, the first amendment does not require suspension of institutional opinion respecting their relative academic worthiness—at least in mediating competing demands, if not in judging their general “right” to be on campus. Rather, the first amendment specifically protects academic value judgments reflected in institutional mechanisms established to determine priorities of use where not all requests can simultaneously be granted. In Stevens’ view, institutional discretion of this sort is not different in kind than the sort Powell embraced for the Court in the *Bakke* case. It is correspondingly entitled to a strong measure of academic freedom respect in the courts.

89. *Widmar*, 454 U.S. at 277 (Stevens, J., concurring) (quoting the majority opinion).

90. *Id.* at 278.

educational institutions. Although not absolute, judicial deference has been afforded in two limited contexts.

First, in cases challenging admissions and retention decisions, courts have expressed a reluctance to interfere with academic decisions made by a university. Ewing is the seminal case on this issue. In Ewing, the plaintiff's primary complaint was that the University arbitrarily evaluated his academic credentials when determining his fitness to remain in school. The plaintiff, Ewing, alleged that he had a property interest in continued enrollment in the medical school, and that the University's decision to dismiss him violated his "substantive due process rights guaranteed by the Fourteenth Amendment." The Supreme Court concluded that even if the plaintiff had a protectible property interest in continued enrollment in medical school, the Court was reluctant to interfere with the University's decision to dismiss him from its accelerated program. Because Ewing alleged an infringement of a constitutionally protected interest, however, the Court evaluated the University's conduct to determine if Ewing's dismissal was the product of "arbitrary state action." The Court's decision was based on a number of factors, including a finding that Ewing's dismissal was not the result of arbitrariness, but in fact was the product of conscientious and careful deliberations by the faculty "based on an evaluation of the entirety of Ewing's

92. Byrne, supra note 41, at 326-27. Byrne states that

[the constitutional right of institutional academic freedom appears to be a collateral descendent of the common law notion of academic abstention. This heritage is made explicit in Regents of the University of Michigan v. Ewing, where the Court, after invoking Horowitz and the rhetoric of abstention, suggests that these views recommend themselves as protection for academic freedom. And the "four freedoms" of Sweezy reflect the kinds of university decisions courts have refused to review under common law principles. Institutional academic freedom can be viewed as academic abstention raised to constitutional status, so that judges can consider whether statutes or regulations fail to give sufficient consideration to the special needs or prerogatives of the academic community.]

93. See, e.g., Van de Zilver v. Rutgers Univ., 971 F. Supp. 925 (D.N.J. 1997); Phelps v. Washburn Univ., 634 F. Supp. 556 (D. Kan. 1986); Montana v. Pantzer, 489 P.2d 375 (Mont. 1971). This position is consistent with Justice Powell's concurring opinion in Board of Curators v. Horowitz, 435 U.S. 78, 96 n.6 (1978) (Powell, J., concurring) ("University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation.").

94. 474 U.S. at 225.

95. Id. at 217.

96. See id. at 225-28; see also Horowitz, 435 U.S. at 90 ("Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.").

academic career. Such academic decision-making was insulated from judicial scrutiny because of two considerations. First, the Court deferred to the faculty's exercise of its "professional judgment." Justice Stevens concluded that in the absence of "a substantial departure from accepted academic norms," judicial restraint should be exercised in these matters. Second, Justice Stevens, citing Sweezy, Keyishian, and Bakke, acknowledged the Court's reluctance to substitute its judgment for the educational expertise utilized in the academic decision-making process. He acknowledged a reluctance to trench on the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom, "a special concern of the First Amendment." If a "federal court is not the appropriate forum in which to review the multitude of personal decisions that are made daily by public agencies" far less is it suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions—decisions that require an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decision-making.

In addition to Supreme Court decisions, lower federal courts also have recognized the doctrine of institutional autonomy and the importance of an educational institution's right to exercise its First Amendment rights in the selection of its student body. In Martin v. Helstad, the District Court of Wisconsin, citing Bakke and Sweezy, held that "[a]cademic institutions are accorded great deference in their freedom to determine who may be admitted to study at the institution. As long as admission standards remain within constitutionally permissible parameters, it is

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98. Id. at 225.
99. Id.
100. Id.
101. See id. at 226. Justice Stevens concluded that "[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself." Id. at 226 n.12 (citation omitted). But see Richard H. Hiers, Academic Freedom in Public Colleges and Universities: O Say, Does That Star-Spangled First Amendment Banner Yet Wave?, 40 WAYNE L. REV. 1, 17 (1993). Professor Hiers argues that "[w]hen Justice Stevens used the expression 'autonomous decision-making by the academy itself,' he was obviously referring to decision-making by the faculty." Id. He further argues that with respect to conflicting rights of the faculty and the university, "[t]he notion that academic institutions are somehow endowed with an 'academic freedom' to restrict or punish the exercise of academic freedom by their faculty is aberrant." Id. at 55.
102. Ewing, 474 U.S. at 226 (alteration in original) (citations omitted). In a concurring opinion, Justice Powell echoed the Court's "emphasis on the respect and deference that courts should accord academic decisions made by the appropriate university authorities." Id. at 230 (Powell, J., concurring). He went on to conclude that "[j]udicial review of academic decisions, including those with respect to the admission or dismissal of students, is rarely appropriate, particularly where orderly administrative procedures are followed." Id.
exclusively within the province of higher educational institutions to establish criteria for admission.\textsuperscript{104}

In \textit{Martin}, the University of Wisconsin had revoked the acceptance of an applicant who was convicted and incarcerated for interstate transportation of forged securities.\textsuperscript{105} Although required to do so, the applicant had failed to include this information about his criminal conviction on his application to law school.\textsuperscript{106} The plaintiff challenged the revocation as a violation of his due process and equal protection rights under the Fourteenth Amendment.\textsuperscript{107} The court, however, recognized that the University's academic freedom to select its student body diminished any private property interest that Martin had in attending law school and granted the University of Wisconsin School of Law's motion for summary judgment.\textsuperscript{108}

Federal courts also have evidenced a willingness to defer to the decision-making authority of academic institutions in the area of discrimination claims based on disability.\textsuperscript{109} For example, in \textit{Anderson v. University of Wisconsin},\textsuperscript{110} an alcoholic law student challenged the University of Wisconsin Law School's decision not to readmit him for a fourth time.\textsuperscript{111} Anderson alleged that the University dismissed him because of his alcoholism in violation of section 504 of the Rehabilitation

\begin{footnotes}
104. \textit{Id.} at 1482 (citations omitted).
105. \textit{See id.} at 1478.
106. \textit{See id.} at 1475-76.
107. \textit{See id.}
108. \textit{See id.} at 1485; \textit{see also} \textit{Wirsing v. Board of Regents of the Univ. of Colo.}, 739 F. Supp. 551 (D. Colo. 1990). In \textit{Wirsing}, the court held that requiring a tenured professor to comply with the University of Colorado at Denver's requirement that she administer standardized teaching evaluations in her classes did not interfere with her right to academic freedom under the First Amendment. \textit{Id.} at 553-54. Instead, the court noted the countervailing institutional autonomy enjoyed by the University to govern the institution. \textit{See id.} at 553. "Because the university must remain independent and autonomous to enjoy academic freedom, the federal courts are reluctant to interfere in the internal daily operations of the academy which do not directly and sharply implicate basic constitutional values." \textit{Id.}

The first of these is a court's limited ability, as contrasted to that of experienced educational administrators and professionals, to determine an applicant's qualifications and whether he or she would meet reasonable standards for academic and professional achievement established by a university . . . . "Courts are particularly ill-equipped to evaluate academic performance."

\textit{Id.} (quoting \textit{Board of Curators of the Univ. of Mo. v. Horowitz}, 435 U.S. 78, 92 (1978)) (omission in original); \textit{see also} \textit{Mallett v. Marquette Univ.}, 65 F.3d 170, 1995 WL 508104, at *3 (7th Cir. 1995) (unpublished opinion) (finding that law school applicant was not "otherwise qualified" for admission to Marquette University Law School notwithstanding his disability).
110. \textit{841 F.2d} 737 (7th Cir. 1988).
111. \textit{See id.} at 739.
\end{footnotes}
The Rehabilitation Act provides that "an institution receiving federal funds may not discriminate against an 'otherwise qualified handicapped individual.'" The district court granted the University's motion for summary judgment upon concluding, as the University did, that Anderson was "not 'otherwise qualified' to continue as a law student" because of his poor academic performance.

On appeal, the Seventh Circuit, in response to Anderson's argument that a jury should be allowed to reach the final disposition of the case, noted that, consistent with the United States Supreme Court's decisions in *Ewing* and *Horowitz*, judicial deference was the more appropriate response to this action. Specifically, the Seventh Circuit concluded that

> [t]he Act does not designate a jury, rather than the faculty of the Law School, as the body to decide whether a would-be student is up to snuff. The Law School may set standards for itself, and jurors unacquainted with the academic program of a law school could not make the readmissions decision more accurately than the faculty of the Law School; the process of litigation would change the substantive standard in addition to raising the costs of its application.

The Sixth Circuit reached a similar conclusion in *Doherty v. Southern College of Optometry*. In *Doherty*, the plaintiff, an optometry student, suffered from a debilitating eye condition known as "retinitis pigmentosa (RP) and an associated neurological condition." In order to advance into his fourth year of the program, the plaintiff was required to pass a pathology clinic examination that required him to perform several manual techniques with proscribed instrumentation. Due to his physical condition, the plaintiff was unable to successfully complete this examination, and was therefore denied a degree. The Sixth Circuit affirmed the district court's dismissal of the plaintiff's discrimination claim because the University could not "reasonably accommodate" his disability. Additionally, in response to his breach of contract claims, the Sixth Circuit adopted the Supreme Court's reasoning from *Ewing* and *Horowitz*

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112. See id.
113. Id. at 740 (quoting 29 U.S.C. § 794).
114. Id.
117. See Anderson, 841 F.2d at 741.
118. Id.
119. 862 F.2d 570 (6th Cir. 1988).
120. Id. at 572.
121. See id.
122. See id. at 572-73.
123. Id. at 575.
and expressed a reluctance to interfere with competency decisions made by academic institutions.\textsuperscript{124} The Sixth Circuit noted that

this case arises in an academic context where judicial intervention in any form should be undertaken only with the greatest reluctance. The federal judiciary is ill equipped to evaluate the proper emphasis and content of a school's curriculum. This is the case especially regarding degree requirements in the health care field when the conferral of a degree places the school's imprimatur upon the student as qualified to pursue his chosen profession.\textsuperscript{125}

The Sixth Circuit ultimately concluded that the University did not breach any express or implied contractual agreements with the plaintiff, and therefore set aside the district court's judgment in favor of the plaintiff on this issue.\textsuperscript{126}

The second context in which federal courts have evidenced a willingness to defer to the decision-making authority of academic institutions is with respect to faculty retention decisions. Although the Supreme Court has broadly interpreted the scope of academic freedom protections for faculty and students, this is an area within the academy where institutional autonomy reigns supreme over those fundamental First Amendment rights. For example, the Sixth Circuit in \textit{Hetrick v. Martin}\textsuperscript{127} held that Eastern Kentucky University did not violate the First Amendment rights of an untenured faculty member when the University failed to renew her contract due to its "displeasure with her pedagogical attitudes."\textsuperscript{128} The court held that the scope of a teacher's right to academic freedom did not "encompass the right of a nontenured teacher to have her teaching style insulated from review by her superiors when they determine whether she has merited tenured status just because her methods and philosophy are considered acceptable somewhere within the teaching profession."\textsuperscript{129} The Sixth Circuit, in accordance with the Supreme Court's decision in \textit{Board of Regents of State Colleges v. Roth},\textsuperscript{130} concluded that in the absence of a deprivation of a constitutionally protected right, a university has the authority to terminate a nontenured faculty member without articulation of a statement of reasons for such action, notice, or a hearing.\textsuperscript{131} The court noted that a contrary decision would subject educational institutions to legal action with "every nonrenewal decision."\textsuperscript{132}

\textsuperscript{124} See id. at 576.
\textsuperscript{125} Id. (citations to \textit{Ewing} and \textit{Horowitz} omitted).
\textsuperscript{126} See id. at 579.
\textsuperscript{127} 480 F.2d 705 (6th Cir. 1973).
\textsuperscript{128} Id. at 708.
\textsuperscript{129} Id. at 709.
\textsuperscript{130} 408 U.S. 564 (1972).
\textsuperscript{131} See \textit{Hetrick}, 480 F.2d at 709.
\textsuperscript{132} Id.
Similarly, the First Circuit in *Lovelace v. Southeastern Massachusetts University*\(^{133}\) held that the University did not interfere with an untenured faculty member’s academic freedom when it refused to renew his contract.\(^{134}\) The faculty member argued that the University retaliated against him for his refusal to “inflate his grades or lower his expectations and teaching standards.”\(^{135}\) The First Circuit emphasized that the University had a recognized right to govern the institution pursuant to the “four essential freedoms”\(^{136}\) as set forth in *Sweezy* and *Bakke*, and that such rights superseded any rights to academic freedom asserted by the faculty member in this situation.\(^{137}\) As a result, the University was entitled to establish and implement policies regarding “course content, homework load, and grading.”\(^{138}\) It was also within the University’s discretion to determine whether it “sets itself up to attract and serve only the best and brightest students or whether it instead gears its standard to a broader, more average population.”\(^{139}\) In the absence of such institutional autonomy, the court concluded that the University would be constrained from “defining and performing its educational mission.”\(^{140}\)

Even though a few circuits are outspoken on this issue, the doctrine of institutional autonomy is in an embryonic state. The expansion of First Amendment protection to academic decision-making, however, is consistent with the deferential treatment afforded by the Supreme Court to the ideas and conduct of individual members of the academic community. Protection of this community as a “marketplace of ideas” requires the Court to recognize the unique nature and complexity of this environment. The foundation of academic decision-making is the professional judgment and expertise utilized by its members. The judiciary is ill-equipped to evaluate the merits of these informed decisions. Judicial interference in this process would subject members of the academic community to unwarranted litigation, and hamper their ability to act in the best interests of their educational institutions. Recognition of the doctrine of institutional autonomy ensures members of the academy that their educational decision-making will be insulated by the First Amendment from unwarranted constitutional scrutiny.

\(^{133}\) 793 F.2d 419 (1st Cir. 1986).
\(^{134}\) See id. at 425.
\(^{135}\) Id. at 425.
\(^{136}\) Id. at 426 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957), as stating that the “four essential freedoms” of a university are “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”).
\(^{137}\) See id.
\(^{138}\) Id.
\(^{139}\) Id. at 425-26.
\(^{140}\) Id. at 426.
B. The Attainment of Diversity as a Permissible Exercise of Academic Freedom

The modern trend toward adoption of the “four essential freedoms” identified in Sweezy was set forth by Justice Powell in Bakke. 141 Specifically, Justice Powell noted that “[t]he freedom of a university to make its own judgments as to education includes the selection of its student body.” 142 It is through this exercise of a free selection process that Justice Powell determined that the “attainment of a diverse student body” 143 was a constitutionally permissible justification for the use of race-based admissions criteria. 144

During the twenty-year period between the Bakke decision and the Fifth Circuit’s explicit rejection of Justice Powell’s diversity justification in Hopwood v. State of Texas, 145 two lower courts held that the use of race-based preferences by educational institutions was constitutionally permissible. In Davis v. Halpern, 146 the United States District Court for the Eastern District of New York accepted as controlling precedent Justice Powell’s view that the use of racial preferences to achieve diversity was a constitutionally permissible goal capable of withstanding the strict scrutiny analysis of the Fourteenth Amendment. 147 In Davis, a white male applicant to the City University of New York (CUNY) law school challenged the University’s numerous rejections of his application

142. Id. at 312.
143. Id. at 311.
   It is important to remember why Justice Powell allowed diversity to rule in the area of college admission. It was not only to help minority students, although that was certainly part of the equation. The stated purpose of diversity on state college campuses was to provide a more diverse educational environment for everyone, minority and nonminority alike. Given an Ivy League setting, the purpose of diversity is to ensure that white students who never attended a school with blacks or Hispanics can observe them for a while close up before they have to work with them out there in the real world.
   Id.
145. 78 F.3d 932 (5th Cir. 1996); see also discussion supra notes 184-97 and accompanying text.
147. See Davis, 768 F. Supp. at 975.
as violations of Title VI of the Civil Rights Act of 1964. The applicant alleged that pursuant to the school’s affirmative action policy, race and gender were considered as factors in the admissions process.

The University asserted that these factors were used to recruit a diversified student body. Specifically, CUNY’s Statement of Admissions Policy, which was set forth in the school’s admissions catalogue, provided that the University’s goal was to “select a diverse group of students, genuinely representative of the remarkable diversity of the City the School serves.” The district court’s decision in this case represents one of the few instances in which a federal court fully adopted Justice Powell’s assertion that the attainment of a diverse student body can serve as a compelling justification for the use of race-based criteria. The court, citing Bakke, noted that

[w]hile the use of racial classifications are highly disfavored and have been infrequently sustained by the Supreme Court, there are instances in which classifications serving proper purposes will be upheld. One such purpose is that of a university’s obtaining the benefits which flow from enrolling an ethnically diverse student body.

The court further recognized the existence of a nexus between the First Amendment and diversity within an educational environment, but like Justice Powell’s opinion in Bakke, it failed to fully explore the justifications for such a connection. The Davis court merely recited Justice Powell’s conclusion that “the First Amendment interest in providing an environment which fosters the ‘robust exchange of ideas’ makes the goal of diversity ‘of paramount importance in the fulfillment of [a university’s] mission.”

The court noted that the University’s use of racial preferences to achieve diversity was consistent with the “Harvard Plan,” approved by

148. Id. at 970; see also 42 U.S.C. §§ 2000d to 2000d-4a (1994) “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” As interpreted by the United States Supreme Court in Bakke, 42 U.S.C. § 2000d prohibits any discriminatory conduct that also violates the equal protection guarantees of the Fourteenth Amendment. See Bakke, 438 U.S. at 287 (opinion of Powell, J.).

149. See Davis, 768 F. Supp. at 974.

150. See id. at 980.

151. Id.

152. Id. at 975.

However, Bakke makes clear that in the absence of prior discrimination by the university the consideration of race as one factor among many by a university admissions process is constitutional only so far as it seeks to procure for the university the educational benefits which flow from having a diverse student body.

Id. at 981.

153. Id. at 975.
Justice Powell in Bakke. Although an admissions policy that adopts this structure may appropriately place “a premium on membership in certain ethnic groups,” and use this as “a perfectly appropriate, and legal, means to achieve diversity,” such a policy violates the Equal Protection Clause if it is used as a remedial measure in the absence of a “proper showing of discrimination.” Although the tenor of this opinion is clearly supportive of diversity within the academy, it is clear that the court was hampered by the University’s failure to justify its admissions policy with rationales that are consistent with Justice Powell’s definition of diversity. Instead, the district court concluded that

...[the fact that the City and State are ethnically diverse, the fact that the Bar may be too homogeneous, or the fact that minorities too often may not be able to find adequate legal representation cannot alone or in combination with one another, without more, support the consideration of race by the law school. The law school’s remedial powers are limited, under the Equal Protection Clause, to addressing such discrimination as it specifically finds to have been perpetuated by its own institutions—not by our society at large.]

In addition to seeking a diversified student body, CUNY’s race-based admissions criteria also was viewed as a remedial measure to diversify the New York bar due to underrepresentation of minorities, and to train minority attorneys so that they would be available to assist underserved minority communities. The court, however, also made clear that remedial measures, even those aimed at achievement of diversity, must be justified by a proper showing of past discrimination, and that no such showing was made by the University in this case. The court noted that if the University’s policy was aimed at remedying societal discrimination, “then it is unconstitutional for its failure to be limited to the goal of remedying specific prior discriminatory practices by the law school.”

The court further determined that the University’s admissions policy unfortunately confused or merged “the goal of diversity, whose intent...

154. See id. at 982. The Harvard Plan is a common reference to the special admissions plan adopted by Harvard College. See Bakke, 438 U.S. 273, app. at 322-23 (opinion of Powell, J.).
155. Id. at 768 F. Supp. at 982.
156. Id. at 981.
157. See id. at 980. The University’s Director of Admissions stated that because minorities and other groups are underrepresented in the legal profession and because of the diverse composition of New York City and State and the Law School’s commitment to diversity in its student body, membership in underrepresented groups is one of several factors, such as GPA and LSAT scores, which Committee members may consider, in determining an applicant’s request for admission.
158. See id. at 980-81 (“Neither side in this case has proffered a shred of evidence suggesting that the law school has ever engaged in discrimination against those underrepresented groups.”).
159. Id. at 980.
is to cultivate a richer academic environment, with that of the remedial consideration of race and ethnicity, which [was impermissibly] directed at addressing the inadequate minority representation in the legal profession.\textsuperscript{160} As a result of the University's failure to present any evidence of past discriminatory conduct that would "justify a race-conscious remedy under Title VI," the district court determined that a triable issue of fact remained regarding the constitutional permissibility of the University's policies.\textsuperscript{161}

Another case that adopted the attainment of diversity as a constitutionally permissible justification for the use of race-based preferences is \textit{McDonald v. Hogness}.\textsuperscript{162} In \textit{McDonald}, an unsuccessful white male applicant challenged the admissions policies of the University of Washington School of Medicine on several constitutional and statutory grounds.\textsuperscript{163} The Medical School's admissions policy considered a number of factors, including "academic performance, medical aptitude, motivation, maturity, and demonstrated humanitarian qualities. Extenuating background circumstances are considered as they relate to these selection factors."\textsuperscript{164} The University considered race or ethnicity as a positive factor in this process.\textsuperscript{165}

The University argued, in accordance with \textit{Sweezy} and \textit{Keyishian}, that the administration of its admissions policy was a constitutionally permissible exercise of academic freedom as protected by the First Amendment.\textsuperscript{166} Although the court agreed that "a university must have wide discretion in making admission judgments," such discretion must be tempered by "constitutional limitations protecting individual rights."\textsuperscript{167} The constitutional limitation imposed by the Equal Protection Clause mandates compliance with the strict scrutiny test when evaluating the

\begin{itemize}
\item \textsuperscript{160} Id.
\item \textsuperscript{161} Id. at 982-83.
\item \textsuperscript{162} 598 P.2d 707 (Wash. 1979) (en banc). Initially, the court noted that the applicant was not entitled to relief on equal protection grounds because evidence showed that he would not have been admitted into the "class even absent the six minority persons accepted and without any consideration of race." Id. at 711. Because of the "public importance of the issue and the likelihood of its recurrence," however, the court considered the broader question of whether the use of race was a constitutionally permissible admissions factor. Id.
\item \textsuperscript{163} See id. at 709 (restating the argument that the University engaged in racial discrimination in violation of the Fourteenth Amendment, section 601 of Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d, and 42 U.S.C. § 1983).
\item \textsuperscript{164} Id.
\item \textsuperscript{165} See id. at 714.
\item \textsuperscript{166} The University relied on Justice Frankfurter's argument in \textit{Sweezy} to argue that the denial of the plaintiff's application "was an exercise of its constitutionally protected freedom to decide who shall be admitted to study." Id. at 713 n.7.
\item \textsuperscript{167} Id. (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 314 (1978) (opinion of Powell, J.).
\end{itemize}
constitutionality of race-based selection criteria. In this regard, the Washington Supreme Court adopted Justice Powell’s conclusion that the attainment of a diverse student body is a compelling justification for the use of racial selection criteria. The attainment of a diverse student body was viewed by the court as a permissible method of promoting an atmosphere of “speculation, experimentation and creation.” The court noted that “[i]n applying his test, Mr. Justice Powell characterizes the goal of the attainment of a diverse student body as compelling, stressing that the freedom to select a student body is an element of academic freedom.” Because the finding of fact that the University’s purpose underlying the use of the racial criteria as a means of promoting diversity in the student body was unchallenged by the applicant, the Washington Supreme Court held that the use of such criteria was in conformity with the Equal Protection Clause of the Fourteenth Amendment.

In McDonald, the University’s use of racial classifications is analogous to the use of such classifications in Bakke. In accordance with the Supreme Court’s interpretation of the strict scrutiny test, notwithstanding the constitutionality of the purpose underlying the race-based classification, a court also may find a violation of the Equal Protection Clause if the race-based classification is not “necessary to the accomplishment of [the] purpose.” This tailoring of the classification to fit its intended purpose was clearly established in McDonald. The court noted the similarities in administration between the University of Washington’s admissions program and the program cited with approval by Justice

168. See id.
169. See id.
170. Id.
171. Id. at 712.
172. See id. at 713 n.7 (“We agree that in seeking diversity, the U.W. medical school must be viewed ‘as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.’”).
173. See id. at 713 n.8.
174. See id. at 715. The court noted:

In dicta, Mr. Justice Powell indicates that the Harvard admission plan, which like the plan here employs race as an admission factor, furthers a compelling state interest in diversity of the student body. Justices Brennan, White, Marshall and Blackmun also found the Harvard plan constitutional under their approach. Thus, a majority of the court find constitutional a plan without a quota or separate consideration for minority groups but where race may be a beneficial factor. The University of Washington School of Medicine’s admission policies and procedures have the same redeeming characteristics. Id. at 713 (citations omitted).
175. The McDonald court, citing Justice Powell’s analysis of the race-based admissions criteria in Bakke, noted that “a program under which race is but one factor in achieving diversity” would survive the tailoring requirement of the Fourteenth Amendment. Id. at 714.
176. Id.
Powell in Bakke.\textsuperscript{177} The McDonald court, citing with approval Justice Powell's position, stated that

\begin{quote}
this diversity encompasses a broad array of qualifications and characteristics of which racial origin is a single element. \[\text{Justice Powell}\] concludes from the experience of other university admission programs which take race into account in achieving diversity that the assignment of a fixed number of places to a minority group is not necessary.\textsuperscript{178}
\end{quote}

The court believed that the University of Washington's admission plan had the same redeeming characteristics as the Harvard Plan, "which like the plan here employs race as an admission factor, furthers a compelling state interest in diversity of the student body."\textsuperscript{179}

To date, the strongest judicial opposition to the use of race-based affirmative action programs to attain a diverse student body has come out of the Fifth Circuit. In Hopwood v. Texas,\textsuperscript{180} the Fifth Circuit prohibited the University of Texas School of Law from using race or ethnicity as a factor in the selection of applicants, effectively terminating the affirmative action program.\textsuperscript{181} The court rejected the University's argument that the goal of attaining a diverse student body was a compelling government interest capable of satisfying the constitutional scrutiny imposed by the Equal Protection Clause.\textsuperscript{182} The Fifth Circuit was not persuaded by the University's reliance on Justice Powell's opinion in Bakke,\textsuperscript{183} and in fact,

\begin{quote}
\begin{itemize}
\item \textsuperscript{177} \textit{See id. at 713.}
\item \textsuperscript{178} \textit{id. (citation omitted).}
\item \textsuperscript{179} \textit{id. at 713.}
\item \textsuperscript{180} 78 F.3d 932 (5th Cir. 1996). For a critical analysis of the Hopwood opinion, see Michael A. Olivas, \textit{The Decision Is Flatly, Unequivocally Wrong}, CHRON. HIGHER EDUC., Mar. 29, 1996, at B3.
\item \textsuperscript{181} Note District Court Judge Sparks's prophetic remarks:
\begin{quote}
The Court believes such meager representation would be woefully inadequate in a state university supported, in part, by revenues from all state residents. Further, the Court concurs with the defendants that diversity requires more than token representation of minorities; strict reliance on the TIs for admission would not further the goal of diversity.
\end{quote}
\item \textsuperscript{182} \textit{See Hopwood}, 78 F.3d at 944.
\item \textsuperscript{183} The Fifth Circuit in Hopwood held:
\begin{quote}
We agree with the plaintiffs that any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment. Justice Powell's argument in Bakke garnered only his own vote and has never represented the view of a majority of the Court in Bakke or any other case. Moreover, subsequent Supreme Court decisions regarding education state that non-remedial state interests will never justify racial classifications.
\end{quote}
\textit{id.}
\end{itemize}
\end{quote}
specifically rejected it, stating: "Justice Powell’s view in Bakke is not binding precedent on this issue."  

The court in Hopwood addressed several problems associated with the use of racial or ethnic classifications to attain a diverse student body. It initially expressed its reliance on the Supreme Court’s decisions in City of Richmond v. J.A. Croson Company and Adarand Constructors, Inc. v. Pena, and thus concluded that these cases serve as the basis for the Supreme Court’s mandate that the use of race-based preferences to achieve diversity is not a compelling interest that can satisfy the strict race-based classifications. Id. at 964-65. Second, he argued that Hopwood could be decided on narrower grounds without reaching the broader constitutional issues. See id. at 966. He noted that the special admissions program utilized by the University was constitutionally invalid because it was not narrowly tailored to achieve the goal of attaining a diverse student body. See id. Judge Wiener wrote that the University’s special admissions program “more closely resembles a set aside or quota system for those two disadvantaged minorities [blacks and Hispanics] than it does an academic admissions program narrowly tailored to achieve true diversity.” Id.

184. Id. at 944. (“While [Justice Powell] announced the judgment, no other Justice joined in that part of the opinion discussing the diversity rationale. . . . As the Adarand Court states, the Bakke Court did not express a majority view and is questionable as binding precedent.”). Fifth Circuit Judge Wiener recognized the premature nature of the majority’s conclusion that Adarand overruled Justice Powell’s conclusion in Bakke that race was a constitutionally permissible means of achieving diversity. See id. at 963 (Wiener, J., concurring). On the contrary, Judge Wiener wrote that the decision to overrule Bakke rests with the Supreme Court, and “not a three-judge panel of a circuit court.” Id. He further argued:

This conclusion may well be a defensible extension of recent Supreme Court precedent [Adarand], an extension which in time may prove to be the Court’s position. It admittedly has a simplifying appeal as an easily applied, bright-line rule proscribing any use of race as a determinant. Be that as it may, this position remains as extension of the law—one that, in my opinion, is both overly broad and unnecessary to the disposition of this case.


185. For criticism of affirmative action, see Jim Chen, Embryonic Thoughts on Racial Identity as New Property, 68 U. COLO. L. REV. 1123, 1159 (1997). Chen argues:

Rather, my point is that the reification of racial identity, no less among nonwhites than among whites, has cloaked the affirmative action debate in the rhetoric of takings jurisprudence. The transmogrification of race from a suspect classification to an accepted, even expected, foundation for the modern state’s dazzling array of new property, from a deviant basis for decisionmaking to a quotidian category, bodes ill for real healing in a land so deeply scarred by the curse of race.

Id. at 1159.

186. Hopwood, 78 F.3d at 944-45 (“Indeed, recent Supreme Court precedent shows that the diversity interest will not satisfy strict scrutiny. Foremost, the Court appears to have decided that there is essentially only one compelling state interest to justify racial classifications: remedying past wrongs.”).

187. Id. at 944 (“As the Adarand Court states, the Bakke Court did not express a majority view and is questionable as binding precedent.”).
The Fifth Circuit held that "remedying past wrongs" was the only compelling state interest that could justify the use of race-based classifications, then set forth a number of reasons why the pursuit of diversity is not a compelling state interest. The court noted that diversity "contradicts, rather than furthers, the aims of equal protection. Diversity fosters, rather than minimizes, the use of race. It treats minorities as group, rather than as individuals. It may further remedial purposes but, just as likely, may promote improper racial stereotypes, thus fueling racial hostility." The court further added that the use of race-based classifications to achieve diversity promotes stigmatization, and "undercuts the ultimate goal of the Fourteenth Amendment: the end of racially-motivated state action."

Although the Fifth Circuit considered several arguments against the use of race-based classifications to achieve diversity, the opinion does not fully address the countervailing consideration of the University's right to exercise its institutional autonomy when selecting its student body. The Hopwood opinion briefly mentions Justice Powell's reliance on the exercise of institutional autonomy to achieve diversity as a constitutionally permissible goal. The court noted:

Saying that a university has a First Amendment interest in this context is somewhat troubling. Both the medical school in Bakke and, in our case, the law school are state institutions. The First Amendment generally protects citizens from the actions of government, not government from its citizens. Significantly, Sweezy involved a person who was called before the Attorney General of New Hampshire to answer for alleged subversive activities. He declined on First Amendment grounds to answer questions about a lecture he had delivered at the University of New Hampshire. While Justice Frankfurter spoke of a university's interest in openness and free inquiry, it was plainly through the First Amendment rights of individual scholars.

The Fifth Circuit thus dismissed the possibility that an institution can have any rights that are subject to the protection of the First Amendment guarantee of academic freedom without a thorough examination of these

188. See id. at 944-45.
189. Id. at 944.
190. See id. at 945. Circuit Judge Wiener, specially concurring, disagreed with the Court's treatment of the argument that diversity could serve as a compelling state interest. See id. at 962 (Wiener, J., concurring) ("As to diversity, however, I respectfully disagree with the panel opinion's conclusion that diversity can never be a compelling governmental interest in a public graduate school.").
191. Id. at 945.
192. See id. at 946.
193. Id. at 947-48.
194. Id. at 942-43.
195. Id. at 943 n.25 (citing Justice Frankfurter's concurring opinion in Sweezy v. New Hampshire, 354 U.S. 234, 262, 266-67 (1957)).
institutional rights. The Fifth Circuit stands alone in its rejection of diversity as a compelling justification for the use of race-based selection criteria within the educational arena. 196

In *Bakke*, Justice Powell concluded that the equal protection implications generated by the use of race-based classifications can be overcome by a determination that such use is necessary to achieve a diverse student body. 197 In reaching this conclusion, Justice Powell recognized that race and ethnicity are components of American society, and as such, are essential components of any effort to assemble a student body that is

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196. In a recent decision addressing this issue, the First Circuit in *Wessmann v. Gittens* implied that *Hopwood*'s rejection of Justice Powell's opinion in *Bakke* may have been "premature." 160 F.3d 790, 796 (1st Cir. 1998). The First Circuit noted that "in the absence of a clear signal," presumably from the Court, that diversity is not a compelling justification, the First Circuit "assume[d] arguendo . . . that *Bakke* remains good law and that some iterations of 'diversity' might be sufficiently compelling, in specific circumstances, to justify race-conscious actions." *Id.* The *Wessmann* court, however, clearly did not decide the question of whether *Bakke* remains good law. *See id.* at 800 ("For purposes of resolving this appeal, however, we need not speak definitively to that vexing question.").

In *Wessmann*, an unsuccessful white applicant to the Boston Latin Academy, a prestigious public school, argued that the Academy's use of race and ethnicity in its selection criteria violated the Equal Protection Clause. *See id.* at 713-94. Among other justifications, the Academy argued that its admissions policy promoted a diverse student body. *See id.* at 796-97. The First Circuit concluded that the policy did not promote diversity, but on the contrary, was an impermissible "mechanism for racial balancing." *Id.* at 799. Additionally, the First Circuit concluded that the Policy focused "exclusively on racial and ethnic diversity," which was inconsistent with Justice Powell's broader definition of diversity within the academic environment. *Id.* at 798. Finally, the First Circuit noted the absence of a particularized showing that its admissions policy furthered their goal of attaining a diverse student body. *See id.* at 799-800.

[T]he School Committee exhorts us to find that diversity is essential to the modern learning experience. Stated at this level of abstraction, few would gainsay the attractiveness of diversity. Encounters between students of varied backgrounds facilitate a vigorous exchange of ideas that not only nourishes the intellect, but also furthers mutual understanding and respect, thereby eroding prejudice and acting as a catalyst for social harmony. Indeed, Justice Powell's opinion in *Bakke* acknowledges that these very attributes may render an educational institution's interest in promoting diversity compelling. In the last analysis, however, the School Committee's reliance on generalizations undercuts its construct. If one is to limit consideration to generalities, any proponent of any notion of diversity could recite a similar litany of virtues. Hence, an inquiring court cannot content itself with abstractions. Just as Justice Powell probed whether the racial classification at issue in *Bakke* in fact promoted the institution's stated goals, we must look beyond the School Committee's recital of the theoretical benefits of diversity and inquire whether the concrete workings of the Policy merit constitutional sanction. Only by such particularized attention can we ascertain whether the Policy bears any necessary relation to the noble ends it espouses. In short, the devil is in the details. *Id.* at 797-98.

representative of that society. He further recognized that the academic freedom guarantees of the First Amendment are so expansive as to protect the right of educational institutions to select a student body that would further this goal. Part III of this Article provides the constitutional framework for the nexus established by Justice Powell between diversity and the exercise of academic freedom.

III. THE ACADEMIC NATURE OF EDUCATIONAL DIVERSITY

Justice Powell's opinion in *Bakke* was founded on the creation of a nexus between the traditional interpretations of the academic freedom doctrine and the goal of attainment of student body diversity. The viability of this nexus, however, has been significantly limited by Justice Powell's failure to set forth the analytical paradigm upon which the nexus is based. Because the attainment of a diverse student body is not possible in the absence of admissions policies designed to effectuate this goal, Part III initially explores whether admissions decisions fall within

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198. See *id.* at 291-95, 314; see also RUDENSTINE, supra note 38, at 1-2. Rudenstine argues: We need to remind ourselves that student diversity has, for more than a century, been valued for its capacity to contribute powerfully to the process of learning and to the creation of an effective educational environment. It has also been seen as vital to the education of citizens—and the development of leaders—in heterogenous democratic societies such as our own. These overarching values have for many decades influenced our approach to admissions, and have provided the rationale for our basic policies.

199. Professor Jim Chen argues that in the absence of an assertion that there is an academic basis for the use of race or ethnicity in selection criteria for students or faculty, "affirmative action in the name of diversity is *content-based* regulation of speech." Chen, supra note 15, at 1875. In this regard, the infringement of the academic freedom of students and faculty, Professor Chen argues, "outweighs the university's administrative interests." *Id.* ("Diversity-inspired educational affirmative action represents a conscious effort to shape the collective speech of a university. When government is 'attempting to control or direct the *content* of . . . speech,' it cannot ask courts to defer to a university's institutional judgment in the name of 'academic freedom.'" (quoting University of Pa. v. EEOC, 493 U.S. 182, 197 (1990))).

It is the position of this author that there are academic justifications for the attainment of student body diversity that outweigh any possible restrictions on educational speech. The impact of diversity on classroom pedagogy and discourse serves not to control but to enhance the quality of academic speech. Accordingly, the primary focus of this Article is to set forth academic justifications for the use of race-based admissions criteria by establishing a nexus between the attainment of student body diversity and the fulfillment of the traditional goals of educational institutions.

200. This outcome is due, in part, to the use of numerical predictors, such as undergraduate GPAs and standardized test scores, by admissions decision-makers to evaluate prospective applicants. Whether attributable to racism, cultural bias, or educational disadvantage, racial and ethnic minorities have achieved only marginal success in their pursuit of higher education. See generally SUSAN WELCH & JOHN GRUHL, AFFIRMATIVE ACTION AND MINORITY ENROLLMENTS IN MEDICAL AND LAW SCHOOLS (1998); Katherine Connor & Ellen J. Vargyas, The Legal Implications of Gender Bias in Standardized Testing, 7 BERKELEY WOMEN'S L.J. 13 (1992); Theodore Cross & Robert Bruce Slater,
the parameters of the academic decision-making process. The remaining portion of this section examines the impact of diversity on each of the traditional goals of educational institutions—teaching, inquiry, research and publication,201 thus establishing the basis for applying the academic freedom doctrine to protect the attainment of diversity as a function of academic decision-making.

A. Admissions Decisions Are Exercises of Academic Decision-Making

The doctrine of institutional autonomy is limited in its applicability to "genuinely academic decisions."202 Although Justice Stevens in Ewing and Justice Powell in Bakke applied varying permutations of the institutional autonomy doctrine, neither Justice specifically defined the types of decisions that could be classified as academic.203 As a result, there is no express standard for determining whether the decision-making


201. See Finkin, supra note 13, at 846.

These opinions do hold open the prospect of a fuller integration of the idea of autonomy as part of a general theory of academic freedom. . . . [T]he German idea [of academic freedom] was premised upon the university as a self-governing body of faculty. In America, [however,] "the university" encompasses a lay governing board and its administrative delegates to which the faculty is legally subordinate. Any reintegration of the two would have to take account of this difference. But neither opinion so much as hints at it. On the contrary, the Powell and Stevens opinions would protect as exercises of "academic freedom" decisions that are not necessarily related to content or methods of instruction, or to research, inquiry, and publication. In fact, the decisions they would insulate need not, and often are not, made by academics at all.

Id.


203. See Van Alstyne, supra note 19, at 137.

Powell's use of "academic freedom" in Bakke, and his quotation of the dictum by Justice Frankfurter from the Sweezy case, represent no departure from the usages of academic freedom we have examined. When Powell writes of academic freedom as "long . . . viewed as a special concern of the First Amendment," his emphasis remains constant at all times. To gain purchase through the first amendment, the decision in any academic freedom case, whether individual or institutional, must still rest—as Frankfurter noted—on academic and not some other grounds. It is all the same, moreover, whether the decision pertains to "who may be admitted to study" rather than to "who may teach," or "what may be taught," or "how."

Id.
engaged in by an educational institution is academic and thus protected by the First Amendment, or unprotected administrative decision-making. Due to the vast complexity of the decision-making process within an educational institution, articulation of a rigid standard is not desirable. The definition of an academic decision, therefore, must be a fluid paradigm, capable of adapting to the changing needs and influences of an educational institution. Although no express definition of an academic decision exists, the Supreme Court’s decisions in this area offer guidance in the development of such a standard.

1. Exercise of Professional Judgment

The first prong of the standard that defines academic decision-making focuses on the expertise of the decision-maker. It is essential that the academic decision-maker possess a level of professional knowledge or expertise sufficient to give the judiciary enough confidence in the merit of the decision to warrant judicial deference. Reliance on the professional judgment of members of the academy is consistent with the position adopted on several occasions by the Supreme Court. In *Board of Curators of the University of Missouri v. Horowitz*, Justice Rehnquist recognized the need for judicial deference to the University’s dismissal of a medical student for inadequate performance because the decision “require[d] an expert evaluation of cumulative information.” Similarly, in *Ewing*, Justice Stevens counseled that when reviewing “the substance of a genuinely academic decision, ... [the judiciary] should show great respect for the faculty’s professional judgment.”

This component of the standard is not dependent on the title or status of the decision-maker as much as it is on the knowledge or skill applied by the decision-maker. For example, in *Horowitz*, the Court upheld the plaintiff’s dismissal, which had been based in part on the inclusion of the faculty’s professional judgment in the procedural mechanism used to evaluate her academic and clinical performance. Throughout her tenure

205. *Id.* at 90; see also *id.* at 96 n.6 (Powell, J., concurring) (“University faculties must have the widest range of discretion in making judgements as to the academic performance of students and their entitlements to promotion or graduation.”).
206. *Ewing*, 474 U.S. at 225 (“Plainly, [judges] may not override [a genuine academic decision] unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.”).
207. See *Horowitz*, 435 U.S. at 80-82. A similar conclusion was reached by Justice Stevens in *Ewing*. See 474 U.S. at 225 (“Ewing’s claim, therefore, must be that the University misjudged his fitness to remain a student in the Inteflex program. The record unmistakably demonstrates, however, that the faculty’s decision was made conscientiously and with careful deliberation, based on an evaluation of the entirety of Ewing’s academic career.”).
in medical school, the plaintiff had received periodic performance evaluations from the "Council on Evaluation, a body composed of both faculty and students."\textsuperscript{208} Members of the faculty, who were physicians, reported repeated incidences of unsatisfactory clinical performance to the Council.\textsuperscript{209} The Council ultimately recommended that the plaintiff be dismissed from school.\textsuperscript{210} Additional faculty members serving on the Coordinating Committee of the medical school reviewed the dismissal decision, and the Dean subsequently ratified the dismissal.\textsuperscript{211}

As \textit{Horowitz} illustrates, the level of expertise necessary for academic decision-making may be so specialized that it is inappropriate for judicial or administrative fact-finders to review the underlying merit of such decisions.\textsuperscript{212} Justice Rehnquist acknowledged as much in \textit{Horowitz} when he stated that grading or disciplinary decisions are "not readily adapted to the procedural tools of judicial or administrative decisionmaking."\textsuperscript{213} With respect to admissions decisions, Professor Matthew Finkin argues that "the Powell and Stevens opinions would protect as exercises of 'academic freedom' decisions that are not necessarily related to content or methods of instruction, or to research, inquiry, and publication. In fact, the decisions that they would insulate need not, and often are not, made by academics at all."\textsuperscript{214} A recent survey of law school admissions programs indicates, however, that law schools utilize several types of admissions decision-making models, most of which include significant faculty participation.\textsuperscript{215} There is no doubt that the involvement of law

\begin{footnotesize}
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\item \textsuperscript{208} \textit{Horowitz}, 435 U.S. at 80.
\item \textsuperscript{209} See \textit{id.} at 80-82.
\item \textsuperscript{210} See \textit{id.} at 82.
\item \textsuperscript{211} See \textit{id.}
\item \textsuperscript{212} See also \textit{DeFunis v. Odegaard}, 416 U.S. 312, 344 (1974) (Douglas, J., dissenting) ("Courts are not educators; their expertise is limited . . . .").
\item \textsuperscript{213} \textit{Horowitz}, 435 U.S. at 90; see also \textit{DeFunis}, 416 U.S. at 325 (Douglas, J., dissenting). Justice Douglas stated:
\begin{quote}
The educational policy choices confronting a university admissions committee are not ordinarily a subject for judicial oversight; clearly it is not for us but for the law school to decide which tests to employ, how heavily to weigh recommendations from professors or undergraduate grades, and what level of achievement on the chosen criteria are sufficient to demonstrate that the candidate is qualified for admission.
\end{quote}
\textit{DeFunis}, 416 U.S. at 325.
\item \textsuperscript{214} Finkin, \textit{supra} note 13, at 846.
\item \textsuperscript{215} An unpublished survey of approximately 130 ABA law schools conducted by the Law School Admission Council in 1997 indicates that law schools utilize three primary types of admissions models. The most commonly used model is the "Presumptive Model." The major characteristic of this model is that admissions files are placed in "presumptive admit or presumptive deny categories." The survey responses indicate the presumptive categories are determined by consideration of primarily numerical predictors, such as LSAC index, LSAT scores, and undergraduate grade point averages. Applicants that do not fall within either presumptive category are forwarded to the admissions committee for a decision. There are two other admissions decision-
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school faculty in the admissions process is significant for several reasons, the least of which involves the faculty's role as "academics." Most significantly, classroom experience exposes law faculty to a large variety of students with various ranges of intellectual abilities. This presents a unique opportunity for law faculty to identify potential characteristics that are necessary for a successful law school experience. This ability to recognize valued characteristics, such as maturity, analytical ability, academic potential, and verbal or written communications skills, cannot be ascertained from a review of numerical predictors whose validity recently has been called into question. In addition, law faculty seek making models that are used by the law schools responding to the LSAC survey. The "Sole Decider Model" relies on the dean or director of admission to make all decisions. "The decision-maker is also usually involved in setting enrollment and class diversity goals." Generally, the role of the admissions committee in a school utilizing this model is policy-making. Obviously, the nature of this model limits the extent of faculty involvement in the admissions decision-making process. The third type of admissions model used is the "Full Committee Review Model." This model is the most labor intensive model for faculty members. This model "places full responsibility for decision-making on a faculty committee who divide and review all files, and in cases, meet as a committee, or a subcommittee, to make decisions."

The survey responses indicate that 98% of the participating law schools have admissions committees. Fifty-three percent (53%) of the schools indicated that between 40-100% of their total applications are reviewed by the committee. One hundred and ten law schools reported the presence of faculty on their committees, and 112 schools indicated that a faculty member chairs their committee. In addition to reading files and making admissions decisions, the admissions committees establish policy and interview prospective candidates.

216. See Olivas, supra note 184, at 1067. Olivas argues:

Professional admissions decisions are crucial both to institutions and to students. Institutions care about the fit between students and the program, and, of course, every faculty member wants to teach the "best" students they can attract and enroll. Students, of course, want the best and most efficacious program to which they can reasonably aspire. Therefore, institutions strive to adopt admissions criteria that accurately and reliably predict optimum performance in their programs. Schools seek both high scorers and those students whose academic predictors do not place them at the top end of their classes, but on whom the schools are willing to take modest risks that they can succeed.

Id.

217. See generally Wightman, supra note 200, at 29. Wightman argues:

The tension between commitment to the principles of racial and ethnic diversity and of competitive evaluation based on quantifiable indicators of individual achievement frequently results in questions about the appropriateness of the use of numerical indicators, especially the LSAT, in the admission process. These questions typically are raised by questioning the validity of the test, particularly the validity of its use with applicants of color. However, one does not need to argue that the test is invalid or a biased predictor against members of certain groups in order to substantiate the negative consequences of misuse or overuse of the test in the admission process. The LSAT is valid for a limited use and has a clearly defined, narrow focus: it is a test of acquired reading and verbal reasoning skills that have been shown to correlate with academic successes in the first year of law school. When it is used for a different and/or far broader purpose, not only is the use inappropriate, but calling on the test to do more than
students who have the potential to contribute to the academic vitality of their institution.

Although faculty participation in the process can further institutional values as well as pedagogical concerns, it is important to recognize that other members of the institution who possess similar knowledge and expertise also could function as capable decision-makers. As long as the primary component of the academic decision-making standard—professional knowledge and expertise—is incorporated into the decision-making model, the first prong of the academic decision-making standard would be satisfied.

2. Narrowly Define the Scope of Academic Decisions

The second prong of the standard for determining whether the decision-making of an educational institution is academic or unprotected administrative decision-making focuses on the nature of the decision. Relying on the common meaning of “academic” narrows the definition of academic decision-making to issues pertaining to or concerning the primary function of the educational institution, which is “the pursuit of and dissemination of knowledge.”\(^\text{218}\) The definition of an academic decision can be further refined by focusing on the traditional pedagogical goals of “teaching, inquiry, research, and publication.”\(^\text{219}\) This standard is broad enough to encompass decisions relating to the essential core functions of an educational institution, yet narrow enough to exclude important, but nonessential decisions made within the context of the educational environment, such as the selection of a food service provider or team mascot.

The Supreme Court has provided guidance in narrowing the parameters of an academic decision. Justice Powell, in his concurring opinion in \textit{Ewing}, referred to the admissions decision-making process as an

\begin{quote}
\textit{Id.} Also note that Justice Douglas in his dissenting opinion in \textit{DeFunis} argued for the possible elimination of the LSAT as a predictor of minority performance in law school due to certain inherent limitations in accounting for the impact of cultural differences. \textit{See DeFunis}, 416 U.S. at 329 (Douglas, J., dissenting). He theorized that “[t]here are many relevant factors, such as motivation, cultural backgrounds of specific minorities that the test can not measure, and they inevitably must impair its value as a predictor.” \textit{Id.}
\end{quote}

\begin{quote}
\textit{218.} The word “academic” is defined as “of, or belonging to, or associated with an academy or school especially of higher learning.” \textit{WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED} 9 (1981). It further defines “school” as “an organized body of scholars and teachers associated for the pursuit of and dissemination of knowledge.” \textit{Id.} at 2031; \textit{see also} Byrne, \textit{supra} note 41, at 333 (“And what are the indigenous values served by universities? First, the university is the preeminent institution in our society where knowledge and understanding are pursued with detachment or disinterestedness.”).
\end{quote}

\begin{quote}
\textit{219.} Finkin, \textit{supra} note 13, at 829.
\end{quote}
"academic decision." He noted that "[j]udicial review of academic decisions, including those with respect to the admission or dismissal of students, is rarely appropriate." Justice Powell's reference to admissions and dismissal decisions within this context is consistent with his advocacy of institutional autonomy to protect the rights of an educational institution to select "who may be admitted to study."

Lower federal courts have adopted similar positions with respect to decisions affecting student grades. For instance, in Balisok v. Boutez, the Ninth Circuit noted that "[s]tudent grades and evaluations are academic decisions and as such are not generally appropriate for judicial review and interference unless they are 'a substantial departure from accepted academic norms.'" Also, in McGregor v. Louisiana State University Board of Supervisors, the Fifth Circuit determined that a law school's refusal to advance a disabled law student to the second year of law school was an academic decision. The court held that "the Law Center's decision to require full-time attendance and in-class examinations for first year students are academic decisions, ones which we find reasonable in light of the Law Center's admittance practices."

The definition of academic decisions has even been expanded to encompass issues affecting faculty. In Huang v. Board of Governors of the University of North Carolina, the Fourth Circuit held that the University's interdepartment transfer of a tenured professor was an academic decision. The court noted that "[w]hen judges are asked to review the substance of a genuinely academic decision, such as this one,

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221. Id.
223. 46 F.3d 1138 (unpublished opinion), No. 93-35516, 1995 WL 23592, at *3 (9th Cir. 1995) (citing Ewing, 474 U.S. at 225-26); see also Kaltenberger v. Ohio College of Podiatric Med., 162 F.3d 432, 437 (6th Cir. 1998). The Kaltenberger court stated:

The decision of the College not to waive this requirement [permitting plaintiff to retake an examination after failing a course twice] and lower the standards for continuing training in podiatric medicine is entitled to deference. We should only reluctantly intervene in academic decisions "especially regarding degree requirements on the health care field when the conferral of a degree places the school's imprimatur upon the student as qualified to pursue his chosen profession."

162 F.3d at 437 (citing Doherty v. Southern College of Optometry, 862 F.2d 570, 576 (6th Cir. 1988)).
225. 3 F.3d 850 (5th Cir. 1993).
226. See id. at 859.
227. Id.
228. 902 F.2d 1134 (4th Cir. 1990).
229. See id. at 1142.
they should show great respect for the faculty's professional judgment." The Fifth Circuit adopted a similar analysis in *Williams v. Texas Tech University Health Services Center*, when it refused to interfere with the University's decision to reduce the salary of a tenured faculty member. The court reiterated that judicial deference must be afforded to legitimate exercises of academic decision-making.

Obviously, this analysis does not offer a bright-line standard for distinguishing between academic and nonacademic decision-making. In fact, given the number and complexity of the educational environment, such a standard is not desirable. The academic decision-making model should be a fact-based continuum that offers guidance in determining the extent that such decision-making may be insulated from constitutional scrutiny.

B. *The Impact of Student Diversity on Each of the Traditional Goals of Educational Institutions—“Teaching, Inquiry, Research and Publication”*

Professor Matthew Finkin has argued that educational institutions have four primary goals: “teaching, inquiry, research, and publication.” The establishment of a nexus between admissions policies aimed at achieving student body diversity and these pedagogical goals is at the core of Justice Powell’s willingness to extend First Amendment protections to admissions decisions. Unfortunately, this task is made more daunting...
by the absence of quantitative empirical research evaluating the impact of student body diversity within the classroom, especially as it pertains to race and ethnicity. In the absence of such quantitative data, qualitative reflections on this issue serve as the only source of data. In this regard, the remaining portion of this section examines narratives that describe the impact of diversity on these traditional goals. The law school environment serves as our laboratory.

1. Teaching: Selection of Course Materials

The first area of inquiry focuses on ways in which student diversity influences the preparation and selection of course materials. As a threshold matter, faculty members now have a great selection of textbooks that include issues pertaining to race, class, sexual orientation, as a barrier to judicial scrutiny is misplaced. See Finkin, supra note 13, at 849. Finkin concedes, however, that there are circumstances in which admissions decisions and traditional educational goals are closely related:

So, too, some admissions decisions may be closely tied to the institution's teaching and research goals. The admissions decisions of a graduate department in a particular discipline, for example, are an inextricable part of the faculty's teaching and research goals when graduate students also function as research or teaching assistants. A plea for autonomy in admissions decisions in this context would also draw support from the claim of academic freedom. Id. at 849.

Finkin further argues that Justice Powell in Bakke failed to undertake an "exacting examination" of whether such a nexus existed before engaging in the "relatively simple act of labeling" the University's preferential admissions policies as a protected exercise of "institutional autonomy." Id. at 849-50.


237. See Stephanie M. Wildman, Teaching and Learning Toward Transformation: The Role of the Classroom in Noticing Privilege, in Privilege Revealed: How Invisible Preference Undermines America 161, 167 (Stephanie M. Wildman et al. eds., 1996). Wildman argues that [t]he struggle taking place in the academy to make gender, race, and sexual orientation a part of the law school curriculum is part of this difficult struggle toward inclusive community. This movement has been fueled primarily by students and a number of law professors, many of whom are members of the Society of American Law Teachers. These members of the legal academy recognize the relevance and importance of issues relating to race, gender, and sexual orientation, not only to our lives but also to our teaching and learning. Id.
disability, and gender from which to choose. The choice of textbook can thereafter determine the extent that traditional monocultural pedagogy or diversity discourse—which seeks to incorporate the history, ideas, and experiences of minorities into the curriculum—will shape class discussions. In addition, even in the absence of such textbooks, faculty members are selecting reading materials that reflect their rejection of monocultural curricula. Selection of course materials that reflect an interest in diversity is not, however, without its difficulty. For instance, Professor Lisa C. Ikemoto identifies several costs associated with compiling diverse course materials, including loss of time to focus on writing articles that would get more credit at promotion and tenure.


239. Sonia Nieto notes that a monocultural curriculum gives students "only one way of seeing the world. Reality is often presented in schools as static, finished, and flat. The underlying tensions, controversies, passions, and problems faced by people throughout history and today are sadly missing." SONIA NIETO, AFFIRMING DIVERSITY 319 (2d ed. 1996); see also Linda S. Marchesani & Maurianne Adams, Dynamics of Diversity in the Teaching-Learning Process: A Faculty Development Model for Analysis and Action, New Directions for Teaching and Learning, No. 52 (Maurianne Adams ed., 1992), Marchesani and Adams argue:

Furthermore, the monocultural experiences of faculty from dominant groups socialized within mainstream culture often create a context in which attitudes, beliefs, and behaviors are not acknowledged as reflections of a particular racial group (white), ethnic heritage (European), or gender orientation (male) but are thought of as universal human traits. The tendency of individuals from dominant cultural groups to see their norms and traditions as universally valued and preferred supports a cultural embeddedness that makes it extremely difficult to acknowledge the extent of negative assumptions and stereotypes toward those with the culture-specific beliefs we grew up with, we are surely responsible for examining and questioning them as adults and as educators.

Id. at 14 (citations omitted).

240. In discussing his use of two civil rights text books, ROY BROOKS ET AL., CIVIL RIGHTS LITIGATION: CASES AND PERSPECTIVES (1995), and BENDER & BRAVEMAN, supra note 238, Professor John O. Calmore notes that

[p]rior to this casebook's publication... I had to rely on developing my own materials, which lacked the advantage of good editing (they were too long), notes and problems, and, I admit, a basic coherence. In many ways the publication of this book and my supplemental text legitimated my materials and approach, somewhat rebutting the notion that my teaching approach and coverage of the course were so far 'out there' as to be kooky.

time,"²⁴¹ loss of political capital defending an "alternative perspective" that "may be perceived as threatening to the authority of others, as well as to the authority of majority viewpoints,"²⁴² and loss of emotional energy. She writes:

I often put together my own course materials. Obviously, this takes a great deal of time. It takes more time to compile readings that expressly address race, gender, sexual orientation, and class than it does to compile readings that express the "law-is-neutral" approach. There are few published texts to use as models. . . . [Y]ou have to do extra research to identify and locate readings that accomplish those teaching goals. I say "extra research" because contextualizing the course subject in a way that makes the social categories obvious often means taking an interdisciplinary approach. As a practical matter, that means cramming in a bit of history, sociological method, science, and other areas... But the fact that it takes so much additional effort to add context and use an interdisciplinary approach indicates how pervasive and deeply ingrained ancontextual, separatist analysis is at law.²⁴³

2. Teaching: Implementation of Diverse Pedagogical Methods

It is important to understand that incorporating diversity into monocultural curricula does not stop with the selection of diverse course materials.²⁴⁴ This second area of inquiry focuses on ways in which diversity influences pedagogical methods in the classroom. Both faculty and students must acknowledge the variety of social, political, and cultural experiences that are at work, and must attempt to foster an environment that is safe and comfortable for the expression of viewpoints without recrimination.²⁴⁵ Several common themes have been advanced

²⁴². Id. at 83.
²⁴³. Id. at 82.
²⁴⁴. See Mildred Garcia, Conclusions: Strategies for a New Era, in AFFIRMATIVE ACTION'S TESTAMENT OF HOPE STRATEGIES FOR A NEW ERA IN HIGHER EDUCATION 250 (Mildred Garcia ed., 1997). Garcia argues:

Increased diversity in our classrooms brings academic vitality through the presence of different perspectives, different views, different languages, and different cultures. In these venues, questions are appropriately raised by those whose experiences and perspectives might be different from what has been presented in the past. These differing viewpoints can lead to rethinking old knowledge and generating new knowledge. Most important, diversity requires defining and perhaps redefining "truth"—the concept at the core of education and discovery.

Id. (citation omitted.)

Classroom safety is integrally tied to respect and the expression of emotion, especially emotions perceived as negative, such as fear, discomfort, threat, pain, anxiety, hostility,
by law faculty members who, in an effort to abandon monocultural discourse and curricula, have modified their pedagogical approach in response to either diversity within the classroom or societal diversity.246

For example, Professor David Dominguez theorizes that within the law school environment, competing interests and an unequal allocation of resources lead to “zero-sum outcomes.”247 Professor Dominguez argues, however, that within this environment, traditional law school pedagogy can be transformed to include multicultural interests by adopting a “negotiable learning” teaching method.248 This method relies on “multicultural negotiation between small groups of students modeled after integrative bargaining in the commercial context.”249 Other members of the legal academy indicate that they are more sensitive to the concerns of minority students when controversial issues arise—that even in the absence of minority students, they expose majority students to issues of race, gender, and class—and that they either modify their coverage or at least control class discussions to acknowledge the concerns of minority students.250 This shift in pedagogical approaches is clearly in its infancy.

"Students must feel secure that their comments will be treated with respect whether or not the faculty member or the class agrees with them. Students must have confidence that faculty members are in control of the discussion and will intervene, if necessary, to prevent personal expressions from provoking personal attacks by some who may find them offensive. At the same time, the faculty members must balance the need for creating a safe space with their obligation to see to it that blatantly false beliefs are subjected to mature and thoughtful criticism. Striking the correct balance is no easy task."


247. David Dominguez, Beyond Zero-Sum Games: Multiculturalism as Enriched Law Training for All Students, 44 J. LEGAL EDUC. 175, 175 (1994).

248. Id. at 178.

249. Id. at 177-78 (discussing “integrative bargaining in the commercial context—i.e., exchanges of goods or services which take optimal advantage of the parties’ shared interests and, as well, trade efficiently on the parties’ differences.

250. See generally Calmore, supra note 240, at 1903; Okieran Christian Dark, Incorporating Issues of Race, Gender, Class, Sexual Orientation, and Disability into Law School Teaching, 32 WILLAMETTE L. REV. 541 (1996); Kimberly E. O’Leary, Using “Difference Analysis” to Teach Problem-Solving, 4 CLINICAL L. REV. 65 (1997); Reginald Leamon Robinson, Teaching From the Margins: Race as a Pedagogical Sub-Text, 19 W. NEW ENG. L. REV. 151 (1997); Donna E. Young, Two Steps Removed: The Paradox of Diversity Discourse for Women of Color in Law Teaching, 11
Recognizing the value of minority student voices when incorporating diversity issues into traditional pedagogy cannot be overemphasized. As a threshold matter, within traditional monocultural classroom environments both women and minority students have expressed feelings of isolation which lead to decreased classroom participation and silencing.


251. Many commentators have discussed the positive social and pedagogical benefits that can be derived from classroom diversity. See, for example, Tanya Murphy's argument that educational diversity serves as an enhancement of the academic environment:

Educational diversity provides many educational, economic, and social benefits that make it an indispensable component of the academic environment. First, diversifying the student body broadens the academic dialogue by adding value to the contributions made by those who do not fit within the "White male norm." Current affirmative action policies and doctrines unfortunately lead many to conclude that all Blacks are somehow less qualified or less deserving of their seat at the university than their White peers. Under the diversity principle, however, Blacks admitted to institutions through affirmative action initiatives are not viewed as "intellectually disadvantaged" per se. To the contrary, Justice Powell's theory of educational diversity "requires that admissions programs treat minority-race applicants as persons who have something valuable to contribute to the educational environment rather than as persons who need special help." This perspective characterizes affirmative action not as handout, but as a method for ensuring that colleges and universities have the elements necessary to provide their students with the most rewarding educational experience possible, in a manner most beneficial to society.

Tanya Murphy, An Argument for Diversity Based Affirmative Action in Higher Education, 95 ANN. SURV. AM. L. 515, 541-42 (1995); see also, e.g., Leo M. Romero, View from the Chair: Diversity—The Legally Defensible Argument, LAW SERVICES REP. (Law School Admission Council, Newton, Pa.), Jan./Feb. 1999 at 1, 8. ("In thinking about the value of diversity in your law school, consider that the variety and richness of the intellectual discourse gives diversity its real power, and that our schools would be the poorer without the insights and perspectives that come from students from different races, cultures, and backgrounds."); CHRISTOPHER EDLEY, JR., NOT ALL BLACK AND WHITE 137 (1992). Edley argues:

In many settings, inclusion means opportunity and the richness of integration. And in some institutions, especially public and elite ones, visible inclusion also has powerful symbolic value, both political and social. It communicates an openness about the power structure, it commands legitimacy, and it leads traditionally excluded groups to believe, correctly, that the exclusion has softened or perhaps dissolved.

Edley, supra, at 137.


All teaching, if it is worth anything, involves transmitting values: students learn from professors and professors learn from students. The transmission is rarely an equal interchange, however, because students look to the professor as the classroom authority on all issues, including the value of class contributions. Professors may use this authority, both consciously and unconsciously, to silence points of view and class participation or to encourage participation.

Id. (citation omitted).

The psychological impact of the devaluation of students, particularly African American women, was demonstrated by Professor Patricia J. Williams in THE ALCHEMY OF RACE AND RIGHTS 55 (1991):
One possible explanation for alienation and the resulting silence is the women's and minority students' lack of ownership or investment in the course material.253 Traditional monocultural curriculum does not include the cultural and historic events that serve as the building blocks for the ideas and experiences of minority students.254 This inability to create a

My abiding recollection of being a student at Harvard Law School is the sense of being invisible. . . . I observed large, mostly male bodies assert themselves against one another like football players caught in the gauzy mist of intellectual slow motion. I stood my ground amid them, watching them deflect from me, unconsciously, politely, as if I were a pillar in a crowded corridor. Law school was for me like being on another planet, full of alienated creatures with whom I could make little connection. The school created a dense atmosphere that muted my voice to inaudibility. All I could do to communicate my existence was to posit carefully worded messages into hermetically sealed, vacuum-packed blue books, place them on the waves of that foreign sea, and pray that they would be plucked up by some curious seeker and understood.  

Id. at 55; see also Banks, supra note 236, at 537 ("[T]he law school classroom is still structured to meet the needs of white upper-middle class males. The result is alienated students whose performance may be adversely affected."); Charles R. Lawrence III, Foreword: Race, Multiculturalism, and the Jurisprudence of Transformation, 47 STAN. L. REV. 819, 841 (1995). Lawrence states:

I have tried to make the classes ethnically diverse. It is important that many different ethnic communities are represented, and it is also important that, where possible, a critical mass of students appears from each ethnic group. This class must be a place where students who find themselves marginalized and alienated within white institutions can experience some of the safety and nurturance of homeplace. It must be a place where students are confident that there is enough common cause, enough trust, enough good will, enough shared experience and understanding to enable them to confront the most difficult conflicts within and between our communities and to address the hardest issues of ideology and strategy.

Lawrence, supra, at 841.

253. But see Dark, supra note 250, at 572. Dark argues that some teachers fear silence, especially when it follows the introduction of an issue about affirmative action or the creation of a tort for racial insults. Silence, however, is a wonderful teaching tool, especially in moments of awkwardness and uneasiness. Silence can help students focus on the underlying assumptions that he or she may be making regarding the efficacy of affirmative action. Sometimes I expect or build in silence at certain points in the discussion that can be used for further reflection. I tell the students what the silent period is for and do not permit anyone to speak before everyone has had a chance to think more carefully about his or her point of entry into the discussion. Awkward silence can be a useful reminder to students that there are many reasons why discussion of these issues is uncomfortable and difficult for them. Likewise, they may experience this same awkward silence in court, at a negotiation, or with a client when they feel it is appropriate to raise an issue concerning diversity on behalf of the client. They must learn not to fear it, but to use it.

Id.

254. See Ann C. Scales, Surviving Legal De-Education: An Outsider's Guide, 15 VT. L. REV. 139, 139 (1990) ("Make no mistake about it. The legal system was designed by white men for white men. The legal system is at once a stunning portrait of white male Christian consciousness, and a reliable institutional protection of the consciousness.").
nexus between the course material and their own personal experiences contributes to the silencing of not only minority students, but women as well. Incorporating diversity issues into traditional curricula attempts to alleviate this problem by making student voices an essential component of the diversified pedagogical paradigm. The techniques advocated by

The systematic silencing of student "voices" and ideas is not unique to the law school environment. bell hooks writes that a multicultural educational experience cannot be attained in the absence of these voices. See BELL HOOKS, TEACHING TO TRANSGRESS 39-40 (1994). Her reflections on her teaching career illustrate this point:

I have taught brilliant students of color, many of them seniors, who have skillfully managed never to speak in classroom settings. Some express the feeling that they are less likely to suffer any kind of assault if they simply do not assert their subjectivity. They have told me that many professors never showed any interest in hearing their voices. Accepting the decentering of the West globally, embracing multiculturalism, compels educators to focus attention on the issue of voice. Who speaks? Who listens? And why? Caring about whether all students fulfill their responsibility to contribute to learning in the classroom is not a common approach in what [Paulo] Freire has called the "banking system of education" where students are regarded merely as passive consumers. Since so many professors teach from that standpoint, it is difficult to create the kind of learning community that can fully embrace multiculturalism. Students are much more willing to surrender their dependency on the banking system of education than are their teachers. They are also much more willing to face the challenge of multiculturalism.

Id. See GUINIER ET AL., supra note 236, at 59. This groundbreaking study of gender attitudes at the University of Pennsylvania Law School between 1987 and 1992 explores the role gender plays in the law school environment.

From the reactions of their professors and the responses to their performance in all areas of the institution, some female students learn that they cannot thrive well in the law school environment. For example, the perception is widespread that within the classroom, white men are encouraged and allowed to speak more often than women of all colors and men of color, for longer periods of time, and with greater positive feedback from professors and peers. When women fail to receive the same level of positive response from faculty, many experience a blow to their self-esteem. Our data suggest that some women internalize the absence of positive feedback, even when the professor's aloofness reaches across gender lines, and some come to believe that they have little to contribute, becoming further alienated from the law school and the process of legal education. Others refuse to engage in discussion and opt for a strong stance of silence because they find the law school's adversarial nature, its focus on argumentation, and its emphasis on abstract as opposed to contextual reasoning to be unappealing. Their method of resistance may be to disengage. Even if this is the case, our data suggest there may be an academic price for such a stance.

Id. (footnotes omitted).


Teaching that is multicultural seeks, listens to, and incorporates the student voice. Students are encouraged to speak from their own experiences, to do more than regurgitate answers that we would like to hear. Teaching that incorporates the student voice allows students to make sense of the subject matter within their own realities. Listening to student voices helps us know students' prior knowledge of the subject matter, including
Professor Charles R. Calleros for modifying traditional monocultural pedagogy directly address this issue.257 Professor Calleros suggests several techniques, including referring to "diverse populations in course materials, lectures, hypothetical questions, and written problems."258 He argues that
to coax a full range of perspectives from students on provocative issues, instructors must lead discussions with sensitivity and open minds. Instructors will encourage participation from marginalized students by providing materials, topics, and assignments addressing issues of diversity. Beyond that, faculty need to set an example for the class by admitting limitations of their own knowledge and by acknowledging the value of listening to and considering diverse perspectives, even if initial reaction is to strongly disagree with them.259

In addition to using "female pronouns and ethnic names," Professor Calleros suggests that faculty members develop "a problem, illustration, or hypothetical example in a cultural setting outside of the normally dominant mainstream."260 Efforts such as these to include student voice in classroom discourse are essential to the integration of diversity issues within traditional monocultural pedagogy.261

any misinformation or lack of information that should suggest future instructional strategies. Student voices help us learn important information about students' cultures. Teaching must start from students' life experiences, not the teacher's life experiences or the experiences necessary to fit into the dominant school culture.

Id. at 306-07.
257. See Calleros, supra note 246, at 140.
258. Id. at 150.
259. Id. at 159.
260. Id. at 150.
261. A cautionary note regarding the incorporation of diversity discourse into the classroom concerns the risk of relying on minority students to represent the "voice" of their communities. A recent law school graduate wrote of her experiences in law school from the perspective of race and gender differences:

There are countless stories of people of color being singled out to speak authoritatively about The Racial Monolith. Sometimes it is a Professor/student asking people of color explicitly to present the racial view; other times it is the fact of being the only whatever in the class, and having Professors or students look to you for approval. When we discuss racial issues, my face gets hot and queasy, afraid of the comments that my colleagues might make and feeling indignant that I must be the educator, always explaining my/ourselves.

Rita Sethi, Speaking Up! Speaking Out! The Power of Student Speech in Law School Classrooms, 16 WOMEN'S Rts. L. REP. 61, 63 (1994); see also bell hooks, supra note 254, at 43-44. bell hooks argues:

Transforming these [predominately white classrooms] is as great a challenge as learning how to teach well in the setting of diversity. Often, if there is one lone person of color in the classroom she or he is objectified by others and forced to assume the role of "native informant." . . . This places an unfair responsibility onto that student. Professors can intervene in this process by making it clear from the outset that experience does not make one an expert, and perhaps even by explaining what it means to place someone in the role
In establishing a paradigm for introducing diversity into the curriculum, Professor Beverly Horsburgh has correctly pointed out that "merely slipping a case into the traditional discipline in which a plaintiff is a member of a minority does not eliminate prejudice or broaden a course's scope of vision, let alone transform legal education. It can even lead to a backlash." To illustrate her point, Professor Horsburgh recounts an attempt to introduce diversity into her course:

In response to the traditional "Who Sued Whom?" a student told me, "A colored guy petitioned for custody of a child." I hope I handled the situation properly when I suggested the appropriate form of address was African American or black. The student began again and reiterated "This colored guy. . . ." I again asked that she use different words. The entire class fell into an uncomfortable silence. No one gasped or indicated by words or gesture any disapproval of the student's reading of the case. Student solidarity against the professor as prosecutor or persecutor was in the air. The small number of black students in the class put their heads down and became engrossed in their notes. The student started over and this time with great animosity repeated "A colored guy . . . ." I interrupted for a third time. At this point I stopped trying to discuss the case and did the unthinkable. I lectured on sensitivity and insisted on politically correct speech.

The pedagogical impact of diversity is not limited to lessons on politically correct speech. As Professor Horsburgh's experience illustrates, however, the choice of words used in the classroom by students and faculty can serve as one of the biggest obstacles to an attempt to create a comfortable environment for raising issues of race, gender, class, disability, or sexual orientation.

The diversification of traditional pedagogy through the incorporation of minority voices into the monocultural classroom enhances the classroom experience of both students and faculty members. Although
the assumption that all minority students will share identical viewpoints and ideas is clearly erroneous, it is not, however, implausible, given the current political, economic, and social conditions faced by minority students, to acknowledge that minority students can offer perspectives that differ from their white counterparts. For example, discussing the oppression in any educational system of the banking of information where “education thus becomes an act of depositing, in which the students are the depositories and the teacher is the depositor. Instead of communicating, the teacher issues communiques and makes deposits which the students patiently receive, memorize, and repeat.” PAULO FREIRE, PEDAGOGY OF THE OPPRESSED 53 (Myra Bergman Rames trans., rev. ed. 1993).

bell hooks advocates for “engaged pedagogy,” which “emphasizes well-being.” hooks, supra note 254, at 21. That means that “teachers must be actively committed to a process of self-actualization that promotes their own well-being if they are to teach in a manner that empowers students. The empowerment of students, she writes, fosters an educational environment that “does not reflect biases or reinforce systems of domination,” but instead students and teachers “are empowered by the process.” Id. The inspiration for hooks’s views is Paulo Freire. hooks states:

When I first began college, Freire’s thought gave me the support I needed to challenge the “banking system” of education, that approach to learning that is rooted in the notion that all students need to do is consume information fed to them by a professor and be able to memorize and store it. Early on, it was Freire’s insistence that education could be the practice of freedom that encouraged me to create strategies for what he called “conscientization” in the classroom. Translating that term to critical awareness and engagement, I entered the classrooms with the conviction that it was crucial for me and every other student to be an active participant, not a passive consumer. Education as the practice of freedom was continually undermined by professors who were actively hostile to the notion of student participation. Freire’s work affirmed that education can only be liberatory when everyone claims knowledge as a field in which we all labor. Id. at 14.

265. Racial minority group membership does lead to shared experiences which may influence group members in ways that are definitely different from influences on members of the majority group. It is these different, shared experiences that diversity seeks to incorporate. See Murphy, supra note 251, at 542. Murphy argues:

Importantly, the variety of viewpoints that the university seeks to foster does not come from any innate difference between the races themselves, but rather from the varying life experiences of the individuals, due in large part to their racial backgrounds. As University of California at Berkeley President Chang-Lin Tien suggests, “People of diverse backgrounds tend to shape different questions and apply different methods to find the answers.” New York Times columnist Anthony Lewis adds, “In the lives of Americans, race is a profound factor. Blacks may be bright or dull, rich or poor, but their experience in life has been different from whites.” This view of diversity provides a forceful argument against claims that race is an inappropriate proxy for “racial characteristics.”

Id.; see also Paul Brest & Miranda Oshige, Affirmative Action for Whom?, 47 STAN. L. REV. 855, 862 (1995). Brest and Oshige argue:

The importance of a diverse student body and faculty does not depend on the false notion that one’s race or ethnicity defines a particular way of thinking about issues of law and policy. It does assume the reality—no less a reality because it is socially constructed—that people of different races and ethnicities often have different life experiences that affect their relations with members of other groups and influence their views on issues
of legal doctrine and policy.
Brest & Oshige, supra, at 862.

266. See Terry v. Ohio, 392 U.S. 1 (1968). Terry is a watershed decision in which the Supreme Court upheld a law enforcement technique commonly referred to as "stop and frisk" in circumstances in which the law enforcement officer has only a minimal level of suspicion of criminal activity. See id.


268. See Rudenstine, supra note 38, at 11. According to Rudenstine, 
[d]iscussion and debate are not purely intellectual processes. They involve emotion and conviction as well as reason and argument. They convert "passion into resolution," and teach candor and moral courage. Education and learning are in this sense human and moral processes concerned ultimately with values and effective action. They are most fully tested when individuals engage others whose ideas, passions, experiences, and beliefs differ from their own.

Id.


270. Another example of the barriers to diversity discourse that can be created by language was conveyed to me by a white professor who was covering intentional infliction of emotional distress in a first year Torts class. Her class included a small number of African American students. She sought my advice, as one of two African American faculty members, regarding the best way to approach the use of the word "nigger" in her class. This issue arose as a result of her coverage of Alcorn v. Anbro Engineering, Inc., 468 P.2d 216 (Cal. 1970), in which an African American truck driver filed an action for intentional infliction of emotional distress against his employer for the verbal abuse he suffered at the hands of his white supervisor. The specific verbal abuse related to a shouting incident in which the following phrase was expressed: "You goddamn 'niggers' are not going to tell me about the rules. I don't want any 'niggers' working for me. I am getting rid of all of the 'niggers,' go pick up and deliver that 8-ton roller to the other job site and get your pay check; you're fired." Alcorn, 468 P.2d at 217.

The professor was concerned that her use of the word during class discussion would be offensive to some of her students, not only the African Americans. Additionally, she did not want her use of the word to be perceived as tacit approval of its use in normal parlance. We discussed several possible ways to address this issue, one of which included totally ignoring it. Other suggestions included the idea of omitting the case from her coverage of this subject, or making a disclaimer
protection challenge to the decision of the Georgia Supreme Court to terminate a trust created pursuant to the terms of the will of United States Senator A.O. Bacon. Senator Bacon devised land to the City of Macon, Georgia for use as “a park and pleasure ground” for white people only. After the United States Supreme Court determined that continued operation of the park as a segregated facility violated the Equal Protection Clause of the Fourteenth Amendment, the Georgia Supreme Court ruled that the trust should fail, and that the corpus of the trust should revert to the Senator’s heirs. The United States Supreme Court upheld Georgia’s decision to terminate the trust.

During the coverage of Evans in one of my courses, a confrontation occurred between several students regarding the use of racially offensive words. During the discussion, a clear demarcation developed between the black and white students regarding whether Bacon’s intent should control the court’s decision to apply the cy pres doctrine in light of societal changes that occurred during the years subsequent to the creation of the trust. In midst of a heated class discussion regarding Senator Bacon’s intent, a white student referred to blacks as “Negroes” and “coloreds.” Although these terms were used in the case, the casual use of these terms during class discussions infuriated some of the students. The African American students looked to me either to remedy the situation or to empower them into action. I stopped the class and attempted to

before the discussion began about the nature of offense associated with the word, or simply banning the word from the class discussion. Ultimately, she used the case, but substituted for “the N word” or some other less inflammatory word for the word “nigger.”

271. See Evans, 396 U.S. at 436.
272. See id. at 437.
273. See id. at 438-39.
274. See id. at 446-47.
275. For example, Senator Bacon’s will contained a number of specific references to African Americans as “Negroes” or “Colored”:

I take occasion to say that in limiting the use and enjoyment of this property perpetually to white people, I am not influenced by any unkindness of feeling or want of consideration for the Negroes, or colored people. On the contrary I have for them the kindest feeling, and for many of them esteem and regard, while for some of them I have sincere personal affection.

Id. at 442.
276. bell hooks discusses the difficulties inherent in incorporating diversity discourse into the classroom. See hooks, supra note 254, at 35-36. She explains that

most of us were taught in classrooms where styles of teachings reflected the notion of a single norm of thought and experience, which we were encouraged to believe was universal. This has been just as true for nonwhite teachers as for white teachers. Most of us learned to teach emulating this model. As a consequence, many teachers are disturbed by the political implications of a multicultural education because they fear losing control in a classroom where there is no one way to approach a subject—only multiple ways and multiple references.
explain the significance and impact of those words to the class.\textsuperscript{277} Clearly, it was ignorance, not racial animosity on the part of the white student who set this into motion, but his ignorance did not diminish the rage and anger experienced by some other students, especially the African American students.\textsuperscript{278} In the midst of this experience, however, barriers were overcome and all of the students gained a greater understanding of the competing social, historic, political, and cultural interests that influenced the Supreme Court's decision in \textit{Evans}. Although the words "Negroes" and "colored" are archaic symbols of a bygone era, their usage in class discussion served as a barometer of the students' readiness to engage in diversity discourse and to incorporate diversity issues into the classroom without the simultaneous introduction of fear, anxiety, and discomfort. As a result of that experience, when I cover this case, I place

\textit{Id.} at 35-36. She further argues:

[Faculty] unwillingness to approach teaching from a standpoint that includes awareness of race, sex, and class is often rooted in the fear that classrooms will be uncontrollable, that emotions and passions will not be contained. To some extent, we all know that whenever we address in the classroom subjects that students are passionate about there is always a possibility of confrontation, forceful expression of ideas, or even conflict. In much of my writing about pedagogy, particularly in classroom settings with great diversity, I have talked about the need to examine critically the way we as teachers conceptualize what the space for learning should be like. Many professors have conveyed to me their feeling that the classroom should be a "safe" place; that usually translates to mean that the professor lectures to a group of quiet students who respond only when they are called on. The experience of professors who educate for critical consciousness indicates that many students, especially students of color, may not feel at all "safe" in what appears to be a neutral setting. It is the absence of a feeling of safety that often promotes prolonged silence or lack of student engagement.

\textit{Id.} at 39.

\textsuperscript{277} Lani Guinier discusses the impact that her role as an African American, female law professor has on empowering and inspiring her students:

In the conventional sense of the term, I function not only as a teacher but as a symbol for certain student voices and aspirations. I bear witness as a trophy of achievement. My conspicuous presence may rebut assumptions of group inferiority that undermine student confidence and performance. My example not only legitimizes the competence of matriculating minority students; my visibility helps lure future minority and female students into the profession. Role models provide psychological uplift, affirming the status of black women as law school citizens who can participate fully in the educational process. By confirming black and female advancement, black women role models may also be seen as living symbols of the equal opportunity process.

\textit{LANI GUINIER ET AL., supra} note 236, at 89-90.

\textsuperscript{278} See Rudenstine, \textit{supra} note 38, at 20. Rudenstine argues:

Real learning, in all its dimensions, rarely takes place altogether easily, without friction or pain. Indeed, the educational benefits of diversity are often first experienced as forms of temporary dislocation and disorientation—just as they can eventually lead to increased understanding and friendship. Genuine risks and difficulties are involved, and it would be foolish to pretend otherwise.

\textit{Id.}
this case and the words used therein into a historical framework, clearly pointing out that although acceptable then, the utterance of such words now is clearly offensive and unacceptable notwithstanding the motivations of the speaker.

The impact of diversity on law school pedagogy is not limited to courses that traditionally raise equal protection issues such as constitutional law and gender discrimination. For example, in a family law course, Professor Lundy Langston has examined how societal diversity resulting from demographic changes in society influences pedagogical methods in that course. Professor Langston argues that the methodology used to teach family law should be modified to value the diversity of "family lifestyle experiences" that are the product of the pluralistic nature of our society. He argues that the absence of such pedagogical modifications have a "silencing or normalizing effect" if the focus of a family law class is based solely on traditional notions of marriage and family. To counter such effects, he offers several pedagogical modifications to traditional approaches to family law courses, including changing the course name to reflect the evolving definition of family,

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279. In addition to selection of course materials, Professor Beverly Horsburgh has offered the following suggestions for modifying hypothetical Contract problems to reflect an awareness of diversity issues:

Hypotheticals that essentialize all individuals into the prototypical offeror or offeree eliminate the significance of differences and the ways in which differences have been socially constructed into handicaps. If color and gender, as well as an individual's socio-economic situation, are not recognized and brought into the contracts discourse as substantial barriers that interfere with the exercise of bargaining power, diversity becomes a masquerade. The prototypical minority offeror who is not encumbered with the social disadvantages of race, gender, or both, is only a male dressed in a skirt or a white donning black face. Nominal inclusion approaches misled students into thinking that everyone faces the same transactional problems and that these problems are unrelated to minority status. In using this strategy to include minorities, a professor could desensitize students from appreciating the difference that differences make in a sexualized, colorized world.

Horsburgh, supra note 262, at 66-67; see also Calleros, supra note 246, at 147 ("[A]cademic subjects set in multicultural contexts that raise issues of difference in our society are worthy mechanisms for acquiring critical thinking skills. Indeed, they may be superior vehicles for developing the ability to approach a problem from multiple perspectives and enhancing sensitivity to potential client relations problems."); Dark, supra note 250, at 551 ("There are many examples of how to raise or incorporate diversity issues in many courses like criminal law, contracts, torts, constitutional law, and even antitrust. The variety of courses suggests something that I believe is fundamentally true: Diversity discussions can be integrated throughout the law school curriculum.").


281. Id.
focusing on "doctrines such as equal protection, privacy, and personhood under the Constitution," and finally

[teaching] family law with an emphasis on multiculturalism which would prevent a "perspectivelessness" view and would provide an education on family matters according to the various cultural perspectives that make up our pluralistic society. Implementing a course on the law of relationships would allow for various lifestyles and cultural differences to be discussed in a way that would force the students to think about, but not value, varying structures. It would also encourage students, as future lawyers, to focus on serving the individual needs of their clients.

The influence of minority group members on the quality of classroom discourse was illustrated by the experiences of Professor Leo M. Romero when discussing the case of State v. Williams in his Criminal Law class. In Williams, an Indian couple was convicted of manslaughter for failing to obtain medical treatment for their dying child. Professor Romero noted that the contribution of Native American students' voices to the class he taught in New Mexico enhanced the depth of discourse in a way that was markedly different from the class discussion of only non-

282. Id. at 199. Langston argues such modifications in family law or similar courses enable students to see the benefits of treating an interpersonal relationship as a family and the difficulties that abound when personal relationships are not treated as family. Intra-family and state and family cases such as abortion, contraceptive, right to die, parent-child relationships and property distribution on death, provide excellent opportunities to discuss the legal analysis and consequences that attend to the determination of whether individuals constitute a family, without using marriage as the starting or ending point in the discussion.

Id. To further illustrate, Langston cites the anecdotal experiences of a family law professor regarding efforts to modify the family law course to reflect the expanded definition of family. The professor recounted:

I followed the family definition discussion with an exploration of what I called “Family Formation via Procreation.” During this segment we examined issues involved in contraception, abortion, sterilization, rights of the fetus and new reproductive techniques, such as surrogacy and alternate insemination. The result of covering this material at the beginning of the course that discusses marriage, divorce and custody, has been that we did not discuss marriage until the fourth week of the semester. By then, the students appeared to be accepting the notion that “family” did not require or mean marriage. While my experience is anecdotal at best, it certainly raised the prospect of moving the discussion of family further back in the course and discussing more legal doctrine that affects “families” rather than “marriages.”

Id. at 200 n.156 (citation omitted).

283. Id. at 198.
285. See Romero, supra note 251, at 8.
286. See Williams, 484 P.2d at 1174.
Native American students at Roger Williams University in Rhode Island. He observed that

[the participation of Native Americans enriches the learning of the other students who hear new concerns and perspectives. Likewise, the Indian students learn from non-Native American students, often parents, who approach the case from the perspective of protecting all children and question the assumptions and opinions voiced by the Indian students. Such a rich discussion, in my opinion, enhances the learning of all students in the class. They learn about differences in culture and values and the extent to which the law should take into account these differences; they also learn the importance of listening to others and of trying to make law just for everyone. My students at Roger Williams, unfortunately, did not get the benefit of this first-hand discussion.]

3. Inquiry, Research, and Scholarship

This final area of inquiry focuses on the impact that diversity has on the goals of inquiry, research, and scholarship. Within the legal academy, to continue my example, the increased presence of racial and ethnic minority students and faculty in the classroom has had a tremendous impact on legal scholarship. This entry of minorities into the

287. See Romero, supra note 251, at 8.
This fall the discussion lacked the insights and perspectives that I had come to expect from my experience with Native American students in the class. Questions like whether the court was applying white middle class norms of behavior to the Indian defendants, whether the test for negligence should be modified to take into account the reasonable Shoshone parent and nontraditional health care, and whether such modification would mean a lower standard of care for Indian children are just some of the questions that are frequently raised in my course in New Mexico.

Id.

288. Id.

289. Mildred Garcia argues that a strategic emphasis for the continued "formulation and strengthening of affirmative action policies" should be placed on qualitative and quantitative research efforts that "definitively demonstrate the benefits of affirmative action policies and the educational value and experiences they promote." Garcia, supra note 244, at 256. The fourth component of Garcia's eight-point strategic plan focuses solely on research goals:

4. Encourage faculty members to conduct research to substantiate the value and success of diversity and affirmative action policies. The results of these studies need to be published in the popular press and should emphasize the use of strong assessment and evaluation components.

Id.

290. See Murphy, supra note 251, at 543. Murphy argues that

[the diversification of the faculty and student bodies at American colleges and universities has already fostered a movement to rethink and reshape university curriculums into racially and ethnically inclusive foundations for study. Chang-Lin Tien explains: In legal education, the addition of women scholars opened the field of feminist jurisprudence, which uses new methodologies and new perspectives in shaping answers. Another new area of legal scholarship is critical race theory. African-American, Hispanic, and Asian-American scholars are questioning the legal treatment of racial and ethnic groups]
academy affords previously excluded voices the opportunity to contribute their own historical, cultural, and experiential perspectives to ongoing jurisprudential dialogues, thus shaping and influencing the development of our legal system in ways that are more representative of the demographic framework of our society. In addition, diversification of students and faculty fosters an atmosphere in which minority group members can examine areas that are of specific interest or importance to them and the constituencies they represent. Indicative of this diversification are the new areas of legal scholarship, such as “Critical Race theory,” feminist legal theory, and “LatCrit” theory that developed and exploring the implications of this treatment on the entire system of justice.

Id.

291. See Mari J. Matsuda, When the First Quail Calls, Multiple Consciousness as Jurisprudential Method, A Talk Presented at the Yale Law School Conference on Women of Color and the Law, April 16, 1988, 11 WOMEN'S RTS. L. REP. 7, 8 (1989). Matsuda states: Outsider scholars have recognized that their specific experiences and histories are relevant to jurisprudential inquiry. They reject narrow evidentiary concepts of relevance and credibility. They reject artificial bifurcation of thought and feeling. Their anger, their pain, their daily lives, and the histories of their people are relevant to the definition of justice.

Id.

292. See Brest & Oshige, supra note 265, at 864. Brest and Oshige argue that [t]hese observations apply not only to students, but to the faculty in their mission of producing and disseminating knowledge. Skepticism about the relevance of diverse life experiences to a university's mission sometimes manifests itself in the observation that a work of scholarship must stand or fall on its own merits, without regard to the scholar's group affiliation. While we have no doubt that this observation is true, it fails to negate the equally obvious point that different life experiences affect scholars' agendas, viewpoints, and approaches to their subjects in ways that enhance knowledge. Especially in law, where regulations and judicial decisions affect different groups differently, it would be amazing if a scholar's experiences did not affect her outlook and interests, and hence her work. The presence of women and minority scholars has in fact changed the intellectual landscape of some areas of law, and their influence has permeated fields that many would not have imagined had much connection with gender or race. In any subject where a faculty member's experience brings different perspectives to her scholarship, it will likely enhance her teaching in similar ways.

Id. (citations omitted).


Teachers of color in the legal academy who chose to join this tradition of radical teaching have sought, in their teaching and scholarship, to articulate the values and modes of analysis that inform their vocation of struggle. These efforts have produced an emerging
as a result of the increased number of minorities in the legal academy. In addition, recent legal textbook publications also reflect the inclusion of issues pertaining to race, gender, class, disability, and sexual orientation into the classroom. As law schools continue to hire minority faculty, some of these individuals will continue to focus their research interests to reflect experiences and ideas originating from their own cultural and historic perspectives.

Finally, scholarship diversification is in direct response to the increased role played by the judiciary in its modern interpretation of the constitutional protections and limitations afforded to all members of society. As long as legal challenges to the use of race-based admissions criteria remain at the forefront of American jurisprudence, inquiry and research in this area of constitutional interpretation will continue to flourish. This Article is but one of dozens of articles and symposia published in the genre known as critical race theory. Critical race theory is grounded in the particulars of social reality that is defined by our experiences and the collective historical experience of our communities of origin. Critical race theorists embrace subjectivity of perspective and are avowedly political. Our work is both pragmatic and utopian, as we seek to respond to the immediate needs of the subordinated and oppressed even as we imagine a different world and offer different values. It is work that involves both action and reflection. It is informed by active struggle and in turn informs that struggle.

Id.


296. See supra note 238.


last fifteen years in furtherance of diversity issues such as affirmative action, civil rights, and discrimination—all of which were either in response to, or an attempt to, influence judicial decision-making. Clearly, the impact on the research and publication functions of universities has been, and will continue to be, influenced by the presence of diversity not only within the academy, but within society as a whole.

The educational community is not an isolated environment. On the contrary, it is an amalgamation of diverse people, issues, interests and concerns. The admissions decision-making process used to assemble the members of this amalgam must reflect this diversity.300 Within the legal academy, legal scholarship, as well as the content and methods of classroom instruction, are being modified to reflect, either directly or indirectly, the academy’s response to the presence of racial minorities within this environment.301 The successful integration of racial and ethnic

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300. See Hurtado & Navia, supra note 234, at 127. Hurtado and Navia made the following recommendation:

In addition, higher education institutions and their admissions offices should assess the extent to which they have relied upon affirmative action as the primary means for diversifying their campuses and student bodies. The use of racial preferences in college admissions is a legal way to ensure diversity, but more documentation may be necessary in terms of providing information on historical and continuous barriers that women and different racial/ethnic groups face in gaining admission. Admissions officers at selective colleges must also acknowledge the biases that result from employing specific criteria for different groups and address them by considering a wide range of information on each candidate, and then selecting students who excel along several dimensions. Moreover, as with all other types of preferences in admissions, institutions must be able to articulate how their selection practices are consistent with the institution’s mission and goals. The goal of educating a diverse student body is not only important to educational processes within the institution, but also extends beyond the campus community to the larger social goals of decreasing inequality, improving race relations, and increasing economic productivity and civic participation among broad segments of society.

Id.

301. See Finkin, supra note 13, at 846.
minorities within the academy will continue to necessitate changes in historically accepted pedagogical approaches. As a result, diversification of the American classroom has become an academic exercise aimed at fostering the "[t]he atmosphere of 'speculation, experiment and creation'" that Justice Powell sought in *Bakke*.

IV. LIMITS ON THE EXERCISE OF INSTITUTIONAL AUTONOMY

As defined in Part III, the exercise of institutional autonomy is only protected by the First Amendment when an educational institution is engaged in academic decision-making. More specifically, in the absence of evidence of past discrimination, only academic decisions undertaken with the goal of attaining a diverse student body may serve as constitutional justification for the use of race-based classifications. Although this doctrine is limited in scope by its applicability only to academic decisions, the opportunity for abuse exists.

For example, universities may use the protections afforded by the First Amendment to restructure the admissions decision-making process to exclude disfavored racial and ethnic minorities, particular gender groups, or individuals with unpopular social or political ideologies. To avoid this result, additional limitations are necessary. In *Bakke*, Justice Powell cautioned that the recognition of institutional autonomy to foster diversity within the academic environment is not absolute, but must be tempered by "constitutional limitations protecting individual rights." Part IV explores the question left unanswered by Justice Powell's admonition; that is, how far can educational institutions go in the exercise of their right to select a diverse student body before infringing on the equal protection guarantees of the Fourteenth Amendment?

Further limitation of this doctrine requires adherence to a narrow interpretation of Justice Powell's definition of diversity. As set forth in

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303. See *Byrne*, *supra* note 41, at 338. Professor Byrne suggested the following:

Just as importantly, constitutional academic freedom ought not to protect institutions resembling universities but which do not pursue genuine liberal studies—that prohibit or consistently discourage professors from following controversial arguments, that recognize no role for faculty in governance, or that seek to indoctrinate rather than educate students. In other words, universities that do not respect the academic freedom of professors (understood as the core of the doctrine developed by the AAUP) or the essential intellectual freedom of students (a concept barely developed) ought not to be afforded institutional autonomy. This limitation, dictated by the justification for the right, may lessen fears that institutional freedom will cloak extensive violations of professors' academic freedom by institutions bent on intellectual orthodoxy. Institutions so perverse in their ends will suffer the loss of constitutional status, a risk that may deter abuses.

*Id.* (footnote omitted).
Bakke, diversity was defined not simply in terms of racial or ethnic diversity, but as Justice Powell explained, "diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."305 In addition to requiring the individualized evaluation of every applicant, an educational institution must consider factors "likely to promote beneficial educational pluralism."306 Although the concept of diversity is based, in large part, on a case-by-case determination, Justice Powell offered guidance in defining the parameters necessary to achieve "educational pluralism."307 In their efforts to attain a diversified student body, educational institutions are not restricted to considering only "students from disadvantaged economic, racial and ethnic groups," but may also consider such factors as a student's geographic background and social and academic interests.308

Limiting the extension of institutional autonomy to admissions decisions that fall within the parameters of strict adherence to the letter and spirit of Justice Powell's definition of diversity will ensure that only educational policies conforming to this standard will benefit from First Amendment guarantees that insulate the exercise of institutional autonomy.309 Neil Rudenstine has stated:

The most constructive and well-conceived admissions programs are those that view affirmative action in relation to the educational benefits of diversity. They may take various characteristics such as race, ethnicity, or gender into account as potential "plus" factors (among many others) when evaluating candidates, but they do not assign such characteristics an overriding value. Nor do they aim to achieve specific numerical targets, either through the use of set-asides or quotas. Programs of this kind, when they are carefully designed and implemented, preserve an institution's capacity—with considerable flexibility—to make its own determinations in admissions. This capacity and flexibility have been critical in the past, and will continue to be so in the future.310

305. Id. at 315.
306. Id. at 317.
307. Id.
308. Id. at 322 (appendix to opinion of Powell, J.). With respect to the attainment of a diverse medical school student body, Justice Powell identified several important factors including "exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important." Id. at 317. In this regard, Justice Powell cited with approval the use of race and ethnicity in the admissions decision-making model used by Harvard College. See id. at 316-18. A description of the Harvard Admissions program was set forth in the appendix to Justice Powell's opinion in Bakke. See id. at 321-24.
309. See discussion supra Part II.B.
310. Rudenstine, supra note 38, at 45.
Additionally, such adherence will eliminate attempts to extend constitutional protection to definitions of diversity that are inconsistent with Justice Powell's mandate. For example, the First Circuit in *Wessmann v. Gittens*, 311 assumed that the goal of attainment of diversity of a student body could justify the use of racial and ethnic admissions criteria for the purpose of withstanding an equal protection challenge. 312 However, after evaluating the admissions policies in light of Justice Powell's definition of diversity, the *Wessmann* court noted that the school's admissions policy focused exclusively on racial and ethnic diversity. 313 This pool of potential students was further restricted to "only five groups—blacks, whites, Hispanics, Asians, and Native Americans—without recognizing that none is monolithic." 314 The court concluded that the school's selection criteria "appear[ed] to be less a means of attaining diversity in any constitutionally relevant sense and more a means for racial balancing." 315 The resulting racial balancing, coupled with the policy's impermissible focus on specific group characteristics instead of individualized evaluations, led the First Circuit to conclude that the admissions policy was inconsistent with the "concept of diversity" as articulated by Justice Powell in *Bakke*. 316

In the event academic decision-making is engaged in for the sole purpose of racial exclusion, and not in accordance with the purpose of attaining diversity, First Amendment insulation would yield to countervailing equal protection considerations. Although this analysis is consistent with the Supreme Court's historic rejection of racially

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311. 160 F.3d 790 (1st Cir. 1998).
312. See id. at 800.
313. See id. at 798.
314. Id.
315. Id. The court stated:
   
   It cannot be said that racial balancing is either a legitimate or necessary means of advancing the lofty principles recited in the Policy. The closest the School Committee comes to linking racial balancing to these ideals is by introducing the concept of "racial isolation." The idea is that unless there is a certain representation of any given racial or ethnic group in a particular institution, members of that racial or ethnic group will find it difficult, if not impossible, to express themselves. Thus, the School Committee says, some minimum number of black and Hispanic students—precisely how many, we do not know—is required to prevent racial isolation.

Id. at 799.
316. See id. The *Wessman* court commented on the admissions policy as follows:

Either way, the School Committee tells us that a minimum number of persons of a given race (or ethnic background) is essential to facilitate individual expression. This very position concedes that the Policy's racial/ethnic guidelines treat "individuals as the product of their race," a practice that the Court consistently has denounced as impermissible stereotyping.

Id.
exclusive classifications,\textsuperscript{317} consideration of racial and ethnic characteristics remain an essential component of the diversity paradigm.\textsuperscript{318} As Justice Powell recognized, however, the inclusive nature of diversity cannot be realistically achieved without the consideration of race and ethnicity as factors in the process.

V. CONCLUSION

Expansion of First Amendment guarantees of academic freedom to educational institutions will ensure that educational institutions have the right to select a diversified student body without excessive judicial

\textsuperscript{317} There is a long line of Supreme Court cases beginning with \textit{Missouri ex rel. Gaines v. Canada}, 305 U.S. 337 (1938), in which the Court noted that such exclusionary conduct was specifically prohibited by the Fourteenth Amendment. For example, in \textit{Gaines}, Chief Justice Charles Evans Hughes concluded as follows:

\begin{quote}
By the operation of the laws of Missouri a privilege has been created for white law students which is denied to negroes by reason of their race. The white resident is afforded legal education within the State; the negro resident having the same qualifications is refused it there and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up, and the provision for the payment of tuition fees in another State does not remove the discrimination.
\end{quote}

\textit{Id.} at 349-50.

Similarly, in \textit{Sweatt v. Painter}, 339 U.S. 629 (1950), the Court ordered Herman Sweatt's admission to the University of Texas Law School. In that decision, Chief Justice Vinson, in reiterating the Court's burgeoning commitment to equality of the laws, concluded that the "petitioner may claim his full constitutional right: legal education equivalent to that offered by the State to students of other races. Such education is not available to him in a separate law school as offered by the State." \textit{Id.} at 635. These cases paved the way for the Court's landmark decision in \textit{Brown}, in which the Supreme Court finally concluded that segregation in public education constituted a deprivation of the "equal protection of the laws guaranteed by the Fourteenth Amendment." \textit{Brown v. Board of Education}, 347 U.S. 483, 495 (1954).

\textsuperscript{318} But see \textsc{Carl Cohen, Naked Racial Preference} 77 (1995). Professor Cohen commented as follows:

\begin{quote}
Finally, there is one troubling aspect of the \textit{Bakke} decision that flows directly from the Powell principles. It may be taken to proffer an invitation that could lead to most unhappy practices. We are told that the Constitution permits the consideration of race in admissions for the sake of diversity to further the First Amendment interest in free expression. That being so, it would appear that other suspect classifications—by political affiliation or by religion—may also be used for the sake of diversity. This is a disquieting result. Should the fact that one is a Republican or a Socialist, Catholic or Jew, be allowed to count in the distribution of opportunities? Even if by invoking such considerations we could increase diversity in some contexts, they surely ought never be factors in the apportionment of any public goods. History gives us strong reasons to conclude that the uses of such classifications, even for putatively honorable goals, invite disaster. We forswear them. For the same reasons, even if \textit{Bakke} permits us to promote diversity in a student body, it will be the part of wisdom to forswear the use of race as well.
\end{quote}

\textit{Id.}
scrutiny. Notwithstanding equal protection guarantees, the Supreme Court has recognized that there are some areas of society that must be protected from excessive governmental interference. The attainment of diversity within the educational environment is worthy of such protection. Institutional autonomy is a necessary component of this effort. Educational institutions can only function in an atmosphere that affords them with the opportunity to make academic decisions that preserve the "marketplace of ideas" that is the foundation of the academic community. Assembling this marketplace requires the admission of groups of people with diverse interests, backgrounds, and life experiences. Such diversified admissions decision-making modifies existing educational paradigms, and influences every facet of the traditional goals of an educational institution—teaching, inquiry, research and scholarship.