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Despite a Recent Eleventh Circuit Decision, Diversity Remains a Compelling Interest in the University Admissions Process

David A. Kelly*

“How can a society which denied the humanity of whole races of people, now, turn to the affected groups and ask them to compete as if they had always enjoyed full equality of economic and social opportunity, of educational preparation and political involvement?”

I. INTRODUCTION

Since the 1978 U.S. Supreme Court decision, Regents of the University of California v. Bakke, the courts have slowly chipped away at affirmative action policies in public universities. In Johnson v. Board of Regents of the University of Georgia, the Eleventh Circuit continued this trend by suggesting that the university’s goal of student body diversity is not a compelling interest sufficient to overcome a constitutional challenge. The admissions policy at issue in that case is an example of the sort of affirmative action programs that public universities have utilized for the last quarter century. These programs use “plus-factor” systems (in which an applicant’s minority status is only considered as a “plus”) to ensure diversity among students in higher education admissions processes. Universities that use race as a “plus” avoid explicit quotas and two-track admissions systems in which minority candidates are compared only with each other. These systems have been widely recognized as constitutionally acceptable ever since Bakke.

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3. 263 F.3d 1234, 1244-51 (11th Cir. 2001).

4. See, e.g., Grutter v. Bollinger, 288 F.3d 732, 744 (6th Cir. 2002) (stating that, under
In *Bakke*, the plaintiff, a white medical school applicant, charged that the University of California’s admission program unfairly discriminated against him. The program reserved a fixed number of spots (or “quotas”) for minorities and rejected the plaintiff though his test scores were higher than those of the minority students who were admitted. A divided U.S. Supreme Court concluded that the California medical school’s admissions process was unconstitutional. However, a different majority of the justices, led by Justice Powell, suggested that an admissions policy that considered an applicant’s minority status a “plus” could pass constitutional muster.

The basis for the Eleventh Circuit’s ruling in *Johnson* is a Supreme Court doctrine that requires courts to apply strict scrutiny to all government decisions that take race into account. Applying strict scrutiny entails a two-pronged inquiry: First, does the challenged policy constitute a “compelling” government interest? Second, is the policy narrowly tailored to achieve that interest? Thus, the issue of whether student diversity is a compelling government interest is at the core of the debate over the continued viability of *Bakke*. Much of this debate centers on Justice Powell’s pivotal concurring opinion in that case, in which he found the university’s goal of attaining a diverse student body to be “clearly [] a constitutionally permissible goal for an institution of higher education.”

The Eleventh Circuit, however, rejected Justice Powell’s opinion as binding precedent, reasoning that the Justice did not speak for a majority of the Court. The Eleventh Circuit assumed for purposes of the opinion that student body diversity was a compelling interest and subsequently resolved the case on grounds that the policy was not narrowly tailored to

5. *Bakke*, 438 U.S. at 276-78.
6. Id. at 276-77.
7. Id. at 271-72.
8. See id. at 316-17.
9. See *Johnson* v. Bd. of Regents of Univ. of Ga., 263 F.3d 1234, 1244 (11th Cir. 2001).
10. See id.
12. *Johnson*, 263 F.3d at 1249 (concluding that “Justice Powell’s opinion does not establish student body diversity as a compelling interest for purposes of this case”).
achieve diversity. While deciding the case on the narrowly-tailored prong of the strict scrutiny test, the court nevertheless engaged in a lengthy discussion of student body diversity as a compelling interest. Despite its disclaimer that the question was an open one, in what was clearly dicta, the court opined that student diversity was probably not an interest compelling enough to survive strict scrutiny. In effect, the court signaled its belief that Bakke could no longer be counted on as sanctioning affirmative action policies in university admissions.

In this Article, I propose that the Eleventh Circuit’s dictum regarding student body diversity sets a dangerous tone (if not precedent). In Part I of this Article, I discuss the facts of Johnson and the district court’s holding that the admissions policy was unconstitutional. Next, I explain the Eleventh Circuit’s ruling that the university’s admissions policy was not “narrowly tailored” to achieve its stated goals. I discuss the court’s analysis of Bakke, and its supposition that diversity is probably not a compelling interest. I conclude Part I with a brief look at how some of the other Circuits have dealt with the issue of diversity as a compelling interest.

In Part II of this Article, I contend that affirmative action is still a viable means of remedying the effects of race-based discrimination in this country. With that in mind, I tackle the issue of whether a race-conscious admissions policy can ever withstand constitutional scrutiny. While I do not defend the specific policy at issue in Johnson, I do conclude that a race-conscious policy can resist a constitutional challenge, provided the goal of the policy is achieving a diverse student body.

II. ELEVENTH CIRCUIT RULES PLUS-FACTOR ADMISSIONS POLICIES ARE UNCONSTITUTIONAL; SUGGESTS DIVERSITY NOT COMPELLING

A. The District Court Finds UGA’s Admissions Policy Unconstitutional

In 1999, Jennifer L. Johnson sued the University of Georgia (UGA) after her application was rejected. She challenged the university’s practice of assigning point bonuses to nonwhite and male applicants, arguing that such a policy violated the Equal Protection Clause of the

13. See id. at 1244-45. (The court stated, “[W]e assume for purposes of this opinion only that UGA’s asserted interest in student body diversity is a compelling interest.” Id. at 1251).
14. Id. at 1244-45.
15. See id. at 1250-51 (noting that, though student body diversity may be compelling interest, weight of recent precedent is undeniably to contrary).
16. Id. at 1237.
Fourteenth Amendment. Her suit was subsequently consolidated with complaints filed by two other rejected freshman applicants, Aimee Bogrow and Molly Ann Beckenhauer. Soon after the suits were filed, UGA president Michael F. Adams ended the practice of awarding gender preferences. However, he left the practice of awarding bonus points to minorities in place for the following admissions year. In December 1999, a number of black students and prospective applicants intervened on behalf of the university.

The policy in question divided the admissions process into three stages. At the first stage, the university automatically admitted applicants with an academic index (AI) and SAT score above a fixed number. Likewise, those applicants with SAT and AI numbers below a certain number were automatically rejected. Applications that fell in between moved into stage two, where each applicant was assigned a total student index (TSI) number. This number was based on a combination of several weighted academic, extracurricular, demographic and other factors, including race. Applicants whose TSI scores were above a pre-set threshold number were automatically admitted. White applicants needed at least a 4.93 to be automatically accepted; minority applicants needed only a 4.43. Those students whose TSI scores did not meet the threshold requirement were passed on to the third stage, where admissions officers evaluated students on an individual basis. In practice, a white applicant needed a TSI score of 4.66 to avoid rejection and reach level three; a minority applicant needed only a 4.16.

The University of Georgia’s admissions policy was developed after, and based on, Justice Powell’s concurring opinion in *Bakke*, wherein he wrote, “the interest in diversity is compelling in the context of a university’s admissions program.” The University maintained that using race in its admission process was necessary to ensure student body
diversity. The district court for the Southern District of Georgia, however, disagreed and granted summary judgment for plaintiffs. Reasoning that Justice Powell’s concurrence in Bakke was not binding precedent, the court noted that it was not required to find that student body diversity constituted a compelling interest. The court explained that UGA’s articulated reason for using race in its admissions process was too generalized, ill-defined, and relied on stereotypical assumptions about members of particular races. Consequently, the court viewed the program as giving preferential treatment to minorities solely on account of their minority status, which it deemed clearly violated the Equal Protection Clause.

Having determined that UGA’s asserted diversity interest was not sufficiently compelling, the court did not reach the question of whether the university’s admissions process was narrowly tailored to meet that need. The court did note, however, that UGA’s articulated diversity interest was “so inherently formless and malleable that no plan [could] be narrowly tailored to fit it.”

B. The Eleventh Circuit Concludes that UGA’s Policy is not Narrowly Tailored

In its ruling of August 2001, the Eleventh Circuit affirmed the district court. Reviewing the case de novo, the court noted that when a governmental entity undertakes race-conscious policies, its actions are subject to strict scrutiny by the courts. Thus, the first question the court had to resolve was whether student body diversity is ever a compelling state interest. Indicating that diversity was probably not a compelling interest sufficient to withstand strict scrutiny, the court assumed for purposes of the opinion that it was. Accordingly, the court moved on to the second prong of its analysis, determining whether UGA’s specific

31. Johnson, 263 F.3d at 1244.
33. Id. at 1370-71.
34. Id. at 1371.
35. Id.
36. Id. at 1373-74.
37. Id. at 1374.
39. Id. at 1242-43.
40. Id. at 1247, 1251. The court noted, “[T]he narrowest . . . common ground of the Brennan and Powell opinions [in Bakke] on the specific subject of student body diversity is that diversity is an ‘important’ interest, but not the kind of compelling interest that potentially might withstand even the strictest constitutional scrutiny.” Id.
admissions policy was narrowly tailored to achieve diversity. The court identified four factors used to determine whether the admissions policy was indeed narrowly tailored:

(1) Whether the policy uses race in a rigid or mechanical way that does not take sufficient account of the different contributions to diversity that individual candidates may offer; (2) whether the policy fully and fairly takes account of race-neutral factors which may contribute to a diverse student body; (3) whether the policy gives arbitrary or disproportionate benefit to members of the favored racial groups; and (4) whether the school has genuinely considered, and rejected as inadequate, race-neutral alternatives for creating student body diversity.

Applying these factors to UGA’s admissions policy, the court had no difficulty in finding the policy unconstitutional. First, the court noted that at the TSI stage, the process mechanically and rigidly awarded all non-white applicants an arbitrary bonus without considering their potential contribution to diversity on an individual basis. Thus, the court suggested that to avoid being invalidated, a policy could not put one racial group on a different and more lenient track than members of another group. The weight accorded race cannot be “subject to rigid or mechanical application,” and must remain flexible enough “to ensure that each applicant is evaluated as an individual and not in a way that looks to her membership in a favored or disfavored racial group as a defining feature of her candidacy.”

Second, the court found that the TSI considered race-neutral factors from a standpoint that failed to account for how the activities might enhance the diversity of an incoming freshman class. The court noted that extracurricular and work activities, both of which reflect a student’s potential contribution to diversity, were only considered in a cursory manner by the admissions committee. Racial diversity may be one component of a diverse student body, the court reasoned, but it is not the only component. “If the goal in creating a diverse student body is to develop a university community where students are exposed to persons of different cultures, outlooks, and experiences, a white applicant in some circumstances may make a greater contribution than a non-white

41. See id. at 1251.
42. Id. at 1253.
43. Id. at 1253-54.
44. Id. at 1254.
45. Id. These factors include: economic disadvantage, travel abroad, individuals from remote or rural areas, “individuals who speak foreign languages”, “individuals with unique communication skills”, and overcoming personal adversity or social hardship. Id. at 1255.
46. Id.
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Thus, a policy that seeks to achieve diversity “by allowing some applicants to be treated more favorably than others based on race must ensure full and fair consideration of other, race-neutral characteristics that contribute to a truly diverse class of students.”

Third, the court reasoned that the benefit awarded minority applicants was “wholly, and concededly, arbitrary” because the university was unable to articulate a basis for the amount of the numerical bonus it awarded non-white candidates. In fact, the court described the bonus points awarded to minorities as selected “out of the blue.” The court also found the benefit UGA mechanically awarded minority applicants to be disproportionate to the very few diversity-related factors that may permissibly be considered at the TSI stage. Thus, to avoid constitutional scrutiny, a policy must use race in a way that does not give an arbitrary or disproportionate benefit to members of the favored racial groups, thereby unduly disadvantaging applicants from outside the favored groups who may well add more to the overall diversity of the student body.

Finally, the court noted that UGA failed to present any evidence that it had rejected or even gave meaningful thought to substituting wholly race-neutral alternatives for its race-conscious admissions policy. Nor did the university offer expert testimony or other evidence establishing that race-neutral alternatives would be ineffective in creating a diverse student body. Accordingly, the court held, “[w]hile strict scrutiny does not require exhaustion of every possible alternative, it does require serious, good faith consideration of race-neutral alternatives, either prior to or in conjunction with implementation of an affirmative action plan.” Thus, to pass constitutional muster a university defending a race-conscious admissions policy must show that it has genuinely considered, and rejected as inadequate, race-neutral alternatives for creating student body diversity.

47. Id. at 1253.
48. Id. at 1254.
49. Id. at 1257.
50. Id.
51. Id.
52. Id. at 1259.
53. Id. at 1259-60.
54. Id. at 1259 (citing Ensley Branch, NAACP v. Seibels, 31 F.3d 1548, 1571 (11th Cir. 1994) (citations omitted)).
C. The Eleventh Circuit Indicates that Diversity is not a Compelling Interest

Perhaps more important than what the Eleventh Circuit actually decided was what it explicitly refrained from deciding. As noted earlier, the court avoided resolving the question of whether student body diversity may ever constitute a compelling interest supporting a university’s use of race in its admissions process. It stated, “the constitutional viability of student diversity as a compelling interest is an open question.” Further, it recognized that the question, because of its great importance, would ultimately have to be resolved by the Supreme Court. Nevertheless, the court acknowledged that some aspects of that issue were relevant to its own narrow tailoring analysis. Consequently, the court embarked upon a lengthy discussion of whether diversity could amount to a compelling interest, concluding that it probably could not.

The court began its analysis with reference to the Bakke decision. In that case, an unsuccessful white applicant to the University of California at Davis Medical School challenged the school’s admissions program, which consisted of a general admissions system for white applicants and a special admissions system for minority applicants. A predetermined number of spots were reserved for minority applicants, irrespective of their academic status as compared to white applicants. The California Supreme Court held that the university’s admissions system was unconstitutional, and prohibited the university from considering race in admissions. The United States Supreme Court, with a majority of five Justices, upheld the California Supreme Court’s finding that the medical school’s admissions system was unconstitutional. However, through an entirely different majority, the Court reversed the California Supreme Court’s total prohibition on the university’s consideration of race in its admissions process.

The only Justice to concur with both majority opinions was Justice Powell, who wrote solely for himself. Applying strict scrutiny, Justice Powell found the university’s diversity justification to be a

55. *Id.* at 1245.
56. *Id.*
57. *Id.*
58. *See id.* at 1245-51 (noting that recent precedent suggests diversity is not compelling).
59. *Id.* at 1245.
61. *Id.*
62. *Id.* at 279-80.
63. *Id.* at 320.
64. *Id.* at 269.
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“constitutionally permissible goal for an institution of higher education.”65 According to Justice Powell, a flexible admissions program that treats race as merely one of several factors that may be considered is constitutional.66 He concluded therefore, “the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.”67

In Johnson, the Eleventh Circuit was quick to point out that, while Justice Powell plainly identified diversity as a compelling interest, no other Justice expressly endorsed that view.68 The court thus reasoned that Justice Powell’s opinion, though persuasive, was not binding authority.69 It found that student body diversity, albeit an important interest, is not the kind of compelling interest that potentially might withstand the Court’s strict scrutiny analysis.70 “Simply put, Justice Powell’s opinion does not establish student body diversity as a compelling interest for purposes of this case.”71 The court cited to several other courts that had similarly concluded that Justice Powell’s opinion was not binding and that diversity was not a compelling interest.72 Johnson ended its discussion of diversity with a reminder that the Supreme Court must ultimately resolve the question of whether student body diversity is a compelling interest justifying a racial preference in university admissions.73

D. Split Circuits

The Eleventh Circuit is the most recent Federal Court of Appeals to consider the continuing vitality of affirmative action programs in institutions of higher education. Several other courts, most notably the First, Fifth, Sixth, and Ninth Circuits, have also weighed in on the issue, coming to opposite conclusions. While there is no consensus among the Circuits, there is an undeniable shift away from finding affirmative

65. Id. at 311-312.
66. Id. at 314.
67. Id. at 320.
69. Id. at 1249.
70. See id. at n.13.
71. Id.
73. Id. at 1250.
action programs in university admissions processes constitutionally kosher.

In 1996, the Fifth Circuit in *Hopwood v. Texas* rejected any and all forms of racial classification in university admissions.74 Reasoning that Supreme Court decisions since *Bakke* have indicated that diversity is not a compelling interest, the court held that, not only was Justice Powell’s concurring opinion not binding, but it had been superseded by more recent rulings.75 The court also argued that racial indicators were not necessarily a predictor of student body diversity. Writing for the panel, Judge Smith reasoned, “[U]se of race, in and of itself, to choose students simply achieves a student body that looks different. Such a criterion is no more rational on its own terms than would be choices based upon the physical size or blood type of applicants.”76

In *Wessmann v. Gittens*, a case similar to *Hopwood*, the First Circuit held that a Boston private school’s affirmative action program was unconstitutional.77 In *Wessmann*, the school’s admissions policy was to reserve half of its seats for students who scored high on standardized tests, while the other half was reserved to reflect the racial composition of qualified applicants.78 The school reasoned that its policy was necessary to maintain diversity and remedy past discrimination.79 The court rejected this rationale, concluding that the policy amounted essentially to a quota system and that past findings of discrimination did not justify the school’s race-conscious admissions policy.80

In 2000, the Ninth Circuit, in *Smith v. University of Washington Law School*, came to the opposite conclusion.81 Referencing *Bakke*, the court noted that Washington has a legitimate and substantial interest in ameliorating the disabling effects of past discrimination.82 The court expressly identified Justice Powell’s opinion as binding and held that “educational diversity is a compelling governmental interest that meets the demands of strict scrutiny of race-conscious measures.”83 Acknowledging that post-*Bakke* Supreme Court decisions have not looked upon race-conscious policies with much favor, the court pointed

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74. 78 F.3d 932 (5th Cir. 1996) cert. denied, 518 U.S. 1033 (1996).
75. Id. at 942-45.
76. Id. at 945.
77. 160 F.3d 790 (1st Cir. 1998).
78. Id. at 793.
79. Id. at 797, 800.
80. Id. at 799, 802-05.
81. 233 F.3d 1188 (9th Cir. 2000).
82. Id. at 1197, 1201 (citing Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978)).
83. Id. at 1201.
out that none of those decisions concerned university admissions.\textsuperscript{84} It concluded that, until the Supreme Court indicates otherwise, it would continue to assume that Justice Powell’s approach was still binding authority.\textsuperscript{85}

Similarly, in the most recent decision addressing this issue, a sharply divided Sixth Circuit upheld the University of Michigan Law School’s admissions policy that used race and other factors as “potential ‘plus’ factors.”\textsuperscript{86} The court spilled considerable ink detailing why Justice Powell’s concurring opinion in \textit{Bakke} was still binding.\textsuperscript{87} The court concluded that, “[b]ecause Justice Powell’s opinion is binding on this court . . . the Law School has a compelling interest in achieving a diverse student body.”\textsuperscript{88} Moreover, the court held that the admissions policy was narrowly tailored to achieve student body diversity and thus withstood strict scrutiny\textsuperscript{89} The opinion explicitly rejected \textit{Johnson’s} suggestion that Justice Powell did not deem student body diversity a compelling interest, noting that, under that rationale, Justice Powell never would have joined “in the Court’s decision to permit ‘the competitive consideration of race and ethnicity.’”\textsuperscript{90}

This recent spate of conflicting federal court rulings could soon lead the U.S. Supreme Court to reconsider \textit{Bakke}. Although the Court declined to review \textit{Hopwood}, either \textit{Smith}, \textit{Johnson}, or \textit{Bollinger} may provide the Court the appropriate vehicle to finally resolve the issue of whether diversity justifies a race-conscious admissions policy.\textsuperscript{91} If and when the Supreme Court revisits \textit{Bakke}, it will inevitably have to resolve the question of whether student body diversity is an interest compelling enough to survive strict scrutiny.

\textsuperscript{84} \textit{Id.} at 1200.
\textsuperscript{85} \textit{Id.} at 1200-1201. The court stated: “Thus, at our level of the judicial system Justice Powell’s opinion remains the law.” \textit{Id.} at 1201.
\textsuperscript{86} Grutter v. Bollinger, 288 F.3d 732, 746 (6th Cir. 2002).
\textsuperscript{87} See \textit{id.} at 738-48.
\textsuperscript{88} \textit{Id.} at 739.
\textsuperscript{89} \textit{Id.} at 752 (holding that the court was “satisfied that the admissions policy is sensitive to the possibility that it might someday have satisfied its purpose” of ensuring student body diversity).
\textsuperscript{90} \textit{Id.} at 742, n.6 (citing Justice Powell’s concurring opinion in \textit{Bakke})
\textsuperscript{91} The Supreme Court declined to review \textit{Hopwood}. \textit{See} 518 U.S. 1033 (1996).
III. ADMISSIONS POLICIES SEEKING TO ENSURE STUDENT BODY DIVERSITY PROMOTE GOOD PUBLIC POLICY AND ENRICH QUALITY OF HIGHER EDUCATION

A. Affirmative Action Remains Effective Remedy for Discrimination

Higher education is sacrosanct in this country. As the epicenter of creative and original thought, it should be reserved for no one and open to anyone. In particular, it should be a viable and worthwhile option for minorities, who have historically been denied educational and employment opportunities. A tool to aid in this endeavor is affirmative action, a policy that seeks to eliminate barriers that have kept minorities and women out of the educational mainstream. Yet affirmative action has come under attack the last few decades. There are those who believe that the policy tends to perpetuate, rather than eliminate, existing disparities between minorities and the majority population. This argument, however, is unavailing in light of the manifold benefits of affirmative action.

In the first place, affirmative action has, if nothing else, alerted society to the difficulties minorities face in their attempts to enter higher education and the job market. Even the current debate over the program’s continued vitality breathes new life in the subject of racial inequality in this country. Moreover, affirmative action embodies the ideal that diversity in the university and workplace is of paramount importance to Americans. After all, our nation’s motto, e pluribus unum ("from the many, one"), suggests that it is our individual differences that make us stronger as a nation. One needs look no further than the

92. Even today, minorities are underrepresented in higher education. For example, African-Americans comprise over 13% of the American population, but receive less than 7.5% of the law degrees. See Ryan Fortson, Comment: Affirmative Action, The Bell Curve, and Law School Admissions, 24 SEATTLE UNIV.L. REV. 1087, 1111-13 (2001). Hispanics suffer even greater underrepresentation. See id.


94. For a brief overview of arguments for and against affirmative action in university admissions, see generally Constance Hawke, Reframing the Rationale for Affirmative Action in Higher Education Admissions Decisions, 135 EDUC. L. REP. 1, Aug. 1999.

95. See, e.g., Glenn C. Loury, Incentive Effects of Affirmative Action, 523 ANNALS AM. ACAD. POL. & SOC. SCI. 19, 20 (1992). Loury notes that critics of affirmative action argue that, for example, if an employer believes his minority workers to be less skilled than majority workers he will be less likely to assign them to high-level positions. See id. at 20-21. As a result, the majority workers will view the minority workers as inferior, and will treat them as such. See id.

96. See Smith, supra note 93, at 44-45.

President’s own Cabinet to appreciate how America celebrates diversity.\(^{98}\)

The fact remains, however, that discrimination based on race continues to exist in our country.\(^{99}\) I submit that affirmative action is still an effective means of remedying the effects of race-based discrimination in this country. However, I also recognize that the program is only as effective as the policies that promote and implement it. Thus, in the educational context, it is imperative that policies aimed at increasing the access minorities have to institutions of higher learning are not deemed automatically unconstitutional. These policies must be examined in light of the objective of a diverse student body.

**B. Diversity Serves as Compelling Interest Sufficient to Overcome Constitutional Challenge**

Many people who support diversity oppose racial diversity as a poor substitute for whatever characteristics constitute diversity.\(^{100}\) While it is true that racial diversity is not the same thing as diversity in general, it is equally true that it is a significant feature marking diversity. Diversity in general encompasses an assortment of individual characteristics, such as the ability to speak fluent Latin or run a four-minute mile. These individuals, regardless of their race, certainly add diversity to a university student body, consequently enhancing the quality of the student body. Similarly, a diversity of ethnic and racial students enhances the quality of the student body. This is because students benefit from an exposure to a variety of perspectives, ideologies, and cultures. Students of all races benefit by being exposed to future Michael Jordans, Amy Tans, and Colin Powells.\(^{101}\)

Those who oppose any consideration of race in college admissions argue that preferentially treating one race over another is simply reverse discrimination. I agree. However, I do not concede that all race-conscious admissions policies prefer one race to the exclusion of another. A policy that merely recognizes race as an important factor in student body diversity is not per se discriminatory. An example is in order.

Suppose the University of California-Davis School of Law (King Hall) seeks to admit one hundred students.\(^{102}\) The law school receives

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98. President Bush’s Cabinet consists of several women, an Asian-American, a Latino, and two African-Americans.
99. See supra note 87.
100. See Loewy, supra note 97, at 1486.
101. See Loewy, supra note 97, at 1489 (noting that students of all races ought to be exposed to the likes of Clarence Thomas and Thurgood Marshall).
102. This illustration is based in large part on an example used by Professor Loewy, supra
over one thousand applications, only fifty of which are from African-American applicants. The school has an admissions policy by which it fills 90% of its class with applicants having only the highest GPA and LSAT scores. It reserves the remaining 10% to those students it believes will ensure the most student body diversity. The school has selected the ninety most meritorious students, a population consisting of eighty-seven Caucasians and only three African-Americans. Among those applicants competing for the final ten spots are Brandon Leader, an African-American with a 3.2 GPA from Harvard and a 155 LSAT, and Ronald Holley, a Caucasian with a 3.5 GPA from Harvard and a 160 LSAT.

At first glance, Ronald may seem the obvious choice. After all, his grades and test scores are higher than Brandon’s, seemingly indicating a greater likelihood of success in law school. He would certainly appear to be the “better” candidate. Or would he? If what has been argued thus far has any merit, it is fair to say that Brandon will likely enhance the quality of the student body in a way that Ronald cannot. While it is true that both Brandon and Ronald bring a distinct perspective, in a law class of only three African Americans, it is fair to say that Brandon’s is more unique. Thus, Brandon adds to the student body diversity, enriching the educational experience of all the other students. Unless Ronald can demonstrate that academic scores are the sole measure of merit in law school admissions, he does not have a constitutional right to be selected over Brandon. If admissions were solely based on GPA and LSAT scores there would be no need for an admissions committee—a computer could do all the work.

The fact is, however, that admissions committees have the right (if not the obligation) to seek to ensure that the student body is as diverse and multi-faceted as possible. King Hall wants the best candidates, which are not necessarily the highest achievers. To accomplish this, the school

note 97. Professor Loewy’s example involves a law school seeking to fill its 200th and last spot in the entering class. The school has to choose between an African-American candidate and a Caucasian candidate. The African-American student has a lower GPA and LSAT score, but would be only the tenth black student in the class. Professor Loewy reasons that while the Caucasian student may have better test scores and grades, the school ought to consider other relevant factors, such as diversity, in determining which student to admit. He concludes, “Because I do not think that it is unfair to count race for the purpose of creating an institution that better educates its students, I have no problem with the fairness of choosing [the Africa-American candidate] over [the Caucasian candidate].” See Loewy, supra note 97, at 1495.

103. For simplicity sake, I am ignoring all other ethnic groups that would certainly be present in any law class UC-Davis admits.

104. For simplicity sake, I am also assuming that both Brandon and Ronald share all other qualities, i.e., that one is no better than the other at a sport or anything else.

105. Again, this is assuming they are equal in every other respect.

106. See Loewy, supra note 97, at 1500.
must have the discretion to select those candidates it deems most beneficial to the quality of the student body. In the example I have given, Brandon would probably beat out Ronald. It is important to point out, however, that the school’s selection of Brandon instead of Ronald is not based on a policy of favoring African-Americans over Caucasians. Rather, it is based on a policy favoring the law school as a whole. The primary beneficiaries of this admissions decision are the already ninety chosen students, eighty-seven of whom are Caucasian. While it is true that in this particular law class, being African-American is an advantage, that will not always be the case. If, for example, Ronald was a retired schoolteacher from Iceland, he might be preferred over Brandon (even if Brandon’s scores were higher) because of the unique perspective he brings to the student body.

Thus, a race-conscious admissions policy that does not favor any particular race, but rather seeks to maximize student diversity, does not necessarily run afoul of the Fourteenth Amendment. The Supreme Court has stated that the Fourteenth Amendment protects persons, not groups. Accordingly, race (a group classification) “should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed.” In the example set forth here, each student is analyzed not as a member of a racial group, but rather as an individual. Each student’s relevant individual attributes are weighed in accordance with the university’s needs. In the original example, in a predominantly Caucasian class, Brandon had an advantage over Ronald because he was African-American. But in the subsequent example, Ronald had the advantage by being a retired schoolteacher from another country.

The model admissions policy set forth herein, in contrast to the policy invalidated by the Eleventh Circuit, also has the advantage of being narrowly tailored to achieve student body diversity. In Johnson, the university’s admissions policy mechanically awarded every minority candidate a “diversity” bonus, while severely limiting the range of other factors relevant to diversity that could be considered. As the court correctly stated, this sort of policy is not narrowly tailored to achieve the goal of overall student body diversity. In contrast, the policy I have

107. See Loewy, supra note 97, at 1493 (noting than an admissions process favoring best athletes may appear to be “male-favoring,” but in reality is only “institution-favoring”).
108. See id.
110. Id.
111. Johnson v. Bd. of Regents of Univ. of Ga., 263 F.3d 1234, 1251 (11th Cir. 2001).
advocated allows for an individual determination of which students most enrich the quality of education offered at the university. This sort of race-conscious admissions policy does not necessarily impose inequalities and is in strict accordance with the Fourteenth Amendment.

IV. CONCLUSION

The Eleventh Circuit’s suggestion in Johnson that diversity is not a compelling interest sufficient to withstand a constitutional challenge deals a crippling blow to affirmative action policies aimed at remedying the effects of racial inequity in this country. The decision will serve to deter universities from relying on Bakke to legitimize their goal of attaining diversity and equal opportunity. This will lead to reduced minority enrollment in institutions of higher education and a concomitant rise in disparate allocation of benefits and opportunities.

I contend that a race-conscious admissions policy can withstand constitutional scrutiny if that policy is aimed at achieving a diverse student body. This sort of policy is not automatically unconstitutional because it does not discriminate against any particular racial group or classification. If the policy merely allows for individual determinations of which students most enrich the quality of education offered at a given university, it does not run afoul of the Constitution.

112. This is evidenced by UGA’s new “interim admissions policy”, announced just a short time ago. This policy only takes scholastic factors into consideration for freshman admissions and abandons any effort to achieve student body diversity. This is an unfortunate consequence of decisions like Johnson.