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# **FEDERAL LAW AND RECRUITMENT, OUTREACH, AND RETENTION: A FRAMEWORK FOR EVALUATING DIVERSITY- RELATED PROGRAMS**

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**A Strategic Planning and Policy Manual**

**Developed as part of the College Board Access and Diversity Collaborative  
on Enrollment Management and the Law**

**Arthur L. Coleman, Scott R. Palmer, Femi S. Richards,  
Holland & Knight LLP**

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This manual is intended as an information source for higher education officials. Its content should not be construed as legal advice, and readers should not act upon information contained in this manual without professional counsel.

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## About the Authors

**Arthur L. Coleman** and **Scott R. Palmer** are partners and co-leaders of Holland & Knight LLP's education policy practice. Along with **Femi Richards**, a member of that practice, they provide legal, policy, strategic planning, and advocacy services to educators throughout the country. Holland & Knight's focus is on preventive law and policy development—helping colleges and universities, states, school districts, and other education providers and associations understand how to structure programs in ways that best serve their educational goals and meet federal and state legal requirements. Their diversity-related services include strategic planning, program audits and policy counseling, and staff training. Messrs. Coleman and Palmer served back-to-back as Deputy Assistant Secretary in the U.S. Department of Education's Office for Civil Rights between 1997 and 2001.

Mr. Coleman received his J.D. from Duke University School of Law (with honors) and his B.A. with high distinction from the University of Virginia, where he was a Phi Beta Kappa graduate.

Mr. Palmer received his J.D. from the University of California, Berkeley, School of Law (Boalt Hall), his master's degree in public policy from Harvard University's John F. Kennedy School of Government, and his B.A. with honors from the University of Maryland.

Mr. Richards, who also has extensive experience with employment and corporate diversity issues, received his J.D. from the University of Connecticut School of Law, his master's degree in public policy from Harvard University's John F. Kennedy School of Government, and his B.A. from the University of Massachusetts-Amherst.

# Foreword

For decades, colleges and universities have worked to achieve their diversity-related educational goals in a manner that meets federal legal requirements. In 2003, the United States Supreme Court's *Grutter v. Bollinger* and *Gratz v. Bollinger* decisions affirmed that the educational benefits of diversity could justify limited race-conscious practices<sup>1</sup> and, as a consequence, generated a renewed focus on both the means and ends associated with diversity-related goals.

In the wake of these landmark decisions, leaders from the College Board convened a series of meetings to explore issues that were not definitively resolved by the Court, and to determine how the College Board could best support the higher education community in achieving its diversity-related goals. The College Board's objective was simple: to frame a forward-thinking agenda designed to address the needs of college and university leaders who want to pursue institutional diversity-related goals in legally sound ways. As a result, and based on conversations with College Board members and other supporting organizations, the College Board launched a groundbreaking initiative: The Access and Diversity Collaborative on Enrollment Management and the Law. The Collaborative is supported by numerous sponsoring and cooperating organizations, sponsoring institutions, higher education systems, and foundations.<sup>2</sup>

The Collaborative began its work through a series of national seminars in 2004 that focused on diversity-related financial aid issues, which culminated in the April 2005 publication of *Federal Law and Financial Aid: A Framework for Evaluating Diversity-Related Programs*. Synthesizing the first phase of the Collaborative, that manual addresses federal nondiscrimination laws and principles applicable to diversity-related financial aid and scholarship practices.

The second phase of the Collaborative's work, which addressed recruitment, outreach and retention issues, led to the publication of this companion manual. As part of the preparation of this manual, we had the privilege of leading several conversations between March and May 2005 involving nearly 200 enrollment management, admissions, financial aid, legal, and policy experts across the country.<sup>3</sup> Based on what we learned through those conversations—as well as what the governing laws and court decisions tell us—we have attempted to craft practical and useful guidance to help higher education officials evaluate their race- and ethnicity-conscious recruitment, outreach, and retention programs, and take appropriate action to ensure that such policies are educationally and legally sound.<sup>4</sup>

We are grateful for the support and input of many individuals who have worked tirelessly to help support the development of this manual. We are particularly indebted to Fred Dietrich, Andre Bell, and Gretchen Rigol, all of whom embraced a vision of helping the higher education community more thoughtfully address the legal and policy challenges of meeting their diversity goals and, as importantly, made a commitment to “make it happen.” We should note, in particular, that this effort would not have been possible without Gretchen's constant support, guidance, and good humor. That she has put up with a team of lawyers and maintained her enthusiasm for this work in its second phase

speaks volumes about her commitment to these issues and their importance to the higher education community.

In addition, we are grateful to those who have taken the time to review drafts of this manual and provide us with constructive ideas and direction. And certainly not least, we are grateful to the hundreds of participants in the College Board's Access and Diversity Collaborative seminars. In those meetings, institutional leaders provided thoughtful observations and posed challenging questions—all of which helped inform the preparation of this manual.

Those conversations—like those occurring during the financial aid phase of the Collaborative—gave substance to three overarching principles illustrated by Justice O'Connor in *Grutter*: (1) Federal law should affirm educationally sound judgments, especially in cases where those decisions are based on relevant evidence; (2) the educational benefits of diversity are “substantial” and “real” and can appropriately be “at the heart of” the mission of higher education institutions; and (3) “context matters” when assessing the legality of race- and ethnicity-conscious practices. Taken together, these principles have guided the development of this document, just as they should shape institution-specific analyses regarding the use of race and ethnicity in recruitment, outreach, and retention programs.

Arthur L. Coleman  
Scott R. Palmer  
Femi S. Richards  
Holland & Knight LLP  
Washington, D.C.  
August 2005

## Foreword Endnotes

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1. See *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).
2. See Appendix E.
3. See Appendix F.
4. It should come as no surprise that segments of this manual are adapted from previous College Board publications on diversity-related legal issues. (See Coleman, Palmer, and Richards, *Federal Law and Financial Aid: A Framework for Evaluating Diversity-Related Programs* [College Board, 2005] and Coleman and Palmer, *Diversity in Higher Education: A Strategic Planning and Policy Manual Regarding Federal Law in Admissions, Financial Aid, and Outreach* [College Board, 2004], segments reproduced with permission.) The basic federal legal standards applicable to race- and ethnicity-conscious practices are generally the same across the board. The *application* of those standards can vary greatly, however, depending on the particular context and facts of a given program. Thus, this manual repeats many of the principles discussed in earlier related publications while highlighting the unique facets of recruitment, outreach, and retention programs that should inform any institutional assessment.



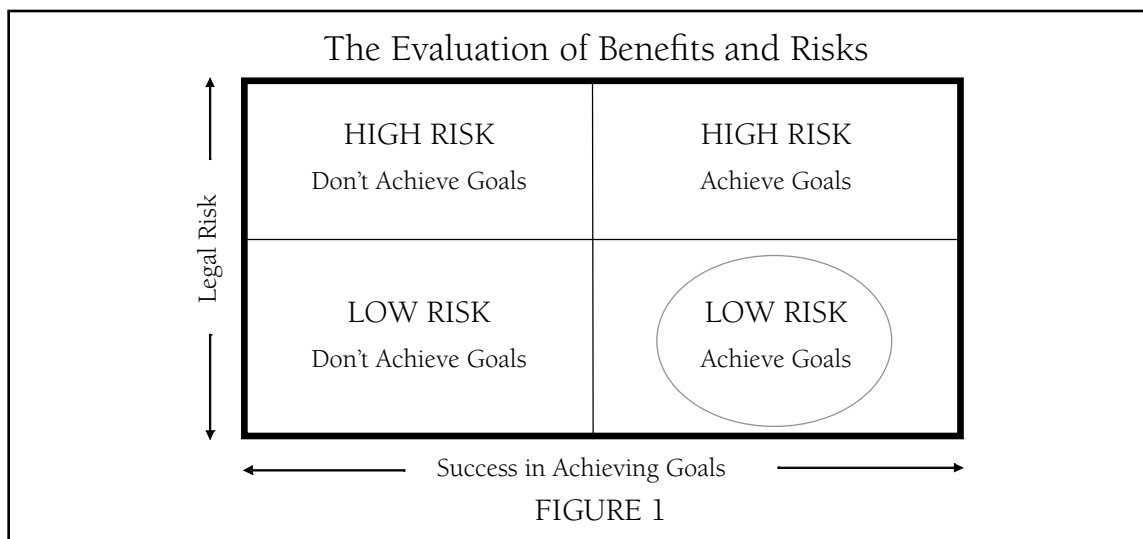
## **Section One: Background**

## I. Overview

The purpose of this manual is to provide higher education leaders with a practical tool that can help guide institutional decision making on issues related to diversity and the use of race and ethnicity as factors in recruitment, outreach, and retention programs. This manual offers a framework that can help structure and inform institution-specific reviews of such programs that are race- and ethnicity-conscious. Although it cannot provide a definitive formula that will establish foolproof models in all settings (and, correspondingly, cannot operate as a substitute for institution- or program-specific legal advice), this manual presents key questions and important information for higher education institutions to consider, based on federal legal principles.

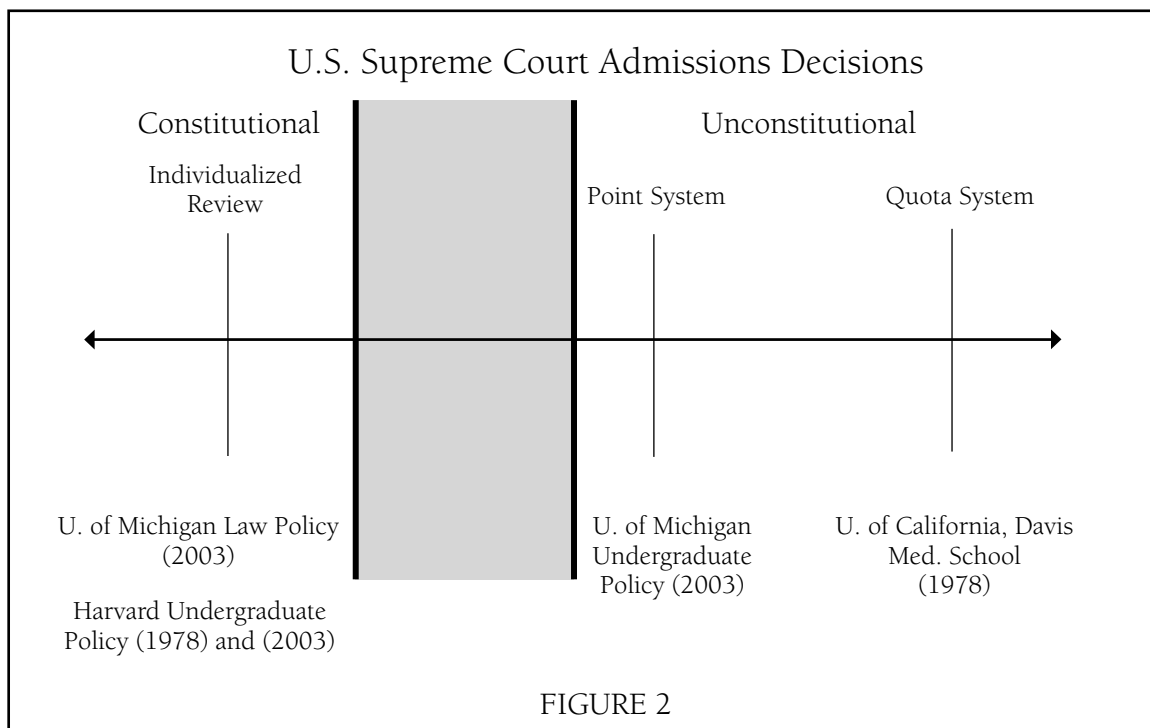
As explained in the text that follows, if institutional leaders commit the necessary resources toward effective strategic planning, implementation, and evaluation, federal law can operate to help them enhance their efforts to achieve the diversity they seek. It can, in essence, ensure that important questions are addressed as part of institutional efforts designed to achieve diversity goals in legally sound ways. This manual provides a framework (with questions) to inform those institution-specific efforts—setting forth what we know (based on clear legal guidance), what we think we know (based on a reasoned analysis regarding the application of settled legal principles), and what we don't fully know (but where we can still raise important questions that may help reduce legal risk).

In sum, the overarching goal of this manual is to provide one tool that can help college and university leaders understand how to structure their recruitment, outreach, and retention programs in a manner that best achieves their diversity-related goals and minimizes legal risk. As this manual will illustrate, success in achieving this overarching goal should be understood in light of each of its related elements. Stated differently, the evaluation of legal risk should not occur in a vacuum, but rather, should be understood in light of an evaluation of overall success in achieving core educational aims—with the ultimate objective of achieving those aims while minimizing legal risk. [See Figure 1.]



This manual has been written in light of prevailing federal law—including both federal court opinions and relevant U.S. Department of Education regulations and case resolutions. Obviously, the 2003 U.S. Supreme Court decisions in *Grutter v. Bollinger* and *Gratz v. Bollinger*, which were the first Supreme Court pronouncements on the use of race- and ethnicity-conscious practices in higher education in a quarter of a century, are primary foundations for the guidance that follows.<sup>1</sup> In addition, case-specific correspondence and data requests by the U.S. Department of Education’s Office of Civil Rights (OCR), which enforces Title VI of the Civil Rights Act of 1964, provide important sources of information for this manual.<sup>2</sup>

The existing body of relevant federal case law and administrative policies and decisions provides significant information that can help guide institutions in their efforts to effectively and legally promote their interests in the educational benefits of diversity, including through the use of race- and ethnicity-conscious recruitment, outreach, and retention programs. At the same time, it should be noted that existing federal law does not provide all of the answers to all of the hard questions that higher education officials are likely to pose. For example, while the Supreme Court’s two landmark decisions in *Grutter* and *Gratz* are valuable in their elaboration on the long-standing legal standards that govern the use of race and ethnicity in the admissions setting (including their analysis of the Court’s 1978 decision in *Regents of the Univ. of California v. Bakke*), nowhere does the Court mention (let alone analyze) recruitment, outreach, and retention programs. Thus, higher education officials addressing such race- and ethnicity-conscious programs are operating in “the space” in which the U.S. Supreme Court has not provided definitive guidance, but in which key principles in the admissions context are likely transportable to the recruitment, outreach and retention setting. [See Figure 2.] (That “space” also includes financial aid practices about which the Court has not spoken, as well as admissions practices that may differ from those challenged in *Grutter*, *Gratz*, and *Bakke*.)



This manual is organized as follows:

Chapter II provides a brief overview of recruitment, outreach, and retention programs, along with an introduction to the relevant legal standards and federal case law.

Chapter III provides an action blueprint for higher education institutions that are addressing issues of race and ethnicity in the context of their recruitment, outreach, and retention programs. It explains key steps that should be taken and important questions that must be considered—all informed by relevant federal legal principles.

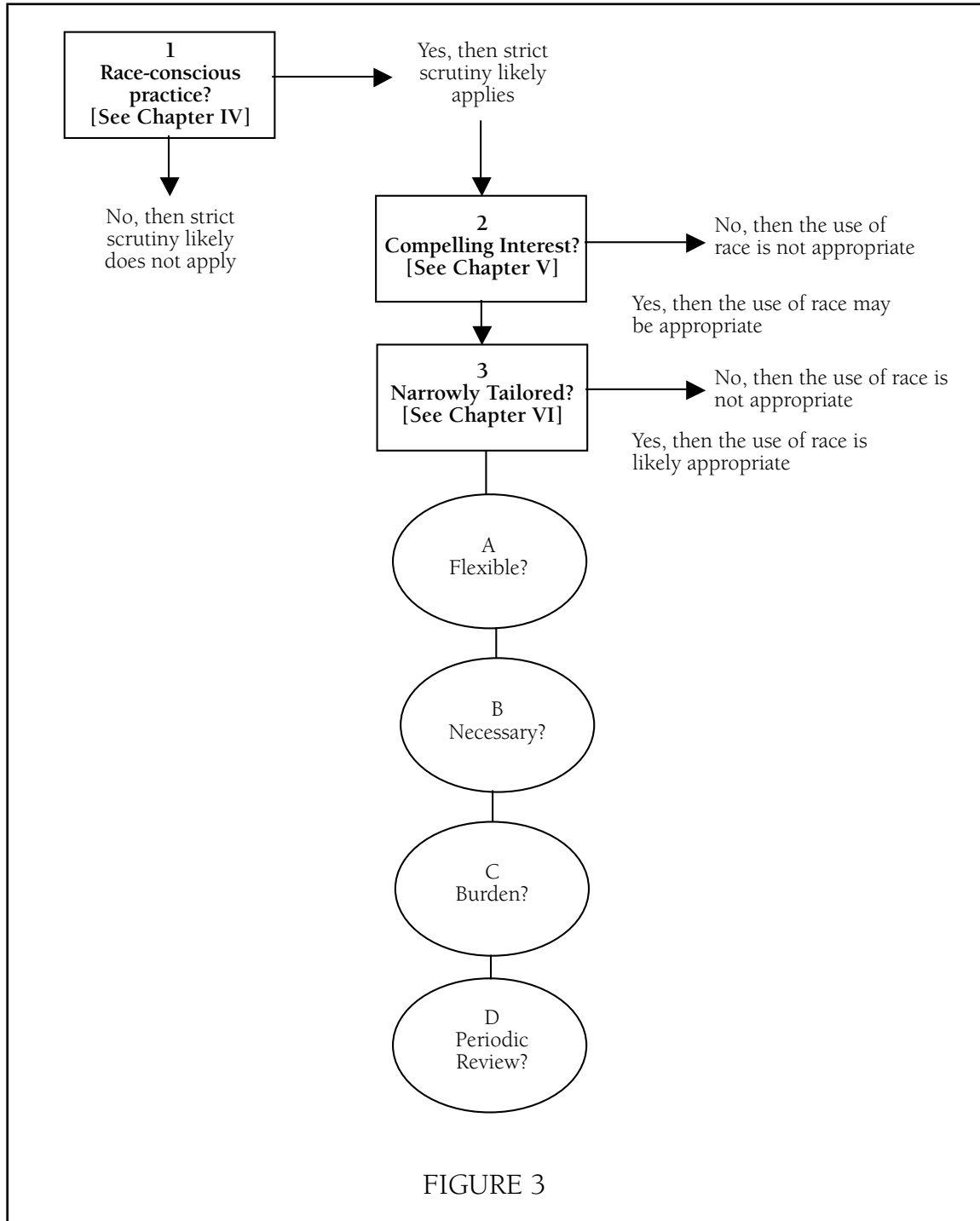
Chapters IV through VI provide a detailed analysis of the three legal concepts that are central to the discussion regarding race- and ethnicity-conscious recruitment, outreach and retention programs: “strict scrutiny,” “compelling interest,” and “narrow tailoring.”

- **Strict scrutiny** is the most rigorous standard of judicial review. It is applicable to race- and ethnicity-conscious decisions that confer opportunities or benefits because distinctions based on race and ethnicity are “inherently suspect” under federal law. To “pass” strict scrutiny, institutional policies must serve a “compelling interest” and be “narrowly tailored” to achieve that interest. Chapter IV addresses the circumstances in which strict scrutiny is (and is not) applicable.
- A **compelling interest** is the end that must be established as a foundation for maintaining lawful race- and ethnicity-conscious programs that confer opportunities or benefits. Federal courts have expressly recognized a limited number of interests that are sufficiently compelling to justify the consideration of race or ethnicity, including a university’s interest in promoting the educational benefits of a diverse student body.<sup>3</sup> Chapter V examines compelling interest issues in detail, providing information about the kinds of evidentiary and program design principles that should be considered by higher education institutions.
- **Narrow tailoring** refers to the requirement that the means used to achieve the compelling interest must “fit” that interest precisely, with the consideration of race or ethnicity only in the most limited manner possible. Federal courts examine several inter-related criteria in determining whether a given program is narrowly tailored, including the flexibility of the program, the necessity of using race or ethnicity, the burden imposed on nonbeneficiaries, and whether the policy has an endpoint and is subject to periodic review. Chapter VI examines these issues in detail, providing information about key design elements associated with recruitment, outreach, and retention decisions that will likely bear on whether those policies are narrowly tailored and thus pass legal muster.

In sum, this manual essentially examines three basic questions:

1. What recruitment, outreach, and retention practices might be subject to strict scrutiny?
2. How can higher education institutions justify as compelling their race- and ethnicity-conscious practices that are subject to strict scrutiny?
3. How can these practices be structured in order to be narrowly tailored to meet the institution’s compelling interest(s)?

Taken together, an examination of these questions [see Figure 3] can help higher education officials: (1) identify the programs that should be subject to an institution-specific analysis; and (2) ensure that their race- and ethnicity-conscious recruitment, outreach, and retention programs promote their diversity-related educational goals with minimized legal risk. Properly understood, these goals should be considered complementary not competing goals, just as federal law should be understood to reinforce good educational practices.



## Chapter I Endnotes

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1. Pursuant to the Equal Protection Clause of the United States Constitution, Title VI of the Civil Rights Act of 1964, and a post-Civil War federal statute (42 U.S.C. § 1981), the Supreme Court in those decisions upheld the University of Michigan Law School's admissions program, while striking down the University of Michigan's undergraduate admissions program. In essence, those decisions: (1) affirmed that the educational benefits of diversity constitute a compelling interest that can justify the limited consideration of race in admissions decisions; and (2) emphasized the need for such admissions decisions to involve an individualized review of applicants (rather than the automatic award of points) in the pursuit of diversity goals.
2. This manual is informed by documents provided in response to an October 2004 Freedom of Information Act request to the U.S. Department of Education, seeking all OCR decisions and correspondence involving complaints regarding race- or national origin-conscious practices in (among other things) recruitment, outreach, and retention programs by higher education institutions. In response to that request, documents relating to 70 case investigations that involved allegations of discrimination under Title VI of the Civil Rights Act of 1964 involving financial aid and scholarships; admissions; and recruitment, outreach, and retention programs in higher education were provided. Many of those materials are cited in this manual. Copies of all documents produced by the Office for Civil Rights in response to this request are on file with the College Board.
3. A key premise of this manual—and the body of law it examines—is that racial or ethnic diversity is not an end in itself, but is, rather, a means to broader educational goals. Correspondingly, the term *diversity* is not, in the first instance, one to be defined by lawyers or judges—or, for that matter, one that can be explained in some formulaic or standardized way. It is a term that should derive its meaning from its institutional or programmatic origins, as it did in the University of Michigan cases. It may, therefore, relate to (and be defined according to) programs and practices that are as varied as the institutional missions and goals that comprise the higher education community. As a result, this manual does not attempt to offer a single definition of the term *diversity*. To do so would be to ignore the very academic foundations from which the concept is derived.

## **II. Federal Law Applicable to Race- and Ethnicity-Conscious Recruitment, Outreach, and Retention Programs: An Introduction**

### **A. The Role and Purpose of Recruitment, Outreach, and Retention Programs**

Like other educational practices that may implicate federal strict scrutiny analysis, race- and ethnicity-conscious recruitment, outreach, and retention programs must be evaluated in light of institutional goals. As explained in subsequent chapters, federal legal standards require that institution-specific compelling interests support any race- or ethnicity-conscious programs—including (with some limited exceptions) those relating to recruitment, outreach, and retention efforts.

Although institution-specific recruitment, outreach, and retention programs may reflect a mix of both institutional and public goals, core institutional goals associated with these practices tend to be:

1. For recruitment and outreach programs, enriching the pipeline and expanding the pool of entrants into higher education and helping inform and better prepare students for the academic rigor of postsecondary education; and
2. For retention programs, ensuring that students are provided with the necessary academic and social support once they enroll in order to enhance their chances for success, and helping institutions reap the educational benefits associated with success by all students, including those who contribute to a diverse learning environment.

More specifically, precollege and early outreach programs are those that provide college information or enrichment through academic support programs in middle and high schools, offer weekend and summer enrichment opportunities, and provide motivational and family support programs. Correspondingly, recruitment programs tend to define institution-specific features for prospective students in an effort to attract an applicant pool that has the qualifications and background characteristics institutions seek. Such programs build not only an awareness of an institution, but also confidence in students who might otherwise believe that a university or college is out of their reach. Institutions may also provide resources specifically to aid students in the college application process.<sup>1</sup>

Retention and student services programs are designed to promote student success on campus through academic and social support services such as acclimation programs, mentoring, and tutoring. Once students have matriculated, retention programs not only ensure that students maintain the academic skills necessary to succeed, but provide opportunities for interaction among students to enhance their socialization and exchange on campus.

To the extent that recruitment, outreach, and retention programs are established (at least in part) as a means to help institutions meet their goals related to racial and ethnic diversity, they can operate as key facets of enrollment management, very much related to

admissions and financial aid policies that have comparable (frequently overlapping) aims. In short, recruitment, outreach, and retention programs should be viewed as strategies (among others) designed to help achieve the institution's broader educational goals by targeting, enrolling, and retaining certain students.<sup>2</sup> This may seem obvious, but it is also of great importance because whether a given practice is legally sustainable will likely depend to a substantial degree on the extent to which the practice is necessary and appropriate to achieve the goal(s) that it advances. And, as explained in detail in Chapter III, it is crucial that each college and university evaluate the full array of its diversity-related policies holistically in light of those overachieving goals.

## B. Standards of Review

Efforts by colleges and universities to achieve the educational benefits of diversity may involve the use of race- and ethnicity-conscious recruitment, outreach, and retention programs. In most cases, those programs are likely to trigger a heightened standard of legal review—what federal law refers to as “strict scrutiny.” Any race- or ethnicity-conscious program will be upheld under that standard only where that program: (1) serves a compelling interest and (2) is narrowly tailored to achieve that interest.

Notably, the questions generated by a “strict scrutiny” analysis are precisely that: questions. As “strict in theory does not mean fatal in fact,”<sup>3</sup> the strict scrutiny standard should not be viewed as a categorical prohibition on race- or ethnicity-conscious practices. Rather, it should be understood as the embodiment of the federal law's guarantee of equal opportunity and equal treatment regardless of race or ethnicity, and its resistance to distinctions based on race or ethnicity except in the most limited—and compelling—circumstances.

Strict Scrutiny = Compelling Interest + Narrow Tailoring

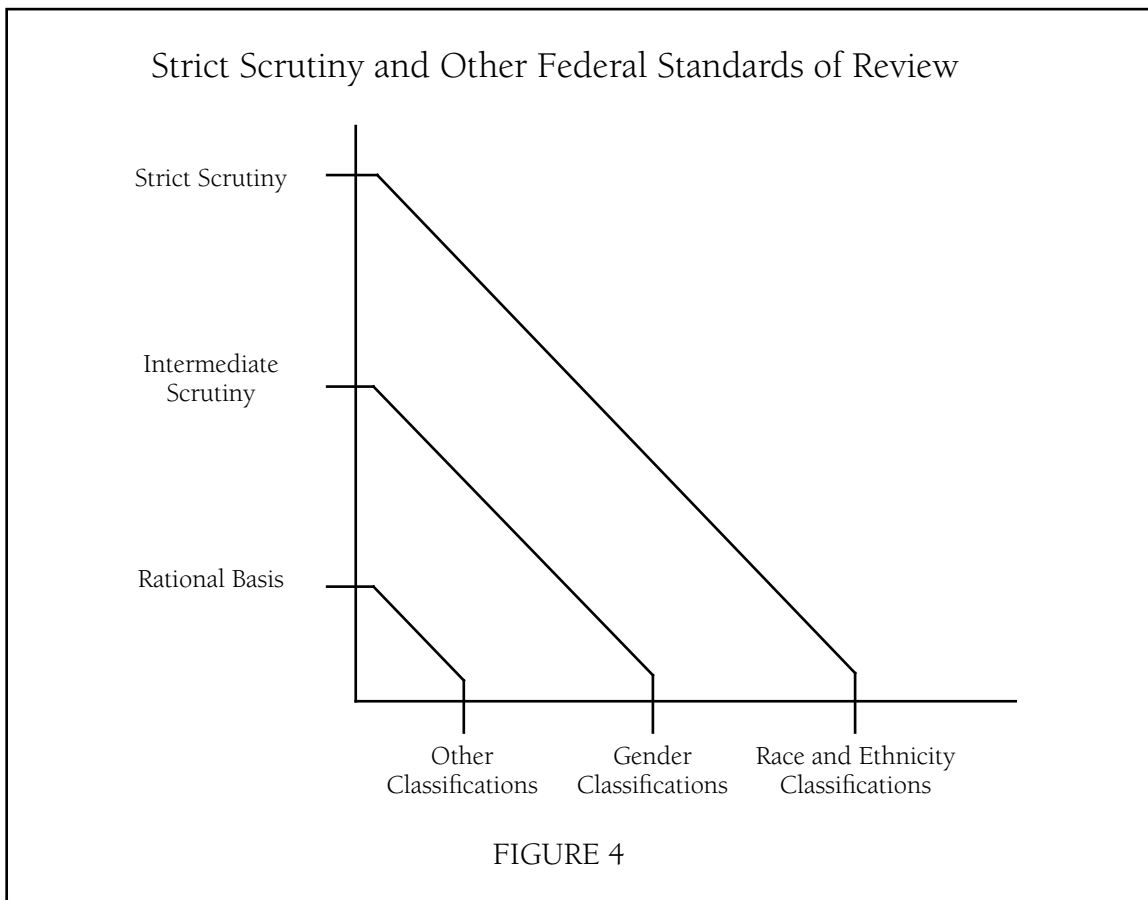
As discussed below (see Chapter V), courts have recognized at least two compelling interests in education that can be sufficient to justify race- or ethnicity-conscious practices: the remedial interest in curing the present effects of past discrimination, and the nonremedial interest in promoting the educational benefits of diversity.

Also, as discussed below (see Chapter VI), courts attempting to determine if a program narrowly tailored (i.e., if there is a “tight fit” between the means and the ends of a race- or ethnicity-conscious policy) will likely examine four factors:

1. Whether the use of race or ethnicity is sufficiently flexible in light of institutional goals;
2. Whether the use of race or ethnicity is necessary in light of institutional goals;
3. Whether the impact of the use of race or ethnicity on nonqualifying candidates is sufficiently limited and diffuse; and
4. Whether there is an end in sight to the use of race or ethnicity and a process of periodic review.



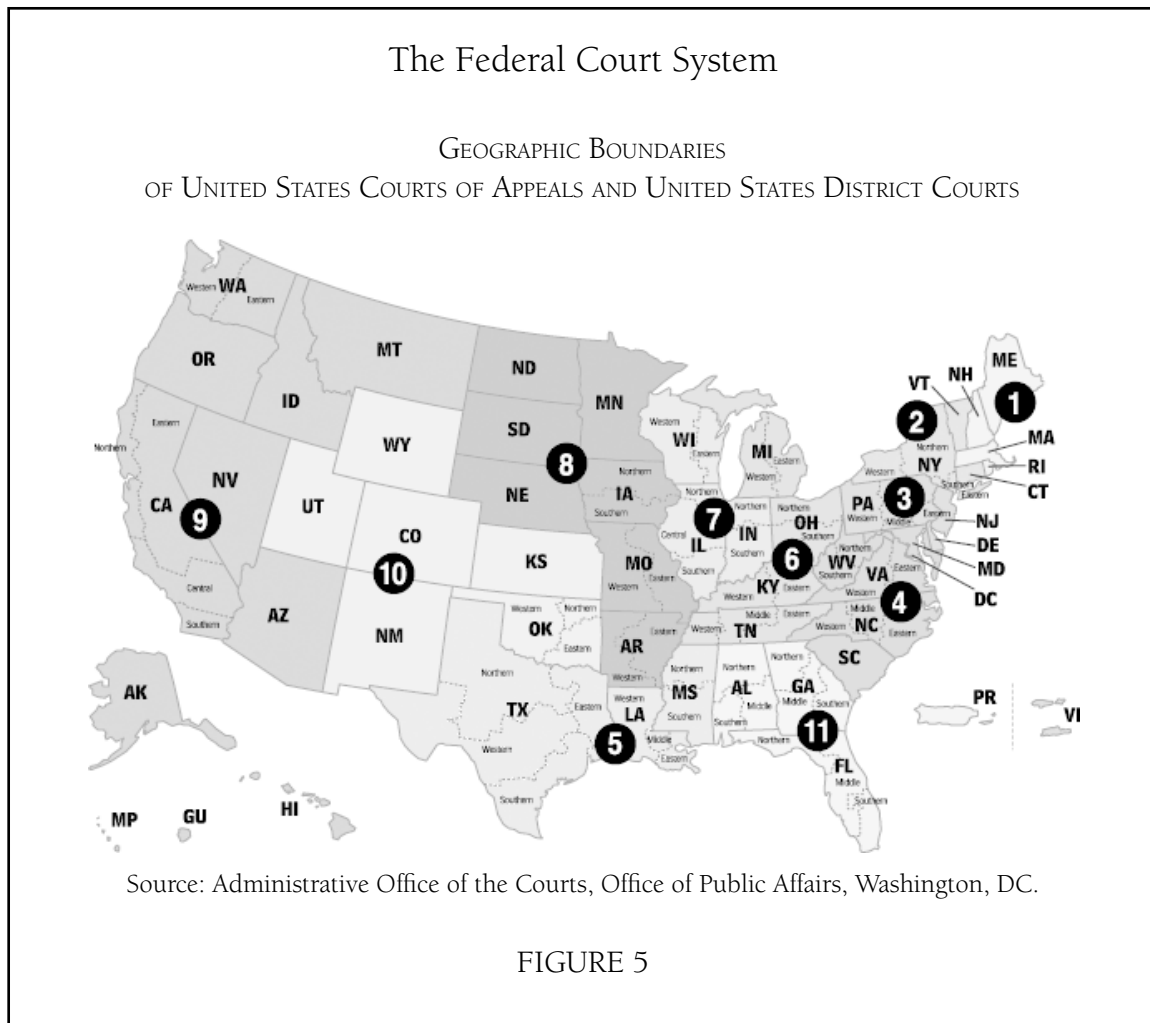
By contrast, in evaluating programs that confer opportunities or benefits based on gender or sex, federal courts have applied intermediate scrutiny (rather than strict scrutiny), which means that such programs must serve “important” (rather than “compelling”) governmental objectives and be “substantially related” (rather than “narrowly tailored”) to the achievement of those objectives. The U.S. Supreme Court has stressed that to rise to the level of an “important governmental objective,” a justification “must be genuine...[a]nd it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males or females.” At the same time, “[s]ex classifications may be used to compensate women ‘for particular economic disabilities [they have] suffered,’...‘to promot[e] equal employment opportunity’...[and] to advance full development of the talent and capacities of our Nation’s people.”<sup>4</sup>



Still further removed from the rigor of strict scrutiny review, federal courts will employ a “rational basis” standard for most other classifications (such as when students receive opportunities or benefits based on income or special talents). As the least rigorous federal standard of review applicable to classifications of individuals, the rational basis analysis requires only that the purpose or interest be “legitimate,” and that the means be “rationally related” to the accomplishment of that interest.<sup>5</sup>

## C. Federal Court Opinions

Although the U.S. Supreme Court has on two occasions addressed the use of race and ethnicity in university admissions, it has not addressed race-conscious recruitment, outreach, and retention programs. As a consequence, some of the most relevant legal authority regarding such programs can be found at the federal appellate and district court levels.<sup>6</sup>



In different settings, several federal courts have addressed the particulars of recruitment and outreach programs. In higher education, employment, and contracting contexts (among others), federal courts have tended to rule that strict scrutiny principles do not in the first instance apply to race- or ethnicity-conscious recruiting and outreach programs *so long as* those programs do not confer tangible benefits upon individuals based on their race or national origin (and, by definition, exclude others from opportunities or benefits). In these situations, federal courts have upheld such programs against charges of illegal discrimination, frequently characterizing such race-conscious measures as “inclusive” (and, in effect, race-neutral) rather than “exclusive.” In a recruitment context, for example, one federal district court stated that “racial classifications ‘that serve to broaden a pool of qualified applicants and to encourage equal opportunity’” that do not confer a benefit

or impose a burden “do not implicate the Equal Protection Clause.”<sup>7</sup> Expanding on this principle in a fair housing marketing challenge, another district court reasoned that while the recruitment of minority applicants might be “race-conscious,” that action—standing alone—would not constitute a “preference” within the meaning of federal authorities on the subject. It stated: “The crucial distinction is between expanding the applicant pool and actually selecting from that pool. Expanding the pool is an inclusive act. Exclusion [based on race]... can only occur at the selection stage.”<sup>8</sup>

Absent directly controlling authority from the U.S. Supreme Court on the subject, it is important to consider particular federal circuit-specific decisions that may bear on institution-specific judgments about which programs may—or may not—be subject to strict scrutiny. At the same time, because federal law creates what is essentially a “floor” (and not a “ceiling”) of protection against discrimination, more restrictive state laws may bear on the question regarding the lawfulness of a particular practice. Notably, the fact that federal law *permits* the consideration of race or ethnicity in certain cases is not the same as a federal legal requirement that institutions consider race or ethnicity in those cases. States may, therefore, impose additional restrictions related to the consideration of race or ethnicity in certain cases.<sup>9</sup>

## **D. U.S. Department of Education Guidance**

Although the U.S. Department of Education’s Office for Civil Rights (OCR) has not promulgated policy guidance regarding race-conscious recruitment, outreach, and retention programs as it has with respect to financial aid,<sup>10</sup> Department regulations that address the issue of when Title VI standards are triggered comport with the federal case law relating to recruitment and outreach practices: Recipients of federal funds are prohibited from engaging in “specific discriminatory actions,” including denying “services” or “benefits” on the basis of race or national origin (except in limited circumstances).<sup>11</sup> OCR has also addressed a number of complaints of discrimination regarding recruitment, outreach, and retention practices. None of this correspondence sheds significant light regarding OCR’s analytical approach towards recruitment, outreach, and retention issues, however.<sup>12</sup>

## **About OCR**

The U.S. Department of Education's Office for Civil Rights is a law enforcement agency, charged with the responsibility of ensuring that recipients of federal funds do not engage in discriminatory conduct.<sup>13</sup>

OCR is obligated by law to investigate, and resolve where possible, complaints filed with OCR that state a claim under various nondiscrimination laws, including Title VI of the Civil Rights Act of 1964. OCR may also initiate investigations known as compliance reviews, which are agency-initiated investigations typically based on information suggesting potential noncompliance by a recipient of federal funds.

In the event that OCR determines there is sufficient evidence to conclude that a recipient is not in compliance with federal law, OCR may:

[1] enter into a voluntary resolution agreement with the recipient, stipulating terms pursuant to which legal compliance will be achieved; or

[2] issue a letter of findings, which may precede the initiation of [a] administrative proceedings to suspend, terminate, or refuse to grant or continue and defer U.S. Department of Education financial assistance to the recipient; or [b] a referral of the case to the U.S. Department of Justice for judicial proceedings.

*Note:* This manual includes references to OCR correspondence relevant to various case investigations. These references can provide insight into OCR's application of relevant federal laws and U.S. Department of Education policies. However, while illustrative of OCR's action in cases involving race- and ethnicity-conscious policies and programs, OCR's case-specific correspondence does not necessarily represent federal policy or controlling precedent.

## Chapter II Endnotes

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1. See generally 2001 Outreach Program Handbook (College Board, 2001) at viii-xxxvi; *Achieving Diversity: Race-Neutral Alternatives in American Education* (U.S. Department of Education, Office for Civil Rights, 2004) [hereinafter *Achieving Diversity*].
2. See generally Gullat and Jan, *How Do Pre-Collegiate Academic Outreach Programs Impact College-Going Among Underrepresented Students?* (Pathways to College Network, 2003); Caperton, *Achieving Diversity with Michigan in Mind* (*The Chronicle of Higher Education*, April 30, 2004).
3. See *Grutter*, at 539 U.S. at 326.
4. *United States v. Virginia*, 518 U.S. 515 (1986).
5. See, e.g., *Williamson v. Lee Optical Co.*, 348 US 483 (1955); *New Orleans v. Dukes*, 427 U.S. 297 (1976); see generally, Lockhart, Kamisar, Choper, and Shiffrin, *Constitutional Law: Cases, Comments, Questions* 6th Ed., 1986.
6. The United States Supreme Court is the highest court in the land and establishes binding precedent regarding federal law for all federal and state courts. Relatively few cases reach the U.S. Supreme Court, which is not obligated to hear most appeals from lower courts.  
 District courts have jurisdiction over nearly all types of federal cases, including both civil matters in which claims of discrimination may initially surface. Comprised of at least one district court in each state, the District of Columbia, and Puerto Rico, the 94 federal judicial districts are organized into 12 regional circuits (including the D.C. Circuit Court of Appeals) [see Figure 5, reprinted with permission], each of which houses a United States Court of Appeals. These Courts of Appeal are charged with hearing appeals of decisions from the district courts in their jurisdiction. Their decisions are binding only within their circuit, but may provide persuasive authority in other circuits and district courts. In short, federal circuit decisions do not constitute binding law that must be followed outside of the circuit in which they are rendered.
7. *Weser v. Glen*, 190 F. Supp. 2d 384 (E.D.N.Y. 2002). Similarly, the U.S. Department of Education's Office for Civil Rights has characterized certain diversity related recruitment efforts as "race-neutral":  
 A greater number of institutions across the nation are adopting race-neutral approaches. The NACAC report [listed below] indicates, for example, that institutions are increasingly focused on recruitment strategies to enhance diversity: "The focus on recruitment is just one significant factor that colleges and universities have already begun adopting practices that could be considered 'race-neutral.' Indeed, if 'race-neutral' means race is not a factor in the admissions decision, then this survey shows more than two-thirds of responding colleges and universities already follow 'race-neutral' policies and practices."  
 See *Achieving Diversity* at 5, citing National Association of College Admissions Counseling, *Diversity and College Admissions in 2003: A Survey Report* (Sept. 2004) available at <http://www.nacac.com/downloads/diversityreport.pdf>.
8. *Raso v. Lago*, 135 F3d 11 (1st Cir. 1998). The court in that case cited a U.S. Department of Justice memorandum, which concluded that "[m]ere outreach and recruitment efforts...typically should not be subject to the *Adarand* [strict scrutiny] standards."
9. For example, Proposition 209 amended the California Constitution in 1996 to prohibit the state and its political subdivisions from "discriminat[ing] against, or grant[ing] preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of...public education..." (except in instances where such action is necessary to maintain eligibility for federal programs). (This law specifically applies to [among others] "any public university system, including the University of California" and community college district. It does not apply to private colleges and universities in California.) In *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537 (2000), the California Supreme Court ruled that Proposition 209's prohibition of discrimination based on race prohibited the employment outreach program at issue. The Court ruled that the prospect that federal nondiscrimination law might not restrict such a program had "no bearing" on its state-law analysis.
10. See 59 Fed. Reg. 8,756 (February 23, 1994).
11. 34 C.F.R. 100.3.
12. At the same time, data requests from OCR law provide use background information. See Appendix C for Sample OCR Data/Information Requests. See also n. 7, above.
13. The Office for Civil Rights enforces several federal civil rights laws that prohibit discrimination in programs or activities that receive federal financial assistance from the Department of Education. Discrimination on the basis of race, color, and national origin is prohibited by Title VI of the Civil Rights Act of 1964; discrimination on the basis of gender is prohibited by Title IX of the Education Amendments of 1972; discrimination on the basis of disability is prohibited by Section 504 of the Rehabilitation Act of 1973; and discrimination on the basis of age is prohibited by the Age Discrimination Act of 1975. These civil rights laws enforced by OCR extend to all state education agencies, elementary and secondary school systems, colleges and universities, vocational schools, proprietary schools, state vocational rehabilitation agencies, libraries, and museums that receive U.S. Department of Education funds. Areas covered may include, but are not limited to: admissions, recruitment, financial aid, academic programs, student treatment and services, counseling and guidance, discipline, classroom assignment, grading, vocational education, recreation, physical education, athletics, housing, and employment. OCR also has enforcement responsibilities under Title II of the Americans with Disabilities Act of 1990, which prohibits discrimination on the basis of disability by public entities, whether or not they receive federal financial assistance. See generally, <http://www.ed.gov/about/offices/list/ocr/index.html> for a comprehensive description of OCR's mission and scope of authority.

## **Section Two: Action Steps**

Taking issue with the majority's conclusion in *Grutter*, which upheld the University of Michigan's race- and ethnicity-conscious law school admissions policy, Justice Scalia highlighted questions that may yet surface in the context of future litigation. These questions merit consideration as institutional policies are developed:

[F]uture lawsuits will presumably focus on whether the discriminatory scheme in question contains enough evaluation of the applicant as an individual, and sufficiently avoids separate admissions tracks to fall under *Grutter* rather than *Gratz*. Some will focus on whether a university has gone beyond the bounds of a good faith effort and has so zealously pursued its critical mass as to make it an unconstitutional de facto quota system, rather than merely a permissible goal. Other lawsuits may focus on whether, in the particular setting at issue, any educational benefits flow from racial diversity. (That issue was not contested in *Grutter*; and while the opinion accords "a degree of deference to a university's academic decisions," deference does not imply abandonment or abdication of judicial review.) Still other suits may challenge the bona fides of the institution's expressed commitment to the educational benefits of diversity that immunize the discriminatory scheme in *Grutter*. (Tempting targets, one would suppose, will be those universities that talk the talk of multiculturalism and racial diversity in the courts but walk the walk of tribalism and racial segregation on their campuses—through minority-only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies.) And still other suits may claim that the institution's racial preferences have gone below or above the mystical *Grutter*-approved "critical mass." Finally, litigation can be expected on behalf of minority groups intentionally shortchanged in the institution's composition of its generic minority "critical mass." I do not look forward to any of these cases.

*Grutter v. Bollinger*, 539 U.S. at 348-49 (Scalia, J., dissenting) (with selected internal quotation marks and citations omitted.)

### III. The Process of Institutional Self-Assessment: What Steps Should College and University Officials Take to Help Ensure that Their Diversity-Related Policies Are Educationally and Legally Sound?

#### A. In General

Although the federal legal standards regarding race- and ethnicity-conscious practices are unique, they do not fundamentally change the basic steps of strategic planning that higher education officials should pursue, even when developing institutional policies of a more general nature: establish clear and concrete goals; devise strategies to achieve those goals; and evaluate results following policy implementation, making changes as necessary. In fact, understood at its broadest level, the strict scrutiny analysis centers precisely on these elements.

1. **Establishing clear goals and objectives.** Higher education institutions must be able to justify their race- and ethnicity-conscious programs with compelling interests, which are clearly defined and central to the achievement of the institutions' educational mission.
2. **Devising appropriate strategies.** Higher education institutions must be able to demonstrate that the means used to achieve their compelling ends are in fact designed and implemented in ways that materially advance those goals.
3. **Reviewing and evaluating results.** Higher education institutions must periodically evaluate their programs to ensure continued compelling interests and the implementation of appropriate strategies advancing those interests; and they must make changes when necessary (for instance, as institutional goals change or as evidence indicates that policies are not having the desired effect).

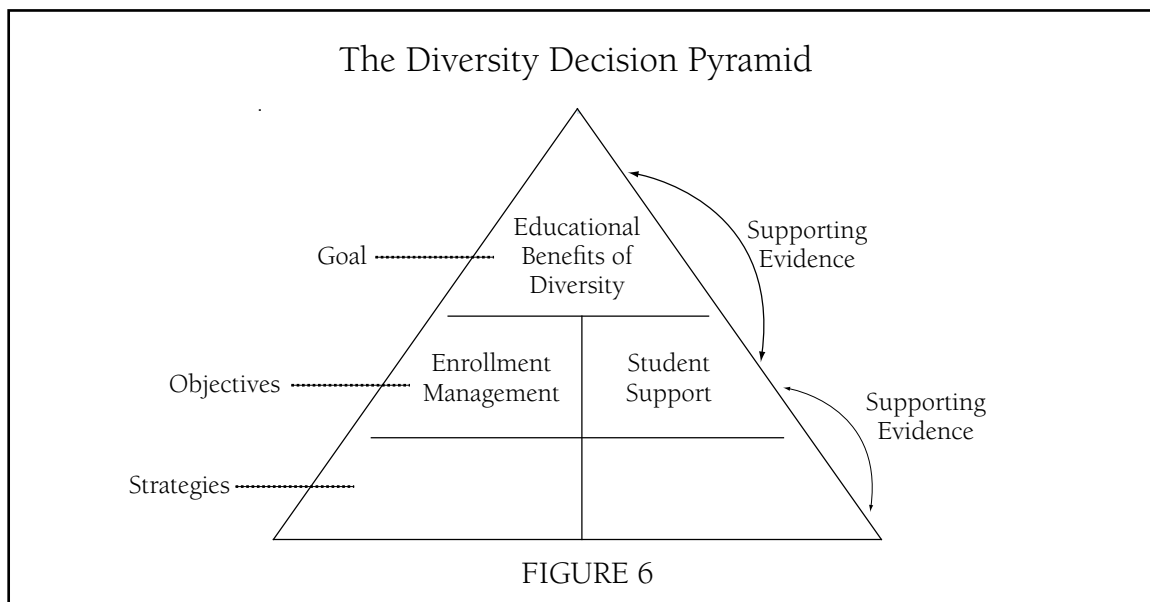
Indeed, when it comes to the use of race- and ethnicity-conscious practices, including those integral to recruitment, outreach, and retention programs, process matters—and it matters a lot.

First, in cases where diversity interests are implicated, the policy goals should be mission related and reflect a strong institutional commitment. Although that commitment can take many forms, the importance of support from the highest levels of the institution (as well as throughout the institution) cannot be underestimated. Without a strong connection to the core institutional mission, such policies are less likely to be deemed by federal courts as compelling to the institution. Second, without the necessary institutional support, the challenge of administering an appropriately resourced process of rigorous, periodic review of race- and ethnicity-conscious policies becomes more daunting. And, absent that process, race- and ethnicity-conscious recruitment, outreach, and retention programs are at substantially greater risk of successful legal challenge. In short, it is crucial to establish a process that will encourage federal court deference to educational judgments—even



in cases where the courts might not agree with the institution's ultimate judgments.<sup>1</sup> Third, and correspondingly, the design and implementation of such policies cannot be evaluated in a vacuum, consistent with prevailing legal standards. In other words, an examination limited to all recruitment, outreach, and retention programs is unlikely to suffice in an effort to establish that a particular race-conscious practice is (among other things) narrowly tailored. Rather, all practices that support relevant diversity goals are likely to be important in any determination about the relative need for a particular race-conscious practice—in light of all other efforts and available race-neutral alternatives.

To visually capture the concept of a holistic process of review, think of a pyramid, such as the one pictured in Figure 6. The top of the pyramid represents the institution's core education goals, such as its interest in promoting the educational benefits of diversity. It is those benefits that a court will examine to determine if they are sufficiently compelling to justify race- or ethnicity-conscious action. To achieve these goals, institutions may establish specific objectives, relating to enrollment management or to student support (e.g., creating an environment that can promote the identified education goals). To achieve those objectives and the broader goals that are potentially compelling, institutions may adopt a range of strategies—from early outreach and recruitment strategies to student support and retention strategies. Strategies that consider race or ethnicity (as part of recruitment, admissions, financial aid, retention, etc.) should be evaluated in terms of how well they promote the institution's mission-driven goals (at the top of the pyramid). This requires thinking through the chain of inferences, from the given strategy to its particular objectives to the overarching goals, and identifying concrete evidence that links each step in that inferential chain to the next step. Further, the strategies should be evaluated collectively in terms of how well they work together to promote those goals in the most effective and least race-conscious manner (across the foundation of the pyramid). In this sense, there should be both a “vertical alignment” (in which the diversity-related strategies are clearly mapped against institutional objectives and goals) and a “horizontal alignment” (in which the various strategies are evaluated holistically).<sup>2</sup>



## B. Action Steps

It is critical that higher education institutions establish a systematic process by which to periodically review their diversity goals, policies, and results—all in the context of educational research and legal developments. The law demands no less.

Although the law has not spelled out the details of what may be involved in such a review, higher education institutions can follow the series of practical steps described below, which are designed to ensure a focus on the right questions in the right way with the right people—with the goal of achieving the right result: legal compliance and educational soundness.

### 1. *INVENTORY: Know Your Programs.*

The first phase of any effective programmatic review will involve the collection and assembly of all relevant information related to the issues to be addressed. Individuals who have relevant institutional expertise or history should be included in conversations to ensure the development of a comprehensive, fact-based initial inventory of diversity-related policies and practices. As part of this initial effort, institutions should ensure that the particular uses of race and ethnicity within discrete programs are well understood.

A critical facet of the information gathering phase will involve the inventory of all race- and ethnicity-conscious policies and practices. The law's demand that institutions evaluate viable race-neutral alternatives (as well as strategies that may achieve the same compelling ends by a less extensive use of race or ethnicity) highlights the need for institutions to cast their nets wide as part of an initial inventory, including all policies or practices designed to support institutional diversity goals (even when they are race neutral). Correspondingly, even if an institution's particular focus or concern may relate to specific policies, information regarding *all* relevant policies and practices should be included in an initial inventory—including, for instance, all admissions, financial aid, outreach, recruitment, and retention policies that bear on diversity goals.

With respect to recruitment, outreach, and retention programs, in particular, officials should also include externally funded race- or ethnicity-conscious programs in cases where the higher education institution supports (through, e.g., the administration of the program) the operation of those programs. These may include programs that are funded by private sources, as well as programs that are authorized or funded by federal or state law.

### 2. *ASSEMBLE: Establish an Interdisciplinary Team.*

Personnel are key in an effective initial inventory and assessment of diversity-related programs. Therefore, higher education institutions should assemble (both in the short term and as part of a longer term strategic planning process) an interdisciplinary team representative of many facets of the institution that can effectively evaluate the relevant policies and programs in light of institutional goals (and legal requirements).

The composition of an institution's evaluation team should be carefully considered. In particular, the team should involve representatives from the college or university's top administrative levels, and include representatives of specific programs and of institutional perspectives that have a bearing on diversity-related goals and strategies (from the top

down). Also, individuals who can help assemble the research bases upon which policies can be evaluated should be included. In addition, because the use of race or national origin in recruitment, outreach, and retention programs (as elsewhere) inevitably raises questions of federal (and frequently state) legal compliance, lawyers with an understanding of these issues should be included in the process.

Higher education officials should also consider the extent to which decisions regarding the establishment of diversity goals and the corresponding use of race or ethnicity in recruitment, outreach, and retention programs merit broader public engagement. Communications experts may be a valuable team addition to facilitate this process. In many cases, broader community input (including, for instance, perspectives of employers of university graduates) can be useful as part of the ongoing process of policy development and evaluation.

### ***3. JUSTIFY: Ensure the Existence of Clearly Defined, Mission-Driven Diversity Goals—Supported by Evidence.***

As federal law makes abundantly clear, race- and ethnicity-conscious policies will only survive under strict scrutiny if the justifications for those policies are well developed and supported by substantial evidence. In practical terms, this means several things.

First, higher education officials should ensure that their educational goals are clearly stated and understood. With respect to diversity goals, in particular, there must be clarity regarding what kind of student body the institution wants to attract (and why) and how the institution conceptualizes (or defines) its objectives. [See Figure 6.] (As explained in Chapter V, the critical mass theory is one avenue that colleges and universities may consider when defining their diversity goals.) Ultimately, given the obligation to ensure that race- and ethnicity-conscious measures are limited in both scope and time, higher education officials should be able to define success with respect to their goals, and know it when they've achieved it.

Second, and as explained elsewhere in this manual, federal law should affirm sound educational judgments. By definition, those judgments should have a solid empirical foundation, with clear and relevant supporting evidence. The sources of evidence can be (and likely will be) many, including:

- Institution-specific policies, including relevant mission statements and strategic goals;
- Institution-specific research and analysis (e.g., student surveys, student data, etc.), including information that reflects assessments about the relative need for and success of the policies in question;
- Social science research (regarding, for example, the educational benefits of diversity) that supports institution-specific goals; and
- Statements or opinions by institutional leaders, professors, students, and employers, which are based on actual experience and which shed light on the educational foundations and justifications that support the institution's diversity-related goals.

In the end, the totality of the evidence should support conclusions that race- and ethnicity-conscious policies and practices are supported by compelling interests, which are mission-driven.

#### ***4. ASSESS: Evaluate the Design and Operation of the Policies In Light of Institutional Goals.***

Once relevant information has been gathered regarding an institution's race- and ethnicity-conscious policies, and institutional goals are clearly defined and grounded in relevant evidence, the design and operation of those programs should be periodically evaluated in light of narrow-tailoring standards, with the overarching aim being to ensure that the use of race or ethnicity is as limited as possible given the compelling institutional interests that those policies promote. This means that race- and ethnicity-conscious policies must be:

- As flexible as possible with regard to the use of race or ethnicity, given institutional aims;
- Necessary, in light of possibly viable race-neutral alternatives;
- Of minimal burden to nonqualifying students, based on race or ethnicity; and
- Periodically reviewed and evaluated against legal standards, with the goal of ultimately eliminating the use of race or ethnicity when institutional goals can be met and sustained without such policies.

#### ***5. ACT: Take Necessary Action Steps.***

Over time, a review of outcomes of race- and ethnicity-conscious efforts (in light of institutional goals) should lead to appropriate adjustments—to ensure that policies and practices are in fact materially advancing goals in appropriate ways and that, when goals are met, relevant policies and practices are modified to reflect changes in circumstances.

### **C. Key Questions**

As part of this five-step process, a series of 15 key questions can serve as a basis for meaningful programmatic evaluation—in both educational and legal terms.<sup>3</sup> Although no one set of questions can completely address the many nuances and variables that enter into the realm of evaluating and managing legal risk related to the achievement of diversity-related goals, these questions can provide a practical frame of reference around which to structure that evaluation.

In addition, although the focus of this manual is on recruitment, outreach, and retention programs, the questions listed below are framed in most instances more generally—to ensure that the substantive focus suggested by these questions reflects the process recommendations set forth in Action Step 1, above, and the importance of the holistic review illustrated in Figure 6.

The questions below are followed by brief explanations of the legal relevance of the inquiry, and by a less complex statement of the relevant point in “The Bottom Line...” In many cases, the explanations identify factors that are more or less likely to lead to compliance with prevailing federal legal standards. Institutional specific facts will ultimately control judgments regarding these issues, however.

## **WHAT policies and programs are diversity related and subject to strict scrutiny?**

1. *Have you assembled information regarding all diversity-related policies and programs and can you:*

- *Identify each group and the name and title of each person that was involved in their development, with copies of related meeting minutes; and*
- *Locate copies of documents related to all reviews of each recruitment, outreach, and recruitment policy after its adoption, and identify staff that conducted each review?*

Success in the legal defense of any race- or ethnicity-conscious policy or program begins and ends with evidence. Be sure that appropriate records are maintained to reflect the process, rationales, and support for adopting race- or ethnicity-conscious policies and programs.<sup>4</sup>

***The Bottom Line...The collection of relevant information over time regarding decisions related to diversity programs can establish important “process” foundations.***

2. *Is race or ethnicity a factor in diversity-related policies and programs?*

If the answer to this question is no, then it is less likely that the policies or programs will be subject to strict scrutiny. If the answer to this question is yes, then the question of the probable scrutiny employed by a federal court will in most cases depend upon whether tangible benefits are provided to certain students—and not to others—based upon their race or national origin. To the extent that race-conscious programs (such as certain outreach programs) do not provide such benefits and are, instead, designed to expand the pool of qualified applicants, they may be more likely to be viewed as “inclusive” and not subject to strict scrutiny. All other race-conscious policies (even if race is one of many factors), including admissions and financial aid policies, will likely be subject to strict scrutiny.

***The Bottom Line...Race- or ethnicity-conscious recruitment and outreach programs that are merely designed to broaden the applicant pool are less likely to be subject to strict scrutiny. By contrast, programs that confer educational race-conscious opportunities or benefits (such as admissions or financial aid programs, and including some recruitment and outreach programs) are likely to be subject to strict scrutiny.***

3. *Is the administration and funding for race- or ethnicity-conscious programs provided by private sources? Does your institution support or administer any facet of the program?*

Purely private support of programs—even where based on race or ethnicity—is not subject to federal constitutional or Title VI prohibitions. (Note, however, that at least one federal statute—42 U.S.C. § 1981—may apply to such private conduct.) However, if a university helps administer or otherwise provides “significant assistance” to a private entity that supports those efforts, then strict scrutiny standards under the Equal Protection Clause and/or Title VI will likely be triggered (subject to the analysis suggested in question 2, above).

***The Bottom Line...***As a general rule, universities are not legally responsible for actions conducted by completely independent third parties, even where students attending those schools may be beneficiaries of that third-party action. However, if they assist in the administration of programs operated by third parties, they must be prepared to defend the lawfulness of those race- or ethnicity-conscious programs.

### ***WHY does an institution consider race or ethnicity?***

4. *What are the educational justifications for using race or ethnicity as part of diversity related efforts? Are those policies and programs mission driven?*

Race- or ethnicity-conscious policies and programs must be supported by a compelling interest. According to current case law, this means that the justifications must relate remedial efforts to eliminate the effects of past or present discrimination, or they must relate to mission-driven, diversity goals.

***The Bottom Line...***Have the foundations to support your use of race- or ethnicity-conscious policies and programs. Sound educational rationales that are mission driven enhance the odds of withstanding probing legal scrutiny.

5. *Are educational benefits associated with a diverse student body a foundation for race- and ethnicity-conscious policies and programs?*

If your justification for race- or ethnicity-conscious policies and programs is related to the educational benefits of diversity, then you should have educational foundations that support this position. These foundations should include evidence of mission-related benefits that stem from a diverse student body. The kinds of educational benefits that stem from student diversity that might support your program include improved teaching and learning, better understanding among students of different backgrounds, and enhanced preparation as citizens and professionals for an increasingly diverse workforce and society.

***The Bottom Line...***Diversity is not an end in itself. Your diversity interests must be associated with broader, institution-based educational goals.

6. *Is there evidence that the educational benefits you have identified flow from your race- and ethnicity-conscious policies and programs?*

The justifications for race- or national origin-conscious policies and programs should include substantial evidence, such as institution- or program-specific evidence (ranging from mission statements to research and data from institutional or other sources).

***The Bottom Line...***The claim of “it’s so because I say it’s so” will not withstand legal scrutiny, despite the academic freedom interests implicated in enrollment management practices. You should have evidence that race- and ethnicity-conscious programs *in fact* advance your diversity-related goals.

7. *Does the university work to ensure that its diversity-related education goals are implemented throughout the institution?*

The authenticity of the interests articulated as a justification for the use of race or ethnicity will receive scrutiny by those who challenge such programs. As a consequence, courts can be expected to examine the institutional commitment to the diversity interests that serve as a predicate for using race or ethnicity in recruitment, outreach, and retention programs. Therefore, attention to those goals and the across-the-board implementation of diversity policies is important.

***The Bottom Line...*Diversity-related institutional goals should be more than statements on a mission statement. The effort to achieve the educational benefits of diversity should be real and transcend all facets of the institution—from the top down, inside and outside of the classroom.**

8. *How is diversity defined? What are the measurable objectives by which success in achieving diversity goals is evaluated?*

From a federal legal standpoint, the term *diversity* must include more than a reference to race or ethnicity. Moreover, the educational goals associated with diversity should be defined with reference to benchmarks against which their success in helping achieve diversity-related goals can be assessed. (The University of Michigan successfully defined its diversity goals as seeking to attain a critical mass of underrepresented minority students. See pp. 43–46, below.)

***The Bottom Line...*In addition to making sure that you have an all-inclusive conceptualization of the term *diversity*, make sure that you’ve established clear benchmarks for evaluation. Can you define success with respect to your diversity-related policies and programs? How do you know it when you’ve seen it?**

### ***HOW have diversity-related policies and programs been designed and implemented?***

9. *Have race-neutral strategies (as supplements to and/or as possible alternatives to your race- or ethnicity-conscious program) been evaluated or tried?*

A key element of the narrow-tailoring requirement is the consideration of race-neutral alternatives. All race-neutral alternatives, regardless of how likely to achieve institutional goals, need not be exhausted to comply with federal legal standards. However, universities must give “serious, good faith consideration [to] workable, race-neutral alternatives that will achieve the diversity that the [institution] seeks.”

***The Bottom Line...*Think outside the box. What are the institutional impediments to achieving the goals of educational diversity, and have you considered all of the avenues for meeting those goals, be they race-specific or not?**

10. *Why were certain race-neutral strategies not tried? What were the deliberate and educational judgments that supported such a conclusion?*

There should be an empirical basis for not trying race-neutral strategies. The experiences of similar institutions or programs with race-neutral efforts can provide a basis for considering—and not trying—those strategies. By the same token, lessons derived from such experiences may suggest the need to try similar strategies.

***The Bottom Line...Brainstorm and evaluate—to ensure that the range of strategies (including race-neutral strategies) has been seriously considered in the context of how best to achieve diversity goals. Remember that the use of race or ethnicity is a means to an end—not an end in itself.***

11. *What results were achieved with the race-neutral strategies that were tried? Has a complete evaluation of those strategies been undertaken? To what end?*

An evaluation of race- and ethnicity-neutral strategies that are tried is a critical step in assessing the viability of such programs in light of overall goals and objectives. The failure to evaluate race-neutral strategies limits the credibility of any institutional claim about the real need for any race- or ethnicity-conscious program.

***The Bottom Line...Your race- or ethnicity-conscious programs should be evaluated to determine the extent to which they continue to serve as necessary and material means for achieving diversity-related ends, especially if race-neutral strategies or policies are effective in helping you meet your diversity-related educational goals.***

12. *What evidence establishes that the use of race- or ethnicity-conscious policies is necessary to achieve the educational goals associated with diversity objectives?*

The empirical foundation for making the case that such policies are necessary should include institution- or program-relevant research, data, and opinions (based upon academic judgments) about the need for race- and ethnicity-conscious policies. The use of race or ethnicity should demonstrably and significantly further diversity-related goals without unjustifiably underreaching or overreaching.

***The Bottom Line...Conclusions about the need for race- or ethnicity-conscious policies and programs are not worth much without strong, substantiating evidence (which should include program-specific information).***

13. *What role does race or ethnicity play in the design of diversity-related policies and programs? Is race or ethnicity an explicit condition of eligibility, or is it one factor among many?*

In admissions, race or ethnicity (if considered) must be one factor among many, rather than an automatic qualifier, to withstand “strict scrutiny.” In other contexts, certainly, programs will be more easily sustained where race operates as one factor among many.

***The Bottom Line...It is important to understand how race and ethnicity affect admissions; financial aid; and recruitment, outreach, and retention decisions—both on the front end, and from an after-the-fact view. While context may affect certain judgments, it is clear that the more diffuse the role of race and ethnicity in a program, the more likely it will withstand “strict scrutiny.”***



14. *What impact does the use of race or ethnicity have on applicants who do not receive the benefit of race or ethnicity consideration? Are students displaced from eligibility because of the use of race or ethnicity ?*

If the use of race or ethnicity has the effect of displacing students who do not receive favorable consideration because of their race or ethnicity, the practice is less likely to withstand legal review. If, however, the impact is more diffuse, then the program is in relative terms more likely to withstand federal scrutiny.

***The Bottom Line...***Evaluate the use of any race- or ethnicity-conscious program on students who do not receive the benefits of that program. The more pronounced the adverse impact, the more susceptible to successful challenge the practice.

15. *How frequently is the program's use of race or ethnicity reviewed to determine the need for continuing the race- or ethnicity-conscious nature of the program and the viability of race-neutral alternatives that (in conjunction or alone) may as effectively achieve the program's diversity-related goals?*

Under federal standards, race- or ethnicity-conscious programs are expected to have a "logical end point"—once the goals associated with the program are met and can be sustained without the consideration of race or ethnicity, or once it is determined that the program does not materially advance diversity-related goals. Institutions with race- and ethnicity-based recruitment, outreach, or retention programs should undertake a rigorous, periodic review of those programs in light of all other related efforts.

***The Bottom Line...***Race- and ethnicity-conscious programs cannot be designed to continue forever; they "must be limited in time to achieve institutional ends." In the context of clear benchmarks of success, review these programs periodically and take appropriate action to ensure that legal standards are met.

### Chapter III Endnotes

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1. Federal courts addressing a wide range of legal challenges in the education setting have, in fact, repeatedly inquired about the foundations (both in terms of process and substance) supporting positions advanced by higher education institutions. Nowhere is this focus more visible than in the context of race- and ethnicity-conscious policies, where the requirement of “periodic review” is a specific element of the narrow tailoring standard that must be satisfied in order to demonstrate compliance with federal law. *See* Chapter VI.
2. *See generally* Scott Palmer, “A Policy Framework for Reconceptualizing the Legal Debate Concerning Affirmative Action in Higher Education” in *Diversity Challenged Evidence on the Impact of Affirmative Action* (Harvard Educ. Pub. Group, 2001) citing Philip Zelikow, *Foreign Policy Engineering: From Theory to Practice and Back Again*, 18 *International Security* 143 (Spring 1994).
3. These questions are derived from Coleman and Palmer, *Diversity in Higher Education: A Strategic Planning and Policy Manual Regarding Federal Law in Admissions, Financial Aid, and Outreach* (College Board, 2004) and information received in response to a U.S. Department of Education Freedom of Information Act request, *see* Chapter I, n. 2.
4. As part of the process of recordkeeping, it is important to distinguish between records that may be subject to state open records requirements and those that should be designated as confidential, within the attorney–client privilege.

## **Section Three: Key Issues and Analysis**

In the landmark decision of *Adarand v. Peña*, the U.S. Supreme Court explained the reasons that strict scrutiny is “essential” when reviewing classifications based on race and ethnicity:

Absent searching judicial inquiry into the justification for “...race-based measures, there is simply no way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to ‘smoke out’ illegitimate uses of race by assuring that the [relevant] body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen ‘fit’ this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype...” “More than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system.”

*Adarand v. Peña*, 515 U.S. 200 (1995) (internal citations omitted).

## **IV. Strict Scrutiny: Which Recruitment, Outreach, and Retention Programs Might Be Subject to Rigorous Legal Review?**

The first issue that must be addressed when reviewing a college's or a university's recruitment, outreach, and retention programs is which, if any, of those programs are likely subject to strict scrutiny (and whether, if structured differently, those programs may not be subject to strict scrutiny).

### **A. In General**

Federal courts have consistently applied strict scrutiny to policies that treat individuals differently based on their race or ethnicity.<sup>1</sup> The application of strict scrutiny to a particular recruitment, outreach, or retention program (as discussed in detail in the following chapters) does not mean, however, that the practice is unlawful. While the strict scrutiny standard is demanding, to be sure, strict in theory does not mean fatal in fact.<sup>2</sup> Indeed, in *Grutter* (which upheld the University of Michigan Law School's admissions program under a strict scrutiny analysis), the Court observed:

Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and sincerity of the reasons advanced by the governmental decision-maker for the use of race in that particular context.<sup>3</sup>

Also in the higher education setting, the status of the entity responsible for making the race- or ethnicity-conscious recruitment, outreach, or retention program decisions is unlikely to affect the level of legal scrutiny applied. The Fourteenth Amendment to the U.S. Constitution, which applies to "state actors" or public entities, is coextensive with Title VI of the Civil Rights Act of 1964 (Title VI), which applies to any recipient of federal education funds, public or private. Therefore, a college's or university's status as public or private is, in most cases, unlikely to affect the determination regarding whether strict scrutiny applies to a particular program. Moreover, though an issue of some continuing debate in the federal courts, arguments exist that support the extension of strict scrutiny principles to purely private conduct involving contracts under 42 U.S.C. §1981. That statute applies to both public and private entities (irrespective of their status as recipients of federal funds) in cases in which they make or enforce race- and ethnicity-conscious contracts.<sup>4</sup>

### **B. Practices That May Be Subject to Strict Scrutiny**

Under federal law, strict scrutiny of educational programs is implicated when two conditions are met: [1] they are race- or ethnicity-conscious; and [2] they confer benefits or opportunities for certain students based on their race or ethnicity.

### **1. Race- and ethnicity-conscious programs.**

Under federal law, race- and ethnicity-conscious programs that include race or ethnicity as an express factor in selection or eligibility decisions will likely trigger strict scrutiny<sup>5</sup>—subject to certain rules discussed in Section B.2., below. In addition, facially race- or ethnicity-neutral programs may be deemed race- or ethnicity-conscious in cases where the intent of those programs is predominantly motivated by race or ethnicity.<sup>6</sup> (By contrast, race- or ethnicity-neutral policies that may have only a disparate impact based on race or ethnicity generally do not implicate strict scrutiny.<sup>7</sup>)

#### **Programs for international students.**

One issue that often arises when higher education institutions develop programs designed to promote their diversity interests relates to the standard by which policies that favor “international students” should be judged. Although little case law in the area exists, some basic equal protection and Title VI principles can inform that determination. First, to the extent that these students are defined with reference to a particular national origin (for example, students of Irish descent), that definition likely triggers strict scrutiny because any benefit conferred would be based on the ethnicity of the student involved. By contrast, if the program eligibility is determined based on geography (such as to “students who reside in Ireland”) and is not based on ethnic origin, then the policy is arguably subject to a more relaxed standard of review because its focus is on the residence of an individual, regardless of ethnicity.

That conclusion should be considered in light of the U.S. Supreme Court authority that addresses discrimination on the basis of alienage—another classification that is subject to strict scrutiny review, at least in certain contexts. In *Nyquist v. Mauclet*,<sup>8</sup> the Court established principles that apply to discrimination *against* resident aliens in student financial aid programs, striking down a state statute that barred resident aliens from eligibility for scholarships (and other financial assistance) under a strict scrutiny analysis. Importantly, however, the reach of that decision may be limited. Although federal rules have not been definitively established, the prevailing view is that discrimination against nonresident aliens may not trigger strict scrutiny review, whereas discrimination against resident aliens will.<sup>9</sup>

#### **Programs for Native American and Native Hawaiian students.**

Given the unique status and history of Native Americans and Native Hawaiians, questions have arisen regarding the potential application of strict scrutiny to recruitment, outreach, and retention programs that benefit those two groups. As a general rule, there appear to be limited arguments supporting the exclusion of such programs from strict scrutiny review. The extent to which such arguments can be pressed likely depends on whether the eligibility factor associated with recruitment outreach or retention programs actually distinguishes among students upon race or ethnicity (and would more likely be subject to strict scrutiny), or whether the eligibility factors are based on political affiliations (or related and specific congressional authorization, e.g., referencing a specific tribal affiliation) associated with the unique status of those groups (and may not be subject to strict scrutiny).

Although definitive guidance in this area does not exist, both federal court decisions and the Department's Title VI financial aid policy are instructive. First, the U.S. Supreme Court has suggested that in most circumstances Native American and Native Hawaiian classifications are likely to be viewed as racial classifications. In 2000, the Court concluded that voting restrictions in favor of Native Hawaiians were racial classifications. In that case, the Court cited to and relied upon cases involving Native American classifications, concluding that such classifications could only be deemed nonracial when the classification at issue related to "members of a federally recognized tribe" (and not Native Americans, generally), and the preference at issue was directly associated with fulfilling Congress's "unique obligation toward the Indians" and "further[ing] Indian self-government."<sup>10</sup> Correspondingly, in its Title VI Policy Guidance on financial aid, the U.S. Department of Education stated that it had "found no legal authority for treating affirmative action by recipients of Federal assistance any differently if the group involved is Native Americans or Native Hawaiians," but acknowledged that its policy did not "address the authority of tribal governments or tribally controlled colleges to restrict aid to members of their tribe."<sup>11</sup>

## ***2. Programs that confer benefits or opportunities based on race or ethnicity.***

Race- or ethnicity-conscious, recruitment, outreach, and retention programs will likely trigger strict scrutiny if they confer benefits and opportunities to students, to the exclusion of others.<sup>12</sup> Unlike admissions decisions and financial aid awards, recruitment and outreach programs may not in all instances confer opportunities or benefits sufficient to trigger strict scrutiny. In multiple recruitment and outreach contexts, federal courts have often characterized recruitment and outreach efforts that were, in fact, race conscious, as race neutral because of their "inclusive" character. In such cases, those programs have not been deemed subject to strict scrutiny at all because they have not been deemed to result in "unequal treatment"—the lynchpin of the inquiry. At the same time, just as all admissions practices are not the same and may lead to differing results under federal law, so too are distinctions to be made among recruitment and outreach programs. The mere fact that a program is labeled "recruitment" does not insulate it from strict scrutiny any more than the fact that an admissions practice is race conscious dooms it under federal law. In short, facts matter. The way in which recruitment and outreach programs operate (and, consequently, are characterized by federal courts) will drive the determination about whether race-conscious recruitment and outreach programs confer benefits or opportunities sufficient to trigger strict scrutiny.

That being said, a number of federal courts in various jurisdictions and contexts have ruled that recruitment and outreach efforts that are designed to attract a diverse pool of qualified applicants (and that, by definition, do not operate to exclude individuals based on race from eligibility or selection) are generally likely to be considered inclusive, and therefore not subject to strict scrutiny.<sup>13</sup> A number of cases suggest that the likelihood that those efforts would not trigger strict scrutiny is increased where such recruitment or outreach practices are balanced—that is, if targeted but not limited to a particular group of individuals on the basis of race or ethnicity—they are less likely to trigger strict scrutiny.<sup>14</sup> Thus, legal support exists to bolster arguments that race-conscious recruiting and outreach efforts that involve the establishment of relationships with other institutions, participating in forums, and contacting professional organizations may not "confer a benefit or impose a burden" sufficient to trigger strict scrutiny.<sup>15</sup> Other related practices that have not triggered

strict scrutiny have included: (1) the establishment of diversity-related goals, without corresponding race-conscious practices; and (2) race- and ethnicity-conscious data collection efforts regarding, e.g., an applicant pool or those accepted from an applicant pool.<sup>16</sup>

By contrast, a number of federal courts addressing recruitment and outreach programs have ruled that government rules that compel certain race-conscious actions in the context of limited resources of parties subject to those rules are likely subject to strict scrutiny when they result in more limited information being provided to certain (nontargeted) parties based on race, or when they influence ultimate selection decisions based on race.<sup>17</sup>

## C. Program Funding and Administration

The source of the support for the program, whether institutional or external, is unlikely to affect the application of strict scrutiny to the higher education institution providing the program, so long as that institution is the entity responsible for making the determination of student eligibility for the program.

### *1. External, private support of race- and ethnicity-conscious programs.*

Two basic issues arise regarding the application of strict scrutiny principles to circumstances in which higher education institutions receive external, private funding that is race- or ethnicity-conscious. From the standpoint of potential institutional liability, the issue to be addressed is whether the institution acts in such a way that the otherwise private race- or ethnicity-conscious conduct becomes the responsibility of the institution. Additionally, irrespective of potential institutional liability, another issue is whether the private action may subject the private donor to strict scrutiny.

First, in cases where higher education institutions are directly involved in the administration of private, externally supported programs, then those institutions are likely to be subject to strict scrutiny liability for those private practices, given their role in actively supporting those programs. In particular, Title VI prohibits discrimination “directly or through contractual or other arrangements” and “in the administration” of programs.<sup>18</sup> As applied by the U.S. Department of Education’s Office for Civil Rights, potential Title VI liability (and consequently, the application of strict scrutiny) extends to situations in which higher education institutions fund, administer, or significantly assist in the administration of private programs. In such cases, that action will likely be deemed to be “within the operations of the college” and, therefore, subject to strict scrutiny.<sup>19</sup>

U.S. Department of Education regulations highlight the kinds of practices that are likely to subject higher education institutions to potential liability pursuant to strict scrutiny for the operation of private race- or ethnicity-conscious scholarships. As potentially useful points of consideration related to recruitment, outreach, and retention programs, these include:

- Institutional assistance in setting criteria for the selection of eligible students;
- Institutional assistance in selecting qualifying students; and



- Institutional assistance in supporting the external funder through advertising (beyond the general assistance provided to any outside entity that seeks to advertise its programs).<sup>20</sup>

Second, even where there is no issue of whether the higher education institution is providing significant assistance to the private recruitment, outreach, or retention program, issues arise regarding the potential strict scrutiny liability of the private entity itself (even though not a recipient of federal funds). As discussed above, federal courts (including, recently, the U.S. Supreme Court in *Gratz and Grutter*) have raised the prospect that even private donors may be subject to strict scrutiny in cases where they make or enforce contracts (which may include recruitment, outreach, and retention programs) that discriminate based on race or ethnicity. Although that point has not been definitively resolved, private funders should be advised of the potential need to evaluate their race- or ethnicity-conscious programs under the standards described in this manual.<sup>21</sup>

## ***2. Federal and state authorized race- and ethnicity-conscious programs.***

Questions have also arisen regarding whether strict scrutiny applies to congressionally and state-authorized race- or ethnicity-conscious programs. Case law and U.S. Department of Education policies make it clear that in certain cases, while subject to strict scrutiny standards as a matter of constitutional law (applicable to public entities), congressionally authorized programs may not be subject to that review as a matter of federal statutory law (e.g., Title VI). Specifically, the U.S. Department of Education's Title VI Policy Guidance regarding financial aid affirms that a college may award race- or ethnicity-conscious financial aid without the prospect of strict scrutiny review in cases where the aid is awarded pursuant to a federal statute that specifically authorizes the award of such aid.<sup>22</sup> That principle would likely extend to recruitment, outreach, and retention programs operated pursuant to federal law. Thus, while congressionally authorized race- and ethnicity-conscious programs remain subject to strict scrutiny when awarded by public entities (state actors) subject to constitutional principles, they may not be subject to that review when awarded by private institutions of higher education subject only to Title VI.

By contrast, any state-sanctioned race- or ethnicity-conscious recruitment, outreach, or retention program will likely subject relevant state entities to strict scrutiny, subject to the rules discussed above. State entities that are responsible for the funding or administration of those programs will likely be (independently) subject to strict scrutiny liability, as well.

## ***Subject to Strict Scrutiny?***

The matrix below is intended to capture the “big picture” regarding the key inquiries discussed in Chapter IV, along with a series of types of programs that many colleges and universities administer in the context of their recruitment, outreach, and retention efforts. Collectively, the matrices at the ends of Chapters IV, V, and VI may serve as a tool to help facilitate the inventory of relevant programs and frame discussions associated with program evaluations.

|  | Race/Ethnicity<br>Conscious? | Benefit Conferred? | Administration/<br>Funding Issues? |
|--|------------------------------|--------------------|------------------------------------|
| <b>Outreach and Recruitment Programs</b>   |                              |                    |                                    |
| Middle and High School Academic Support  |                              |                    |                                    |
| High School Alternative  |                              |                    |                                    |
| Summer and/or Weekend Enrichment Programs  |                              |                    |                                    |
| Motivational Programs  |                              |                    |                                    |
| Family Support Programs  |                              |                    |                                    |
| Informal Volunteer Work  |                              |                    |                                    |
| Direct Mail Marketing Through the Purchase of Specific Student Contact Information |                              |                    |                                    |
| Special Publications   |                              |                    |                                    |
| Minority Media Advertising   |                              |                    |                                    |
| Campus Visit/Orientation Programs  |                              |                    |                                    |
| Campus Academic/Enrichment Programs  |                              |                    |                                    |
| Feeder Schools   |                              |                    |                                    |
| Specialized Admissions Officers  |                              |                    |                                    |
| Alumni Volunteer Programs  |                              |                    |                                    |
| High School Visits   |                              |                    |                                    |
| Faculty, Coaches, and Administrators Supporting Admissions Goals                   |                              |                    |                                    |
| Student Contacts   |                              |                    |                                    |
| Other Activities   |                              |                    |                                    |
| <b>Retention and Student Services Programs</b>                                     |                              |                    |                                    |
| Academic Support   |                              |                    |                                    |
| Social Support and Acclimation   |                              |                    |                                    |
| Mentoring  |                              |                    |                                    |
| Student Activities   |                              |                    |                                    |
| Other Activities   |                              |                    |                                    |

## Chapter IV Endnotes

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1. See *Adarand v. Peña*, 515 U.S. at 224; see also *In re Seton Hall University School of Law*, OCR Case No. 02-04-2099 (ruling that complaint without specific supporting allegations of different treatment based on race or national origin failed to state a Title VI claim.)
2. See *Grutter*, 539 U.S. at 326.
3. *Grutter*, 539 U.S. at 327. See also *Adarand*, 515 U.S. at 228. (“[S]trict scrutiny is not blind to context...[T]o determine whether a particular racial classification offends the equal protection guarantee, a reviewing court must factor any and all relevant contextual considerations into the decisional calculus.”)
4. In both *Grutter* and *Gratz*, the U.S. Supreme Court ruled that “the prohibition against discrimination in §1981 is co-extensive with the Equal Protection Clause.” In *Doe v. Kamehameha Schools*, No. 04-15044 (9th Cir., August 2, 2005), however, a federal circuit court citing to other Supreme Court authorities applied a standard less than strict scrutiny to a nonrecipient private school facing a §1981 discrimination challenge. In that case, the court reasoned that the Court’s ruling in the Michigan cases suggested only that intentional discrimination was a requirement of both §1981 and the Equal Protection Clause.
5. Ethnicity, or national origin, refers to heritage, nationality group, lineage, or country of birth of the person or the person’s parents or ancestors before their arrival in the United States. See American Community Survey, U.S. Census Bureau, *Subject Definitions*, [www.census.gov/acs/www/UserData/Def/Hispanic.htm](http://www.census.gov/acs/www/UserData/Def/Hispanic.htm). See also *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973) (in a Title VII employment discrimination case, ruling that a citizenship requirement did not constitute discrimination based on national origin as long as it was not a pretext for national origin discrimination, and that “the term ‘national origin’ on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came”); *Dawavendewa v. Salt River Project*, 154 F.3d 1117 (9th Cir. 1998) (ruling that “national origin” includes “the country of one’s ancestors” in a Title VII employment discrimination case); *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 Fed. Reg. 58,782 (October 30, 1997) issued by the Office of Management and Budget.  
Some federal courts have rejected an overly rigid construction of a definition of national origin by finding ethnicity-conscious different treatment, based on an individual having the “physical, cultural or linguistic characteristics of a national origin group.” See *Bennun v. Rutgers State University*, 941 F.2d 154, 173 (3d Cir. 1991) (stating that national origin is a function of one’s outward physical appearance because “discrimination stems from a reliance on immaterial outward appearances that stereotype an individual with imagined, usually undesirable, characteristics thought to be common to members of the group that shares these superficial traits”); *Harel v. Rutgers*, 5 F.Supp.2d 246 (D.N.J. 1998) (finding that a man who was born in Czechoslovakia could still claim discrimination based on being perceived as Israeli because his appearance and accent could lead one to believe he was of Israeli origin); *Almendares v. Palmer*, 222 F.R.D. 324 (D. Ohio, 2004) (ruling that a class of Spanish speakers could claim national origin discrimination based on shared linguistic characteristics). See also *Guidelines on Discrimination Because of National Origin*, 45 Fed. Reg. 85,632 (December 29, 1980).
6. Programs that are neutral on their face may trigger strict scrutiny in the event that “discriminatory intent or purpose” is a primary motivating factor behind the program. See *Village of Arlington Heights v. Metro. Housing Develop. Corp.*, 429 U.S. 252, 265 (1977); *Hunter v. Underwood*, 471 U.S. 222, 225 (1985). The impact of the questioned policy (whether, e.g., it “bears more heavily on one race than another,” *Washington v. Davis*, 426 U.S. 229, 242 (1976)), standing alone, is generally insufficient to demonstrate a constitutional violation, but it “may provide an important starting point” in the analysis. See *Village of Arlington Heights*, 429 U.S. at 266. See generally, Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 Baylor L. Rev. 289 (2001) (concluding that if a policy would not be enacted “but for” an intent to cause a racial effect, it should be subject to strict scrutiny).
7. A disparate impact inquiry would involve a determination of whether the effect of eligibility criteria resulted in an adverse impact on a group, identifiable by race or ethnicity, and not others, and if so, whether a sufficient justification existed for the practice. See Coleman, *Excellence and Equity in Education: High Standards for High-Stakes Tests*, 6 Va. J. Soc. Pol’y & L. 81, 98 (1998) (citing federal authorities). Notably, the existence of statistically significant impact is not a per se violation of the law. Rather, the existence of the impact prompts an examination of the justification (or lack thereof) of the particular practice at issue. See *In re California State University System*, OCR Case Nos. 09992143 and 09992144 (concluding that the disproportionate adverse impact on minority students of an institution’s achievement standards and prerequisites did not, standing alone, constitute a Title VI violation).
8. 432 U.S. 1 (1977).
9. See, e.g., *Leclerc v. Webb*, 270 F. Supp. 2d 779 (E.D. La. 2003) (“Non-immigrant aliens ...are sufficiently different from citizens and immigrant aliens in relevant respects that distinctions between them should not call for heightened scrutiny.”); *Wallace v. Calogero*, 286 F. Supp. 2d 748 (E.D. La. 2003) (Nonimmigrant resident aliens as a class are a “prime example of a ‘discrete and insular’ minority for whom...heightened judicial solicitude is appropriate.”) (emphasis added.); *Ahmed v. University of Toledo*, 664 F. Supp. 282 (N.D. Ohio 1987) (“International students (nonimmigrant alien students) are not a suspect classification.” (citations omitted) See generally Kaplan and Lee, *The Law of Higher Education* (Third Edition, 1995) at pp. 436–441.

10. *Rice v. Cayetano*, 528 U.S. 495 (2000). The Court's decision was rendered pursuant to the Fifteenth Amendment of the U.S. Constitution, which (among other things) prohibits states from denying or abridging the right to vote based on race. Correspondingly, at least one federal court has ruled that alleged discrimination on the basis of tribal affiliation falls within the definition of national origin (which includes "the country of one's ancestors"). See *Dawavendewa v. Salt River Project*, 154 F.3d 1117 (9th Cir. 1998). See also *Booker v. Special School District No. 1*, 585 F.2d 347 (8th Cir. 1978). But see *Arakaki v. Cayetano*, 2003 U.S. App. Lexis 9169 (9th Cir. 2003) (observing that the Supreme Court in *Rice* did not "address the merits of Native Hawaiians' equal protection claim" and avoided that "difficult terrain").
11. 59 Fed. Reg. 8,756. In the context of this rule, OCR in 1995 resolved *In re Northwest Indian College*, OCR Case No. 10952002, which involved a claim that providing reduced tuition for students who were members of a federally recognized tribe was forbidden by Title VI. OCR concluded that the college's policy, which provided that preference, was a "permissible" distinction because "it [was] a political rather than a racial distinction" and Title VI did not apply. OCR also observed that the Tribally Controlled Community Colleges Act provided federal assistance to Northwest Indian College "based on the number of Indians [attending and] defined as 'members of federally recognized tribes.'" Thus, OCR concluded that a tuition preference for students who could "demonstrate Indian ancestry" was within the bounds of tribal authority to define and control membership [...] consistent with the purpose of the Tribally Controlled Community Colleges Act."
12. By contrast, the fact that a college or university may have diversity goals, standing alone, does not trigger strict scrutiny review. See *In re University of Wisconsin System*, OCR Case No. 05012066 (July 27, 2001) (finding an insufficient factual basis upon which to initiate a Title VI investigation where: (1) the evidence was that higher education system had established broad diversity objectives—including to "increase the number of students of color who apply, are accepted, and enroll;" but (2) there was no evidence of, e.g., race-conscious admissions policies conferring opportunities for students in furtherance of those objectives).
13. See *Sussman v. Tanoue*, 39 F. Supp. 2d 13 (D. D.C. 1999); *Shuford v. Alabama State Board of Education*, 897 F. Supp. 1535 (M.D. Ala. 1995); *Honadle v. Univ. of Vermont*, 56 F. Supp. 2d 419 (D. Vt. 1999).
14. See *Bowen Engineering Corp. v. Village of Chammalion*, 2003 WL 21525254 (N.D. Ill. 2003). In *Bowen*, which cited numerous cases on the topic, the federal court addressed a challenge to recruiting requirements related to the financing of a project that the defendant maintained constituted "mere" outreach and that, therefore, were not subject to strict scrutiny. After extensive analysis, the court concluded that the requirements were subject to strict scrutiny. It ruled:  
 Though worded in terms of goals and good faith, the [challenged] statute imposes mandatory requirements with concreteness. The scheme requires distribution of information only to members of designated groups [based on race and gender], without any requirement or condition that persons in other groups receive the same information. Thus the [challenged] statute may be satisfied by distribution of information exclusively to persons in the designated groups....The outreach the statute requires is not from all equally or to all equally.
15. See, e.g., *Weser v. Glen*, 190 F. Supp. 2d 384, 399 (E.D.N.Y. 2002).
16. See, e.g., cases cited in notes 13 and 15, above.
17. See n. 14, above; see also *MD/DC/DE Broadcasters Assn. v. FCC*, 236 F.3d 13 (D.C. Cir. 2001). In this case, the circuit court ruled that a "government mandate for recruitment targeted at minorities constitutes a 'racial classification' that subjects persons of different races to 'unequal treatment,'" thereby subjecting the challenged government rule to strict scrutiny. Rejecting the position that "preferential recruiting disadvantages no one," the court concluded that the challenged rule compelled broadcasters to "redirect" their "finite" resources to generate a larger percentage of minority applicants. It reasoned that "some prospective nonminority applicants who would have learned of job opportunities but for the [challenged rule] will be deprived of an opportunity to compete simply because of their race."
18. 34 C.F.R. 100.3. The Department has also confirmed that "individuals or organizations not receiving federal funds are not subject to Title VI." See Title VI Policy Guidance at n.12. Note, however, that OCR may examine the relationship among potential "external" funders or administrators to ensure that they are, in fact, separate from the higher education institution. In one case, OCR rejected as "not a good choice" a proposal by a college to allow a separate foundation to administer race-conscious scholarships that were funded from another external source. OCR indicated that the college's "extensive ties" to the foundation were problematic and would raise Title VI concerns. See *In re Northern Virginia Community College*, OCR Case No. 03962088 (August 1, 1997).
19. At the same time, if recruiting, outreach or retention programs are externally funded and administered—without significant assistance from the higher education institution—then higher education institutions are unlikely to be subject to strict scrutiny review related to those programs. See *In re Northern Virginia Community College*, OCR Case No. 03962088 (August 1, 1997) (approving the transfer of the "administration and award" of race-conscious scholarships to a private entity, where the higher education institution also "returned the funds for the scholarships to the [external] donors").
20. See 34 C.F.R. 106.37 (explaining rules related to sex discrimination prohibitions of Title IX of the Education Amendments of 1972).
21. See n. 4, above.

22. The Department, applying long-standing rules of statutory construction, has concluded that financial aid programs authorized under one federal statute cannot be considered to violate another federal statute. As a foundation for that conclusion, the Department has cited the “canon of construction under which the specific provisions of a statute prevail over the general provisions of the same or a different statute.” Title VI Policy Guidance at 8,759 (citing 2A N. Singer, *Sutherland Statutory Construction* section 46.05 [5th ed. 1992]; *Radzanower v. Touche Ross and Co.*, 426 U.S. 148, 153 [1976]; *Morton v. Mancari*, 417 U.S. 535, 550–51 [1974]; *Fourco Glass Co. v. Transmira Products Corp.*, 353 U.S. 225, 228–29 [1957]). A key question that must be addressed with respect to federally authorized programs is the level of specificity pursuant to which the congressional authorization is deemed to exist. Correspondingly, when institutions of higher education implement policies designed to adhere to federal statutory authority, they should take steps to ensure that their policies closely track federal rules so as not to restrict opportunities or benefits based on race or ethnicity more than that called for in federal law.

The benefits of a diverse student body, cited by Justice Powell in his 1978 *Bakke* opinion, set the stage for the U.S. Supreme Court's decisions in the University of Michigan cases:

[T]he overall quality of the educational program is affected not only by the academic and personal qualities of the individual students who are enrolled, but also by the characteristics of the entire group of students who share a common educational experience....In a residential college setting, in particular, a great deal of learning occurs informally ...through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world.... People do not learn very much when they are surrounded only by the likes of themselves... In the nature of things, it is hard to know how, and when, and even if, this informal 'learning through diversity' actually occurs. It does not occur for everyone. For many, however, the unplanned, casual encounters with roommates, fellow sufferers in an organic chemistry class, student workers in the library, teammates on a basketball squad, or other participants in class affairs or student government can be subtle and yet powerful sources of improved understanding and personal growth... These kinds of learning experiences, sometimes very satisfying and sometimes very painful, are important not only for particular students in an immediate sense but also for the entire society over time. Our society—indeed our world—is and will be multiracial. We simply must learn to work more effectively and more sensitively with individuals of other races, and a diverse student body can contribute directly to the achievement of this end.

Bowen, *Admissions and the Relevance of Race*, Princeton Alumni Weekly, September 26, 1977, pp. 9–10, portions cited in *Bakke*, 438 U.S. at 313, n.48 (1978) (Powell, J.)

## V. Compelling Interests: When Might Race-Conscious Recruitment, Outreach, and Retention Programs Be Justified by the Educational Benefits of Diversity (or Other Compelling Reasons)?

If a recruitment, outreach, or retention program is deemed to be race- or ethnicity-conscious such that it triggers strict scrutiny, then the second issue to be examined is whether that particular program is supported by a compelling interest. Thus, the second area of focus by higher education officials should be on the justifications for their consideration of race and ethnicity when administering recruitment, outreach, or retention programs.

### A. In General

As discussed in Chapter II, the mission-driven, diversity-related interests to be achieved by recruitment, outreach, and retention programs are similar (if not, in many cases, identical) to the interests in admissions (and other enrollment management) practices. Thus, many of the principles regarding compelling interests that apply in the admissions context will likely apply to the recruitment, outreach, and retention setting, as well.

Although there is no precise legal formula for determining whether a particular interest is compelling under strict scrutiny, case law confirms at least two interests that can be sufficiently compelling to justify a higher education institution's use of race or ethnicity in admissions and recruitment, outreach, and retention practices. One is an institution's interest in remedying the present effects of its own prior discrimination (at least where such effects can be traced to its own discrimination).<sup>1</sup> The other is an institution's interest in securing the mission-based educational benefits of a diverse student body, which is the focus of this chapter.

**The Compelling Interest Landscape**

| Accepted  | Rejected  |
|---|---|
| <ul style="list-style-type: none"> <li>• The educational benefits of diversity</li> <li>• Remedial interests</li> </ul> | <ul style="list-style-type: none"> <li>• Societal discrimination</li> </ul> |

### B. The Educational Benefits of Diversity

#### 1. In General.

In *Grutter*, the U.S. Supreme Court resolved the issue that had vexed numerous federal courts for almost a decade, ruling that a university's interest in promoting the educational

benefits of diversity can be sufficiently compelling to justify the limited consideration of race and ethnicity in admissions.<sup>2</sup> The Court reached this conclusion based on several principles:

- **Educational mission-driven judgments are entitled to deference.** Colleges and universities are entitled to deference in their judgments that the benefits of diversity are essential to their mission, and federal courts should presume good faith by the given institution, absent a showing to the contrary.
- **The educational benefits of diversity are “substantial” and “real.”** Abundant evidence establishes that the educational benefits of diversity (including enhanced learning, improved civic values, and better preparation for the workforce) are “substantial” and “not theoretical but real.”
- **Diversity may be defined with respect to an educational goal of attracting a critical mass of minority students.** Higher education institutions may define their diversity goals with reference to the objective of achieving a “critical mass” of under-represented students—a flexible numerical goal associated with the educational benefits the institution seeks to achieve.
- **Principles of access and equity complement educational diversity goals.** It is important that higher education institutions—and corresponding pathways to leadership—be visibly open and accessible to students from all backgrounds (including students of all races and ethnicities) in order for higher education institutions to serve their fundamental role.

## 2. *Mission-Driven Educational Judgments Merit Deference.*

As a foundation for its ruling, the Court recognized that higher education institutions “occupy a special niche in our constitutional tradition”—given the “important purpose of public education and the expansive freedoms of speech and thought associated with the university environment.” As a result, the Court deferred to the University of Michigan’s educational judgment that diversity was essential to its mission, presuming “good faith on the part of the university...absent a showing to the contrary.”<sup>3</sup>

Thus, based on the Court’s analysis, it is clear that the interest in diversity first articulated by Justice Powell in his *Bakke* opinion and then embraced by the Court in *Grutter* is an educational, mission-driven interest. The Court in *Grutter* confirmed, in fact, the importance of diversity interests being aligned with educational goals that were “at the heart” of the University of Michigan’s mission—an important foundation for the Court affirming the interest as compelling. As a consequence, higher education institutions should ensure that educational benefits associated with diversity on their campuses are established as part of their mission, and that their race- and ethnicity-conscious recruitment, outreach, and retention programs are fully aligned with those goals.

The alignment of an institution’s interest in achieving racial and ethnic diversity in its student body with the institution’s mission in furthering a concrete set of educational goals is critical for two reasons.

First, it shows that the institution is interested not in diversity for diversity’s sake (which courts generally reject as unlawful racial balancing), but rather in diversity as an instru-



ment to achieve some other distinct and important end. What constitutes a compelling interest under the law is an institution's interest in the *educational benefits* of diversity, not an interest merely in diversity itself.

Second, such alignment properly frames the use of race and ethnicity in recruitment, outreach, and retention programs (as well as in admissions and financial aid decisions) as the kind of enrollment management-related policy choice to which courts have typically shown some deference. (Institutional decisions about who may be admitted to study constitute an exercise of academic freedom, a special concern of the First Amendment.)

### ***3. The Educational Benefits of Diversity Are Substantial and Real.***

Having determined that the educational benefits of diversity were, in fact, mission-driven, the Supreme Court then evaluated the educational benefits of diversity asserted by the University of Michigan. Based on evidence that diversity among its students enhanced learning outcomes, improved the preparation of students for a diverse workforce and society, and supported the preparation of students as professionals, the Court concluded that those benefits were, in fact, “substantial” and “real.” As a foundation for that conclusion, the Court observed that campus diversity helped promote cross-racial understanding, break down stereotypes, and enable students to better understand persons of different races.

The University of Michigan's development and use of evidence was a crucial factor in its successful defense of its law school's admissions policy. Indeed, the Supreme Court cited extensive evidence in the record in support of its conclusion, including:

- Testimony by professors that a diverse student body produced better, more enlightening classroom discussions and enhanced learning;
- Numerous expert and research studies—some institution-specific and some more general—demonstrating the asserted educational benefits of diversity; and
- Evidence provided by other parties regarding the importance of diversity in numerous contexts (including the military and the workforce), which were associated with the role and mission of higher education and supportive of the University of Michigan's claims.

Thus, when evaluating relevant information that can support positions advancing the educational benefits of diversity, higher education officials should consider the relevance of both institution-specific and more general research and data that relates to their efforts to achieve educational goals associated with diversity. Although the Supreme Court did not specifically address the question regarding the threshold that an institution must meet in order to have sufficient evidence regarding its educational interests in diversity, the University of Michigan cases can be reasonably read to suggest that higher education officials should ensure that there is a sufficient institution-specific basis in evidence (that may be complemented by other more general research) supporting the diversity interests that the institution is advancing.

### ***4. Diversity Goals May Be Defined with Reference to “Critical Mass.”***

The Court in the University of Michigan cases also affirmed that higher education institutions may define their diversity goals with respect to the objective of enrolling “a critical mass” of underrepresented students. In reaching its conclusion, the Court confirmed that

the educational interests served by race- and ethnicity-conscious admissions practices cannot exclusively be those related to race and ethnicity, observing that the University's goal was not to assure "some specified percentage of a particular group merely because of its race or ethnic origin," but rather to achieve "the educational benefits that diversity is designed to produce."<sup>4</sup> Thus, there were sufficient foundations for the Court to embrace the University of Michigan's conceptualization of diversity according to a critical mass theory, which established clear objectives (but not rigid quotas) linked to the educational interests in diversity.

Notably, Justice O'Connor did not describe critical mass with great precision, other than to reference trial testimony that it meant "meaningful numbers" or "meaningful representation" or "a number that encourages underrepresented minority students to participate in the classroom and not feel isolated."<sup>5</sup> Thus, a review of the underlying record before the Court can help illuminate key factors for higher education institutions to consider when evaluating the applicability of the critical mass theory to their diversity-related programs.

The key features of the arguments pressed by the University of Michigan are important to understand, especially in light of the vigorous challenge to the concept of critical mass presented by the dissenting Justices ("simply a sham" and a "veil" covering a "naked effort to achieve racial balancing," according to the minority on the Court), as well as subsequent policy and legal questions that have been raised since the Michigan opinions were rendered.

### **Educational objectives.**

The University of Michigan argued before the U.S. Supreme Court that its Law School admissions policies were tailored to achieve its objective of obtaining a critical mass of underrepresented minority students—to ensure the "presence of 'meaningful numbers' ...of 'students from groups which have been historically discriminated against...'" The Law School's focus on African Americans, Hispanics, and Native Americans in this context was related to the fact that "these students 'are particularly likely to have experiences and perspectives of special importance to [its] mission.'"

Based on educational and social science evidence, the University of Michigan maintained that meaningful interaction among students of different racial backgrounds improved the quality of education at the Law School, particularly as "race matters to a great many issues...central to its...pedagogical mission." More specifically, the Law School argued that it sought a diverse student body to "create significant opportunities for personal interaction, to show that there is no consistent 'minority viewpoint' on particular issues, and to ensure that 'minority students' d[id] not feel isolated or like spokespersons for their race, and [felt] comfortable discussing issues freely based on their personal experiences."

### **Not quotas.**

When framing its objective as wanting "enough students so that every minority student doesn't feel that...their race is being evaluated every time they speak," the Law School carefully distinguished the concept of critical mass from quotas. It pointed to testimony that the Law School did not seek a "specific number of students of particular races," did not "employ a numerical target or range of targets" and that there was "no hard and fast

number” that would ultimately define critical mass. (Data showed that between 1992 and 2000, the percentage of underrepresented minority students enrolled varied from 13.5 to 20 percent.)

Although testimony from admissions officials and others reflected a reluctance to establish goals or targets, a draft of a relevant admissions policy indicates: “[I]t is important to note that in the past we seem to have achieved the kinds of benefits that we associate with racial and ethnic diversity from classes in which the proportion of African American, Hispanic, and Native American members has been between about 11 percent and 17 percent of total enrollees.” (The District Court concluded that this reflected the “written and unwritten policy at the law school.”) In oral argument before the U.S. Supreme Court, those percentages were asserted by the Law School to be “an aspiration...not a fixed minimum.” (Based on the theory asserted and the relevant institution-specific analysis conducted, it is important to note that this range might not necessarily apply to institutions of different sizes with different programs where different kinds of academic and social interaction might occur.)

Ultimately, the University of Michigan asserted that “every honest *Bakke* program” would be subject to attack as a “secret quota” under the logic of the students challenging its policies, in contradiction to Justice Powell’s statement that “some attention to numbers” was appropriate—and, indeed, “required in order to ensure that the use of race in admissions was narrowly tailored to the [diversity] interests [the Law School sought] to promote.”

The dissenting Justices took issue with the Law School’s critical mass theory, fundamentally asserting two central challenges: (1) the variation *among* underrepresented minorities in enrollment reflected, in effect, a different application of the concept among the three underrepresented minority groups leading to a series of unanswered questions,<sup>6</sup> and (2) the “correlation between the percentage of the Law School’s pool of applicants...and the percentage of the admitted applicants” who were underrepresented minorities was not sufficiently explained. On the latter point, Justice Kennedy observed: “[T]he constancy of admitted minority students and the close correlation between the racial breakdown of admitted minorities and the composition of the applicant pool...require the Law School either to produce a convincing explanation or to show it has taken adequate steps to ensure individual assessment. The Law School does neither.”

### **One objective among many.**

Finally, the Law School also stressed that “enrolling a critical mass of minority students [was] one educational objective among many,” representing one goal that was “at all times weighed against other educational objectives.” Specifically, witnesses testified that the Law School regularly rejected “qualified minority candidates, even if that risks falling short of a critical mass, because it believes that assembling a class with exceptional academic promise is even more valuable or because it concludes that particular white or Asian American candidates will bring other things to the educational environment that are, on balance, even more intriguing and valuable.”

In sum, although the Court in the University of Michigan cases did not mandate that higher education institutions define their diversity goals based on the theory of critical mass, to be sure, it offered that theory as one legally acceptable way to conceptualize

diversity goals. Based on the Court's analysis, higher education officials should ensure that their diversity-related interests are not merely associated with race or ethnicity, and that appropriate objectives associated with educational interests are established.

### ***KEY QUESTION***

If the university has determined or decided that it needs a critical mass of students from particular races or national origins as a condition for achieving the educational benefits of diversity, indicate:

- a. How the university defines critical mass.
- b. How the university's definition of critical mass relates to:
  - i. The university's mission and core educational objectives.
  - ii. Each educational benefit described above.
  - iii. The ability of students to make unique contributions to the character of the university.
  - iv. How the university determines the numbers of students needed to establish a critical mass.
  - v. How the recruitment, outreach, and retention programs are aligned with and closely tailored to the critical mass needs.

Derived from OCR Title VI Information Request

### ***5. Principles of Access and Equity Complement Diversity Interests.***

Finally, in affirming the University of Michigan's position regarding the educational benefits of diversity, Justice O'Connor expanded on the traditional diversity rationale and stressed the importance of students from all racial and ethnic groups having access to public universities and law schools. According to the Court:

“[T]he diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity...[E]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective....And, ‘[n]owhere is the importance of such openness more acute than in the context of higher education.’ Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized....In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity....[L]aw schools ‘cannot be effective in isolation from the individuals and institutions with which the law interacts.’”<sup>7</sup>

Emphasizing the importance of access to public law schools in this regard (but with principles that may apply more broadly), she continued:

Access...must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.<sup>8</sup>

Thus, colleges and universities might consider the way in which principles of access and equity may complement their goals regarding the educational benefits of diversity. Moreover, given the absence of any precise formula regarding what may constitute a “compelling interest,” the *potential* to make the case about other compelling interests in education should not be ignored. Thus, in cases where the educational benefits of diversity may not, in fact, provide an appropriate justification for a race- or ethnicity-conscious recruitment, outreach, or retention practice, higher education officials may consider the potential that principles of access and equity, standing alone, might provide a compelling justification for those practices.<sup>9</sup>

## ***Are There Compelling Interests?***

The matrix below is intended to capture the “big picture” regarding the key inquiries discussed in Chapter V, along with a series of types of programs that many colleges and universities administer in the context of their recruitment, outreach, and retention efforts. Collectively, the matrices at the ends of Chapters IV, V, and VI may serve as a tool to help facilitate the inventory of relevant programs and frame discussions associated with program evaluations.

|  | <b>Institutional Goals?</b> | <b>Institutional Objectives?</b> | <b>Alignment and Evidence?</b> |
|--|-----------------------------|----------------------------------|--------------------------------|
| <b>Outreach and Recruitment Programs</b>   |                             |                                  |                                |
| Middle and High School Academic Support  |                             |                                  |                                |
| High School Alternative  |                             |                                  |                                |
| Summer and/or Weekend Enrichment Programs  |                             |                                  |                                |
| Motivational Programs  |                             |                                  |                                |
| Family Support Programs  |                             |                                  |                                |
| Informal Volunteer Work  |                             |                                  |                                |
| Direct Mail Marketing Through the Purchase of Specific Student Contact Information |                             |                                  |                                |
| Special Publications   |                             |                                  |                                |
| Minority Media Advertising   |                             |                                  |                                |
| Campus Visit/Orientation Programs  |                             |                                  |                                |
| Campus Academic/Enrichment Programs  |                             |                                  |                                |
| Feeder Schools   |                             |                                  |                                |
| Specialized Admissions Officers  |                             |                                  |                                |
| Alumni Volunteer Programs  |                             |                                  |                                |
| High School Visits   |                             |                                  |                                |
| Faculty, Coaches, and Administrators Supporting Admissions Goals                   |                             |                                  |                                |
| Student Contacts   |                             |                                  |                                |
| Other Activities   |                             |                                  |                                |
| <b>Retention and Student Services Programs</b>                                     |                             |                                  |                                |
| Academic Support   |                             |                                  |                                |
| Social Support and Acclimation   |                             |                                  |                                |
| Mentoring  |                             |                                  |                                |
| Student Activities   |                             |                                  |                                |
| Other Activities   |                             |                                  |                                |

## Chapter V Endnotes

1. Race- or ethnicity-conscious measures can be used to remedy the present and continuing effects of past discrimination, but only upon satisfying strict scrutiny standards and upon a “strong basis in evidence.” (This evidence may—but need not in all cases—stem from court, legislative, or administrative findings of discrimination. *See generally* 59 Fed. Reg. 36 at 8759-60 (summarizing relevant federal law).) The evidentiary burden for establishing a remedial justification, particularly with respect to the link between present race- or ethnicity-conscious policies and past discrimination, is very high.
2. “At bottom,” according to one federal court of appeals, “*Grutter* plainly accepts that constitutionally compelling internal and external societal benefits flow from the presence of racial and ethnic diversity in educational institutions.” *Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 377 F.3d 949, 964 (9th Cir. 2004) *vacated and reh’g granted*, 395 F.3d 1168 (2005) (ruling that a school choice plan using race as a tiebreaker was justified by a compelling interest, the educational benefits of diversity, but concluding that the plan was not narrowly tailored).  

Cases decided after the University of Michigan decisions have extended the reach of the conclusion that the educational benefits of diversity are compelling to the elementary and secondary setting. *See id.* (the “internal educational and external societal benefits [that] flow from the presence of racial and ethnic diversity in educational institutions” are “as compelling in the high school context as they are in higher education.”); *Comfort v. Lynn Sch. Comm.*, 2005 U.S. App. LEXIS 11755 at 37, 34 (1st Cir. 2005) (en banc) (ruling that “there are significant educational benefits to be derived from a racially diverse student body in the K–12 context” and observing that “there is significant evidence... that the benefits of a racially diverse school are more compelling at younger ages”).

*Note:* As this manual went to press, the Ninth Circuit Court of Appeals had not yet issued an anticipated en banc opinion in *Seattle School District*, in which the panel opinion described had been withdrawn pending further court action. However, for the purposes of illustrating potential applications of *Grutter* and *Gratz*, several references to that decision are included in this and subsequent endnotes.
3. The Ninth Circuit Court of Appeals has elaborated on this ruling in two cases. Cautioning against an overly expansive extension of deference in a strict scrutiny analysis, the court in *Seattle School District* refused to extend the deference to educational policymakers called for in *Grutter* in an “unfettered” manner. Specifically, the court refused to defer to educational judgments that (among other things) were not “internal to the school environment” or “within the special expertise of school administrators.” Expanding on its conclusion, the court observed that while limited deference might be appropriate when schools pursue “core goals,” such deference is “entirely unwarranted when they court tangential ones.” In addition, the court stated:  

[W]e see a crucial difference between a school’s pursuit of the internal academic benefits of diversity and its pursuit of diversity’s external social benefits. For although the former manifest within the District’s schoolhouses, and thus are susceptible to ready appraisal exclusively by education policymakers, the “democratic” benefits attributable to classroom diversity are diffuse, manifest long after students leave the classroom, in contexts not subject to the exclusive oversight of teachers, and cannot be measured with skills possessed uniquely by educators.

*Seattle School District*, 377 F. 3d at 982.

Five months later, the Ninth Circuit Court of Appeals in a higher education context (and with a different panel of judges) stated that when determining if a law school had met its obligation with respect to strict scrutiny, “we must assume that it acted in good faith in the absence of a showing to the contrary and defer to its educational judgments.” *Smith v. University of Washington Law School*, 392 F.3d. 367,372 (9th Cir. 2004), petition for writ of certiorari filed with U.S. Supreme Court, April 18, 2005.
4. At the same time, policies established in the name of diversity are unlikely to survive strict scrutiny when the goals themselves are “too amorphous” or “too ill defined” to reflect authentic—and compelling—institutional interests. *See, e.g., Wessman v. Gittens*, 160 F.3d 790, 796 (1st Cir. 1998); *Johnson v. Board of Regents*, 263 F.3d. 1234, 1239 (11th Cir. 2001).
5. *Grutter*, 539 U.S. at 318; *see also* Larry White, *One Year After the Michigan Cases: What Are We Doing? With Special Emphasis on Provocative Questions Raised or Left Unanswered by the Michigan Cases* (2004) at 20. A very enlightening discussion of the antecedents and underpinnings of the critical mass theory are chronicled by Mr. White, *see id.* at 21–28.
6. Justice Rehnquist challenged the fact that a different critical mass might exist for different subpopulations, as the University of Michigan maintained: “...From 1995 through 2000, the Law School admitted between 1,130 and 1,310 students. Of those, between 13 and 19 were Native American, between 91 and 108 were African-Americans, and between 47 and 56 were Hispanic. If the Law School is admitting between 91 and 108 African-Americans in order to achieve ‘critical mass,’ thereby preventing African-American students from feeling ‘isolated or like spokespersons for their race,’ one would think that a number of the same order of magnitude would be necessary to accomplish the same purpose for Hispanics and Native Americans. ... [O]ne would have to believe that the objectives of ‘critical mass’ ... are achieved with only half the number of Hispanics and one-sixth the number of Native Americans as compared to African-Americans. But [Michigan officials] offer no race-specific reasons for su[per] concept is applied differently among the three underrepresented minority groups.” 539 U.S. at 365–66.
7. *Grutter*, 539 U.S. at 331–32.
8. *Grutter*, 539 U.S. at 332–33.
9. Though some judicial hostility to expanding the list of compelling interests is apparent, *see Grutter*, 539 U.S. at 395 (Kennedy, dissenting) (approving consideration of race in “this one context”); *Grutter*, 539 U.S. at 349–378 (Thomas, dissenting) (expansive discussion of hostility to racial classifications); *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–94 (1989), the U.S. Supreme Court in the University of Michigan decisions did not address (and, therefore, did not rule out) other interests that might justify race-conscious practices in the higher education context. Moreover, in its race-conscious financial aid policy, the U.S. Department of Education declined to “foreclos[e] the possibility that there may be other bases [in addition to remedial and diversity-related interests] on which a college may support its consideration of race or national origin in awarding financial aid.” Title VI Policy Guidance at n. 1.

## VI. Narrow Tailoring: Under What Circumstances Might Race-Conscious Recruitment, Outreach, and Retention Programs Be Viewed As Sufficiently Limited So As to Lawfully Support Compelling Interests?

Under the strict scrutiny standard, not only must the ends of an institutional policy be compelling, but also the “fit” between ends and means must be exact in the sense that race and ethnicity must be used in the most limited way possible consistent with the compelling interest advanced by the higher education institution. Thus, the third question that an institution must address is whether the institution’s effort to achieve its compelling interest is specifically and narrowly framed to accomplish that purpose.<sup>1</sup>

### A. In General

In cases where a higher education institution seeks to achieve the educational benefits of diversity through race- and ethnicity-conscious recruitment, outreach, and retention programs, the particular ways in which race and ethnicity are used must be limited—with those factors used only as absolutely necessary to promote that interest. The reason that federal courts demand this “tight fit” between the ends (e.g., the educational benefits of diversity) and the means is to ensure that “there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.”<sup>2</sup>

The U.S. Supreme Court has indicated that the way in which the narrow tailoring analysis is framed is very much tied to the particular interest advanced. With respect to a higher education admissions policy designed to promote the educational benefits of diversity, the Court in *Grutter* said: The narrow-tailoring inquiry “must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education.”<sup>3</sup> That principle would govern recruitment, outreach, and retention programs, just as it does in the admissions setting.

Given the similarity of the interests advanced by recruitment, outreach, and retention practices, on the one hand, and admissions decisions, on the other, the Supreme Court’s framework likely provides an appropriate foundation against which to evaluate such practices. Notably, however, given the differences in the nature of the benefits conferred, there may be important distinctions in how the Court’s framework is actually applied in recruitment, outreach, and retention settings.

The Court’s framework for determining whether an institution’s use of race or ethnicity is as limited as possible in advancing diversity-related interests focuses on the following factors:

- **Flexibility.** Is the use of race or ethnicity sufficiently flexible to ensure individualized consideration of all students? More specifically, does the use of race: (1) ensure com-



petitive consideration among all students (and not operate as a quota, which insulates certain students from competition with others), and (2) ensure that each applicant is “evaluated as an individual”?<sup>4</sup>

- **Necessity.** Is the consideration of race or ethnicity necessary to achieve the institution’s compelling interest[s]? In other words, to the extent that race-neutral programs or strategies might be effective in furthering the achievement of educationally related diversity goals, have they been considered and, where appropriate and feasible, tried? What research can inform this determination? What process for systematically assembling and evaluating this information has been established?
- **Burden.** Does the race- or ethnicity-conscious program minimally impact members of nonfavored racial or ethnic groups? Stated differently, does the program unduly burden individuals who are not members of the favored racial and ethnic groups?
- **Limits in Duration.** Is the use of race or ethnicity in the program limited in time, with a logical end point? Has a process for periodic review and evaluation been established so that the continuing need for race- and ethnicity-conscious programs can be determined in light of federal legal standards?

As reflected in various federal court opinions, narrow tailoring factors should not be viewed or applied in a rigid mechanical way but, rather, they should be considered in light of each other, as part of a comprehensive assessment. It is possible, for instance, that the relative strength of one or more factors might offset weaker support related to another of the narrow tailoring factors.<sup>5</sup>

## B. Flexibility in the Use of Race or Ethnicity in Programs

The federal requirement that race- and ethnicity-conscious policies be sufficiently flexible was, in the context of the University of Michigan’s goal of achieving the educational benefits of diversity, the single most important factor distinguishing the Court’s acceptance of the University of Michigan Law School’s admissions policy from its rejection of the undergraduate admissions policy. Building on Justice Powell’s *Bakke* opinion, the Court focused its inquiry into the flexibility of the admissions programs on two elements: (1) Whether the use of race or ethnicity ensured competitive consideration among all students (thereby not operating as an impermissible quota, insulating certain students from competition with others); and (2) whether the use of race or ethnicity ensured that each applicant was “evaluated as an individual and not in a way that [impermissibly] made an applicant’s race or ethnicity the defining feature of his or her application.”<sup>6</sup>

Under federal law, race- and ethnicity-conscious policies may not operate as quotas—insulating certain candidates from competition with others based on certain desired qualifications, and imposing a “fixed number or percentage [of students based on certain characteristics] that must be attained or that cannot be exceeded.”<sup>7</sup> By contrast, so long as such policies operate in a way that permits competitive consideration among all applicants, higher education institutions may establish and seek to attain flexible goals (requiring, in operation, “only a good faith effort...to come within a range demarcated by the goal itself”).<sup>8</sup> In sum, “some attention to numbers” can be appropriate so long as relevant

practices do not operate to insulate certain students from comparison with others based on race or ethnicity.

Moreover, in the context of efforts to achieve the educational benefits of diversity, federal law requires that race- and ethnicity-conscious policies be flexible enough to take into account all pertinent elements of educational diversity (not merely race and ethnicity) that each applicant may bring to an institution. As a result, and as the Court in the University of Michigan cases explained, applicants' files in the admissions process should be subject to a "highly individualized, holistic review," with "serious consideration" to "all the ways an applicant might contribute to a diverse educational environment." In short, admissions practices must not result in an applicant's race becoming "the defining feature of his or her application."<sup>9</sup>

In its rejection of the University of Michigan's undergraduate admissions program, in which 20 points (out of a possible total of 150) were "automatically" assigned to "every single applicant from an underrepresented minority group" (defined by the University of Michigan), the Court set forth several clearly impermissible characteristics of that point system:

- Certain applicants received an admissions advantage based on nothing more than their status as an underrepresented minority;
- The operation of the point system made "race a decisive factor for virtually every minimally qualified underrepresented minority applicant"; and
- The point system precluded meaningful comparisons and evaluations of how students' "differing backgrounds, experiences, and characteristics" might benefit the institution.<sup>10</sup>

The Court's emphasis on the need for flexible, individualized review in the admissions process has several implications related specifically to questions that have arisen regarding recruitment, outreach, and retention programs.

Most predominantly, questions have arisen regarding the use of race- and ethnicity-exclusive recruitment, outreach, and retention programs that, by definition, condition eligibility on a student being a member of a particular racial or ethnic group. As an initial matter, it is obvious that if a program is structured so that, for example, race is one factor among others (such as community service, special talents, or academic promise), and the consideration of race when determining eligibility is pursuant to an individualized review, then the practice is much more likely to be sustained as lawful—consistent with the University of Michigan decisions. At the same time, there is no federal case or Department rule that categorically rejects all race- or ethnicity-exclusive practices under strict scrutiny standards.<sup>11</sup>

Perhaps more to the point, the core principles set forth by the Court suggest that higher education officials should evaluate—and maintain—any race- or ethnicity-exclusive policy *only* if they can establish that the exclusive nature of that policy is necessary to achieve their goals *and* that no less extreme or categorical use of race or ethnicity will allow the institution to achieve its goals.<sup>12</sup>

In addition, the manner in which the strict scrutiny analysis operates suggests clearly that recruitment, outreach, and retention programs should be evaluated in the context of all other policies and practices that are designed to operate in tandem as part of the effort to achieve diversity goals. As a consequence, the prospect that the use of race in recruitment, outreach, or retention programs might result in a lesser burden on nonquali-

ying students than other uses of race or ethnicity should not be ignored. For instance, a race-conscious outreach program may in fact impose less of a burden on nonqualifying students than an otherwise lawful race-conscious admissions policy. Therefore, in some contexts, it is possible that the limited use of race-exclusive recruitment, outreach, and retention practices to achieve clear and compelling diversity goals might in fact operate as the less discriminatory alternative.

### C. The Necessity of Having Race- and Ethnicity-Conscious Practices

As with other elements of the narrow tailoring analysis, the necessity of maintaining race- or ethnicity-conscious practices must be evaluated in the context of the goals the institution seeks to achieve with those practices. Specifically, race and ethnicity may be used as factors in recruitment, outreach, and retention programming decisions only to the extent necessary to achieve the institution's compelling interest—in many cases, the educational benefits of diversity. In this context, federal courts have demanded that institutions give “serious, good faith consideration [to] workable race-neutral alternatives that will achieve the diversity they seek.”<sup>13</sup> The Supreme Court in *Grutter* also admonished that higher education institutions “draw on the most promising aspects of ... race-neutral alternatives as they develop”—specifically pointing to experimentation in states where race- and ethnicity-conscious admissions practices had been banned as a matter of state law.<sup>14</sup>

#### ***Race-Neutral Alternatives***

Depending on the mission of the program involved and the circumstances of that institution, a college or university may consider a broad range of factors such as the following (either in lieu of, or in addition to, the consideration of race or ethnicity), which *may not* be subject to strict scrutiny. They include:

- Demonstrated experience with and/or commitment to working with historically underserved or underprivileged populations;
- Graduation from a historically black college or university or other minority-serving institutions;
- Experience living and working in diverse environments;
- Experience with a different cultural tradition;
- Contribution of intellectual, athletic, and artistic skills;
- First generation in one's family to attend college or graduate school;
- Individuals who have overcome substantial educational or economic obstacles;
- Socioeconomically disadvantaged students;<sup>15</sup>
- Students from rural or inner-city areas; and
- Students from school districts that have been historically underrepresented at the university.

Importantly, the need to consider (and try, as appropriate) race- or ethnicity-neutral alternatives to race- or ethnicity-conscious practices does not mean that an institution must exhaust “every conceivable race-neutral alternative...[or] choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups.” In short, federal courts will not require that institutions face the Hobson’s choice—choosing between their diversity goals and other institutional goals.<sup>16</sup> Instead, they must evaluate the implementation of their diversity goals and ensure the appropriate consideration of race-neutral alternatives in the context of other related institutional goals.

It is also important that the specific race- and ethnicity-conscious recruitment, outreach, or retention programs actually help the institution achieve its goals. If in fact they fail in that endeavor, those practices are likely to be rejected as not narrowly tailored toward institutional goals.<sup>17</sup>

#### **D. Burden on Individuals Who Do Not Receive Racial or Ethnic Preferences**

Under federal law, race- and ethnicity-conscious policies must not “unduly burden individuals who are not members of the [policy’s] favored racial and ethnic groups.”<sup>18</sup> As a general rule, the less severe and more diffuse the burden on individuals who do not benefit from a race- and ethnicity-conscious policy, the more likely the policy will pass legal muster. As the Supreme Court in the University of Michigan cases recognized, for example, the use of race and ethnicity as “plus” factors in admissions in the context of an “individualized consideration” of all applicants did not disqualify nonminority applicants from competing for every seat in the class and did not result in undue harm to nonminority candidates.

Recruitment, outreach, and retention programs, in particular, do not necessarily result in a student being foreclosed from attending an institution based solely on race. In the overall analysis of whether a particular practice may meet narrow tailoring requirements, and consistent with Justice O’Connor’s admonition that “context matters” when making strict scrutiny judgments, these principles have several implications for recruitment, outreach, and retention practices.

First, the total number of opportunities available in such programs should be determined. If, in fact, the number of race- or ethnicity-conscious programs represents only a small fraction of relevant programs available to all students, then arguments may exist to support the position that the “burden” on nonqualifying students imposed by those particular programs is small and diffuse.<sup>19</sup>

Moreover, in relative terms, the burden of many recruitment, outreach, and retention programs on certain nonqualifying students may be less than, for instance, the burden upon nonqualifying students in an admissions or financial aid setting. Thus, the prospect that certain race-conscious measures in a recruitment or outreach setting, in particular, might obviate the need for a more extensive consideration of race in other settings (e.g., admissions) should be considered. It is possible that such measures may, in fact, operate as the less discriminatory alternative and *support* the position that those measures are narrowly tailored.

## E. End Point and Periodic Review

The Supreme Court in the University of Michigan decisions, recognizing that a “core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race,” ruled that “all governmental use of race must have a logical end point.” In the context of higher education, the Court established that this “durational requirement” can be met by sunset provisions and “periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity.”<sup>20</sup>

To ensure that race is used only to the extent necessary to further an interest in the educational benefits of diversity, an institution must therefore regularly review its race- and ethnicity-conscious policies to determine whether its use of race or ethnicity continues to be necessary and, if necessary, if the policies merit refinement in light of relevant institutional developments. (Periodic review can be especially important in light of the changing racial and ethnic demographics of the nation’s youth and the potential changes over time to institutional missions and goals.) Such periodic reviews may show that an institution’s interest in educational diversity is attainable without the use of race and ethnicity or with uses of race and ethnicity that are less restrictive than current practices.

With respect to recruitment, outreach, and retention programs (very much like those in admissions), it is important that higher education institutions establish a process of review and evaluation, which should include a record of relevant issues considered and decided. In many educational contexts, and certainly within the realm of enrollment management, federal courts do not profess to be experts, and they look for opportunities to defer to methodical and research-based educational decisions (much as Justice O’Connor did in *Grutter*). Thus, in the context of institutional efforts to comply with federal nondiscrimination laws, process matters, as discussed in Chapter III.

## ***Narrowly Tailored?***

The matrix below is intended to capture the “big picture” regarding the key inquiries discussed in Chapter VI, along with a series of types of programs that many colleges and universities administer in the context of their recruitment, outreach, and retention efforts. Collectively, the matrices at the ends of Chapters IV, V, and VI may serve as a tool to help facilitate the inventory of relevant programs and frame discussions associated with program evaluations.

|  | Flexibility | Necessity | Burden | Duration and Review |
|--|-------------|-----------|--------|---------------------|
| <b>Outreach and Retention Programs</b>   |             |           |        |                     |
| Middle and High School Academic Support  |             |           |        |                     |
| High School Alternative  |             |           |        |                     |
| Summer and/or Weekend Enrichment Programs  |             |           |        |                     |
| Motivational Programs  |             |           |        |                     |
| Family Support Programs  |             |           |        |                     |
| Informal Volunteer Work  |             |           |        |                     |
| Direct Mail Marketing Through the Purchase of Specific Student Contact Information |             |           |        |                     |
| Special Publications   |             |           |        |                     |
| Minority Media Advertising   |             |           |        |                     |
| Campus Visit/Orientation Programs  |             |           |        |                     |
| Campus Academic/Enrichment Programs  |             |           |        |                     |
| Feeder Schools   |             |           |        |                     |
| Specialized Admissions Officers  |             |           |        |                     |
| Alumni Volunteer Programs  |             |           |        |                     |
| High School Visits   |             |           |        |                     |
| Faculty, Coaches, and Administrators Supporting Admissions Goals                   |             |           |        |                     |
| Student Contacts   |             |           |        |                     |
| Other Activities   |             |           |        |                     |
| <b>Retention and Student Services Programs</b>                                     |             |           |        |                     |
| Academic Support   |             |           |        |                     |
| Social Support and Acclimation   |             |           |        |                     |
| Mentoring  |             |           |        |                     |
| Student Activities   |             |           |        |                     |
| Other Activities   |             |           |        |                     |

## Chapter VI Endnotes

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1. *Grutter*, 539 U.S. at 333. One diversity-related higher education case decided since the University of Michigan decisions affirmed the lawfulness of a law school's admissions policy pursuant to *Grutter* and *Gratz* narrow tailoring standards. In *Smith v. University of Washington Law School*, 392 F.3d 367 (9th Cir. 2004), petition for writ of certiorari filed with the U.S. Supreme Court, April 18, 2005, the court upheld the use of an admissions process by which candidates for admission were designated (based on an index score) as "presumptive admits" or "presumptive denials" before their applications for admission were further reviewed, with a limited number being referred to committee for further evaluation.

Factors in addition to the index score (a weighted tabulation of an applicant's undergraduate GPA and Law School Admission Test score) that were considered by the University of Washington included: [1] race and ethnicity (the "most significant factors" in the admissions decision next to the index score, with the amount of preference differing "depending on an applicant's particular race or ethnicity"); and [2] nonracial diversity factors (including cultural background, activities or accomplishments, career goals, life experiences, and special talents).

Except for students who remained in the presumptive admit category, all applicants "were measured against each other, taking into account all the ways that an applicant might contribute to a diverse educational environment, including the applicant's racial or ethnic minority status." Reflecting that the law school "seriously weigh[ed] many other diversity factors besides race that [could] make a real and dispositive difference" was evidence that the law school accepted nonminority applicants with grades and test scores lower than underrepresented minority applicants who were rejected.

The court in *Smith* also addressed claims regarding four specific elements of the admissions policy:

- [1] The court upheld the use of an "ethnicity substantiation letter" sent to self-identified racial and ethnic minorities with the goal of obtaining additional information about "whether the applicant's race or ethnicity should be considered a plus factor." In the court's view, this practice was "designed to be sufficiently flexible to give more weight to those minority candidates who had more to contribute to the diversity of the classroom" and need not have been extended to all applicants (given their opportunity to supplement their files "on their own initiative").
  - [2] The court upheld the policy of providing Asian Americans "a slight plus for racial diversity" even where they "might have comprised 7 to 9 percent of the class in the relevant years in the absence of a racial or ethnic plus." The court deferred to the University's judgment on this point, noting that the *Grutter* Court "explicitly refrained from setting a cap on what could constitute critical mass."
  - [3] The court upheld a practice of pulling and evaluating "minority files" from a pool of "discretionary" applicants (as judged by index scores) on an expedited basis to permit the Law School to "mak[e] an early decision on minority candidates who were extremely well qualified based solely on their high index scores." The court found that the challenged process conformed to the *Grutter*-required individualized review, even though a single reviewer did not review all files, and concluded that the Law School "simply sought to achieve the compelling interest in diversity by taking steps to increase the prospects of actually enrolling qualified minority applicants rather than risk losing them to other law schools."
  - [4] The court upheld practices that resulted in "predominantly white" applicants being referred to the Admissions Committee for review, rather than (in numbers comparable to minority applicants) being automatically admitted. The court found that none of the favorable admissions decisions by the referring admissions officer was "based solely on race" and she did not "keep track by race of the number of applicants admitted directly or referred to the Admissions Committee." In addition, the process was subject to a "system of checks and balances" in which such decisions were reviewed and debated in the event that the Admissions Committee chairperson believed admission had to be recommended for "less academically promising applicants."
2. *Grutter*, 539 U.S. at 333. *See also Gratz*, 539 U.S. at 270 ("Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.")
  3. *Grutter*, 539 U.S. at 334.
  4. *Grutter*, 539 U.S. at 337.
  5. *See* Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, "Memorandum to General Counsels Re: *Adarand*," June 28, 1995. In addition, in the wake of the University of Michigan decisions, several federal courts have framed the Supreme Court's narrow tailoring analysis in different ways. While the suggested frameworks have differed, they appear to have done so only in form; the ultimate questions posed by the courts have effectively been the same. *See Smith*, 392 F.3d at 373, n.3.
  6. *Grutter*, 539 U.S. at 337. In this context, the Court squarely rejected the claim that pursuing individualized consideration where the program was capable of providing that kind of review was impractical. The Court said: The existence of "administrative challenges does not render constitutional an otherwise problematic system." *Gratz*, 539 U.S. at 275.
  7. *Grutter*, 539 U.S. at 335.
  8. *Grutter*, 539 U.S. at 335.
  9. *Grutter*, 539 U.S. at 337. The potential that race- and ethnicity-conscious programs (such as early intervention programs or bridge programs) may relate more broadly to institutional goals associated with strengthening the educational pipeline for all students or helping close the achievement gap among discrete groups of students should be considered as part of any institutional assessment. Institutions that have race- or ethnicity-conscious programs designed to achieve such goals should carefully consider the process recommendations of Chapter III, and, in that context, evaluate the relationship between those goals and the goal of achieving the educational benefits of diversity.

10. Justice O'Connor's concurrence in *Gratz* highlighted the key distinctions between Michigan's law school and undergraduate programs:  
The law school considers the various diversity qualifications of each applicant, including race, on a "case-by-case basis" while the undergraduate program "relies on a selection index to assign every underrepresented minority applicant the same, *automatic* 20-point bonus without consideration of the particular background, experiences, or qualities of each individual applicant," which operates to "by and large [ ] automatically determine [ ] the admissions decision for each applicant." (O'Connor, J., concurring) (emphasis in original).
11. Although the admissions policies operate differently than recruitment, outreach, and retention programs and therefore are distinguishable on potentially numerous fronts (see *Grutter*, 539 U.S. at 970 ("Context matters when reviewing race-based governmental action under the Equal Protection Clause")), it is important to recognize that the Court's rejection of a point system in an admissions context provides support for arguments that race- or ethnicity-exclusive practices are highly suspect and unlikely to survive strict scrutiny.
12. In the financial aid context, in *Florida Atlantic University*, Case No. 04-90-2067, OCR in 1997 specifically approved of a scholarship program "restricted to black applicants on the basis of their race" in the context of a resolution that recognized that transforming the program to one involving "race-as-a-plus-factor" (if successful in meeting diversity interests) could "strengthen the legal support" for the program. In that case, OCR cited as support for its conclusion the following evidence:
  - Black students indicated that they could not have attended the University without the aid in question;
  - The State of Florida Board of Regents found that "black student recruitment and retention [were] heavily dependent upon financial assistance programs" and the provision of financial aid was "among one of the most important criteria [for] black college-bound high school seniors in choosing a college";
  - The University had implemented "numerous non-race exclusive measures," which were successful in recruiting students of other races and ethnicities, but "not...as successful in recruiting black students"; and
  - Only 7–8% of the University's scholarship financial aid was allocated to race-targeted programs, and there was "no indication that these programs created an undue burden" on the University's ability to offer scholarship aid to nonminority students.
13. *Grutter*, 539 U.S. at 339 (internal citations omitted).
14. *Id.* at 342.
15. At least one federal circuit court of appeals has concluded that "the use of socioeconomic status instead of race would not trigger strict scrutiny." *Lynn School Committee*, 2004 U.S. App. LEXIS 21791 at 58, n. 11, *aff'd on reh'g*, 2005 U.S. App. LEXIS 11755.
16. The Court in *Grutter* specifically rejected any notion that the University of Michigan was obligated to consider: (1) adopting a lottery system (which would have eliminated the nuanced individual consideration of applicants and "sacrifice[d] all other educational values"); (2) lowering admissions standards (which, as a "drastic remedy," would have required the University to "become a much different institution and sacrifice a vital component of its educational mission"); and (3) implementing percentage plans (which did not appear to "work for graduate and professional schools" and might have precluded "individualized" student assessments necessary to achieve a student body that was "diverse along all the qualities valued by the university").
17. In the financial aid context, a finding by OCR makes this point, expressly. In *In re Northern Virginia Community College*, OCR Case No. 03962088 (August 1, 1997), OCR evaluated a scholarship program that was designed to enhance student diversity on campus by "improving retention and graduation rates of minority students." The relevant evidence indicated, however, that the scholarship program had no effect on those rates; thus, OCR concluded that the program was not necessary to achieve the college's goals and violated Title VI. Elaborating on its conclusion, OCR stated that the fact that minority students might have lower graduation rates than others did not, standing alone, justify the scholarship program. Rather, the college was obligated to demonstrate "the relationship between [its race-conscious] scholarships and the graduation rates of minority students," as well as the connection between minority students' graduation rates and the college's diversity goals. Because it failed with respect to both issues, OCR required a modification of the challenged program.
18. *Grutter*, 539 U.S. at 341.
19. Notably, the Department in its Final Title VI Guidance framed the question as one whether the effect of the use of race or ethnicity (in this case, for minority students) was "sufficiently small and diffuse so as not to create an undue burden on [nonqualifying, majority students'] *opportunities to receive financial aid*." Title VI Policy Guidance at 8,757 (emphasis added).
20. It should be noted that the Court did not establish a sunset requirement as one applicable in all cases. In fact, no such policy existed at the University of Michigan Law School, and that policy was ruled to be lawful under federal nondiscrimination laws.



## APPENDIX A. Questions and Answers

1. **What are the most important steps I can take to help ensure that my institution is meeting its legal obligations while, at the same time, effectively pursuing its mission-related, diversity-related goals?**

As a general rule, the most important steps that any institution can take involve achieving clarity regarding the precise diversity goals of the institution, ensuring that those goals are understood by the college or university community, and establishing a process by which key stakeholders help develop and refine, over time, the strategies pursued to help achieve those goals. Needless to say, the commitment and support of the institution's leadership is critical to the success of any effort to achieve the educational benefits of diversity. (See generally Chapter III.)

As part of these efforts, college and university officials should clearly delineate distinctions between their goals and the strategies to be pursued to reach those goals. Properly understood, efforts to achieve the educational benefits of diversity should not be fundamentally driven by agendas to preserve race- or ethnicity-conscious practices. Rather, they should address clear educational goals with an eye toward determining which of the available strategies—including but not limited to race- or ethnicity-conscious programs—make educational sense and are truly necessary to help achieve mission-related goals.

2. **What recruitment, outreach, and retention practices should be identified as potentially subject to strict scrutiny review, and therefore included in self-assessments or audits conducted by higher education institutions?**

Any recruitment, outreach or retention practice that is diversity-related should be included in an initial inventory of policies. The “sweep” of the inventory should be broad, initially, in light of the potential that strict scrutiny may apply to some diversity-related policies even if they are neutral on their face. (See Chapter IV.) In addition, programs that are not exclusively the province of the institution (such as privately funded programs, or programs that are authorized and administered by federal, state, or local governments) should be included as part of an initial assessment in cases where the institution maintains a real operational connection with the program (such as in funding, partially administering, or significantly assisting external providers).

3. **How should my institution address issues regarding race- and ethnicity-conscious programs in cases where external, private parties want to support my institution?**

In the event that external parties want your institution to help administer or otherwise administratively support the race- and ethnicity-conscious programs, you should analyze that support under the very same standards that would apply to programs that your institution funds and administers, directly. In addition, external parties should be advised of the potential need to evaluate their actions (independent of your institution's legal concerns), given the potential application of certain federal

nondiscrimination laws that may reach purely private conduct that involves race-conscious contracts. (See Chapter IV.)

**4. What are the kinds of interests that might justify the use of race or ethnicity when making recruitment, outreach, and retention decisions?**

The U.S. Supreme Court has recognized two interests in the higher education setting that can support race- and ethnicity-conscious practices in higher education: [1] interests in remedying the present effects of past discrimination; and [2] interests in achieving the educational benefits of diversity.

In addition, Justice O'Connor in *Grutter* recognized the complementary interest of ensuring access and equity for all students, including minority students. She did not, however, specifically address the question of whether this interest, standing alone, might support race- or ethnicity-conscious policies under strict scrutiny standards.

**5. What are the key factors that I should consider when structuring my race- and ethnicity-conscious recruitment, outreach, and retention programs?**

In general, several key factors merit careful consideration:

- Clarity on core institutional, diversity-related goals, and the evidence that will support those interests;
- Alignment of various programs with core goals, as well as coherence among the range of diversity-related programs throughout the institution;
- A basis for demonstrating the need for race- or ethnicity-conscious programs—in light of race- or ethnicity-neutral policies (or less discriminatory, more limited policies) that might just as effectively help achieve institutional diversity goals; and
- A process by which key institutional stakeholders periodically review and evaluate diversity related goals, objectives, and strategies—with an eye toward ensuring that any race- or ethnicity-conscious policy is limited in scope and time.

**6. Are race-exclusive practices illegal? How should my institution evaluate such practices?**

No court has ever ruled that all race-exclusive practices are categorically illegal. Although not *per se* illegal under prevailing law, race-exclusive practices in most cases are likely to present more of a legal challenge to sustain than race-as-a-factor programs. One central question to address in the context of all of the relevant strict scrutiny inquiries is whether the race-exclusive practice is necessary to achieve its stated goals, or whether a less extensive use of race can as effectively achieve those goals. (See Chapter VI.)

**7. Do I need to consider or try race-neutral alternatives? How should I evaluate race-neutral alternatives?**

For decades federal law has demanded that institutions using race or ethnicity to confer educational opportunities or benefits do so only after serious consideration of race-neutral alternatives. In Justice O'Connor's words, higher education institutions should give "serious, good faith consideration [to] workable race-neutral alternatives that will achieve the diversity they seek." Institutions are not required to exhaust "every conceivable race-neutral alternative." They should, however, pay careful

attention to “the most promising aspects of . . . race-neutral alternatives as they develop.” As the Supreme Court suggests, these alternatives can only be meaningfully evaluated in light of relevant institutional goals.

## APPENDIX B. Excerpts from the U.S. Supreme Court Opinions in *Grutter v. Bollinger* and *Gratz v. Bollinger* (2003)

SUPREME COURT OF THE UNITED STATES

*GRUTTER* v. *BOLLINGER* ET AL. [Excerpts]

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE SIXTH CIRCUIT

No. 02–241. Argued April 1, 2003—Decided June 23, 2003

539 U.S. 306; 123 S. Ct. 2325; 156 L. Ed. 2d 304

JUSTICE O’CONNOR delivered the opinion of the Court.

...Today, we hold that the Law School has a compelling interest in attaining a diverse student body.

The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School’s assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their *amici*. Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits. See *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985); *Board of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 96, n. 6 (1978); *Bakke*, 438 U.S., at 319, n. 53 (opinion of Powell, J.).

We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition. See, e.g., *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Keyishian v. Board of Regents of Univ. of State of N. Y.*, 385 U.S., at 603. In announcing the principle of student body diversity as a compelling state interest, Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy: “The freedom of a university to make its own judgments as to education includes the selection of its student body.” *Bakke*, *supra*, at 312. From this premise, Justice Powell reasoned that by claiming “the right to select those students who will contribute the most to the ‘robust exchange of ideas,’” a university “seek[s] to achieve a goal that is of paramount importance in the fulfillment of its mission.” 438 U.S., at 313 (quoting *Keyishian v. Board of Regents of Univ. of State of N.Y.*, at 603). Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School’s proper institutional mission, and that “good faith” on the part of a university is “presumed” absent “a showing to the contrary.” 438 U.S., at 318–319.

As part of its goal of “assembling a class that is both exceptionally academically qualified and broadly diverse,” the Law School seeks to “enroll a ‘critical mass’ of minority students.” Brief for Respondents *Bollinger et al.* 13. The Law School’s interest is not simply “to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin.” *Bakke*, 438 U.S., at 307 (opinion of Powell, J.). That would amount to outright racial balancing, which is patently unconstitutional. *Ibid.*; *Freeman v. Pitts*, 503 U.S. 467, 494 (1992) (“Racial balance is not to be achieved for its own sake”); *Richmond v. J.A. Croson Co.*, 488 U.S., at 507. Rather, the Law School’s concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce.

These benefits are substantial. As the District Court emphasized, the Law School’s admissions policy promotes “cross-racial understanding,” helps to break down racial stereotypes, and “enables [students] to better understand persons of different races.” App. to Pet. for Cert. 246a. These benefits are “important and laudable,” because “classroom discussion is livelier, more spirited, and simply more enlightening and interesting” when the students have “the greatest possible variety of backgrounds.” *Id.*, at 246a, 244a.

The Law School’s claim of a compelling interest is further bolstered by its *amici*, who point to the educational benefits that flow from student body diversity. In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes, and “better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.” Brief for American Educational Research Association et al. as *Amici Curiae* 3; see, e.g., W. Bowen & D. Bok, *The Shape of the River* (1998); Diversity Challenged: Evidence on the Impact of Affirmative Action (G. Orfield & M. Kurlaender eds. 2001); Compelling Interest: Examining the Evidence on Racial Dynamics in Colleges and Universities (M. Chang, D. Witt, J. Jones, & K. Hakuta eds. 2003).

These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. Brief for 3M et al. as *Amici Curiae* 5; Brief for General Motors Corp. as *Amicus Curiae* 3–4. What is more, high-ranking retired officers and civilian leaders of the United States military assert that, “[b]ased on [their] decades of experience,” a “highly qualified, racially diverse officer corps...is essential to the military’s ability to fulfill its principle mission to provide national security.” Brief for Julius W. Becton, Jr. et al. as *Amici Curiae* 27. The primary sources for the Nation’s officer corps are the service academies and the Reserve Officers Training Corps (ROTC), the latter comprising students already admitted to participating colleges and universities. *Id.*, at 5. At present, “the military cannot achieve an officer corps that is both highly qualified and racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies.” *Ibid.* (emphasis in original). To fulfill its mission, the military “must be selective in admissions for training and education for the officer corps, and it must train and educate a highly qualified, racially diverse officer corps in a racially diverse setting.” *Id.*, at 29 (emphasis in original). We agree that “[i]t requires only a small step from this analysis to conclude that our country’s other most selective institutions must remain both diverse and selective.” *Ibid.*

We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to “sustaining our political and cultural heritage” with a fundamental role in maintaining the fabric of society. *Plyler v. Doe*, 457 U.S. 202, 221 (1982). This Court has long recognized that “education...is the very foundation of good citizenship.” *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). For this reason, the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity. The United States, as *amicus curiae*, affirms that “[e]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective.” Brief for United States as *Amicus Curiae* 13. And, “[n]owhere is the importance of such openness more acute than in the context of higher education.” *Ibid.* Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.

Moreover, universities, and in particular, law schools, represent the training ground for a large number of our Nation’s leaders. *Sweatt v. Painter*, 339 U.S. 629, 634 (1950) (describing law school as a “proving ground for legal learning and practice”). Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives. See Brief for Association of American Law Schools as *Amicus Curiae* 5–6. The pattern is even more striking when it comes to highly selective law schools. A handful of these schools accounts for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges. *Id.*, at 6.

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. As we have recognized, law schools “cannot be effective in isolation from the individuals and institutions with which the law interacts.” See *Sweatt v. Painter*, *supra*, at 634. Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.

The Law School does not premise its need for critical mass on “any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.” Brief for Respondent *Bollinger et al.* 30. To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School’s mission, and one that it cannot accomplish with only token numbers of minority students. Just as growing up in a particular region or having particular professional experiences is likely to affect an individual’s views, so too is one’s own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters. The Law School has determined, based on its experience and expertise, that a “critical mass” of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body.

## B

Even in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still “constrained in how it may pursue that end: [T]he means chosen to accomplish the [government’s] asserted purpose must be specifically and narrowly framed to accomplish that purpose.” *Shaw v. Hunt*, 517 U.S. 899, 908 (1996) (internal quotation marks and citation omitted). The purpose of the narrow tailoring requirement is to ensure that “the means chosen ‘fit’ . . . th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.” *Richmond v. J. A. Croson Co.*, 488 U.S., at 493 (plurality opinion).

Since *Bakke*, we have had no occasion to define the contours of the narrow-tailoring inquiry with respect to race-conscious university admissions programs. That inquiry must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education. Contrary to JUSTICE KENNEDY’s assertions, we do not “abandon[ ] strict scrutiny,” see *post*, at 8 (dissenting opinion). Rather, as we have already explained, *ante*, at 15, we adhere to *Adarand*’s teaching that the very purpose of strict scrutiny is to take such “relevant differences into account.” 515 U.S., at 228 (internal quotation marks omitted).

To be narrowly tailored, a race-conscious admissions program cannot use a quota system—it cannot “insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants.” *Bakke, supra*, at 315 (opinion of Powell, J.). Instead, a university may consider race or ethnicity only as a “‘plus’ in a particular applicant’s file,” without “insulat[ing] the individual from comparison with all other candidates for the available seats.” *Id.*, at 317. In other words, an admissions program must be “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.” *Ibid.*

We find that the Law School’s admissions program bears the hallmarks of a narrowly tailored plan. As Justice Powell made clear in *Bakke*, truly individualized consideration demands that race be used in a flexible, nonmechanical way. It follows from this mandate that universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks. See *id.*, at 315–316. Nor can universities insulate applicants who belong to certain racial or ethnic groups from the competition for admission. *Ibid.* Universities can, however, consider race or ethnicity more flexibly as a “plus” factor in the context of individualized consideration of each and every applicant. *Ibid.*

We are satisfied that the Law School’s admissions program, like the Harvard plan described by Justice Powell, does not operate as a quota. Properly understood, a “quota” is a program in which a certain fixed number or proportion of opportunities are “reserved exclusively for certain minority groups.” *Richmond v. J. A. Croson Co., supra*, at 496 (plurality opinion). Quotas “impose a fixed number or percentage which must be attained, or which cannot be exceeded,” *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 495 (1986) (O’CONNOR, J., concurring in part and dissenting in part), and “insulate the individual from comparison with all other candidates for the available seats.” *Bakke, supra*, at 317

(opinion of Powell, J.). In contrast, “a permissible goal...require[s] only a good-faith effort...to come within a range demarcated by the goal itself,” *Sheet Metal Workers v. EEOC*, *supra*, at 495, and permits consideration of race as a “plus” factor in any given case while still ensuring that each candidate “compete[s] with all other qualified applicants,” *Johnson v. Transportation Agency, Santa Clara Cty.*, 480 U.S. 616, 638 (1987).

Justice Powell’s distinction between the medical school’s rigid 16-seat quota and Harvard’s flexible use of race as a “plus” factor is instructive. Harvard certainly had minimum goals for minority enrollment, even if it had no specific number firmly in mind. See *Bakke*, *supra*, at 323 (opinion of Powell, J.) (“10 or 20 black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States”). What is more, Justice Powell flatly rejected the argument that Harvard’s program was “the functional equivalent of a quota” merely because it had some “plus” for race, or gave greater “weight” to race than to some other factors, in order to achieve student body diversity. 438 U.S., at 317–318.

The Law School’s goal of attaining a critical mass of underrepresented minority students does not transform its program into a quota. As the Harvard plan described by Justice Powell recognized, there is of course “some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted.” *Id.*, at 323. “[S]ome attention to numbers,” without more, does not transform a flexible admissions system into a rigid quota. *Ibid.* Nor, as JUSTICE KENNEDY posits, does the Law School’s consultation of the “daily reports,” which keep track of the racial and ethnic composition of the class (as well as of residency and gender), “suggest [ ] there was no further attempt at individual review save for race itself” during the final stages of the admissions process. See *post*, at 6 (dissenting opinion). To the contrary, the Law School’s admissions officers testified without contradiction that they never gave race any more or less weight based on the information contained in these reports. Brief for Respondents *Bollinger et al.* 43, n. 70 (citing App. in Nos. 01–1447 and 01–1516 (CA6), p. 7336). Moreover, as JUSTICE KENNEDY concedes, see *post*, at 4, between 1993 and 2000, the number of African American, Latino, and Native American students in each class at the Law School varied from 13.5 to 20.1 percent, a range inconsistent with a quota.

THE CHIEF JUSTICE believes that the Law School’s policy conceals an attempt to achieve racial balancing, and cites admissions data to contend that the Law School discriminates among different groups within the critical mass. *Post*, at 3–9 (dissenting opinion). But, as THE CHIEF JUSTICE concedes, the number of underrepresented minority students who ultimately enroll in the Law School differs substantially from their representation in the applicant pool and varies considerably for each group from year to year. See *post*, at 8 (dissenting opinion).

That a race-conscious admissions program does not operate as a quota does not, by itself, satisfy the requirement of individualized consideration. When using race as a “plus” factor in university admissions, a university’s admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admis-



sions program is paramount. See *Bakke, supra*, at 318, n. 52 (opinion of Powell, J.) (identifying the “denial...of th[e] right to individualized consideration” as the “principal evil” of the medical school’s admissions program).

Here, the Law School engages in a highly individualized, holistic review of each applicant’s file, giving serious considerations to all the ways an applicant might contribute to a diverse educational environment. The Law School affords this individualized consideration to applicants of all races. There is no policy, either *de jure* or *de facto*, of automatic acceptance or rejection based on any single “soft” variable. Unlike the program at issue in *Gratz v. Bollinger, ante*, the Law School awards no mechanical predetermined diversity “bonuses” based on race or ethnicity. See *ante*, at 23 (distinguishing a race-conscious admissions program that automatically awards 20 points based on race from the Harvard plan, which considered race but “did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university’s diversity”). Like the Harvard plan, the Law School’s admissions policy “is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.” *Bakke, supra*, at 317 (opinion of Powell, J.).

We also find that, like the Harvard plan Justice Powell referenced in *Bakke*, the Law School’s race-conscious admissions program adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions. With respect to the use of race itself, all underrepresented minority students admitted by the Law School have been deemed qualified. By virtue of our Nation’s struggle with racial inequality, such students are both likely to have experiences of particular importance to the Law School’s mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences. See App. 120.

The Law School does not, however, limit in any way the broad range of qualities and experiences that may be considered valuable contributions to student body diversity. To the contrary, the 1992 policy makes clear “[t]here are many possible bases for diversity admissions,” and provides examples of admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields. *Id.*, at 118–119. The Law School seriously considers each “applicant’s promise of making a notable contribution to the class by way of a particular strength, attainment, or characteristic—*e.g.*, an unusual intellectual achievement, employment experience, non-academic performance, or personal background.” *Id.*, at 83–84. All applicants have the opportunity to highlight their own potential diversity contributions through the submission of a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School.

What is more, the Law School actually gives substantial weight to diversity factors besides race. The Law School frequently accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants (and other nonminority applicants) who are rejected. See Brief for Respondents *Bollinger et al.* 10; App. 121–122. This shows that the Law School seriously weighs many other diversity factors besides race that can make a real and dispositive difference for nonminority applicants as well. By this

flexible approach, the Law School sufficiently takes into account, in practice as well as in theory, a wide variety of characteristics besides race and ethnicity that contribute to a diverse student body. JUSTICE KENNEDY speculates that “race is a likely outcome determinative for many members of minority groups” who do not fall within the upper range of LSAT scores and grades. *Post*, at 3 (dissenting opinion). But the same could be said of the Harvard plan discussed approvingly by Justice Powell in *Bakke*, and indeed of any plan that uses race as one of many factors. See 438 U.S., at 316 (“When the Committee on Admissions reviews the large middle group of applicants who are “admissible” and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor”).

Petitioner and the United States argue that the Law School’s plan is not narrowly tailored because race-neutral means exist to obtain the educational benefits of student body diversity that the Law School seeks. We disagree. Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups. See *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 280, n. 6 (1986) (alternatives must serve the interest “about as well”); *Richmond v. J. A. Croson Co.*, 488 U.S., at 509–510 (plurality opinion) (city had a “whole array of race-neutral” alternatives because changing requirements “would have [had] little detrimental effect on the city’s interests”). Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks. See *id.*, at 507 (set-aside plan not narrowly tailored where “there does not appear to have been any consideration of the use of race-neutral means”); *Wygant v. Jackson Bd. of Ed.*, *supra*, at 280, n. 6 (narrow tailoring “require[s] consideration” of “lawful alternative and less restrictive means”).

We agree with the Court of Appeals that the Law School sufficiently considered workable race-neutral alternatives. The District Court took the Law School to task for failing to consider race-neutral alternatives such as “using a lottery system” or “decreasing the emphasis for all applicants on undergraduate GPA and LSAT scores.” App. to Pet. for Cert. 251a. But these alternatives would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both.

The Law School’s current admissions program considers race as one factor among many, in an effort to assemble a student body that is diverse in ways broader than race. Because a lottery would make that kind of nuanced judgment impossible, it would effectively sacrifice all other educational values, not to mention every other kind of diversity. So too with the suggestion that the Law School simply lower admissions standards for all students, a drastic remedy that would require the Law School to become a much different institution and sacrifice a vital component of its educational mission. The United States advocates “percentage plans,” recently adopted by public undergraduate institutions in Texas, Florida, and California to guarantee admission to all students above a certain class-rank threshold in every high school in the State. Brief for United States as *Amicus Curiae* 14–18. The United States does not, however, explain how such plans could work for graduate and professional schools. Moreover, even assuming such plans are race-neutral, they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along

all the qualities valued by the university. We are satisfied that the Law School adequately considered race-neutral alternatives currently capable of producing a critical mass without forcing the Law School to abandon the academic selectivity that is the cornerstone of its educational mission.

We acknowledge that “there are serious problems of justice connected with the idea of preference itself.” *Bakke*, 438 U.S., at 298 (opinion of Powell, J.). Narrow tailoring, therefore, requires that a race-conscious admissions program not unduly harm members of any racial group. Even remedial race-based governmental action generally “remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit.” *Id.*, at 308. To be narrowly tailored, a race-conscious admissions program must not “unduly burden individuals who are not members of the favored racial and ethnic groups.” *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 630 (1990) (O’CONNOR, J., dissenting).

We are satisfied that the Law School’s admissions program does not. Because the Law School considers “all pertinent elements of diversity,” it can (and does) select nonminority applicants who have greater potential to enhance student body diversity over underrepresented minority applicants. See *Bakke*, *supra*, at 317 (opinion of Powell, J.). As Justice Powell recognized in *Bakke*, so long as a race-conscious admissions program uses race as a “plus” factor in the context of individualized consideration, a rejected applicant “will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname....His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.” 438 U.S., at 318.

We agree that, in the context of its individualized inquiry into the possible diversity contributions of all applicants, the Law School’s race-conscious admissions program does not unduly harm nonminority applicants.

We are mindful, however, that “[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.” *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). Accordingly, race-conscious admissions policies must be limited in time. This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle. We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point. The Law School, too, concedes that all “race-conscious programs must have reasonable durational limits.” Brief for Respondents *Bollinger et al.* 32.

In the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity. Universities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law, are currently engaged in experimenting with a wide variety of alternative approaches. Universities in other States can and should draw on the most promising aspects of these race-neutral alternatives as they develop. Cf. *United States v.*

*Lopez*, 514 U.S. 549, 581 (1995) (KENNEDY, J., concurring) (“[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear”).

The requirement that all race-conscious admissions programs have a termination point “assure[s] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself.” *Richmond v. J. A. Croson Co.*, 488 U.S., at 510 (plurality opinion); see also Nathanson & Bartnik, *The Constitutionality of Preferential Treatment for Minority Applicants to Professional Schools*, 58 *Chicago Bar Rec.* 282, 293 (May–June 1977) (“It would be a sad day indeed, were America to become a quota-ridden society, with each identifiable minority assigned proportional representation in every desirable walk of life. But that is not the rationale for programs of preferential treatment; the acid test of their justification will be their efficacy in eliminating the need for any racial or ethnic preferences at all”).

We take the Law School at its word that it would “like nothing better than to find a race-neutral admissions formula” and will terminate its race-conscious admissions program as soon as practicable. See Brief for Respondents *Bollinger et al.* 34; *Bakke, supra*, at 317–318 (opinion of Powell, J.) (presuming good faith of university officials in the absence of a showing to the contrary). It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. See Tr. of Oral Arg. 43. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in part and dissenting in part.

...today’s *Grutter-Gratz* split double header seems perversely designed to prolong the controversy and the litigation. Some future lawsuits will presumably focus on whether the discriminatory scheme in question contains enough evaluation of the applicant “as an individual,” *ante*, at 24, and sufficiently avoids “separate admissions tracks” *ante*, at 22, to fall under *Grutter* rather than *Gratz*. Some will focus on whether a university has gone beyond the bounds of a “good faith effort” and has so zealously pursued its “critical mass” as to make it an unconstitutional *de facto* quota system, rather than merely “a permissible goal.” *Ante*, at 23 (quoting *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 495 (1986) (O’CONNOR, J., concurring in part and dissenting in part)). Other lawsuits may focus on whether, in the particular setting at issue, any educational benefits flow from racial diversity. (That issue was not contested in *Grutter*; and while the opinion accords “a degree of deference to a university’s academic decisions,” *ante*, at 16, “deference does not imply abandonment or abdication of judicial review,” *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).) Still other suits may challenge the bona fides of the institution’s expressed commitment to the educational benefits of diversity that immunize the discriminatory scheme in *Grutter*. (Tempting targets, one would suppose, will be those universities that talk the talk of multiculturalism and racial diversity in the courts but walk the walk of tribalism and racial segregation on their campuses—through minority-only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation

ceremonies.) And still other suits may claim that the institution's racial preferences have gone below or above the mystical *Grutter*-approved "critical mass." Finally, litigation can be expected on behalf of minority groups intentionally shortchanged in the institution's composition of its generic minority "critical mass." I do not look forward to any of these cases. The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.

## SUPREME COURT OF THE UNITED STATES

## GRATZ ET AL. v. BOLLINGER ET AL. [Excerpts]

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE SIXTH CIRCUIT

No. 02–516. Argued April 1, 2003—Decided June 23, 2003

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

...Because “[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification,” *Fullilove v. Klutznick*, 448 U.S. 448, 537 (1980) (STEVENS, J., dissenting), our review of whether such requirements have been met must entail “a most searching examination.” *Adarand, supra*, at 223 (quoting *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 273 (1986) (plurality opinion of Powell, J.)). We find that the University’s policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single “underrepresented minority” applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program.

In *Bakke*, Justice Powell reiterated that “[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake.” 438 U.S., at 307. He then explained, however, that in his view it would be permissible for a university to employ an admissions program in which “race or ethnic background may be deemed a ‘plus’ in a particular applicant’s file.” *Id.*, at 317. He explained that such a program might allow for “[t]he file of a particular black applicant [to] be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism.” *Ibid.* Such a system, in Justice Powell’s view, would be “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant.” *Ibid.*

Justice Powell’s opinion in *Bakke* emphasized the importance of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual’s ability to contribute to the unique setting of higher education. The admissions program Justice Powell described, however, did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university’s diversity. See *id.*, at 315. See also *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 618 (1990) (O’CONNOR, J., dissenting) (concluding that the FCC’s policy, which “embodie[d] the related notions that a particular applicant, by virtue of race or ethnicity alone, is more valued than other applicants because [the applicant is] ‘likely to provide [a] distinct perspective,’ “impermissibly value[d] individuals” based on a presumption that “persons think in a manner associated with their race”). Instead, under the approach Justice Powell described, each characteristic of a particular applicant was to be considered in assessing the applicant’s entire application.

The current LSA policy does not provide such individualized consideration. The LSA's policy automatically distributes 20 points to every single applicant from an "underrepresented minority" group, as defined by the University. The only consideration that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups. Moreover, unlike Justice Powell's example, where the race of a "particular black applicant" could be considered without being decisive, see *Bakke*, 438 U.S., at 317, the LSA's automatic distribution of 20 points has the effect of making "the factor of race...decisive" for virtually every minimally qualified underrepresented minority applicant. *Ibid.*<sup>19</sup>

Also instructive in our consideration of the LSA's system is the example provided in the description of the Harvard College Admissions Program, which Justice Powell both discussed in, and attached to, his opinion in *Bakke*. The example was included to "illustrate the kind of significance attached to race" under the Harvard College program. *Id.*, at 324. It provided as follows:

"The Admissions Committee, with only a few places left to fill, might find itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up in an innercity ghetto of semiliterate parents whose academic achievement was lower but who had demonstrated energy and leadership as well as an apparently abiding interest in black power. If a good number of black students much like A but few like B had already been admitted, the Committee might prefer B; and vice versa. If C, a white student with extraordinary artistic talent, were also seeking one of the remaining places, his unique quality might give him an edge over both A and B. Thus, the critical criteria are often individual qualities or experience *not dependent upon race but sometimes associated with it.*" *Ibid.* (emphasis added)

This example further demonstrates the problematic nature of the LSA's admissions system. Even if student C's "extraordinary artistic talent" rivaled that of Monet or Picasso, the applicant would receive, at most, five points under the LSA's system. See App. 234–235. At the same time, every single underrepresented minority applicant, including students A and B, would automatically receive 20 points for submitting an application. Clearly, the LSA's system does not offer applicants the individualized selection process described in Harvard's example. Instead of considering how the differing backgrounds, experiences, and characteristics of students A, B, and C might benefit the University, admissions counselors reviewing LSA applications would simply award both A and B 20 points because their applications indicate that they are African-American, and student C would receive up to 5 points for his "extraordinary talent."<sup>20</sup>

Respondents emphasize the fact that the LSA has created the possibility of an applicant's file being flagged for individualized consideration by the ARC. We think that the flagging program only emphasizes the flaws of the University's system as a whole when compared to that described by Justice Powell. Again, students A, B, and C illustrate the point. First, student A would never be flagged. This is because, as the University has conceded, the effect of automatically awarding 20 points is that virtually every qualified underrepresented minority applicant is admitted. Student A, an applicant "with promise of superior aca-

ademic performance,” would certainly fit this description. Thus, the result of the automatic distribution of 20 points is that the University would never consider student A’s individual background, experiences, and characteristics to assess his individual “potential contribution to diversity,” *Bakke, supra*, at 317. Instead, every applicant like student A would simply be admitted.

It is possible that students B and C would be flagged and considered as individuals. This assumes that student B was not already admitted because of the automatic 20 point distribution, and that student C could muster at least 70 additional points. But the fact that the “review committee can look at the applications individually and ignore the points,” once an application is flagged, Tr. of Oral Arg. 42, is of little comfort under our strict scrutiny analysis. The record does not reveal precisely how many applications are flagged for this individualized consideration, but it is undisputed that such consideration is the exception and not the rule in the operation of the LSA’s admissions program. See App. to Pet. for Cert. 117a (“The ARC reviews only a portion of all of the applications. The bulk of admissions decisions are executed based on selection index score parameters set by the EWG”).<sup>21</sup> Additionally, this individualized review is only provided after admissions counselors automatically distribute the University’s version of a “plus” that makes race a decisive factor for virtually every minimally qualified underrepresented minority applicant.

Respondents contend that “[t]he volume of applications and the presentation of applicant information make it impractical for [LSA] to use the...admissions system” upheld by the Court today in *Grutter*. Brief for Respondents 6, n. 8. But the fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system. See *Richmond v. J. A. Croson Co.*, 488 U.S., at 508 (citing *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (plurality opinion of Brennan, J.) (rejecting “administrative convenience” as a determinant of constitutionality in the face of a suspect classification)). Nothing in Justice Powell’s opinion in *Bakke* signaled that a university may employ whatever means it desires to achieve the stated goal of diversity without regard to the limits imposed by our strict scrutiny analysis.

We conclude, therefore, that because the University’s use of race in its current freshman admissions policy is not narrowly tailored to achieve respondents’ asserted compelling interest in diversity, the admissions policy violates the Equal Protection Clause of the Fourteenth Amendment.<sup>22</sup> We further find that the admissions policy also violates Title VI and 42 U.S. C. § 1981.<sup>23</sup> Accordingly, we reverse that portion of the District Court’s decision granting respondents summary judgment with respect to liability and remand the case for proceedings consistent with this opinion.

It is so ordered.

JUSTICE O’CONNOR, concurring.\*

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\* Justice Breyer joins this decision, except for the last sentence.



## I

Unlike the law school admissions policy the Court upholds today in *Grutter v. Bollinger*, *post*, p. 1, the procedures employed by the University of Michigan's (University) Office of Undergraduate Admissions do not provide for a meaningful individualized review of applicants. Cf. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (principal opinion of Powell, J.). The law school considers the various diversity qualifications of each applicant, including race, on a case-by-case basis. See *Grutter v. Bollinger*, *post*, at 24. By contrast, the Office of Undergraduate Admissions relies on the selection index to assign every underrepresented minority applicant the same, automatic 20-point bonus without consideration of the particular background, experiences, or qualities of each individual applicant. Cf. *ante*, at 23, 25. And this mechanized selection index score, by and large, automatically determines the admissions decision for each applicant. The selection index thus precludes admissions counselors from conducting the type of individualized consideration the Court's opinion in *Grutter*, *supra*, at 25, requires: consideration of each applicant's individualized qualifications, including the contribution each individual's race or ethnic identity will make to the diversity of the student body, taking into account diversity within and among all racial and ethnic groups. Cf. *ante*, at 24 (citing *Bakke*, *supra*, at 324)).

On cross-motions for summary judgment, the District Court held that the admissions policy the University instituted in 1999 and continues to use today passed constitutional muster. See 122 F. Supp. 2d 811, 827 (ED Mich. 2001). In their proposed summary of undisputed facts, the parties jointly stipulated to the admission policy's mechanics. App. to Pet. for Cert. 116a–118a. When the university receives an application for admission to its incoming class, an admissions counselor turns to a Selection Index Worksheet to calculate the applicant's selection index score out of 150 maximum possible points—a procedure the University began using in 1998. App. 256. Applicants with a score of over 100 are automatically admitted; applicants with scores of 95 to 99 are categorized as “admit or postpone”; applicants with 90–94 points are postponed or admitted; applicants with 75–89 points are delayed or postponed; and applicants with 74 points or fewer are delayed or rejected. The Office of Undergraduate Admissions extends offers of admission on a rolling basis and acts upon the applications it has received through periodic “[m]ass [a]ction[s].” App. 256.

In calculating an applicant's selection index score, counselors assign numerical values to a broad range of academic factors, as well as to other variables the University considers important to assembling a diverse student body, including race. Up to 110 points can be assigned for academic performance, and up to 40 points can be assigned for the other, nonacademic factors. Michigan residents, for example, receive 10 points, and children of alumni receive 4. Counselors may assign an outstanding essay up to 3 points and may award up to 5 points for an applicant's personal achievement, leadership, or public service. Most importantly for this case, an applicant automatically receives a 20 point bonus if he or she possesses any one of the following “miscellaneous” factors: membership in an underrepresented minority group; attendance at a predominantly minority or disadvantaged high school; or recruitment for athletics.

In 1999, the University added another layer of review to its admissions process. After an admissions counselor has tabulated an applicant's selection index score, he or she may

“flag” an application for further consideration by an Admissions Review Committee, which is composed of members of the Office of Undergraduate Admissions and the Office of the Provost. App. to Pet. for Cert. 117a. The review committee meets periodically to discuss the files of “flagged” applicants not already admitted based on the selection index parameters. App. 275. After discussing each flagged application, the committee decides whether to admit, defer, or deny the applicant. *Ibid.*

Counselors may flag an applicant for review by the committee if he or she is academically prepared, has a selection index score of at least 75 (for non-Michigan residents) or 80 (for Michigan residents), and possesses one of several qualities valued by the University. These qualities include “high class rank, unique life experiences, challenges, circumstances, interests or talents, socioeconomic disadvantage, and underrepresented race, ethnicity, or geography.” App. to Pet. for Cert. 117a. Counselors also have the discretion to flag an application if, notwithstanding a high selection index score, something in the applicant’s file suggests that the applicant may not be suitable for admission. App. 274. Finally, in “rare circumstances,” an admissions counselor may flag an applicant with a selection index score below the designated levels if the counselor has reason to believe from reading the entire file that the score does not reflect the applicant’s true promise. *Ibid.*

## II

Although the Office of Undergraduate Admissions does assign 20 points to some “soft” variables other than race, the points available for other diversity contributions, such as leadership and service, personal achievement, and geographic diversity, are capped at much lower levels. Even the most outstanding national high school leader could never receive more than five points for his or her accomplishments—a mere quarter of the points automatically assigned to an underrepresented minority solely based on the fact of his or her race. Of course, as Justice Powell made clear in *Bakke*, a university need not “necessarily accor[d]” all diversity factors “the same weight,” 438 U.S., at 317, and the “weight attributed to a particular quality may vary from year to year depending on the ‘mix’ both of the student body and the applicants for the in-coming class,” *id.*, at 317–318. But the selection index, by setting up automatic, predetermined point allocations for the soft variables, ensures that the diversity contributions of applicants cannot be individually assessed. This policy stands in sharp contrast to the law school’s admissions plan, which enables admissions officers to make nuanced judgments with respect to the contributions each applicant is likely to make to the diversity of the incoming class. See *Grutter v. Bollinger*, *post*, at 22 (“[T]he Law School’s race-conscious admissions program adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions”).

The only potential source of individualized consideration appears to be the Admissions Review Committee. The evidence in the record, however, reveals very little about how the review committee actually functions. And what evidence there is indicates that the committee is a kind of afterthought, rather than an integral component of a system of individualized review. As the Court points out, it is undisputed that the “[committee] reviews only a portion of all the applications. The bulk of admissions decisions are executed based on selection index score parameters set by the [Enrollment Working Group].” *Ante*, at 26

(quoting App. to Pet for Cert. 117a). Review by the committee thus represents a necessarily limited exception to the Office of Undergraduate Admissions' general reliance on the selection index. Indeed, the record does not reveal how many applications admissions counselors send to the review committee each year, and the University has not pointed to evidence demonstrating that a meaningful percentage of applicants receives this level of discretionary review. In addition, eligibility for consideration by the committee is itself based on automatic cut-off levels determined with reference to selection index scores. And there is no evidence of how the decisions are actually made—what type of individualized consideration is or is not used. Given these circumstances, the addition of the Admissions Review Committee to the admissions process cannot offset the apparent absence of individualized consideration from the Office of Undergraduate Admissions' general practices.

For these reasons, the record before us does not support the conclusion that the University of Michigan's admissions program for its College of Literature, Science, and the Arts—to the extent that it considers race—provides the necessary individualized consideration. The University, of course, remains free to modify its system so that it does so. Cf. *Grutter v. Bollinger*, *post*, p. 1. But the current system, as I understand it, is a nonindividualized, mechanical one. As a result, I join the Court's opinion reversing the decision of the District Court.

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19. JUSTICE SOUTER recognizes that the LSA's use of race is decisive in practice, but he attempts to avoid that fact through unsupported speculation about the self-selection of minorities in the applicant pool. See *Post*, at 6 (dissenting opinion).
  20. JUSTICE SOUTER is therefore wrong when he contends that "applicants to the undergraduate college are [not] denied individualized consideration." *Post*, at 6. As JUSTICE O'CONNOR explains in her concurrence, the LSA's program "ensures that the diversity contributions of applicants cannot be individually assessed." *Post*, at 4.
  21. JUSTICE SOUTER is mistaken in his assertion that the Court "take[s] it upon itself to apply a newly formulated legal standard to an undeveloped record." *Post*, at 7, n. 3. He ignores the fact that the respondents have told us all that is necessary to decide this case. As explained above, respondents concede that only a portion of the applications are reviewed by the ARC and that the "bulk of admissions decisions" are based on the point system. It should be readily apparent that the availability of this review, which comes after the automatic distribution of points, is far more limited than the individualized review given to the "large middle group of applicants" discussed by Justice Powell and described by the Harvard plan in *Bakke*. 438 U.S., at 316 (internal quotation marks omitted).
  22. JUSTICE GINSBURG in her dissent observes that "[o]ne can reasonably anticipate... that colleges and universities will seek to maintain their minority enrollment... whether or not they can do so in full candor through adoption of affirmative action plans of the kind here at issue." *Post*, at 7–8. She goes on to say that "[i]f honesty is the best policy, surely Michigan's accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises." *Post*, at 8. These observations are remarkable for two reasons. First, they suggest that universities—to whose academic judgment we are told in *Grutter v. Bollinger*, *post*, at 16, we should defer—will pursue their affirmative-action programs whether or not they violate the United States Constitution. Second, they recommend that these violations should be dealt with, not by requiring the universities to obey the Constitution, but by changing the Constitution so that it conforms to the conduct of the universities.
  23. We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI. See *Alexander v. Sandoval*, 532 U.S. 275, 281 (2001); *United States v. Fordice*, 505 U.S. 717, 732, n. 7 (1992); *Alexander v. Choate*, 469 U.S. 287, 293 (1985). Likewise, with respect to §1981, we have explained that the provision was "meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race." *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295 (1976). Furthermore, we have explained that a contract for educational services is a "contract" for purposes of §1981. See *Runyon v. McCrary*, 427 U.S. 160, 172 (1976). Finally, purposeful discrimination that violates the Equal Protection Clause of the Fourteenth Amendment will also violate §1981. See *General Building Contractors Assn., Inc. v. Pennsylvania*, 458 U.S. 375, 389 (1982).

## Appendix C. Sample OCR Data/Information Requests

The following questions are derived from institution-specific OCR data and information requests that follow complaints of discrimination filed with OCR. They are provided to illustrate the kinds of inquiries that may surface in response to complaints of discrimination—to inform institutional planning and policy development. These questions do not represent federal policy or reflect relevant inquiries in all cases. See also *Federal Financial Aid: A Framework for Evaluating Diversity-Related Programs* (College Board, 2005) at Appendix D (a comprehensive, sample OCR financial aid information request).

In a case involving allegations that a law school program offered a separate admissions track for minority and disadvantaged students and provided support services for those students after matriculation, OCR requested the following information:

1. A copy of the admissions application form and instruction booklet for the school and the program used during the academic year for admission into the following year's academic class, and any of the school's and the program's admissions processes and requirements that are sent to prospective applicants.
2. Documentation that describes the policies, procedures, and criteria followed by the school and program in processing admissions requests for the two previous academic years.
3. Documentation explaining the minimum grade point average (GPA) or test scores for admission to the school and/or the program. Indicate if there is a distinction made for minority students and nonminority students.
4. Documentation explaining whether a personal statement is used in the admissions process to the school and/or the program. Indicate how the statement is weighted/scored and, if applicable, whether there is a distinction made for minority students and nonminority students.
5. Documentation explaining whether the school uses a scored interview for admission to the school and/or the program. Indicate whether there is a distinction made between how the interview is scored for minority students and nonminority students.
6. Documentation explaining whether weight is given to prior work experience or volunteer work in the admissions process to the school and/or the program. Indicate how that weight is determined and whether there is a distinction made for minority students and nonminority students.
7. Documentation explaining whether letters of recommendation are used in the admissions process to the school and/or the program. Indicate how those letters are used and whether there is a distinction made for minority students and for nonminority students.
8. Documentation explaining how race or national origin is considered in applying any of the admissions criteria or at any stage of the admissions process at the school and/or the program.

9. A detailed description of the program, including but not limited to: 1) the date and reason for its implementation; 2) its purpose; 3) the services provided to prospective students and students currently enrolled, in the program; and 4) the criteria for admission.
10. The racial composition of the school.
11. The racial composition of the program.
12. For each applicant applying for admission to the school and the program in the two previous academic years:
  - a. the applicant's race;
  - b. the applicant's secondary school GPA;
  - c. the applicant's state of residence, if considered;
  - d. the applicant's standardized test score;
  - e. any rating or score given to the applicant during the course of the admissions process, and an explanation of the rating or score;
  - f. whether the applicant was accepted, rejected, or placed on a waiting list and the reason for the applicant's acceptance, rejection, or placement on the waiting list.
13. Statistics or other evidence indicating the enrollment of minority students in the school before and after the program was established.
14. Documentation detailing whether the program is periodically reviewed and modified, including the date the last review was completed and the results of the review.
15. A description of any program(s) or services the school provides nonminority students to assist them in seeking admission to law school and/or during their course of study.
16. All individuals by name, title, and function who have decision-making authority in the school and the program's admissions process. Also identify any personnel who helped review any of the admissions applications or interviewed applicants to the school and/or the program in the two previous academic years.
17. A copy of the school's and the program's student handbook, catalog, and any other literature disseminated to all students entering the school and/or the program.
18. A copy of the complainant's admissions file and all related documentation, as well as copies of correspondence between the complainant and the school and/or the program.

In a case involving claims of discrimination regarding a law school's participation in a job fair that accepted minority students exclusively and participation in a law firm mentorship program targeting minority students, OCR requested the following information:

1. A description of the Job Fair, including the purpose, location, participants, dates, and benefits provided to student participants.
2. All advertisements used in any way by the Law School regarding the Job Fair (copies of posters, flyers, brochures, Web sites, mailings, etc.). If the Law School sent any mailings to students, the races of the students that were informed by such means and a sample copy of each type of mailing used were included.

3. A description of how the Job Fair is funded (percentage funded by School versus the private law firms). In addition, identification of all other administrative support or other assistance provided to the Job Fair by the Law School.
4. The specific eligibility requirements for students to attend or participate in the Job Fair. If membership in particular racial or ethnic groups is required for student participation at the Job Fair, identification of each such group.
5. A description of the Law School's role in the Job Fair.
6. Descriptions and requirements for participation in other job fairs sponsored or organized by the Law School. For each other job fair, the extent to which the benefits provided are comparable to the benefits provided at the Job Fair that is the subject of this complaint.
7. The number of students, by race and national origin, who participated in the Job Fair specified by the complainant.
8. A list of all students, by race and national origin, if any, who were rejected from participation in the specified Job Fair.
9. All documentation/information regarding the mentorship program (the Program). Include a description of all criteria for participation, including the nature and extent of any use of race or national origin as a criterion or factor, the application process, the involvement of the Law School in the selection of students, and benefits provided to students through the Program.
10. A list of all applicants, by race and national origin, who applied to the Program for the previous two years, indicating which applicants were selected to participate. For each Program participant, the amount of financial aid provided by the Program and the student's race or national origin.

In a case involving allegations that a university's student support program, which provided stipends to certain academically at-risk students, resulted in race discrimination, OCR requested the following information:

1. Copies of any brochures or pamphlets that describe the program.
2. Copies of the College's policies and procedures for participation in the program, including any application procedures, eligibility criteria, and selection procedures for receiving support services or stipends. Indicate if these policies and procedures have changed during the last three years. Also, a copy of any forms or standard notices used in the application and selection process.
3. The names, titles, and telephone numbers of all individuals involved in the decision-making process for awarding stipends to students in the program and in administering the program during the two previous academic years, including those of any individuals involved in considering the complainant's eligibility for a stipend.
4. Copies of correspondence between the complainant and the College that relates to his participation in or eligibility for the program and stipend.

5. If students apply to participate in the program, a list of all the students who applied during the two previous academic years. For each student, a statement of his or her race or national origin, whether or not he or she received program support services or a stipend, and the basis for any decision to grant or deny such services or a stipend for that student.
6. If there is no application process, a description of how students are considered for participation. Also, a list of all students considered for support services or a stipend during two previous academic years. For each student, a statement of his or her race or national origin, whether or not he or she received support services or a stipend, and the basis for any decision to grant or deny such services.

## Appendix D. Resources

### In General

*Affirmative Action in Higher Education: A Report by the Council Committee on Discrimination*, AAUP Policy Documents & Reports 193, 194 (9th ed. 2001).

*Affirmative-Action Plans: Recommended Procedures for Increasing the Number of Minority Persons and Women on College and University Faculties*, AAUP Policy Documents & Reports 201 (9th ed. 2001).

Alger, Jonathan and Donna Snyder, *Donated Funds and Race-Conscious Scholarship Programs After the University of Michigan Decisions* ([http://www.nacua.org/nacualert/docs/RaceConsciousFinAid/Alger\\_Snyder\\_05.pdf](http://www.nacua.org/nacualert/docs/RaceConsciousFinAid/Alger_Snyder_05.pdf)) (April 23, 2004).

Baum, Sandy and Kathleen Payea, *Education Pays 2004: The Benefits of Higher Education for Individuals and Society*, College Board ([www.collegeboard.com](http://www.collegeboard.com)).

Bok, Derek. *The Uncertain Future of Race-Sensitive Admissions*, Revised Draft, January 20, 2003 (Posted on the National Association of College and University Attorneys Web site at [http://www.nacua.org/NACUAResourcePages/Docs/AffirmativeAction/Uncertain\\_Future\\_of\\_Race\\_Sensitive\\_Admissions\\_Revised.pdf](http://www.nacua.org/NACUAResourcePages/Docs/AffirmativeAction/Uncertain_Future_of_Race_Sensitive_Admissions_Revised.pdf)).

Bowen, William G. and Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions*, Princeton University Press (1998).

Bowen, William G. and Neil L. Rudenstine, *Race-Sensitive Admissions: Back to Basics* ([http://www.mellon.org/publications/Admissions/WGB\\_NLR\\_Back\\_to\\_Basics\\_with\\_cita](http://www.mellon.org/publications/Admissions/WGB_NLR_Back_to_Basics_with_cita)

Coleman, Arthur L. and Scott R. Palmer, *Diversity in Higher Education: A Strategic Planning and Policy Manual Regarding Federal Law in Admissions, Financial Aid, and Outreach*, College Board (2nd ed. 2004).

Coomes, Michael D., editor, *The Role Student Aid Plays in Enrollment Management*, Jossey-Bass Publishers (New Directions for Student Services, Number 89, Spring 2000).

*Does Diversity Make a Difference? Three Research Studies on Diversity in College Classrooms*, American Council on Education and American Association of University Professors (2000).

Gullatt, Yvette and Wendy Jan, *How Do Pre-Collegiate Academic Outreach Programs Impact College-Going Among Underrepresented Students?* Pathways to College Network (2003).

Malcolm, Shirley, Daryl Chubin and Jolene Jesse, *Standing Our Ground: A Guidebook for STEM Educators in the Post-Michigan Era*, American Association for the Advancement of Science (October 2004).



*Reaffirming Diversity: A Legal Analysis of the University of Michigan Affirmative Action Cases*, The Civil Rights Project, Harvard University ([http://www.civilrightsproject.harvard.edu/policy/legal\\_docs/Diversity\\_%20Reaffirmed.pdf](http://www.civilrightsproject.harvard.edu/policy/legal_docs/Diversity_%20Reaffirmed.pdf)) (July 2003).

Rigol, Gretchen W., *Implications of the U.S. Supreme Court Decisions in the University of Michigan Admissions Cases: Summary of the Proceedings*, College Board (2003).

Springer, Ann D., *Update on Affirmative Action in Higher Education: A Current Legal Overview* (<http://www.aaup.org/Issues/AffirmativeAction/aalegal.htm>).

Swail, W.S., *Educational Opportunity and the Role of Precollege Outreach Programs in 2001 Outreach Program Handbook*, College Board (2001).

Swail, W.S. and L.W. Perna, *A View of the Landscape: Results of the National Survey of Outreach Programs in 2001 Outreach Program Handbook*, College Board (2001).

*What Are Pre-College Outreach Programs?* Pathways to College Network (2004).

## Government Publications

*Achieving Diversity: Race-Neutral Alternatives in American Education*, U.S. Department of Education Office for Civil Rights (<http://www.ed.gov/about/offices/list/ocr/edlite-raceneutralreport2.html>) (2004).

*Higher Education: Information on Minority-Targeted Scholarships*, U.S. General Accounting Office (<http://archive.gao.gov/t2pbat4/150617.pdf>) (January 1994).

*Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964. Notice of Final Policy Guidance* (<http://www.ed.gov/about/offices/list/ocr/docs/racefa.html>) (February 1994).

## Web Sites (as of October 10, 2005)

**U.S. Department of Education Office for Civil Rights Home Page**  
(<http://www.ed.gov/about/offices/list/ocr/index.html>).

### Diversity Web:

<http://www.diversityweb.org/>

(A comprehensive compendium of campus practices and resources about diversity in higher education.)

### College Board Web Sites on Diversity in Higher Education

(<http://www.collegeboard.com/diversitycollaborative>)

(<http://www.collegeboard.com/highered/ad/ad.html>)

(These Web sites contain information on the College Board's Access and Diversity Collaborative and other resources.)

**University of Michigan Web Site on *Grutter* and *Gratz* Cases**

(<http://www.umich.edu/~urel/admissions/>)

(This Web site contains a wealth of information, including all of the legal filings in the cases, most of the amicus briefs, and references to resources and research on all related issues.)

**National Association of College and University Attorneys**

[http://www.nacua.org/lrs/nacua\\_resources\\_page/affirmativeactionresources.htm](http://www.nacua.org/lrs/nacua_resources_page/affirmativeactionresources.htm))

(This Web site contains a variety of affirmative action resources.)

**The American Association of University Professors**

(<http://www.aaup.org/Issues/AffirmativeAction/index.htm>)

(The organization's Web site has specific information on affirmative action in higher education.)

## **Appendix E. Access and Diversity Collaborative Sponsors and Cooperating Organizations**

### **Sponsoring Institutions and Systems**

Austin College  
 Boston College  
 California State University: Chico  
 Connecticut State University System  
 Dartmouth College  
 Davidson College  
 DePauw University  
 Florida State University  
 Harvey Mudd College  
 Northeastern University  
 Northwestern University  
 Ohio State University  
 Rice University  
 Seattle University  
 Southern Methodist University  
 Texas A&M University  
 Texas Christian University  
 Texas Tech University  
 University of California: Davis  
 University of Connecticut  
 University of Georgia  
 University of Houston  
 University of Maryland: College Park  
 University of Michigan  
 University of Nevada: Reno  
 University of North Carolina at Chapel Hill  
 University of San Francisco  
 University of Scranton  
 University of Southern California  
 University of Texas at Austin  
 University of Toledo  
 Vanderbilt University  
 Wesleyan University

### **Sponsoring Organizations**

American Dental Education Association (ADEA)  
 Association of American Medical Colleges (AAMC)  
 Graduate Management Admission Council (GMAC)  
 Law School Admission Council (LSAC)

### **Cooperating Organizations**

American Association of Community Colleges (AACCC)  
 American College Personnel Association (ACPA)  
 National Association for College Admission Counseling (NACAC)  
 National Association of College and University Attorneys (NACUA)  
 National Association of Student Financial Aid Administrators (NASFAA)  
 National Association of Student Personnel Administrators (NASPA)

### **Foundations**

The Goldman Sachs Foundation  
 Nellie Mae Education Foundation

## Appendix F. Participants in National Seminars on “Federal Law and Recruitment, Outreach, Retention, and Student Services”

Almost 200 individuals representing more than 85 institutions and organizations attended national seminars held in Dallas (3/15/2005), Chicago (4/26/2005), and Boston (5/11/2005). The majority of attendees were administrators responsible for enrollment management, admissions, and student affairs; however, individuals from many other areas—including financial aid, marketing and communications, multicultural development, institutional advancement, and research—attended, along with general counsels, provosts, deans, and faculty. In addition to undergraduate programs, a number of graduate and professional schools were also represented.

|  |  |
|--|--|
| American University, District of Columbia                            | Indiana University School of Law   |
| American University, Washington College of Law, District of Columbia | Kalamazoo College, Michigan  |
| Austin College, Texas  | Law School Admission Council, Pennsylvania   |
| Ball State University, Indiana                                       | Louisiana State University and Agricultural and Mechanical College                 |
| Baylor University School of Law, Texas                               | Louisiana State University Law School  |
| Bentley College, Massachusetts                                       | Marlboro College, Vermont  |
| Boston College, Massachusetts  | Massachusetts College of Art   |
| Boston University, Massachusetts                                     | Michigan State University  |
| Bryant University, Rhode Island                                      | Michigan Technological University  |
| California State University at Chico                                 | National Association of Student Financial Aid Administrators, District of Columbia |
| Chapman University School of Law, California                         | Nellie Mae Education Foundation, Massachusetts                                     |
| Community College of Philadelphia, Pennsylvania                      | Northeastern University, Massachusetts   |
| Creighton University, Nebraska                                       | Northeastern University School of Law, Massachusetts                               |
| Dartmouth College, New Hampshire                                     | Northern Kentucky University   |
| DePaul University, Illinois  | Northwestern University, Illinois  |
| DePauw University, Indiana   | Ohio Northern University   |
| Frank Lloyd Wright School of Architecture, Arizona                   | Ohio State University  |
| Franklin Pierce Law Center, New Hampshire                            | Oklahoma State University  |
| Golden Gate University School of Law, California                     | Quinnipiac University, Connecticut   |
| Grand Valley State University, Michigan                              | Rice University, Texas   |
| Harvey Mudd College, California                                      | Roosevelt University, Illinois   |
|  | Saint John’s University, New York  |

Samford University, Cumberland School of Law, Alabama

Sarah Lawrence College, New York

Seattle University, Washington

Seton Hall University School of Law, New Jersey

Siena College, New York

Southern Methodist University, Texas

Stetson University College of Law, Florida

Suffolk University Law School, Massachusetts

Syracuse University, New York

Texas A&M University

Texas Christian University, Texas

Texas Tech University

Texas Woman's University

United States Coast Guard Academy, Connecticut

United States Military Academy, New York

University of California

University of California at Davis

University of Connecticut

University of Denver, Colorado

University of Denver, Sturm College of Law, Colorado

University of Georgia

University of Houston, Texas

University of Illinois at Urbana-Champaign

University of Louisville, Kentucky

University of Maine

University of Maryland at College Park

University of Miami, Florida

University of Minnesota Law School

University of Nevada at Reno

University of North Carolina at Chapel Hill

University of Richmond, Virginia

University of Saint Thomas, Minnesota

University of San Francisco, California

University of Scranton, Pennsylvania

University of the Pacific, California

University of Texas at Austin

University of Washington, School of Dentistry

University of Wisconsin at Superior

Wake Forest University, North Carolina

Wartburg College, Iowa

Wesleyan University, Connecticut

West Texas A&M University

Western New England College, Massachusetts

**\$15**