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# **DIVERSITY in HIGHER EDUCATION**

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**A Strategic Planning and  
Policy Manual  
Regarding Federal Law in Admissions,  
Financial Aid, and Outreach**

**Second Edition: Updated following the U.S. Supreme Court  
decisions in the University of Michigan cases**

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# Contents

About the Authors . . . . .	ii
Foreword . . . . .	iii
I. Introduction . . . . .	1
II. From <i>Bakke</i> to <i>Grutter</i> and <i>Gratz</i> : Confirming the Educational Benefits of Diversity . . . . .	5
III. Basic Legal Principles: An Overview of Federal Law Regarding the Consideration of Race or Ethnicity in Higher Education . . . . .	11
IV. From Admissions to Financial Aid to Outreach: Context Matters . . . . .	19
V. The Process of Self-Assessment: An Outline of Critical Steps . . . . .	21
VI. The Defining Questions: A Framework for Programmatic Self-Assessment . . . . .	25
<b>Appendix One:</b>	
U.S. Department of Education Final Policy Guidance Regarding Race- and National Origin- Based Financial Aid . . . . .	33
<b>Appendix Two:</b>	
Recruitment and Outreach Programs: A Summary of Relevant Law . . . . .	45
<b>Appendix Three:</b>	
Race- and Ethnicity-Neutral Alternatives: Strategies for Consideration . . . . .	49
<b>Appendix Four:</b>	
The Harvard Plan: A Retrospective . . . . .	53

## **About the Authors**

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## Foreword

Two years ago, amidst significant confusion and controversy regarding the use of race and national origin in the higher education community, the College Board published the first edition of this Manual to provide a practical tool for educators that could help promote the establishment of educationally and legally sound race-conscious practices. That first edition acknowledged that while much was known as a matter of law, many significant questions remained. Among those questions was whether the United States Supreme Court would ultimately affirm Justice Powell's 1978 opinion in *Regents of the University of California v. Bakke*<sup>1</sup> and conclude that the educational benefits of diversity could justify the limited consideration of race in higher education admissions decisions.

On June 23, 2003, the U.S. Supreme Court put that question to rest. In *Gratz v. Bollinger*<sup>2</sup> and *Grutter v. Bollinger*<sup>3</sup>, the Court ruled that colleges and universities have the authority to consider race or ethnicity as one factor among many in admissions decisions to further their *compelling interest* in promoting the educational benefits of diversity. The Court also held that when institutions pursue this interest, only admissions programs that ensure individualized consideration of applicants can be sufficiently *narrowly tailored* to meet legal requirements. Thus, the Court upheld the University of Michigan Law School's admissions policy (in *Grutter*), which included an individualized, full-file review of all applications, but struck down the University of Michigan's undergraduate admissions policy (in *Gratz*), which assigned preset points to applicants based on certain admissions criteria, including race and ethnicity.

These decisions affirm—and build upon—Justice Powell's *Bakke* opinion regarding the educational benefits of diversity in higher education.<sup>4</sup> They also expound upon the existing federal “strict scrutiny” framework in important ways. As before, the Court has not addressed all of the questions that will arise in the context of race-conscious higher education practices. Yet the Court's analysis, which closely conforms to the framework of the first edition of this Manual, provides significant additional guidance that can help colleges and universities as they review and consider the use of race-conscious policies in admissions, financial aid, recruitment, and other areas.

We are grateful for the support and input of many individuals who have worked tirelessly to help inform and guide the development of this edition of the Manual. In addition to those who helped shape the first edition of this Manual, we are indebted to Gretchen Rigol, Fred Dietrich, and the hundreds of participants in the College Board's regional and national meetings that immediately followed the issuance of the *Grutter* and *Gratz* decisions. In those meetings, which were held throughout the United States, admissions, financial aid, and other institutional leaders provided thoughtful observations and posed important questions—all of which helped guide the drafting of this Manual.

In particular, those conversations confirmed a common understanding among higher education officials regarding the Court's related observations that while the educational benefits of diversity, which are “substantial” and “real,” can appropriately be “at the heart of” the mission of higher education institutions, “race-conscious admissions policies [designed to further those ends] must be limited in time.” In light of the Court's expression of the “expect[ation] that 25 years from now, the use of racial preferences will no longer be necessary to further the [diversity] interest approved today,” the message from the Court is clear: All institutions that employ race-conscious policies as part of their diversity-related efforts must periodically review and refine their programs to ensure that any use of race is limited to advancing their compelling educational goals. This Manual has been written to assist in that important effort.

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iv Diversity in Higher Education:  
A Strategic Planning and Policy Manual Regarding Federal Law in Admissions, Financial Aid, and Outreach

# I. Introduction

The use of race or national origin<sup>5</sup> by states, colleges, and universities in making admissions decisions or awarding financial aid raises complex legal issues. The purpose of this Manual is to help states and institutions of higher education evaluate, manage, and minimize the risk of liability when using race and ethnicity in admissions and financial aid decisions. The Manual also addresses questions related to race- and national origin-conscious recruitment and outreach programs.

There are several reasons why colleges and universities may seek to consider race or national origin as a factor in making admissions or financial aid decisions. These reasons may vary from remedying the present effects of past discrimination to promoting forward-looking educational goals. Although the use of race or ethnicity to pursue any of these objectives raises a series of legal questions, this Manual does not examine the legal issues implicated by every type of race- or ethnicity-conscious admissions or financial aid policy. Instead, it focuses on policies motivated by one primary purpose—achieving a diverse student body to further core educational goals.

Since the U.S. Supreme Court's decision in *Bakke*<sup>6</sup>, the higher education community has invoked educational diversity as the primary justification for using race or ethnicity as a factor in admissions and financial aid decisions. For example, in 1997, 62 major research universities, including eight Ivy League institutions and over 30 public institutions, issued a collective statement “reaffirm[ing] our commitment to diversity as a value that is central to the very concept of education in our institutions” and “express[ing] our strong conviction concerning the continuing need to take into account a wide range of considerations—including ethnicity, race, and gender—as we evaluate the students whom we select for admission.”<sup>7</sup> In recent years, the higher education community has faced a number of legal challenges regarding the use of race in admissions.

On June 23, 2003, the U.S. Supreme Court addressed two of those legal challenges in *Gratz* and *Grutter* and fundamentally affirmed the educational diversity principles stated in Justice Powell's opinion in *Bakke*. On a record in which over 80 public and private colleges and universities, over 50 higher education associations, over 60 major corporations, over 20 states, and nearly 30 former high-ranking military leaders filed briefs in support of the University of Michigan's defense of diversity, the Supreme Court affirmed the central principle put forward by the University of Michigan—namely, that the educational benefits of diversity constitute a compelling interest that can justify the limited consideration of race in admissions decisions. Highlighting 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, the Court upheld the law school's admissions program, while striking down the undergraduate admissions program under 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's resolution of the question regarding whether the educational benefits of diversity can be a compelling interest sufficient to justify the limited consideration

of race and ethnicity in higher education admissions decisions has not silenced the debate about “affirmative action” in higher education any more than the decisions have answered all of the relevant questions applicable to other admissions, financial aid, and outreach practices. In light of the Supreme Court’s recent decisions and the continuing scrutiny race-conscious decisions receive, it is imperative that states, colleges, and universities using or seeking to use race or ethnicity in admissions, financial aid, or outreach decisions take steps to evaluate the use of race to maximize their education goals and minimize the risk of running afoul of legal standards.

Without the utmost care in planning, implementation, and evaluation, the use of race or ethnicity invites litigation and, worse, may drive courts and policymakers to adopt ever more expansive prohibitions on policies that higher education institutions consider essential to their educational missions. In short, bad facts—that can lead to bad cases—make bad law. Although the volatility of the legal and political issues concerning race- and ethnicity-conscious policies presents substantial challenges, there is much that colleges and universities can do to mitigate the risk and costs of facing a legal challenge and, ultimately, the risk of an adverse legal judgment. This Manual points the way.

Several principles are central to the coverage and use of this Manual.

First, this Manual focuses on the use of race and ethnicity to achieve the educational benefits of a diverse student body, not on the use of race or ethnicity for remedial or other purposes. Although colleges and universities may not be the best institutions to sort out who owes what to whom in society,<sup>8</sup> they are uniquely qualified to determine what mix of students best serves an institution’s educational mission. Indeed, the freedom to determine who may be admitted to study is a key component of the academic freedom that the Supreme Court has recognized as a “special concern” of the First Amendment. Moreover, where race or ethnicity is used voluntarily in higher education decisionmaking, educational diversity is the rationale most often invoked by the higher education community—and now endorsed by the U.S. Supreme Court.

Second, 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. Diversity for diversity’s sake serves no educational purpose and, undirected toward any educational purpose, likely will be viewed by courts as impermissible racial or ethnic balancing. Consequently, 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. 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 definition of the term. To do so would be to ignore the very academic foundations from which the concept has evolved.

Third, the purpose of the Manual is not to produce legally foolproof admissions and financial aid policies, but to help institutions of higher education and related entities assess and minimize the risk of liability. This Manual does not and cannot definitively spell out a formula for legally sufficient admissions and financial aid policies that use race or

ethnicity as a factor because the application of legal principles depends on program- and institution-specific policies, objectives, and facts. In short, the Manual is not a substitute for institution- or program-specific legal advice.

Fourth, the Manual is intended to be of benefit to educators, administrators, policy-makers, and lawyers. It is written in a way designed to untangle and translate legalisms and court jargon. The attempt to operationalize as much of the existing law as possible is not without risk, at least for those who will attempt to align every word or sentence with the exact phraseology of particular court opinions. Such an effort will prove as futile as it is unworthy, given the aims of this Manual. (Citations are provided for readers seeking more legal background and information regarding the points contained in this Manual).

In sum, this Manual can help colleges and universities assess and minimize their risk of running afoul of the U.S. Constitution and federal civil rights laws. Some fundamental legal precepts are settled, and recent cases usefully demonstrate how they might be applied more broadly. The Manual provides a framework for asking the right questions based on an interpretation of existing legal rulings. For those seeking a reference that should be used as one tool among many in the effort to evaluate institutional policies and practices, this Manual provides a useful place to begin.



## II. From *Bakke* to *Grutter* and *Gratz*: Confirming the Educational Benefits of Diversity

**Bakke Sets the Stage.** Justice Powell's 1978 opinion in *Bakke* establishes the foundation for the principle that institutions of higher education can use race or national origin, as one factor among many, in admissions and financial aid decisions to promote the educational benefits of a diverse student body. In that case, Justice Powell concluded:

[T]he attainment of a diverse student body...clearly is a constitutionally permissible goal for an institution of higher education. Academic freedom...long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body.... The atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body.<sup>9</sup>

At the same time, Justice Powell advised that “[e]thnic diversity...is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body,” and that the “assignment of a fixed number of places to a minority group is not a necessary means toward” the goal of educational diversity. In short, Justice Powell's most emphatic (and repeated) admonition was that any admissions plan that includes the positive consideration of race or national origin must treat all applicants as individuals and ensure “competitive consideration” among all applicants.<sup>10</sup> (It was this point that would command significant attention when the Supreme Court revisited the issue a quarter of a century later.)

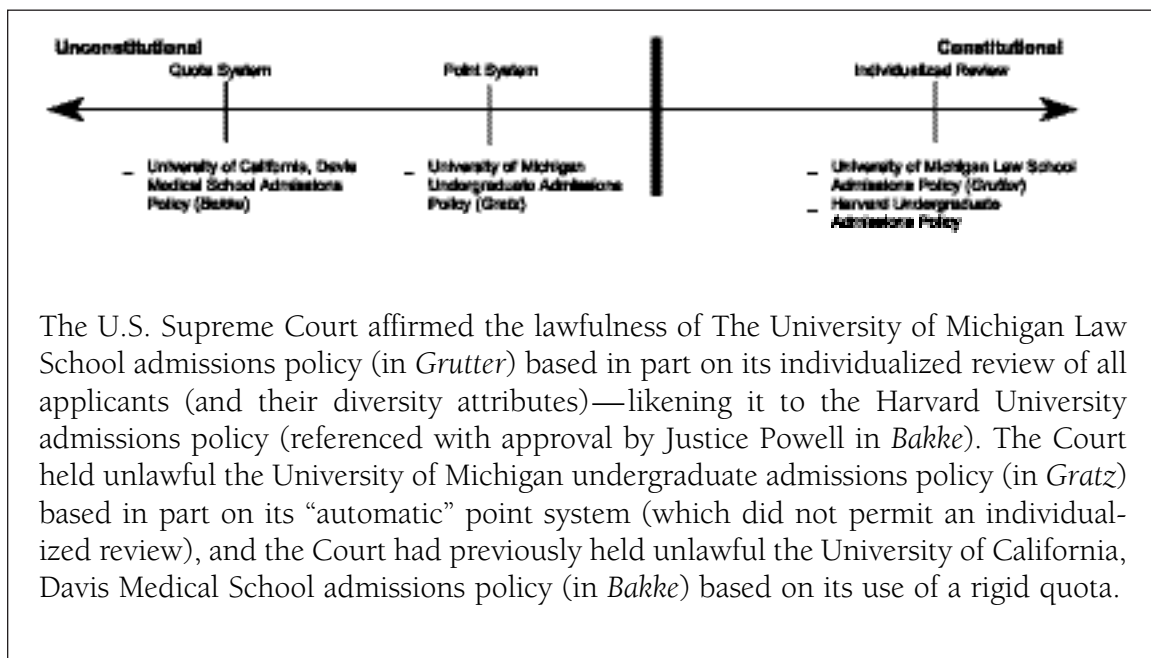
In *Bakke*, with its six separate and splintered opinions, no one opinion commanded a majority of the U.S. Supreme Court. Justice Powell's opinion represented, in essence, a “compromise position” between two factions of the Court that were split four-to-four. In particular, he joined with four justices who concluded that the Constitution did not preclude all uses of race in higher education admissions, and he joined with four other justices who concluded that the specific admissions practices at issue in *Bakke* were unconstitutional.

**Powell's Opinion Challenged.** For decades, Justice Powell's opinion served as “the touchstone for constitutional analysis of race-conscious admissions policies.”<sup>11</sup> However, given the absence of a clear majority opinion on the question of whether the educational benefits of diversity could be a compelling interest, litigants in the 1990s began to raise questions regarding the viability of Justice Powell's ruling. In *Hopwood v. Texas*<sup>12</sup>, a divided, three-judge panel concluded that Justice Powell's opinion in *Bakke* established no binding precedent and indicated that only an interest in remedying the effects of past discrimination could constitute a compelling interest justifying race-conscious admissions practices. That opinion—and others that subsequently rejected it as overreaching—set the stage for the decisions by the U.S. Supreme Court in *Gratz* and *Grutter*.

**Powell’s Opinion Endorsed.** In *Gratz* and *Grutter*, the Supreme Court affirmed and expanded upon the principles laid out by Justice Powell in *Bakke*, holding that a university’s interest in promoting the educational benefits of diversity can be sufficiently compelling to justify the consideration of race and ethnicity in admissions decisions.

Although both of the University of Michigan’s challenged admissions programs considered race or ethnicity as one factor among many with the goal of promoting the educational benefits of diversity, the policies differed in their design. The law school admissions process at issue in *Grutter* involved an individualized, holistic review of each applicant’s file that considered both academic criteria (grades, LSAT scores) and other criteria that were important to the law school’s educational goals (such as work experience, leadership and service, letters of recommendation, and life experiences, including whether the applicant was an underrepresented minority). The undergraduate admissions process at issue in *Gratz* used a “Selection Index” where each applicant was awarded points toward admissions based on preset criteria, with the maximum number of points awarded to any applicant totaling 150. Underrepresented minorities (as well as socioeconomically disadvantaged students and students who attended a high school that served a predominately minority population) received 20 points under this program.

### UNIVERSITY ADMISSIONS PLANS ANALYZED BY THE U.S. SUPREME COURT



In *Grutter*, the Court (by a vote of 5–4) upheld the law school admissions program in its entirety. The Court recognized that the law school’s interest in promoting the educational benefits of diversity is a sufficiently compelling interest to justify consideration of race or ethnicity as one of several factors in admissions decisions. The Court emphasized that it would defer to the educational judgment of colleges and universities in valuing a diverse student body as part of their educational mission and held that the law school’s interest in promoting the educational benefits of diversity was compelling. The Court further found that the law school’s individualized review was

narrowly tailored—and consistent with the Harvard University admissions plan endorsed by Justice Powell in *Bakke*—in that the admissions program used an individualized review that was flexible, considered multiple factors, and was not unduly burdensome to nonminority applicants.

In *Gratz*, the Court (by a vote of 6–3) recognized (per the Court’s decision in *Grutter*) that the undergraduate program served a compelling interest in diversity, but held that the University’s admissions program was not sufficiently narrowly tailored because it used a point system that automatically awarded minority students 20 points regardless of other factors and did not allow for an individualized review and comparison of the full breadth or depth of diversity factors.

Several key principles can be taken from the Court’s opinions in *Gratz* and *Grutter*:<sup>13</sup>

- **Justice Powell’s 1978 opinion in *Bakke* is a correct statement of the law.** The Court expressly “endorse[d]” Justice Powell’s opinion and its “diversity rationale,” which for 25 years has “served as the touchstone for constitutional analysis of race-conscious admissions policies.” (As a consequence, the Fifth Circuit’s decision in *Hopwood v. Texas* was nullified in so far as it held that the diversity rationale could not be sufficiently compelling to justify race-based admissions programs.) Notably, although Justice Kennedy dissented from the majority opinion in *Grutter* based on a disagreement about the way in which the majority applied Justice Powell’s opinion, he did conclude that the “opinion by Justice Powell...states the correct rule for resolving this case.”<sup>14</sup> Therefore, six justices have affirmed that Justice Powell’s opinion represents the law of the land.
- **Colleges and universities are entitled to deference in their mission-driven educational judgments.** According to the Court, “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.” Therefore, the Court deferred to the University of Michigan’s educational judgment that diversity is essential to its educational mission, and held that “‘good faith’ on the part of a university is ‘presumed,’ absent ‘a showing to the contrary.’”<sup>15</sup>
- **The educational benefits of diversity are “substantial” and “are not theoretical but real.”** In finding the educational benefits of diversity to be compelling, the Court recognized that “race unfortunately still matters” in our society and that racial diversity in colleges and universities can help enliven classroom discussions, break down racial stereotypes, and prepare students for success in our increasingly global marketplace. Moreover, the Court stressed the importance of students from all racial and ethnic groups having access to public universities and law schools. According to the Court, “the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity.... 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.”<sup>16</sup>

The Court rendered its determination of the compelling nature of the diversity rationale based in part on substantial evidence regarding the educational benefits of diversity provided by the University and others filing briefs, including expert studies and reports and opinions from business and military leaders. Importantly, the Court's decision indicates that where a university's interest in promoting the educational benefits of diversity is central to its mission—a point on which the Court indicated that deference is required though evidence is relevant—then that interest is compelling as a matter of law.

- **Colleges and universities may pursue a goal of admitting a “critical mass” of minority students as part of their effort to assemble a diverse student body.** The Court held that colleges and universities, in order to promote the educational benefits of diversity, can seek to enroll a “critical mass” of students from different racial and ethnic groups—so long as the critical mass is “defined by reference to the educational benefits that diversity is designed to produce,” and the goal is not “some specified percentage of a particular group merely because of its race or ethnic origin.”<sup>17</sup>
- **Admissions programs that consider race or ethnicity under the diversity rationale must be designed to ensure individualized review of applicants and their diversity attributes.** The Court held that the importance of individualized consideration of applicants “in the context of a race-conscious admissions program is paramount.” To satisfy this standard, universities seeking to justify the use of race or ethnicity in student admissions based on the diversity rationale must include an individualized, non-mechanical, full-file review of each applicant. “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.’”<sup>18</sup> Moreover, the Court stated that the fact that the adoption of an individualized admissions program might present administrative challenges or burdens based on the volume of applications some colleges and universities receive does not excuse them from the obligation of adopting admissions policies that meet federal constitutional and statutory mandates.
- **Colleges and universities must consider race-neutral alternatives in good faith, but need not exhaust every option or sacrifice broader educational goals before using race-conscious programs.** According to the Court, the need to ensure the limited consideration of race “does not require exhaustion of every conceivable race-neutral alternative.... [It] does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.” Thus, the Court encouraged colleges and universities to examine and learn from others with regard to race-neutral alternatives as promising practices develop. The Court held that colleges and universities need not sacrifice their “academic quality” or broader educational goals in considering the efficacy of race-neutral alternatives. Thus, higher education institutions are not required to deemphasize such factors as grades or test scores to promote diversity before using race.<sup>19</sup>

- **Colleges and universities must conduct periodic reviews of their race-based admissions programs, and such programs cannot be timeless.** The Court reaffirmed that a core purpose of the Fourteenth Amendment is to eliminate distinctions based on race, and, therefore, “race-conscious admissions policies must be limited in time.” According to the Court, “[i]n 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.” This is consistent with long-standing legal requirements, which require periodic reviews of race-conscious programs.<sup>20</sup>

**A Footnote: The Harvard Plan** As a foundation for his opinion in *Bakke*, Justice Powell described with particularity the Harvard admissions plan, which he cited as a model. Notably, the Court in *Grutter* and in *Gratz* relied on facets of Justice Powell’s favorable consideration of the Harvard Plan as “instructive,” and noted his approval of the Plan throughout its opinions. A detailed analysis of the Plan is provided in Appendix Four.



### III. Basic Legal Principles: An Overview of Federal Law Regarding the Consideration of Race or Ethnicity in Higher Education

The law relating to the use of race and ethnicity in admissions and financial aid decisions will undoubtedly continue to evolve. There is, however, much we already know about proper and improper uses of race and ethnicity in admissions and financial aid decisions. This section summarizes the basic legal principles reflected in existing case law and federal policy that should inform institutional policies and practices.

#### Strict scrutiny

The Equal Protection Clause of the U.S. Constitution and Title VI of the Civil Rights Act of 1964 impose the same basic requirements on colleges and universities: Any use of race or ethnicity in admissions or financial aid is subject to *strict scrutiny*, pursuant to which the given program must (1) serve a *compelling interest* and (2) be *narrowly tailored* to achieve that interest. Strict scrutiny is the most rigorous type of judicial review of governmental or institutional policies, but, as the majority of the Supreme Court has made clear, strict scrutiny is not always “fatal in fact.”

Why, one might ask, do courts apply strict scrutiny to uses of race or ethnicity designed not to discriminate invidiously against particular groups, but rather to further a benign objective, such as achieving an educationally diverse student body? One reason why courts apply strict scrutiny is that unequal treatment based on race or ethnicity, whether invidious or benign, imposes tangible and intangible burdens on members of certain racial or ethnic groups. Because the law generally guarantees equal opportunity and equal treatment regardless of race or ethnicity, such burdens are tolerated only when a race- or ethnicity-conscious policy serves an interest of paramount importance and when the policy uses race or ethnicity only to the extent necessary to further that interest. Another reason, according to the U.S. Supreme Court, is that without strict scrutiny, it is not easy to tell whether a given race- or ethnicity-conscious policy is, in fact, invidious or benign. Uses of race or ethnicity that appear benign may actually be motivated by improper racial or ethnic stereotyping or impermissible racial or ethnic politics. Courts use strict scrutiny to distinguish among these possibilities.<sup>21</sup>

### ***What we know about... gender-based decision making***

In conversations about race- or ethnicity-conscious admissions and financial aid decisions, a frequent question arises relating to the consideration of gender as a factor in admissions and financial aid decisions. Although the questions are comparable, the scrutiny relating to gender-based decisions is “skeptical” rather than “strict.” More specifically, the U.S. Supreme Court has ruled that the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution requires that classifications that deny opportunities based on gender must serve “important governmental objectives” and be “substantially related to the achievement of those objectives.”

To rise to the level of an “important governmental objective,” the justification for such practices “must be genuine...[a]nd it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males or females.” By contrast, “[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.”

*Sources: United States v. Virginia, 518 U.S. 515 (1996); see also Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).*

## **The application of “strict scrutiny”**

Virtually every institution of higher education in the nation, public or private, must meet strict scrutiny requirements when using race or ethnicity in admissions and financial aid decisions. These requirements arise from the Equal Protection Clause, which applies to all “state actors” (including any public institution of higher education), and from Title VI, which applies to any college or university, public or private, that receives federal funds. (In addition, at least one federal statute—42 U.S.C. § 1981—has been held to apply to private discriminatory conduct, irrespective of whether the entity receives federal funds. Indeed, the U.S. Supreme Court in *Gratz* stated that this statute—designed “to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race”—applies to contracts “for educational services.” According to the Court, “purposeful discrimination” in violation of Constitutional prohibitions also violates §1981.<sup>22</sup>)

Thus, college and university policies that condition educational benefits on race or ethnicity are generally subject to strict scrutiny. (This includes policies that expressly consider race, and may include policies that are race-neutral on their face but race-conscious in their intent.<sup>23</sup>) At the same time, most federal courts have not applied strict scrutiny to general recruitment and outreach programs—even when those programs are focused on attracting individuals of particular races or ethnicities. As long as such programs do not confer material benefits or opportunities to some individuals and deny them to others based upon race or national origin, courts and federal agencies have most often viewed the programs as “inclusive,” and they have not applied a strict scrutiny analysis. (See Appendix Two.)

## Educational diversity as a compelling interest

**Overview.** Although there is no 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 financial aid decisions.<sup>24</sup> One is an entity’s interest in remedying the present effects of its own past discrimination (at least where such effects can be traced to its own discrimination).<sup>25</sup> The other is an institution’s interest in securing the mission-based educational benefits that flow from a diverse student body—the focus of this Manual. This compelling interest that justifies the use of race and ethnicity in admissions and financial aid decisions is fundamentally an educational interest. It is an interest in securing the educational benefits of a student body that is diverse not only by race and ethnicity but also by nonracial and nonethnic attributes. Importantly, the educational benefits must be defined in terms specific to the particular entity engaged in race- or ethnicity-conscious decision making. Although the law recognizes that institutional decisions about who may be admitted to study implicate academic freedom interests, institutions should have sufficient evidence to support a stated interest in educational diversity. In short, academic judgments must have empirical foundations. Relevant evidence likely includes policies demonstrating alignment between institutional operations and diversity-related educational goals, as well as educational research showing that student body diversity does in fact yield educational benefits.

**Diversity as a mission-driven, educational interest.** As defined by the courts, the diversity rationale for using race or ethnicity in the context of admissions and financial aid is fundamentally an educational rationale. In other words, the institution’s interest in achieving racial and ethnic diversity in its student body must be directly aligned with the institution’s mission in furthering a concrete set of educational goals.

A clear articulation of this alignment 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 instrument 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 admissions and financial aid decisions as the kind of educational policy choice to which courts have typically shown great deference. Institutional decisions about who may be admitted to study constitute an exercise of academic freedom, a special concern of the First Amendment.

**Defining diversity.** Colleges and universities must define their diversity goals with reference to their compelling educational interests. In the context of diversity, the U.S. Supreme Court in *Grutter* affirmed the goal of enrolling a “critical mass” of minority students where the University of Michigan defined that goal with specific “reference to the educational benefits that diversity is designed to produce.” Importantly in this context, the Court contrasted the University’s permissible goal of enrolling a critical mass of underrepresented minorities with the impermissible goal of “assur[ing] within its student body some specified percentage of a particular group merely because of its race or ethnic origin.”<sup>26</sup>

### ***What we know about... the compelling interest in educational diversity***

An institution's interest in achieving the educational benefits of diversity is most likely compelling if it:

- encompasses the educational benefits of racial and ethnic *and* nonracial and nonethnic diversity;
- is particularized to the structure, pedagogy, and mission of the institution that uses race or ethnicity in admissions or financial aid decisions; and
- is supported by evidence that educational diversity is not a pretext for racial and ethnic balancing and that student body diversity in fact enhances desired educational outcomes.

*Sources: Grutter, 123 S. Ct. at 2338-41; Bakke, 438 U.S. at 311-18.*

**Individualized diversity.** In defining the educational interest served by race- and ethnicity-conscious decision-making in admissions, colleges and universities must be careful not to focus the interest solely on the benefits of racial and ethnic diversity. The compelling interest recognized by law is conceptually broader—encompassing the educational benefits of nonracial and nonethnic diversity as well as racial and ethnic diversity. The type of diversity at the core of a compelling educational interest is a diversity of individuals—their backgrounds, cultures, and life experiences—of which race and ethnicity are only two of several determinants. Others may include geographic origin, socioeconomic background, exceptional talents, and academic and nonacademic interests.

**Particularity.** Colleges and universities must define their educational interests in terms relevant to their institution—or to the relevant school, department, or program that uses race or ethnicity as a factor in admissions or financial aid decisions. For example, a graduate program in the humanities may have different educational reasons for seeking a diverse student body than a medical school. What is important is that each program articulates an educational rationale for seeking diversity (including racial and ethnic diversity) that is particularized to the structure, pedagogy, and mission of that program.

**Evidence.** Although the U.S. Supreme Court in *Gratz* and *Grutter* held that an institution's interest in promoting the educational benefits of diversity can be compelling, and that colleges and universities are entitled to deference in their determinations that diversity is central to their educational missions, an institution of higher education should have evidence substantiating this interest.

Although courts have offered little guidance on the quality and type of evidence required, relevant case law suggests the following:

First, an institution must show that its stated interest in educational diversity is not a pretext for improper racial or ethnic balancing or stereotyping. What is important here is alignment—not only between an institution's educational interests in diversity and its admissions and financial aid policies, but also between those interests and the institution's

programs. Evidence in this context is intended to show that an institution is not paying mere lip service to the educational benefits of diversity.

Second, an institution should show that its interest in educational diversity has empirical merit. In other words, an institution should promote evidence that diversity in the student body, including racial and ethnic diversity, does in fact yield the educational benefits articulated by the institution. Educational research (institution-specific or otherwise) and institutional self-assessment are important in this context.

***What we know about...  
the evidence that supports claims that the  
educational benefits of diversity are compelling***

The Court in *Grutter v. Bollinger* described at length the educational benefits of diversity that constitute a compelling interest that can justify the use of race in college and university admissions decisions. The Court found that diverse learning environments can enhance “cross-racial understanding,” “break down racial stereotypes,” improve learning outcomes, and better prepare students for a diverse workforce and society. Several evidentiary foundations supported the Court’s conclusion about the educational benefits of diversity, including:

- The institutional mission of the University, which included a goal of “assembling a class that is both exceptionally academically qualified and broadly diverse;”
- Testimony by professors that “‘classroom discussion is livelier, more spirited, and simply more enlightening and interesting’ when the students have the greatest possible variety of backgrounds;”
- Numerous expert and research studies demonstrating the educational benefits of diversity;
- Statements of dozens of leading corporations that “the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints;” and
- Statements of numerous retired military officials that a “highly qualified, racially diverse officer corps...is essential to the military’s ability to fulfill its principle mission to provide national security.”

Source: *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (No. 02-241).

## Narrow tailoring

**Overview.** Under the strict scrutiny standard, not only must the ends of an institutional policy be compelling, but also the “fit” between means and ends must be exact, in the sense that race and ethnicity must be used in the most limited way possible consistent with the compelling interest at issue. In the Supreme Court’s view, how an institution seeks to accomplish its compelling interest “must be specifically and narrowly framed to accomplish that purpose.” In the case of educational diversity, where an institution seeks diversity through race- and ethnicity-conscious admissions or financial aid policies, such policies must be narrowly tailored to further their diversity-related educational goals. Fundamentally, this means that race and ethnicity may be used only in a manner consistent with a university’s compelling diversity interest and only to the extent necessary to promote that interest.

### ***What we know about...narrow tailoring***

In the higher education admissions context, courts have generally posed several questions as a foundation for determining whether the challenged use of race was as limited as possible in the attempt to help achieve diversity-related interests:

1. Is the consideration of race necessary? Have race-neutral programs or strategies been considered or tried?
2. How flexible is the consideration of race? Is race but one factor among many, or does it operate to insulate some candidates from consideration with others?
3. What is the impact of the race-conscious practice on otherwise qualified nonbeneficiaries? Are those nonqualifying candidates significantly disadvantaged by the race-conscious practice?
4. What is the process of review and refinement of the race-conscious program, and is there an end in sight?

**Necessity.** The foremost requirement is that race and ethnicity may be used only to the extent necessary to achieve an educationally diverse student body. This means that before an institution may use race or ethnicity in its admissions or financial aid policies, it must consider the extent to which alternative, race-neutral approaches would be effective in furthering its interest in educational diversity. Possible race-neutral alternatives include admissions or financial aid criteria that assign significant or even determinative weight to high school grades, high school class rank, socioeconomic disadvantage, or other nonacademic factors.

The need to consider (and try, as appropriate) race-neutral alternatives to race-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.” Rather, in the words of the Supreme Court, higher education officials must give “serious, good faith consideration [to] workable race-neutral alternatives that will achieve the diversity” they seek.<sup>27</sup>

### ***What we know about...percentage plans***

In *Grutter*, the U.S. Supreme Court addressed “percentage plans,” such as those adopted in Texas, Florida, and California, pursuant to which “all students above a certain class-rank threshold in every high school in the State” are guaranteed admissions to designated public undergraduate institutions. The Court rejected the claim that such plans constituted effective race-neutral alternatives to the University of Michigan’s law school admissions policy, observing that it was unclear “how such plans could work for graduate and professional schools” and adding: “[E]ven 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.”

At the same time, the Court recognized that universities in states where racial preferences in admissions are prohibited are “currently engaged in experimenting with a wide variety of [race-neutral] alternative approaches to race-conscious admissions policies.” The Court advised that “[u]niversities in other States can and should draw on the most promising aspects of the[] race-neutral alternatives as they develop.”

*Source: Grutter v. Bollinger, 123 S. Ct. 2325 (2003) (No. 02-241).*

**Flexibility/Individualized Review.** Federal law requires race- and ethnicity-conscious admissions processes to be flexible enough to take into account all pertinent elements of educational diversity (not merely race and ethnicity) that each applicant may bring. The process need not assign the same weight to every diversity-related attribute, but it must consider the same range of academic and nonacademic factors in evaluating each applicant.

The requirement that admissions decisions result from the “individualized consideration” of all candidates was not only a central theme in Justice Powell’s *Bakke* opinion, but it was the single most important factor explaining the Court’s different conclusions regarding the University of Michigan’s undergraduate and law school admissions programs. Permissible, individualized consideration ensures that applicants’ files are subject to a “highly individualized, holistic review,” with “serious consideration” to “all the ways an applicant might contribute to a diverse educational environment.” By contrast, admissions practices must not result in an applicant’s race becoming “the defining feature of his or her application.”<sup>28</sup> Legally impermissible practices can be characterized by the automatic assignment of points to an applicant:

- Based on nothing more than his or her status as an “underrepresented minority;”
- With an impact that “makes race a decisive factor for virtually every minimally qualified underrepresented minority applicant;” and
- That precludes meaningful comparisons and evaluations of how students’ “differing backgrounds, experiences, and characteristics” might benefit an institution.<sup>29</sup>

**No undue burden on particular individuals.** 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. For example, whereas using race and ethnicity as “plus” factors in admissions does not disqualify nonminority applicants from competing for every seat in the class (and thus may be permissible), using a racial or ethnic quota does (and is impermissible).

### ***What we know about...quotas versus goals***

In the words of the Supreme Court, “[p]roperly understood, a ‘quota’ is a program in which a certain fixed number or proportion of opportunities is ‘reserved exclusively for certain minority groups.’...Quotas ‘impose a fixed number or percentage which must be attained, or which cannot be exceeded.’... In contrast, ‘a permissible goal ...require[s] only a good faith effort...to come within a range demarcated by the goal itself...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.”

In the admissions context, courts have made clear that race and ethnicity may be used as no more than “plus” factors in evaluating an individual applicant’s credentials. Institutions can set flexible diversity goals consistent with their compelling educational interests in achieving a “critical mass” of students from different backgrounds, but neither strict quotas nor two-track admissions processes are appropriate. The key principle is that applicants may not be insulated from competition with all other applicants for available seats. Any race- and ethnicity-conscious admissions policy must treat each applicant fundamentally as an individual, not as a member of a racial or ethnic group.

*Source: Grutter v. Bollinger, 123 S. Ct. 2325 (2003) (No. 02-241).*

**Periodic review.** To ensure that race is used only to the extent necessary to further an interest in educational diversity, an institution must regularly review its race- and ethnicity-conscious policies to determine whether its use of race or ethnicity continues to be necessary. Periodic review is especially important in light of the changing racial and ethnic demographics of the nation’s youth and the potential modifications to institutional missions. Such review 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. Moreover, 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.” The Court also found that “[i]n 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.”

## IV. From Admissions to Financial Aid to Outreach: Context Matters

One of the central teachings of federal law is, in the words of Justice O'Connor, that "context matters."<sup>30</sup> With respect to the Court's review of the University of Michigan programs, Justice O'Connor stressed that the "fundamental purpose" of the strict scrutiny analysis is to "take 'relevant [factual] differences into account.'" Thus, rather than rely on "generalizations" or simplistic across-the-board analyses when evaluating constitutional claims, courts are obligated to examine the "variant controlling facts" before reaching conclusions that, for instance, a law school admissions program is lawful when an undergraduate admissions program is not. In sum:

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 decisionmaker for the use of race in that particular context.<sup>31</sup>

Obviously, this admonition by the Court highlights the importance of ensuring that institutions with race-conscious practices undertake the kind of strategic and fact-specific review recommended in this Manual.

In addition, the Court's emphasis on the importance of context highlights the important distinctions among *various kinds* of policies that embody race-conscious practices, which have been recognized by lower federal courts and by the U.S. Department of Education.

Perhaps the most comprehensive statement distinguishing between admissions decisions and financial aid practices is the U.S. Department of Education's final policy guidance, published in 1994, which governs its analysis of race-conscious financial aid practices under Title VI of the Civil Rights Act of 1964 (see Appendix One).<sup>32</sup> In the policy guidance, the Department affirmed the general applicability of the "strict scrutiny" principles to race-conscious financial aid (pursuant to Justice Powell's *Bakke* opinion, later "endorse[d]" by the Court in *Grutter*) while highlighting important legal distinctions between race-conscious admissions and financial aid decisions. In particular, when addressing the use of race-conscious financial aid to promote diversity interests, the Department described the application of guiding federal principles in the financial aid context, stating:

- First, the determination about whether race-conscious financial aid will satisfy federal strict scrutiny standards involves a "case-by-case" analysis. When making financial aid decisions, colleges and universities may consider race as one factor among others or as a condition of eligibility so long as their race-conscious financial aid programs satisfy strict scrutiny standards.<sup>33</sup>
- The "important differences" between financial aid and admissions decisions may affect relevant legal analyses inasmuch as the corresponding degree of the burden on those students "excluded from the benefit conferred by the classification based on race" may vary. Where the impact of race-conscious policies on students who are nonbeneficiaries

(because of their race) is more diffuse, those policies are more likely to withstand legal review. In particular:

- Unlike the admissions program in *Bakke*, which “had the effect of excluding applicants...on the basis of their race,” race-conscious financial aid “does not, in and of itself, dictate that a student would be foreclosed from attending a college solely on the basis of race.” Hence, the burden on nonbeneficiaries resulting from race-conscious financial aid practices may be less than that resulting from race-conscious admissions practices.
- “[I]n contrast to the number of admissions slots, the amount of financial aid available to students is not necessarily fixed.” In other words, a decision to remove race-conscious restrictions on aid administered by a college or university will not necessarily result in “increased resources” for nontargeted students. For example, private donors might not provide any aid at all in the event that race restrictions are removed, and universities might “rechannel [race-conscious aid] into other methods of recruitment if restricted financial aid is barred.” Hence, depending on institution-specific facts, universities may be able to show that their race-conscious financial aid practices have a minimal negative impact on nonbeneficiaries of that aid, thereby enhancing their legal position.

### ***What we know about...race-conscious financial aid***

There is only one reported federal case reflecting a challenge to race-conscious financial aid practices. That case, *Podberesky v. Kirwan*, involved a challenge to the University of Maryland’s award of race-exclusive scholarships to African American students attending the University of Maryland. The *Podberesky* case did *not* involve the question of whether the educational benefits of diversity could justify those scholarships; the justification offered by the University of Maryland was that the present effects of the University’s past discrimination justified its program. The court ruled that there was insufficient evidence to support the scholarship program under a strict scrutiny analysis, and entered a judgment in favor of the plaintiff.

*Source: Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995).

In addition, most federal courts that have examined general race- and national origin-conscious recruitment and outreach programs have upheld those programs under a *less rigorous* standard than the strict scrutiny standard where they have not conferred material benefits or opportunities to some students (and not to others) based on race or national origin. As discussed in more detail in Appendix Two, many courts have considered these kinds of “inclusive” programs as not harming or otherwise excluding nontargeted individuals. As with financial aid practices described above, however, each program requires a case-by-case analysis. In short, not all “outreach” programs are the same. Depending on their design, some may in fact confer benefits or opportunities to some students and not to others, based on their race. If that is the case, then a more probing review under strict scrutiny standards is probably in order.

## V. The Process of Self-Assessment: An Outline of Critical Steps

The process that leads to policy decisions—such as those in which race and ethnicity may be considered as factors in admissions—is as fundamental to the establishment of legally and educationally sound practices as any substantive decision rendered. In fact, federal courts that have addressed the issue of race or national origin programs in the higher education admissions context have consistently posed an inquiry regarding the timing and nature of the institutional review of such programs, to ensure their continuing viability and necessity. Therefore, states, colleges, and universities that are serious about an examination of race- or national origin-conscious programs should be as conscious of their process as they are of the ultimate conclusions reached.

The issue of how best to evaluate (and refine, if necessary) race- and national origin-conscious programs is, from a strategic planning standpoint, not much different from the issue of how to prepare for periodic accreditation reviews, how to launch a fund-raising campaign, or how to ensure that the pedagogy of a particular department is meeting larger institutional goals. The strategic planning process can be divided into the following steps:

- Know your program.
- Assemble your team.
- Understand your objective(s).
- Evaluate your program.
- Take necessary action steps.
- Monitor results.

**Know your program:** Inventory all race- and ethnicity-based policies and other diversity-related policies, including admissions, financial aid, outreach, recruitment, and employment policies.

The first step in any meaningful assessment of race- or national origin-conscious admissions or financial aid policies and programs is to collect the facts. Determine the range and scope of all policies or programs that may involve the consideration of race or national origin. Collect all relevant policies and procedures and complete an inventory of related documents that may bear upon such practices. Talk to individuals who have institutional expertise or history to ensure that the factual foundations for your assessment is complete. In the end, make sure that you know precisely how race and national origin are used in admissions, financial aid, and other programs, and why.

**Assemble your team:** Establish an interdisciplinary strategic planning team and a process to evaluate the relevant policies, now and over time.

Because process counts as much as substance, the composition of your evaluation team should be carefully considered and addressed. In particular, representatives of specific programs or institutional perspectives that have a bearing on diversity-related goals should be included. Similarly, involve individuals who can help assemble the kind of information necessary to establish a foundation for race- or national origin-conscious programs on an ongoing basis. In addition, because the use of race or national origin as admissions or financial aid factors inevitably raises questions of federal (and frequently state) legal compliance, lawyers with an understanding of these issues should be included in the process. To the extent that the decisions to be made regarding the use of race or national origin in admissions are ones in which public engagement is important, include broader community input as part of the ongoing conversation.

**Understand your objective(s):** Identify the diversity-related educational goals and supporting evidence that justify each of the relevant policies.

Federal law should affirm sound educational judgments. In the context of diversity rationales—which are by definition mission- and program-specific—clarity regarding your objectives is critical. The first questions that federal courts will pose to educators who are the subject of discrimination claims are: “Why are you operating your program in this way? What is your educational rationale and justification for such a use of race or national origin?” Also, part of the inquiry regarding the diversity-related interests that may justify race- or national origin-conscious programs should center on how the college or university conceptualizes diversity. How is it defined and measured? What constitutes success?

**Evaluate your program:** Evaluate race-based and race-neutral policies and options in light of core educational interests.

From educational, research, and legal bases, conduct a rigorous evaluation of your program in the context of overall objectives and legal standards. Use the list of questions on the following pages to frame the conversation and inquiry. As part of the examination of the use of race or national origin in your admissions or financial aid program, also examine the basic qualifying criteria and their impact—without a consideration of race or national origin—on the admissions of students of all races and ethnicities.

**Take necessary action steps:** Ensure that any consideration of race is as limited as possible, consistent with institutional diversity goals.

On the basis of the program evaluation, take the steps necessary to continue to ensure a sound educational and legal foundation for all decisions involving the use of race or national origin in the admissions or financial aid context. Step outside of the admissions or financial aid arena for the purposes of this evaluation. Examine institutional or programmatic mission statements, strategic plans, self-evaluation studies prepared for accreditation, and related documents to ensure an alignment in theory and in fact.

**Monitor results:** Review outcomes of diversity efforts and make appropriate adjustments over time.

Where race and national origin are concerned, a one-time review won't pass legal muster. Establish a process (that is likely to become less onerous and resource intensive over time) by which a periodic review of programs, policies, goals, and results is conducted—all in the context of educational, research, and legal developments.



## VI. The Defining Questions: A Framework for Programmatic Self-Assessment

No one document or set of questions can completely address the many nuances and variables that enter into the realm of higher education admissions and financial aid. It bears repeating that this Manual makes no attempt to suggest that a formulaic outline or a checklist will, without more, resolve the issues addressed in this Manual. Professional judgments—both legal and educational—must affect the ultimate conclusions regarding inherently contextual and fact-specific policies and practices. Therefore, this chapter should be read as it is intended: as a practical frame of reference for evaluating policies and program where race or national origin may be a factor. It is designed to address the three central questions posed by the federal courts when they evaluate race- or national origin-based programs:

- What is the nature of the program and is it subject to *strict scrutiny*?
- Why does the program involve the use of race or national origin and is there a *compelling interest* that *justifies* the program?
- How is the program designed and administered and is the use of race or national origin *narrowly tailored* to achieve the compelling interest?

These questions, and the subsets of questions that follow, are interrelated. The relative strength of a program with regard to some questions may mitigate the need for a comparably strong showing with regard to others. Ultimately, those determinations must be made based on the facts of a particular program.

The questions below are followed by a brief explanation of the legal relevance of the inquiry, and by a less complex, operational statement of the relevant point in “The Bottom Line...” In many cases, the explanations identify factors or qualities that are more or less likely to lead to compliance with prevailing federal legal standards. The symbols in the margin indicate if the question applies to admissions [A], financial aid [\$], or both.

### WHAT is the nature of the program?

- [A/\$] 1. *Is race or national origin used as a factor in the admissions or financial aid decision?*

If the answer to this question is no, then your admissions or financial aid policies are unlikely to be subject to the “strict scrutiny” of the federal courts. If the answer is yes, it does not mean that the given policy is unlawful; rather the institution (like the University of Michigan Law School) must demonstrate that the policy serves a compelling interest and is narrowly tailored to achieve that interest.

#### **The Bottom Line...**

You have much more flexibility in the academic choices that you make and the factors that you consider in the admissions context when race or national origin factors are not considered.

[A] 2. *Is race or national origin a factor in recruitment or outreach programs?*

If the answer to this question is no, then it is unlikely that the 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 such programs do not provide such benefits, they are more likely to be viewed as “inclusive” and not subject to strict scrutiny. (See Appendix Two for a discussion of relevant authorities.)

**The Bottom Line...**

Race- or national origin-conscious recruitment and outreach strategies that are merely designed to broaden the applicant pool are not likely to be subject to strict scrutiny.

[\$] 3. *Is the funding for financial aid programs provided by private sources? Does your college or university support or administer any facet of the program?*

Purely private awards of financial aid—even where based on race or national origin—are 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. See page 12.) However, if a university helps administer or otherwise provides “significant assistance” to a private entity making such awards, then strict scrutiny standards under the Equal Protection Clause and/or Title VI may be triggered.

**The Bottom Line...**

Colleges and universities are not legally responsible for actions that are conducted by completely independent third parties, even where students attending those schools may be beneficiaries of the third-party action. However, if they assist in the administration of programs operated by those third parties, they must be prepared to defend the lawfulness of the race-conscious practices they support.

## **WHY does the institution consider race or national origin in its admissions or financial aid process?**

[A/\$] 1. *What is the educational justification for using race or national origin in the admissions or financial aid decision?*

Where programs include the consideration of race or national origin, institutions must have a “compelling interest” to use those factors. For example, this means that the justifications must relate to obligations to remedy the effects of past or present discrimination or they must relate to mission-driven, educationally related diversity goals.

**The Bottom Line...**

Have the foundations to support your use of race or national origin. Sound educational rationales are more likely to withstand probing legal scrutiny.

- [A/\$] 2. *Are educational benefits associated with a diverse student body a foundation for the use of race in the admissions or financial aid decision?*

If your justification for considering race or national origin is related to the educational benefits of diversity, then you must have educationally sound reasons that support this position. These should include mission-related benefits that stem from a diverse student body. The kinds of educational benefits that stem from student diversity that may support your admissions 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.

- [A/\$] 3. *Is there evidence that those educational benefits flow from such admissions or financial aid policies?*

The justifications for diversity efforts that include the use of race or national origin in admissions should be supported by substantial evidence. Institution- or program-specific evidence (ranging from mission statements to research and data from institutional or other sources) should provide the empirical basis for your position.

**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 admissions decisions.

- [A/\$] 4. *Are diversity objectives and goals part of and aligned with the program’s mission? How broadly is “program” defined?*

The authenticity of the mission-based educational interest proffered in support of race- or national origin-conscious programs is a point of inquiry for the federal courts. In addition, the alignment of diversity goals and discrete activities that are part of the “program” for which race- or national origin-conscious policies are used may be a relevant inquiry. Therefore, attention to the goals and the across-the-board applicability of diversity policies is important.

**The Bottom Line...**

From mission statement to admissions policy to educational programs, 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.

- [A/\$] 5. *Does the college or university work to implement its education goals that are linked to diversity objectives in all phases of its programs?*

The authenticity of the interests articulated as a justification for the use of race or national origin 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 provide a predicate for using race or national origin in admissions or financial aid decisions.

**The Bottom Line...**

Diversity-related institutional objectives should be more than a statement of goals on a mission statement.

- [A/\$] 6. *Are admissions goals flexible and tied to the institution's compelling educational diversity interests?*

Admissions goals in the diversity context should be flexible and tied to the institution's educational diversity goals. In particular, a college or university may seek to enroll a "critical mass" of students from different racial and ethnic backgrounds to achieve the educational benefits of diversity.

**The Bottom Line...**

Diversity-related admissions goals should be flexible (i.e., not quotas) and driven by the nature and context of diversity necessary to achieve the institution's broader, compelling educational goals.

- [A/\$] 7. *How is diversity defined or framed in the context of the program's overall educational objectives?*

What does your institution mean by the term "diversity" in admissions? From a federal legal standpoint, that term must include more than a reference to race or ethnicity. Moreover, the educational goals associated with diversity in the admissions context cannot be limited to simply addressing the issue of "underrepresentation" of certain groups of students or achieving racial balance.

**The Bottom Line...**

Think education. And make sure you have an all-inclusive conceptualization of the term "diversity" in the admissions context.

- [A/\$] 8. *Are the program's diversity-related goals in harmony with its definition of "merit" in the admissions or financial aid process?*

As the term has frequently been used, "merit" has referred to typical indices of academic standing—such as grades and standardized test scores. To the extent that the qualities that the university values are broader than this set of factors, the university should clearly include those additional factors in any articulation of "merit" and related admissions criteria. (And, it is important that all public statements regarding "merit" reflect this policy.) To do otherwise raises the likelihood of claims that program standards should include nothing but grades and test scores.

**The Bottom Line...**

The criteria established as factors in admissions or financial aid decisions should be established in a way that is fully aligned with institutional mission-related goals and inclusive of all relevant factors.

## HOW has the program been designed and implemented with respect to the use of race or national origin?

- [A/\$] 1. *Have race-neutral strategies (as supplements and as possible alternatives to the program) been evaluated or tried?*

An integral element of the narrow-tailoring requirement is the consideration of race-neutral alternatives. It is not a requirement that all race-neutral alternatives, regardless of how costly or likely to achieve institutional goals, be exhausted to comply with federal legal standards. Rather, 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?

- [A/\$] 2. *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 certain 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, such experiences may suggest the need to try similar efforts.

### **The Bottom Line...**

Brainstorm and evaluate—to ensure that the range of strategies (including race-neutral strategies) has been fully considered in the context of how best to achieve diversity goals.

- [A/\$] 3. *What results were achieved with the race-neutral strategies that were tried? Has a complete evaluation of such programs or practices 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 the context of overall goals and objectives. The failure to evaluate the program limits the credibility of the institutional response with regard to the real need justifying any race-conscious programs.

### **The Bottom Line...**

If race-neutral strategies or policies are effective in helping you meet your diversity-related educational goals, your race- or national origin-conscious programs should be reevaluated to determine the extent to which they continue to serve as necessary and material means for achieving diversity-related ends.

- [A/\$] 4. *What are the benchmarks of success associated with the program's diversity-related goals? By what measure can the university evaluate the program's success and determine the ongoing need to use race or national origin? Are desired outcomes being achieved?*

The complement to the evaluation of race-neutral programs in the context of attaining diversity, these inquiries center on the need to ensure that the use of race is a meaningful step in the achievement of overall diversity goals. The use of race or national origin should demonstrably and significantly further diversity-related goals. Otherwise, such practices are less likely to be viewed as "necessary."

**The Bottom Line...**

What is success, and how do you know when you have achieved it?

- [A/\$] 5. *What evidence establishes that the use of race- or national origin-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-conscious policies.

**The Bottom Line...**

Conclusions about the need for race- or national origin-conscious programs are not worth much without strong, substantiating evidence (which should include program-specific information).

- [A] 6. *Are all applicants evaluated according to the same criteria? Are all of the admissions criteria aligned to the program's mission-related diversity goals?*

One set of criteria should guide admission decisions. If admissions standards—particularly those related to test scores and grade point averages—apply differently to different students based on their race or national origin, then the admissions practices are legally suspect and are unlikely to withstand "strict scrutiny."

**The Bottom Line...**

Do not establish separate cutoff scores, separate committees, or separate waiting lists for students based upon their race or national origin. In the admissions context, all students should be evaluated in the context of a common set of standards.

- [A/\$] 7. *What role does race or national origin play in the admissions decision? And for awards of financial aid, is race or national origin an explicit condition of eligibility, or is it one factor among many?*

In admissions, race or national origin must be one factor among many, rather than an automatic qualifier, to withstand “strict scrutiny.” However, note the Title VI policy of the U.S. Department of Education on this point, which in certain circumstances would permit race-exclusive scholarships.

**The Bottom Line...**

It is important to understand how race and national origin affect admissions and financial aid decisions, both on the front end, and from an after-the-fact view. The more diffuse the role of race and national origin, the more likely it will withstand “strict scrutiny.”

- [A] 8. *In cases where race or national origin is used as a plus factor in admissions, how is the race or the national origin of the applicant considered? Is it considered in the context of whole-file reviews, or do applicants receive points because of their race, without further analysis?*

The limited use of race as one factor among many in admissions was sanctioned in Justice Powell’s *Bakke* opinion. Building on this view, the U.S. Supreme Court in the Michigan decisions distinguished between the (permissible) individualized, whole-file consideration of applicants and the (impermissible) “automatic” and mechanical admissions point system, pursuant to which designated “under-represented minorities” received points because of their racial or ethnic status.

**The Bottom Line...**

Where race and national origin are considered in admissions, they should be factors in the context of the assessment of the individual student and his or her background. Race and national origin should not be factors that are mechanically assigned numerical weight.

- [A/\$] 9. *What impact does the use of race or national origin have on applicants who do not receive the benefit of race or national origin consideration? Are students displaced from eligibility because of the use of race or national origin?*

If the use of race or national origin as part of an admissions or financial aid process has the effect of displacing students who do not receive favorable consideration because of their race or national origin, the practice is less likely to withstand legal review. If, however, the impact is more diffuse, then the program is more likely to withstand federal scrutiny.

**The Bottom Line...**

Evaluate the use of any race- or national origin-conscious program on students who do not receive the benefits of that program. The more pronounced the impact, the more problematic the practice.

- [A/\$] 10. *How frequently is the program's use of race or national origin reviewed to determine the need for continuing the race- or national origin-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 national origin-conscious programs are expected to have a "logical end point"—once the goals associated with the program are met, or once it is determined that the program does not materially advance diversity-related goals. Institutions with race- and national origin-based admissions or financial aid policies should undertake a rigorous, periodic review of those programs and consider the establishment of sunset provisions.

#### **The Bottom Line...**

Race- and national origin-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.

- [/\$] 11. *What is the source of funding for the financial aid program under review, and what would happen to that aid if it were not targeted to assist students based on race or national origin?*

The question of "if not here, where?" could be central to an evaluation of a race- or national origin-targeted financial aid program. If the institution receives privately donated money for race-targeted financial aid, for instance, but is without the ability to use the funds for that purpose, the funds would not be available for any student. The potential burden is also more diffuse on nonbeneficiaries of the program where significantly more funds are available in other financial aid programs at the institution.<sup>34</sup>

#### **The Bottom Line...**

If nonbeneficiaries of the financial aid program have access to a substantial pool of financial aid funds, a strong argument that the impact of the race- or national origin-conscious program is minimally intrusive on nonbeneficiaries can be made.

## Appendix One

### U.S. Department of Education Final Policy Guidance Regarding Race- and National Origin-Based Financial Aid (1994)

**FEDERAL REGISTER**

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Wednesday  
February 23, 1994

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Part VIII

**Department of  
Education**

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**Nondiscrimination in Federally Assisted  
Programs; Title VI of the Civil Rights Act  
of 1964; Notice**

**DEPARTMENT OF EDUCATION**

**Non-discrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964**

**AGENCY:** Department of Education.  
**ACTION:** Notice of final policy guidance.

**SUMMARY:** The Secretary of Education issues final policy guidance on Title VI of the Civil Rights Act of 1964 and its implementing regulations. The final policy guidance discusses the applicability of the statute's and regulations' non-discrimination requirement to student financial aid that is awarded, at least in part, on the basis of race or national origin.

**EFFECTIVE DATE:** This policy guidance takes effect on May 24, 1993, subject to the transition period described in this notice.

**FOR FURTHER INFORMATION CONTACT:** Joanne C. Lim, U.S. Department of Education, 400 Maryland Avenue, SW., room 5998-1 Switzer Building, Washington, DC 20202-3174. Telephone (202) 305-8635. Individuals who use a telecommunications device for the deaf (TDD) may call the TDD number at 1-800-358-8247.

**SUPPLEMENTARY INFORMATION:** On December 10, 1991, the Department published a notice of proposed policy guidance and request for public comment in the Federal Register (56 FR 64348). The purpose of the proposed guidance and of this final guidance is to help clarify how colleges can use financial aid to promote campus diversity and success of minority students in postsecondary education without violating federal anti-discrimination laws. The Secretary of Education encourages continued use of financial aid as a means to provide equal educational opportunity and to provide a diverse educational environment for all students. The Secretary also encourages the use by postsecondary institutions of other efforts to recruit and retain minority students, which are not affected by this policy guidance.

This guidance is designed to promote those purposes in light of Title VI of the Civil Rights Act of 1964 (Title VI), which states that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The Department has completed its review of this issue, taking into account the results of a recent study by the

General Accounting Office (GAO) and public comments submitted in response to the proposed policy guidance. The Secretary has determined that the proposed policy guidance interprets the requirements of Title VI too narrowly in light of existing regulations and case law. While Title VI requires that strong justifications exist before race or national origin is used as a basis for awarding financial aid, many of the rationales for existing race-based financial aid programs described by commenters appear to meet this standard.

The recent report by GAO on current financial aid programs does not indicate the existence of serious problems of non-compliance with the law in postsecondary institutions. That report found that race-targeted scholarships constitute a very small percentage of the scholarships awarded to students at postsecondary institutions. The Secretary anticipates that most existing programs will be able to satisfy the principles set out in this final guidance.

The Department will use the principles described in this final policy guidance in making determinations concerning discrimination based on race or national origin in the award of financial aid. Those principles describe the circumstances in which the Department, based on its interpretation of Title VI and relevant case law, believes consideration of race or national origin in the award of financial aid to be permissible. A financial aid program that falls within one or more of these principles will be, in the Department's view, in compliance with Title VI. This guidance is intended to assist colleges in fashioning legally defensible affirmative action programs to promote the access of minority students to postsecondary education. The Department will offer technical assistance to colleges in reexamining their financial aid programs based on this guidance.

This notice consists of five simple-stated principles and a section centering in legal analysis for each principle. The legal analysis addresses the major comments received in response to the notice of proposed policy guidance.

In identifying the principles, the Department is not excluding the possibility that there may be other forms of action that may require consideration of race or national origin in awarding financial aid. The Department will continue to consider whether a program could, during the course of a Title VI investigation or case, be considered

**Summary of Changes in the Final Policy Guidance**

Almost 600 written responses were received by the Department in response to the proposed policy guidance, many with detailed suggestions and analyses. Many additional suggestions and concerns were raised in meetings between Department officials and representatives of postsecondary institutions and civil rights groups. The vast majority of comments expressed support for the objective of clarifying the options colleges have to use financial aid to promote student diversity and success of minorities in postsecondary education without violating Title VI. Many comments, however, took issue with specific principles in the proposed policy guidance and questioned whether those principles would be effective in accomplishing this purpose.

As more fully explained in the legal analysis section of this document, after reviewing the public comments and reexamining the legal precedents in light of those comments, the Department has revised the policy guidance in the following respects:

(1) Principle 3—"Financial Aid to Remedy Past Discrimination"—has been amended to permit a college to award financial aid based on race or national origin as part of affirmative action to remedy the effects of its past discrimination without waiting for a finding to be made by the Office for Civil Rights (OCR), a court, or a legislative body, if the college has a strong basis to believe of discrimination justifying the use of race-targeted scholarships.

(2) Principle 4—"Financial Aid to Create Diversity"—has been amended to permit the award of financial aid on the basis of race or national origin if the aid is a necessary and narrowly tailored means to accomplish a college's goal to have a diverse student body that will enrich its academic environment.

(3) Principle 5—"Private Gifts Restricted by Race or National Origin"—has been amended to clarify that a college can administer financial aid from private donors that is restricted on the basis of race or national origin only if that aid is consistent with the other principles in this policy guidance.

(4) A provision has been added to permit historically black colleges and universities (HBCUs) to participate in race-targeted programs for black students established by third parties if the programs are not limited to students at HBCUs.

(5) Provisions in the proposed policy guidance for a transition period have

been revised to provide that, as far as the Department's enforcement efforts are concerned—

(1) Colleges and other recipients of Federal financial assistance will have a reasonable period of time—up to two years—to review their financial aid programs and to make any adjustments necessary to come into compliance with the principles in this final policy guidance;

(2) No student who has received or applied for financial aid at the time this guidance becomes effective will lose aid as a result of this guidance. Thus, if an award of financial aid is inconsistent with the principles in this guidance, a college or other recipient of Federal financial assistance may continue to provide the aid to a student during the course of his or her enrollment in the academic program for which the aid was awarded, if the student had either applied for or received the aid prior to the effective date of this policy guidance.

#### Principles

##### Definitions

For purposes of these principles, *College* means any postsecondary institution that receives Federal financial assistance from the Department of Education.

*Financial aid* includes scholarships, grants, loans, work-study, and fellowships that are made available to assist a student to pay for his or her education at a college.

*Race-neutral means* not based, in whole or in part, on race or national origin.

*Race-targeted, race-based, and awarded on the basis of race or national origin* mean limited to individuals of a particular race or races or national origin or origins.

##### Principle 1: Financial Aid for Disadvantaged Students

A college may make awards of financial aid to disadvantaged students, without regard to race or national origin, even if that means that these awards go disproportionately to minority students.

Financial aid may be earmarked for students from low income families, financial aid also may be earmarked for students from urban districts with high dropout rates, or students from single-parent families, or students from families in which few or no members have attended college. None of these or other race-neutral ways of identifying and providing aid to disadvantaged students present Title VI problems. A college may use funds from any source to provide financial aid to disadvantaged students.

##### Principle 2: Financial Aid Authorized by Congress

A college may award financial aid on the basis of race or national origin if the aid is awarded under a Federal statute that authorizes the use of race or national origin.

##### Principle 3: Financial Aid To Remedy Past Discrimination

A college may award financial aid on the basis of race or national origin if the aid is necessary to overcome the effects of past discrimination. A finding of discrimination may be made by a court or by an administrative agency—such as the Department's Office for Civil Rights. Such a finding may also be made by a State or local legislative body, as long as the legislature has a strong basis in evidence identifying discrimination within its jurisdiction for which the remedial action is necessary.

In addition, a college may award financial aid on the basis of race or national origin to remedy its past discrimination without a formal finding of discrimination by a court or by an administrative or legislative body. The college must be prepared to demonstrate to a court or administrative agency that there is a strong basis in evidence for concluding that the college's action was necessary to remedy the effects of its past discrimination. If the award of financial aid based on race or national origin is justified as a remedy for past discrimination, the college may use funds from any source, including unrestricted institutional funds and privately donated funds restricted by the donor for aid based on race or national origin.

A State may award financial aid on the basis of race or national origin, under the preceding standards, if the aid is necessary to overcome its own past discrimination or discrimination at colleges in the State.

##### Principle 4: Financial Aid To Create Diversity

America is unique because it has forged one Nation from many people of a remarkable number of different backgrounds. Many colleges seek to create on campus an intellectual environment that reflects that diversity. A college should have substantial discretion to weigh many factors—including race and national origin—in its efforts to attract and retain a student population of many different experiences, opinions, backgrounds, and cultures—provided that the use of race or national origin is consistent with the constitutional standards reflected in Title VI, i.e., that it is a narrowly

tailored means to achieve the goal of a diverse student body.

There are several possible options for a college to promote its First Amendment interest in diversity. First, a college may, of course, use its financial aid program to promote diversity by considering factors other than race or national origin, such as geographic origin, diverse experiences, or socioeconomic background. Second, a college may consider race or national origin with other factors in awarding financial aid if the aid is necessary to further the college's interest in diversity. Third, a college may use race or national origin as a condition of eligibility in awarding financial aid if the use is narrowly tailored, or, in other words, if it is necessary to further its interest in diversity and does not unduly restrict access to financial aid for students who do not meet the race-based eligibility criteria.

Among the considerations that affect a determination of whether awarding race-targeted financial aid is narrowly tailored to the goal of diversity are (1) whether race-neutral means of achieving that goal have been or would be ineffective; (2) whether a less extensive or intrusive use of race or national origin in awarding financial aid as a means of achieving that goal has been or would be ineffective; (3) whether the use of race or national origin is of limited extent and duration and is applied in a flexible manner; (4) whether the institution regularly reexamines its use of race or national origin in awarding financial aid to determine whether it is still necessary to achieve its goal; and (5) whether the effect of the use of race or national origin on students who are not beneficiaries of that use is sufficiently small and diffuse so as not to create an undue burden on their opportunity to receive financial aid.

If the use of race or national origin in awarding financial aid is justified under this principle, the college may use funds from any source.

##### Principle 5: Private Gifts Restricted by Race or National Origin

Title VI does not prohibit an individual or an organization that is not a recipient of Federal financial assistance from directly giving scholarships or other forms of financial aid to students based on their race or national origin. Title VI simply does not apply.

The provisions of Principles 3 and 4 apply to the use of race-targeted privately donated funds by a college and may justify awarding those funds on the basis of race or national origin if the







promote better health-care delivery to "improved citizens." *Id.*, at 311.

"With respect to the final objective, the attainment of a diverse student body," Justice Powell found that—

Take clearly to a constitutionally permissible goal for an institution of higher education, Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to educational objectives, the selection of its student body.

*Id.*, at 311, 312. Thus, colleges have a First Amendment right to seek diversity in admissions to fulfill their academic mission through the "robust exchange of ideas" that flows from a diverse student body. *Id.*, at 312-313.<sup>10</sup> However, the means to achieve this "countervailing constitutional interest" under the First Amendment must comport with the requirements of the Fourteenth Amendment. The Medical School's policy of setting aside a fixed number of admission spaces solely for minorities was found not to pass the Fourteenth Amendment's strict scrutiny test, because the policy's use of race as a condition of eligibility for the slots was not necessary to promote the school's diversity interest. *Id.*, at 315-316.

Justice Powell found that the Medical School could advance its diversity interest under the First Amendment in a narrowly tailored manner that passed the Fourteenth Amendment's strict scrutiny test by using race or national origin as one of several factors that would be considered as a plus factor for an applicant in the admissions process. *Id.*, at 317-318.

Following the *Bakke* decision, the Department reexamined its Title VI regulations to determine whether any changes were necessary. In a policy interpretation published in the Federal Register (49 FR 58500), the Department concluded that no change was warranted. The Department determined that the Title VI regulatory provision authorizing voluntary affirmative action was consistent with the Court's decision and that the provision would be interpreted to incorporate the limitations on voluntary affirmative

action announced by the Court.<sup>11</sup> Thus, if a college's use of race or national origin in awarding financial aid meets the Supreme Court's test under the Fourteenth Amendment for permissible voluntary affirmative action, it will also meet the requirements of Title VI.

In the Department's proposed policy guidance on financial aid, a principle was included permitting the use of race or national origin as a "plus" factor in awarding student aid. The basis for the principle was the *Bakke* decision and the Department's assessment that using an approach that had been approved by the Supreme Court as narrowly tailored to achieve diversity in the admissions context also would be permissible in awarding financial aid.<sup>12</sup>

In response to the proposed policy, many colleges submitted comments arguing that the use of race or national origin as a plus factor in awarding financial aid may be inadequate to achieve diversity. They contended that, in some cases, it may be necessary to designate a limited amount of aid for students of a particular race or national origin. According to these commenters, a college's financial aid program can serve a critical role in achieving a diverse student body in at least three respects: First, the availability of financial aid set aside for members of a particular race or national origin serves as a recruitment tool, encouraging applicants to consider the school. Second, it provides a means of encouraging students who are offered admission to accept the offer and enroll at the school. Finally, it assists colleges in retaining students until they complete their program of studies.

The commenters argued that a college—because of its location, its reputation (whether deserved or not) of being inhospitable to minority students, or its number of minority graduates—may be unable to recruit sufficient minority applicants even if race or national origin is considered a positive factor in admissions and the award of aid. That is, the failure to attract a sufficient number of minority applicants who meet the academic requirements of the college will make it impossible for the college to enroll a diverse student body, even if race or national origin is given a competitive "plus" in the

admissions process. In addition, a college that has sufficient minority applicants to offer admission to a diverse group of applicants may find that, absent the availability of financial aid set aside for minority students, its offers of admission are disproportionately rejected by minority applicants.

Furthermore, commenters were concerned that, while there may be large amounts of financial aid available for undergraduates at their institutions, there may be insufficient aid for graduate students, almost all of whom are able to demonstrate financial need. Thus, it is possible that a college that is able to achieve a diverse student body in some of its programs using race-neutral financial aid criteria or using race or national origin as a "plus" factor may find it necessary to use race or national origin as a condition of eligibility in awarding limited amounts of financial aid to achieve diversity in some of its other programs, such as its graduate school or particular undergraduate schools.

The Department agrees with the commenters that in the circumstances they have described it may be necessary for a college to set aside financial aid to be awarded on the basis of race or national origin in order to achieve a diverse student body. Whether a college's use of race targeted financial aid is "narrowly tailored" to achieve this compelling interest involves a case-by-case determination that is based on the particular circumstances involved. The Department has determined, based on the comments, to expand Principle 4 to permit those case-by-case determinations.

The Court in *Bakke* indicated that race or national origin could be used in making admissions decisions to further the compelling interest of a diverse student body even though the effort might be to deny admission to some students who did not receive a competitive "plus" based on race or ethnicity.<sup>13</sup> However, the use of a set-aside of places in the entering class was impermissible because it was not necessary to the goal of diversity. In cases since *Bakke*, the Supreme Court has provided additional guidance on the factors to be considered in determining whether a classification based on race or national origin is narrowly tailored to its purpose. These factors will be

<sup>10</sup> The Secretary believes that a college's academic freedom interest in the "robust exchange of ideas" also includes an interest in the existence of a diverse faculty and, more generally, in diversity of professors nationally, since academic exchange is the interchange of ideas with others in their field, and not merely with faculty at their particular school. A university could contribute to this interest by enrolling students and faculty who are committed to learning processes and who will cooperate in, and assist in, the ability of scholars in their field of study, regardless of the diversity of the students who are admitted to the university's own graduate program.

<sup>11</sup> The present policy guidance on student financial assistance supplements the 1979 policy interpretation.

<sup>12</sup> The Department will presume that a college's use of race or national origin as a plus factor, with other factors, is narrowly tailored to further the compelling governmental interest in diversity, as long as the college rationally determines whether its use of race or national origin is a plus factor continues to be necessary to achieve a diverse student body.

<sup>13</sup> *Bakke* was the Supreme Court's first decision in an affirmative action case. Since that time, the Court has decided a number of affirmative action cases, none of which have invalidated Justice Powell's opinion in *Bakke*, but the question of diversity as the higher education sector is a compelling interest.

**40** Diversity in Higher Education:  
A Strategic Planning and Policy Manual Regarding Federal Law in Admissions, Financial Aid, and Outreach

previously described, it is similarly permissible to solicit the funds from private sources.

#### *Financial Aid of Historically Black Colleges and Universities*

To ensure that the principles in this policy guidance do not subvert congressional efforts to enhance historically black colleges and universities (HBCUs), these institutions may participate in student aid programs established by third parties for black students that are not limited to students at the HBCUs and may use their own institutional funds in those programs if necessary for participation.<sup>13</sup> See 20 U.S.C. 1051, 1060, and 1132c (congressional findings of past discrimination against HBCUs and of the need for enhancement).

This finding is based upon congressional findings of past discrimination against HBCUs and the students they have traditionally served, as well as the Department's determination that these institutions and their students would be harmed if precluded from participation in programs created by third parties that designate financial aid for black students. This action would have an unintended negative effect on their ability to recruit excellent students and would undermine congressional actions aimed at enhancing these institutions.

Congress has repeatedly made findings that recognize the unique historical mission and important role that HBCUs play in the American system of higher education, and particularly in providing equal educational opportunity for black students. 20 U.S.C. 1051, 1060, and 1132c. Congress has created programs that strengthen and enhance HBCUs in Titles II through VII of the Higher Education Act, as amended by Public Law 99-498. 20 U.S.C. 1071-1132-3. It has found that "there is a particular national interest in aiding institutions of higher education that have historically served students who have been denied access to postsecondary education because of race or national origin . . . so that equality of access and quality of postsecondary education opportunities may be enhanced for all students." 20 U.S.C. 1051. "A key link to the chain of expanding college opportunity for African American youth is

strengthening the Nation's historically black colleges and universities." House Report No. 102-447, 1002 U.S. Code Cong. and Adm. News p. 353.

Congress has found that "the current scale of HBCUs is partly attributable to the discriminatory action of the States and the Federal Government and this discriminatory action hampers the remedy of enhancement of black postsecondary institutions to ensure their continuation and participation in fulfilling the Federal mission of equality of educational opportunity." 20 U.S.C. 1090. See also, House Report No. 102-447, 1992 U.S. Code Cong. and Adm. News p. 353; House Report No. 99-303, 1986 U.S. Code Cong. and Adm. News 2532-2590. This includes providing access and quality education to low-income and minority students, and improving HBCUs' academic quality. 20 U.S.C. 1051.

For those same reasons, every Administration in recent years has recognized the special role and contributions of HBCUs and expressed support for their enhancement. See "Revised Criteria Specifying the Ingredients of Acceptable Plans to Integrate State Systems of Public Higher Education," 43 FR 6638 (1977); Exec. Order Nos. 12232, 45 FR 23437 (1980); 13320, 46 FR 48107 (1981); 12877, 54 FR 16889 (1989); and 12878, 54 FR 56735 (1989). The Department's own data indicate that HBCUs continue to play a vital role in providing higher education for many black students. In 1989 and 1990, more than one in four black bachelor's degree recipients received their degree from an HBCU (28.7%). See, "Historically Black Colleges and Universities, 1976-90" (U.S. Department of Education, Office of Educational Research and Improvement, July 1992).

This policy guidance is not intended to limit the efforts to enhance HBCUs called for by Congress and the President. The Department recognizes, however, that Principle 3 (remedying past discrimination) and Principle 4 (creating diversity) may not provide for HBCUs the same possibility of participating in race-targeted programs of financial aid for black students established by third parties or are provided for other colleges and universities. As some commenters pointed out, HBCUs continue to enroll a disproportionate percentage of black students and need to be able to compete for the most talented black students if they are to improve the quality and prestige of their academic environments and, therefore, enhance their attractiveness to all students regardless of race or national origin.

HBCUs' abilities to recruit, enroll and retain talented students will be undermined unless HBCUs are permitted to attract talented black students by participating in aid programs for black students that are established by third parties in which other colleges, i.e., those that meet Principle 3 or 4, participate. Limiting or precluding HBCUs' participation in private programs, such as the National Achievement Scholarship program, would have an unintended negative effect on their ability to recruit a talented student body. Under this scholarship program, which is restricted to academically excellent black students, one type of National Achievement Scholarship is funded by the institution. If HBCUs were unable to participate in this program, some top black students might be forced to choose between (1) receiving a National Achievement Scholarship to attend a school that met Principle 3 or 4 and (2) attending an HBCU. For these reasons, the Department interprets Title VI to permit HBCUs to participate in certain race-targeted aid programs for black students, such as the National Achievement Scholarship program.

The Department reads Title VI consistent with other statute and Executive orders addressing the special needs and history of HBCUs. In particular, the Department notes congressional findings of discrimination against black students that are the basis for enhancement efforts at HBCUs. Additionally, the Department interprets Title VI to permit limited use of race to avoid an anomalous and absurd result, i.e., penalizing HBCUs and students who seek admission to HBCUs, and putting HBCUs at a disadvantage with respect to other schools' precisely because of the special history and composition of the HBCUs.

The use of race-targeted aid by HBCUs that the Department is interpreting Title VI to permit under this provision is narrowly tailored to further the congressionally recognized purpose of enhancement of HBCUs. HBCUs may not discriminate on the basis of race or national origin in admitting students. They may not create their own race-targeted financial aid programs using their own institutional funds unless they satisfy the requirements of any of the other principles in this guidance. Nor may they accept private donations of race-targeted aid for black students that are limited to students at the institution unless otherwise permitted by the guidance. Because HBCUs have traditionally enrolled black students, it should not subvert the goal of enhancing the institutions to require

<sup>13</sup> This provision is limited to HBCUs as defined in Title III of the Higher Education Act, and not only generally to predominantly black institutions of higher education. The use of Title III institutions that Congress has made specific findings concerning the racial status of the HBCUs that serve as the basis for this provision.







## Appendix Two

### Recruitment and Outreach Programs: A Summary of Relevant Law

There is little federal authority regarding the circumstances under which the strict scrutiny standard applicable to the use of race or national origin in admissions and financial aid may be applicable to recruitment and outreach efforts. However, several federal courts have addressed the question in the context of employment, contracting, and housing discrimination claims. This illustrative selection of case summaries may provide some helpful guidance when devising or implementing policies and programs where race or national origin may be a factor. Note that some of these cases involve programs conducted by the hiring, contracting, or housing entity itself, while others involve government regulations or guidelines that affect the way in which such practices may be conducted by regulated entities.

Although the resolution of each of the cases discussed below turns on its own particular facts and circumstances, a general principle has emerged from this body of case law: As long as recruitment and outreach programs do not confer tangible benefits upon individuals based on their race or national origin, to the exclusion of other individuals, the more rigorous strict scrutiny review is unlikely to be appropriate. As a general proposition, therefore, it appears that race- and national origin-conscious recruitment and outreach programs are more likely to withstand federal court review under nondiscrimination principles so long as nonbeneficiaries are not denied material educational benefits or opportunities in the process.

State law may bear on this issue and, in fact, be more restrictive. The case of *High-Voltage Wire Works, Inc. v. City of San Jose*, 2000 Cal. LEXIS 8928 (Nov. 30, 2000) illustrates this point. In that case, which challenged certain employment practices under California's nondiscrimination law Proposition 209, the court acknowledged that federal nondiscrimination laws that might allow the challenged outreach program at issue were not dispositive of the issue where California voters had ratified a state law that differed in significant respects from prevailing federal standards. The court ruled that the City's outreach program, which required prime contractors to notify, solicit, and negotiate with minority- and women-owned businesses (and to justify rejection of their bids), violated state law.

### Federal Cases

*Duffy v. Wolle*, 123 F3d 1026 (8th Cir. 1997), cert. denied, 523 U.S. 1137 (1998).

In a reverse discrimination employment case, the court ruled that the challenged employment recruiting actions did not constitute discrimination; instead, they were a means to increase the pool of qualified applicants.

***MD/DC/DE Broadcasters Assn. v. FCC***, 236 F.3d 13 (D.C. Cir. 2001), *cert. denied*, 534 U.S. 1113 (2002).

Addressing a challenge to an FCC EEO rule, the 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 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. They reasoned that under the challenged regulation, “some prospective nonminority applicants who would have learned of job opportunities but for [the challenged rule] now will be deprived of an opportunity to compete simply because of their race.”

***Lutheran Church–Missouri Synod v. FCC***, 141 F.3d 344 (D.C. Cir.), *reh’g en banc denied*, 154 F.3d 487 (D.C. Cir. 1998).

The court ruled that the government regulation related to the FCC’s EEO rule was subject to strict scrutiny because it was “built on the notion that stations should aspire to a workforce that attains or at least approaches proportional representation” and it “obliged stations to grant some degree of preference to minorities in hiring.” On a petition for rehearing, the court affirmed its prior ruling, concluding that a federal agency’s requirement that employers create affirmative action programs targeting minorities and women, which established numerical goals in the workforce, did not qualify as nondiscriminatory outreach, and therefore required review under strict scrutiny standards. The court ruled that a government regulation constitutes a racial classification subject to strict scrutiny not only when it requires preferential race hiring, but also where it encourages race-conscious hiring: “Although an analysis of the degree of government pressure to grant a racial preference would no doubt be significant in evaluating whether a regulation survives strict scrutiny, it is the fact of encouragement... that makes this regulation a racial classification.”

***Sussman v. Tanoue***, 39 F. Supp. 2d 13 (D.D.C. 1999), *aff’d*, 64 Fed. Appx. 248 (D.D.C. 2003), *reh’g en banc denied*, 2003 U.S. App. LEXIS 11469 (D.C. Cir. 2003).

In an employment discrimination case, the court ruled that the affirmative action program did not confer any benefit to employees on the basis of race or gender and, therefore, did not trigger strict scrutiny. The program at issue, which attempted to discover and eliminate barriers leading to workforce imbalances, did not affect promotion and hiring decisions. It was, therefore, characterized as “inclusive,” designed to increase the pool of qualified candidates and create equal employment opportunities.

***Shuford v. Alabama State Bd. of Educ.***, 897 F. Supp. 1535 (M.D. Ala. 1995).

In a case involving claims of employment discrimination, the court approved a consent decree, and ruled that the race- and gender-based recruitment requirements were found to be “inclusive” rather than “exclusive,” thereby failing to trigger strict scrutiny analysis. Acknowledging that some inclusive measures have the potential of excluding applicants, and recognizing the need for balance, the court nonetheless found that the measures in place were inclusive because they were designed to broaden the applicant pool and no harm was done to any eligible applicant.

***Honadle v. Univ. of Vermont***, 56 F. Supp. 2d 419 (D. Vt. 1999).

In a reverse discrimination employment case, the court ruled that a funding program that provided financial grants to departments for hiring minority faculty members did not on its face have the purpose of creating an inducement to hire minority faculty and did not, therefore, trigger strict scrutiny. The court ruled that the financial incentives program did not allocate benefits or burdens to any individual because of his or her race, and therefore qualified as an inclusive measure. The court cautioned, however, that strict scrutiny would apply in any situation where the availability of financial incentives influenced hiring decisions.

***South Suburban Hous. v. Greater S. Suburban Bd. of Realtors***, 935 F.2d 868 (7th Cir. 1991), cert. denied, 502 U.S. 1074 (1992).

On the question of whether affirmative marketing by Realtors that encouraged housing integration violated the Fair Housing Act, the court concluded that the outreach efforts created additional competition in the market by attempting to attract people to housing opportunities that they might not generally consider, but did not operate to exclude or deter individuals of certain races from pursuing home ownership in certain neighborhoods. As a result, the nonexclusive efforts passed legal review.



## Appendix Three

### **Race- and Ethnicity-Neutral Alternatives: Strategies for Consideration**

The consideration of race- and ethnicity-neutral alternatives in the context of higher education admissions policies is frequently a topic that generates confusion. Given the polarizing nature of the public discourse around the subject of “affirmative action,” some (understandably) approach the question of diversity with an either-or view: to promote diversity, either use race or ethnicity as factors in admissions or adhere to race- or ethnicity-neutral policies to achieve those goals. This conceptualization misses the mark as a legal matter and potentially as an educational matter. No program or practice that has the potential to further educational objectives should be arbitrarily put aside—whether it is race based or race neutral. The question is: “Will it work?” Or, from a legal perspective: “What are the strategies that will best serve an institution’s diversity-related goals?”

To address this question, the law makes it clear that institutions must distinguish between goals and strategies. The pursuit of diversity-related goals must include, but not be limited to, consideration of race-neutral strategies. As Justice O’Connor reiterated: Federal law requires “serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity [a] university seeks.” Moreover, the narrow tailoring requirement does not insist upon “the 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.”<sup>35</sup>

As the U.S. Department of Education recently indicated in *Race Neutral Alternatives in Postsecondary Education: Innovative Approaches to Diversity*, “No single race-neutral program is a panacea.”<sup>36</sup> What is called for, however, is more research, discussion, and consideration of such alternatives that can as effectively help institutions achieve their diversity-related goals.

### **Race- and ethnicity-neutral criteria that institutions have used in undergraduate admissions and financial aid:**

- The applicant’s high school record, including grade point average, class rank, courses taken, and letters of recommendation from teachers
- The quality of the applicant’s high school, including courses offered, teacher quality, funding level, and poverty level
- The socioeconomic background of the applicant, including the degree to which the applicant’s family is above or below the poverty level, the applicant’s household income, assets owned by the family, and the applicant’s parents’ level of education
- Whether the applicant would represent the first generation of her or his family to attend or graduate from an institution of higher education

50 Diversity in Higher Education:

A Strategic Planning and Policy Manual Regarding Federal Law in Admissions, Financial Aid, and Outreach

- Whether the applicant has bilingual proficiency
- The level of wealth in the applicant's community and school district
- The applicant's responsibilities during high school, including employment, child rearing, and other family obligations
- Whether the applicant lives in a rural or urban area or in a particular region of the state or nation
- Participation in extracurricular or community service activities
- Demonstrated leadership, compassion, integrity, maturity, creativity, motivation, and persistence
- Personal talents or accomplishments
- Demonstrated commitment to a particular field of study
- Demonstrated ability to overcome hardship or adversity





## Appendix Four

### The Harvard Plan: A Retrospective

As a foundation for his opinion in *Bakke*, Justice Powell described with particularity the Harvard admissions plan [the Harvard Plan], which he cited as a model. Moreover, in its reliance upon Justice Powell's *Bakke* opinion as a foundation for its rulings in *Grutter* and *Gratz*, the U.S. Supreme Court in the University of Michigan cases pointed on several occasions to Justice Powell's favorable consideration of the Harvard Plan as "instructive." The Court also included several references to the Harvard Plan in its analysis of both cases. Therefore, to further illustrate the principles and concepts described in this Manual, Justice Powell's statement of the Plan is provided in the left column of the text that follows. The right column elaborates upon the underlined text, highlighting the salient features of the Harvard Plan with relevant commentary by Justice Powell or by the Court majorities in *Grutter* and in *Gratz*.

Appendix to Justice Powell's opinion in *Bakke* (emphasis added):

For the past 30 years Harvard College has received each year applications for admissions that greatly exceed the number of places in the freshman class. The number of applicants who are deemed to be not "qualified" is comparatively small. The vast majority of applicants demonstrate through test scores, high school records and teachers' recommendations that they have the academic ability to do adequate work at Harvard, and perhaps to do it with distinction. Faced with the dilemma of choosing among a large number of "qualified" candidates, the Committee on Admissions could use the single criterion of scholarly excellence and attempt to determine who among the candidates were likely to perform best academically. But for the past 30 years the Committee on Admissions has never adopted this approach. The belief has been that if scholarly excellence were the sole or even predominant criterion, Harvard College would lose a great deal of its vitality and intellectual excellence and that the quality of the educational experience offered to all students would suffer. Final Report of W.J. Bender, Chairman of the Admission and Scholarship Committee and Dean of Admissions and Financial Aid, pp. 20 et seq. (Cambridge, 1960). Consequently, after selecting those students whose intellectual potential will seem extraordinary to the faculty—perhaps 150 or so out of an entering class of over 1,100—the Committee seeks—

The Harvard Plan sets criteria for determining who is academically "qualified" to study at Harvard. The criteria are race-neutral and "do not insulate the individual from comparison with all other candidates." *Bakke*, 438 U.S. at 317.

Variety in making its choices. This has seemed important... in part because it adds a critical ingredient to the effectiveness of the educational experience [in

Harvard College]. . . . The effectiveness of our students' educational experience has seemed to the Committee to be affected as importantly by a wide variety of interests, talents, backgrounds and career goals as it is by a fine faculty and our libraries, laboratories and housing arrangements. (Dean of Admissions Fred L. Glimp, Final Report to the Faculty of Arts and Sciences, 65 Official Register of Harvard University No. 25, 93, 104-105 (1968) ("Final Report") (emphasis supplied).

The belief that diversity adds an essential ingredient to the educational process has long been a tenet of Harvard College admissions. Fifteen or twenty years ago, however, diversity meant students from California, New York, and Massachusetts; city dwellers and farm boys; violinists, painters and football players; biologists, historians and classicists; potential stock-brokers, academics and politicians. The result was that very few ethnic or racial minorities attended Harvard College. In recent years Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. Harvard College now recruits not only Californians or Louisianans but also blacks and Chicanos and other minority students. Contemporary conditions in the United States mean that if Harvard College is to continue to offer a first-rate education to its students, minority representation in the undergraduate body cannot be ignored by the Committee on Admissions.

In practice, this new definition of diversity has meant that race has been a factor in some admissions decisions. 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 just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer. The quality of the educational experience of all the students in Harvard College depends in part on these differences in the background and outlook that students bring with them.

The diversity Harvard seeks "encompasses a far broader array of qualifications and characteristics" than race or ethnicity. *Bakke*, 438 U.S. at 315.

A plan that "ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions" is constitutional. *Grutter*, 123 S. Ct. at 2344.

Racial or ethnic diversity is "but a single though important element" of the educational diversity Harvard seeks. *Bakke*, 438 U.S. at 315.

"[R]ace or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats." *Bakke*, 438 U.S. at 317.

In Harvard College admissions the Committee has not set target-quotas for the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year. At the same time the Committee is aware that if Harvard College is to provide a truly [heterogeneous] environment that reflects the rich diversity of the United States, it cannot be provided without some attention to numbers. It would not make sense, for example, to have 10 to 20 students out of 1,100 whose homes are west of the Mississippi. Comparably, 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. Their small numbers might also create a sense of isolation among black students themselves and thus make it more difficult for them to develop and achieve their potential. Consequently, when making its decisions, the Committee on Admissions is aware that there is 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. But that awareness does not mean that the Committee sets a minimum number of blacks or of people from west of the Mississippi who are to be admitted. It means only that in choosing among thousands of applicants who are not only "admissible" academically but have other strong qualities, the Committee, with a number of criteria in mind, pays some attention to distribution among many types and categories of students.

The further refinements sometimes required help to illustrate the kind of significance attached to race. 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 inner-city 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.

The race of an applicant may be considered "without being decisive." No "single characteristic automatically ensure[s] a specific and identifiable contribution to a university's diversity." *Gratz*, 123 S. Ct. at 2428; *Grutter*, 123 S. Ct. at 2343.

The goal of "attaining a critical mass of underrepresented minority students does not transform [a] program into a quota." *Grutter*, 123 S. Ct. at 2343.

"[T]he weight attributed to a particular quality may vary from year to year depending upon the 'mix' both of the student body and the applicants for the incoming class." *Bakke*, 438 U.S. at 317-18. "[T]he assignment of a fixed number of places to a minority group is not a necessary means toward" achieving educational diversity. *Id.*, at 316.

The permissible consideration of how "differing backgrounds, experiences, and characteristics of students A, B, and C might benefit the University" should be contrasted with the impermissible award of a fixed number of points to an applicant "simply" because the applicant is African American. *Gratz*, 123 S. Ct. at 2429.



## Notes

1. *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978).
2. *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003) (No. 02-516).
3. *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (No. 02-241).
4. *Bakke*, 438 U.S. 265.
5. Throughout this Manual and unless otherwise noted, the terms “race,” “national origin,” and “ethnicity” are used interchangeably.
6. *Bakke*, 438 U.S. 265.
7. Association of American Universities, *On the Importance of Diversity in University Admissions*, *New York Times*, Apr. 24, 1997, at A27.
8. *See Bakke*, 438 U.S. at 308 (Powell, J.).
9. *Bakke*, 438 U.S. at 311-12.
10. *Bakke*, 438 U.S. at 314-20.
11. *Grutter*, 123 S. Ct. at 2336.
12. *Hopwood v. Texas*, 78 F3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996), *overruled in part by Grutter v. Bollinger*, 123 S. Ct. 2325 (2003).
13. This overview is derived from: Arthur L. Coleman and Scott R. Palmer, *The U.S. Supreme Court Decisions in Gratz v. Bollinger and Grutter v. Bollinger: Case Analysis and Lessons Learned Regarding the Use of Race by Colleges and Universities*, Nixon Peabody LLP (June 2003), and reprinted with permission. See [http://www.nixonpeabody.com/linked\\_media/publications/ELPA\\_06232003.pdf](http://www.nixonpeabody.com/linked_media/publications/ELPA_06232003.pdf) for the complete text of this document.
14. *Grutter*, 123 S. Ct. at 2370 (Kennedy, J., dissenting).
15. *Grutter*, 123 S. Ct. at 2339 (citations omitted).
16. *Grutter*, 123 S. Ct. at 2340-41.
17. *Grutter*, 123 S. Ct. at 2342 (internal citations omitted).
18. *Grutter*, 123 S. Ct. at 2342-43 (citations omitted).
19. *Grutter*, 123 S. Ct. at 2344-45.
20. *Grutter*, 123 S. Ct. at 2346-47.
21. *Grutter*, 123 S. Ct. at 2338. *See* Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 *Harv. C.R.-C.L.L. Rev.* 381, 407 (1998).
22. *Gratz*, 123 S. Ct. at 2431, n.23.
23. *Hunter v. Underwood*, 471 U.S. 222 (1985); *Vill. of Arlington Heights v. Metro. Hous. Develop. Corp.*, 429 U.S. 252 (1977); Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 *Baylor L. Rev.* 289 (2001).
24. The U.S. Supreme Court in the University of Michigan decisions did not address 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.” United States Department of Education Race-Targeted Scholarship Policy, 59 *Fed. Reg.* 8756, n.1 (Feb. 23, 1994).

- 58 Diversity in Higher Education:  
A Strategic Planning and Policy Manual Regarding Federal Law in Admissions, Financial Aid, and Outreach
25. Race- or ethnicity-conscious measures can be used to remedy the effects of discrimination. Such remedial measures, which have long been viewed as serving compelling governmental interests, may be pursued in response to 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).
  26. *Grutter*, 123 S. Ct. at 2339 (citations omitted).
  27. *Grutter*, 123 S. Ct. at 2345.
  28. *Grutter*, 123 S. Ct. at 2343.
  29. *Gratz*, 123 S. Ct. at 2429-30.
  30. *Grutter*, 123 S. Ct. at 2338.
  31. *Grutter*, 123 S. Ct. at 2338.
  32. United States Department of Education Race-Targeted Scholarship Policy, 59 Fed. Reg. 8756 (Feb. 23, 1994). The policy guidance was informed by public comment, which included nearly 600 written responses, to the Department’s 1991 publication of proposed policy guidance, as well as a race-conscious financial aid study conducted by the United States General Accounting Office, completed in 1994.
  33. As the guidance makes clear, strict scrutiny standards apply if the financial aid operates as race-exclusive or race-as-a-factor aid. Moreover, the fact that private donors may provide that aid will not insulate colleges or universities from Title VI liability if they fund, administer or provide significant assistance to private donors of such aid.
  34. *See generally* United States Department of Education Race Targeted Scholarship Policy, 59 Fed. Reg. 8756, 8761-62 (Feb. 23, 1994).
  35. *Grutter*, 123 S. Ct. at 2344.
  36. *Race Neutral Alternatives in Postsecondary Education: Innovative Approaches to Diversity*, U.S. Department of Education (March 2003).