
PRESERVING DIVERSITY IN HIGHER EDUCATION

**A Manual on Admissions Policies and Procedures
After the University of Michigan Decisions**

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In light of the urgent need for guidance in completing admissions policies, Chapters I and II have been released first. Chapters III through VII will be released within the next few weeks.

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Introduction

Many factors contribute to how an educational institution chooses to design its admissions policy. The primary goal is to admit students who will help further the academic mission of the school. Admissions offices want to recruit and admit students who are qualified, eager to learn, able to contribute to the broader education of the entire student body, and able to contribute to society in their personal and professional lives after graduation.

Prior to the *Grutter v. Bollinger* and *Gratz v. Bollinger* decisions, most colleges, universities, and graduate programs looked to the U.S. Supreme Court's decision in *Regents of University of California v. Bakke* for guidance in creating race-conscious admissions policies. Many institutions modeled their plans after the Harvard admissions policy, described by Justice Powell in *Bakke* as exemplary. The Court's fractured opinion in *Bakke*, however, failed to set clear parameters as to what conduct was constitutionally permissible. While the Court's decision in *Grutter* fully embraces Justice Powell's opinion in *Bakke* and cites with approval the Harvard Plan, it also gives more guidance regarding what is permissible in a race-conscious admissions policy. Meanwhile, the *Gratz* opinion analyzes an undergraduate admissions program that the Court deemed to violate constitutional boundaries.

Therefore, *Grutter* and *Gratz* provide institutions with an opportunity to reexamine their admissions policies in light of new guidance from the Court. Even schools that modeled their admissions policies on the Harvard Plan should reevaluate their policies to determine whether the policies are constitutionally sound. Ultimately, some institutions may find it necessary to create a new admissions policy. Others may need only to modify their current plan. Whether or not an institution has a constitutionally sound admissions policy in place, the reevaluation process may prove useful; it provides the opportunity for an institution to improve its policy to ensure that it fully advances its educational mission and diversity goals.

Each institution approaches the admissions process from a unique perspective, and thus the Supreme Court has allowed considerable flexibility in constructing race-conscious admissions plans. A large, public university faces a different set of challenges than a small, private graduate school program. The suggestions contained in this compliance manual, therefore, may not apply to all schools, and are not exhaustive. Instead, this manual provides guiding principles that admissions officers and lawyers should use to design a program that meets the context-specific characteristics of a particular institution.

Retooling or redrafting an admissions policy to fully comply with the law and fulfill an institution's educational mission may seem daunting. Some institutions may be hesitant to take on the added burdens that a constitutional, race-conscious plan might impose. Other institutions, threatened by the prospect of litigation, may feel pressured into eliminating effective, legal race-conscious programs.

Institutions should not simply abandon race-conscious admissions programs or other academic values in favor of less effective "race-neutral" alternatives. With some effort, and using this manual as a guide, colleges and universities can design workable, effective, and constitutional race-conscious admissions procedures. The potential benefit is a diverse,

vibrant educational environment that is, in the words of the U.S. Supreme Court, “open and available to all segments of American society, including people of all races and ethnicities.”¹

This Manual is divided into three Parts. Part One describes the basic legal and constitutional framework appropriate for reviewing race-conscious higher education admissions policies. In particular, the Part examines key passages from the Supreme Court’s *Grutter* decision and identifies the “compelling interest” and “narrow tailoring” requirements established by the Court. Part Two provides guidelines for developing race-conscious admissions policies in the aftermath of the Michigan decisions. The Part provides suggestions for institutions seeking to maintain a diverse student body through the use of constitutionally sound race-conscious admissions procedures, as well as general guidelines for institutions in states where the consideration of race in admissions is prohibited. Part Two also describes evidence and documentation that may be useful for institutions that are defending challenges to their programs. Part Three offers detailed legal analyses of issues not directly addressed in *Grutter* and *Gratz*. The Part examines race-conscious admissions programs that seek to remedy past discrimination; discusses the appropriate use of race in admissions-related programs, such as financial aid, scholarship, recruitment, outreach, retention, preparation and support programs; and explores the legality of considering race in faculty and staff hiring.² *Included here are Part One, and Chapter II of Part Two. The remaining portions of Part Two (Chapters III and IV) and all of Part Three (Chapters V through VII) will be released within a few weeks.*

PART ONE: GENERAL GUIDELINES

Chapter I Basic Legal and Constitutional Principles

When analyzing the consideration of race in higher education, courts look to the Equal Protection Clause of the Fourteenth Amendment as well as to two federal statutes, Title VI of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. This Chapter describes the basic constitutional and statutory framework appropriate for reviewing race-conscious higher education admissions policies. It examines the two “compelling governmental interests” currently recognized by the Supreme Court, student body diversity and the remediation of past discrimination. It also describes the requirements for a “narrowly tailored” race-conscious admissions policy, paying special attention to the narrow tailoring criteria announced by the Court in *Grutter*.

A. Constitutional and Statutory Framework

The Supreme Court has twice ruled on the consideration of race in university admissions, first in *Regents of the University of California v. Bakke*,³ and second in the recent companion cases, *Grutter v. Bollinger* and *Gratz v. Bollinger*. In *Bakke*, the Court scrutinized a medical school admissions program that reserved 16 spots in each class for racial minorities. The Court concluded that racial quotas and set-asides are unconstitutional.⁴ Justice Powell’s opinion in *Bakke*, however, recognized that diversity is a compelling governmental interest and left the door open to other possible uses of race in admissions. In *Grutter*, the Court reaffirmed Justice Powell’s opinion in *Bakke*.⁵

1. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution provides that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”⁶ Ratified in 1868, three years after the end of the Civil War, the Fourteenth Amendment’s immediate and original purpose was to protect newly freed African Americans from oppressive state action.⁷ Over time, however, the underlying principles of Equal Protection have taken on far broader and further-reaching significance. For example, the Equal Protection Clause has served as the legal foundation for desegregating public schools.⁸

Equal Protection is triggered when the government classifies individuals.⁹ When a law that classifies individuals is challenged under the Equal Protection Clause, a court first evaluates the law’s purpose. Second, the court evaluates the link between the law’s purpose and the classification it makes. Courts analyze Equal Protection cases by applying different levels of scrutiny depending on the type of government classification. The Supreme Court has identified three levels of scrutiny: rational basis, intermediate scrutiny, and strict scrutiny. For classifications based on race or national origin, courts apply strict scrutiny, the highest level of review.¹⁰ Under a strict scrutiny analysis, “racial classifications are constitutional only if they are **narrowly tailored** to further **compelling governmental interests**.”¹¹ Race-conscious admissions programs classify some applicants, in part, based on their minority status, and thus are subject to strict scrutiny.¹²

Although rigorous, strict scrutiny review does not invalidate all racial classifications. The Supreme Court made clear in *Grutter* that “[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause” and “strict scrutiny must take ‘relevant differences’ into account.”¹³ Applying strict scrutiny in both *Grutter* and *Gratz*, the Court held that a higher education admissions policy may consider race if the policy is narrowly tailored to achieve the compelling interest of student body diversity.¹⁴

2. Title VI and 42 U.S.C. § 1981

In addition to the Equal Protection Clause, two federal laws are relevant to the consideration of race in university admissions: Title VI of the Civil Rights Act of 1964 and 42 U.S.C. § 1981.

Title VI provides that “[n]o 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.”¹⁵ Title VI is relevant to the consideration of race because most universities, including private institutions, receive federal financial assistance.

Section 1981 provides that “[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens. . . .”¹⁶ Section 1981 is relevant to the consideration of race in university admissions because the Supreme Court has held that the provision of educational services constitutes a “contract” for Section 1981 purposes.¹⁷

In practice, it appears that the courts look to the Equal Protection Clause first, and only those admissions policies that violate the Equal Protection Clause will be found to violate either Title VI or Section 1981.¹⁸ For example, the Supreme Court held that the University of Michigan Law School’s policy did not violate Title VI or Section 1981, because the policy did not violate the Equal Protection Clause.¹⁹ As a result, this manual focuses primarily on the requirements imposed by the Equal Protection Clause.

B. Compelling Interests Under Equal Protection

The U.S. Supreme Court has recognized two interests that are sufficiently compelling to justify the use of race in higher education admissions: (1) promoting student body diversity; and (2) remedying the present effects of an institution's past discrimination.

1. Diversity Is a Compelling Interest

Although the list of interests that are compelling enough to justify race-conscious affirmative action under strict scrutiny is still evolving, the *Grutter* decision clearly states that "student body diversity is a compelling state interest that can justify the use of race in university admissions."²⁰

Prior to the ruling in *Grutter*, Justice Powell's opinion in *Bakke* was the only U.S. Supreme Court decision to directly address the use of diversity as a compelling interest to justify race-conscious admissions programs. Because Powell's opinion was not adopted by a majority of the Court, there was a split among the lower courts as to its value as binding precedent. Certain circuits rejected the idea that diversity could ever be a compelling interest.²¹ Other circuits, however, found Justice Powell's opinion to be controlling law.²² The Court's decision in *Grutter* resolves this split. In *Grutter*, a majority of the Court adopts Powell's position in *Bakke* to hold that diversity is a compelling interest that can be used to justify race-conscious admissions programs.

The Supreme Court has expressly recognized that educational institutions play a key role in society in developing and training future leaders. They are places for the "robust exchange of ideas" and because of this role, educational institutions have a protected First Amendment interest in the selection of students and faculty. Once an institution has determined that diversity will enhance the educational experience, it has a constitutional basis—the First Amendment—to promote that goal.²³ In *Grutter*, the Court states that academic freedom, though not a specifically enumerated constitutional right, "long has been viewed as a special concern of the First Amendment."²⁴ The Court recognizes that educational institutions should be allowed a certain amount of discretion and freedom to define and accomplish their educational missions, which may involve a diverse student body, which in turn will enhance the educational experience.²⁵

The Supreme Court also highlights the "important and laudable" educational benefits of diversity. According to various expert studies and reports cited by the Court, a diverse student body promotes "classroom discussion [that] is livelier, more spirited, and simply more enlightening and interesting."²⁶ It also promotes "cross-racial understanding," prevents minorities from feeling "isolated or like spokespersons for their race,"²⁷ and produces a vibrant educational experience that challenges and breaks down racial stereotypes.²⁸

In addition, diversity is beneficial because it "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals."²⁹ Major American businesses that filed *amici curiae* briefs in the Michigan cases emphasized that "cross-cultural experience and understanding" in higher education plays a "crucial role . . . in preparing students to be the leaders this country needs in business, law, and all other pursuits that affect the public interest."³⁰ Furthermore, retired officers of the U.S. military recognized that the ROTC programs on college campuses must "train and educate a highly

qualified, racially diverse officer corps in a racially diverse setting” in order to allow the military to “fulfill its principle mission to provide national security.”³¹ A student body that reflects a diversity of races, viewpoints, and perspectives thus creates the sort of vibrant educational environment that results in better educated and better prepared individuals who can more effectively contribute to society after graduation.

Diversity is a compelling interest, however, only when it provides clearly defined educational benefits. Accordingly, an institution cannot develop a race-conscious admissions or financial aid program purely for diversity’s sake.³² A university should be able to articulate the benefits obtained by having a diverse student body, such as more spirited and more enlightening classroom discussions, or the fact that diversity better prepares students for the workplace.

2. Remediating Past Discrimination Is a Compelling Interest

The remediating of past discrimination is also a compelling interest that may justify race-conscious admissions programs by educational institutions.³³ An institution may therefore, in some limited instances, defeat a challenge to its race-conscious programs on this basis.

A public entity can assert remediation as a compelling interest only when its race-conscious affirmative action program was designed either to remedy the public entity’s own discriminatory practices or to dismantle a system of discrimination in which the entity has been a “passive participant” or a “joint participant.”³⁴ A public entity may not use race-conscious policies simply to combat “societal discrimination,” to provide role models for students, or to benefit “racial groups that . . . may never have suffered.”³⁵ To institute a race-conscious policy of any sort based on the remedial justification, the public entity must show that it has a “*strong basis in evidence*” for its conclusion that remedial action was necessary.³⁶ If a public entity can meet the requirements of this compelling interest, even quota systems may be permitted.³⁷ For this reason, in the admissions context, colleges and universities with a clearly documented or proven discriminatory past may find the remedial approach a useful supplement to the diversity justification discussed above.

For a fuller discussion of remediation as a compelling interest, see Chapter V (forthcoming).

C. Narrow Tailoring Under Equal Protection

1. Narrow Tailoring When Diversity Is a Compelling Interest

Under a strict scrutiny analysis, when a public entity relies on a racial classification to further a compelling interest, the entity is “constrained in how it may pursue that end: “[T]he means chosen to accomplish the [government’s] asserted purpose must be specifically and narrowly framed to accomplish that purpose.”³⁸ While *Bakke*, *Grutter* and *Gratz* identify certain race-conscious admissions policies that cannot be used because they are not narrowly tailored, the Supreme Court recognizes that there are permissible, narrowly tailored ways to consider race to further the diversity of a student body. As discussed below, the Court highlights some options by which race can be considered in admissions

policies that are narrowly tailored and permissible, but it does not indicate that a narrowly tailored consideration of race is limited to these options.

Under *Grutter*, when educational institutions adopt race-conscious admissions programs to advance student body diversity, those programs must have the following characteristics to be narrowly tailored: (1) Educational institutions looking to adopt race-conscious admissions policies must seriously and in good faith consider whether workable race-neutral alternatives exist to achieve educational diversity (or, if a race-conscious program is already in place, reevaluate race-neutral alternatives); (2) if no workable alternative exists, institutions may use race as a factor in the admissions process, but only in a flexible and nonmechanical manner; (3) the adopted race-conscious admissions programs must not unduly burden nonminority applicants; and (4) the institutions must reevaluate the efficacy of their race-conscious admissions programs periodically and adjust them accordingly if such programs prove unnecessary or if workable race-neutral alternatives become available.

A narrowly tailored race-conscious admissions policy:

1. Requires a serious and good faith consideration of whether workable race-neutral alternatives will effectively further diversity;
2. Takes race into account in a flexible and nonmechanical way, if no workable race-neutral alternatives exist to achieve the desired educational diversity;
3. Does not otherwise unduly burden nonminority applicants; and
4. Is periodically reevaluated for its necessity.

a. Workable Race-Neutral Alternatives Must Be Considered

Narrow tailoring requires educational institutions that are either considering or already have existing race-conscious admissions policies to examine whether workable race-neutral alternatives exist to achieve their diversity interest. What is required is a “serious, good faith consideration of *workable* race-neutral alternatives.”³⁹ The institutions need not exhaust “*every conceivable* race-neutral alternative.”⁴⁰ For example, the Court in *Grutter* found the University of Michigan Law School’s admissions program to be narrowly tailored even though the law school did not consider lowering its admissions standards for all applicants or instituting a percentage plan⁴¹—policies that some have pointed to as “race-neutral alternatives.”⁴²

Nor do educational institutions need “to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups.”⁴³ For example, *Grutter* recognized that a lottery system “would effectively sacrifice all other educational values, not to mention every other kind of diversity,” and that lowering admissions standards for all applicants would make Michigan Law School less competitive and “sacrifice a vital component of its educational mission.”⁴⁴ Likewise, *Grutter*

observed that percentage plans—admissions policies that automatically admit a specified percentage of the highest-performing graduates of a high school or college to a public university—are unworkable in many settings, particularly in graduate and professional schools.⁴⁵ Therefore, while narrow tailoring requires educational institutions to consider seriously and in good faith workable, race-neutral options, it does not require the institutions to exhaust all possible race-neutral options or to adopt a race-neutral alternative that will harm their academic values or their interest in diversity.

Educational institutions need not use a race-neutral alternative that will harm their educational values or their interest in diversity.

b. Race-Conscious Admissions Programs Must Be Flexible and Nonmechanical

Educational institutions may adopt race-conscious admissions programs after seriously considering workable race-neutral alternatives. When race is used in the admissions process, narrow tailoring requires the institutions to review each application individually and evaluate a “wide variety of characteristics besides race and ethnicity” that could contribute to student body diversity. According to *Grutter*, this holistic, individualized review “demands that race be used in a flexible, nonmechanical way.”⁴⁶

Race-conscious admissions programs must be “flexible enough to consider all pertinent qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.”⁴⁷ According to *Grutter*, one way to achieve this flexibility is to “consider race or ethnicity only as a ‘plus’ in a particular applicant’s file, without insulat[ing] the individual from comparison with all other candidates for the available seats.”⁴⁸ For example, in *Grutter*, the Court found the Michigan Law School’s race-conscious admissions program to be flexible because it also considered a host of nonracial diversity factors, including applicants’ travel experiences, fluency in different languages, overcoming of personal adversity, family hardship, community service, and career histories.⁴⁹ Such a race-conscious program “adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions.”⁵⁰

In addition, race-conscious admissions programs must not be mechanistic so as to insulate or limit an applicant from comparison to other applicants based on his or her race.⁵¹ Quotas and point systems that automatically make race a determinative factor in an admissions decision exemplify this rigidity. In *Bakke*, the Supreme Court struck down the University of California Davis Medical School’s system, which reserved 16 out of 100 seats for African American, Native American, and Asian American students solely because of their race. In *Gratz*, the Court struck down the University of Michigan’s College of Literature, Science, and the Arts point system, which awarded 20 out of 150 points to applicants’ minority status, making race automatically decisive “for virtually every minimally qualified underrepresented minority applicant.”⁵² In both *Bakke* and *Gratz*, the admissions programs were deemed not narrowly tailored because they insulated minority applicants in a separate admissions track and provided no meaningful comparison of the minority applicants to others in the general applicant pool.⁵³

An educational institution, however, *may* adopt goals or targets for minority applicants.⁵⁴ A goal is “defined by reference to the educational benefits that diversity is designed to produce.”⁵⁵ It is not mandatory and fixed like a quota, but rather is discretionary and flexible—a “good-faith effort . . . to come within a range demarcated by the goal itself.”⁵⁶ For instance, Harvard’s admissions policy, which was cited with approval by Justice Powell in *Bakke*, set a goal designed to encourage classroom participation and a richness and diversity of perspectives.⁵⁷ The Harvard policy had no set maximum number but determined that “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.”⁵⁸ Similarly, the University of Michigan Law School’s admissions policy, approved in *Grutter*, aspired for a “critical mass” or “meaningful representation” of minorities, which would “encourage[] underrepresented minority students to participate in the classroom and not feel isolated.”⁵⁹

A goal must be flexible and designed to reap the educational benefits of a diverse student body.⁶⁰ An institution may keep and consult daily records of the racial and ethnic composition of the admitted class as part of achieving a goal—so long as admissions officers do not give race “any more or less weight based on the information contained in these reports.”⁶¹ Whether an institution can seek to enroll the same percentage of minority students in the applicant pool is not clear from *Grutter*. The Supreme Court did state, however, that if the institution were to admit the same percentage of minorities year after year, it would indicate that the “critical mass” or goal was not flexible.⁶² Articulating and striving for a numerical goal, target, or critical mass of enrolled minorities from the applicant pool—so long as it operates in a flexible manner—is a viable method by which an educational institution can announce and enact its commitment to diversity without running afoul of the Constitution.

A narrowly tailored, race-conscious admissions program considers race in a flexible and nonmechanical manner.

Institutions may use race as a “plus” factor and adopt goals, targets, or “critical masses.”

Institutions may not adopt quotas and determinative point systems.

c. Race-Conscious Admissions Programs Must Not Unduly Burden Nonminority Applicants

Narrow tailoring also means that educational institutions implementing race-conscious admissions policies must not unduly harm members of any racial group, particularly those “individuals who are not members of the favored racial and ethnic groups.”⁶³ One way for institutions to ensure that nonminority applicants are not unduly burdened by race-conscious admissions policies is to provide an individualized, flexible, and nonmechanical review of all applications, as achieved by the University of Michigan Law School’s policy.⁶⁴ Race-conscious admissions programs must consider “all pertinent elements of diversity” so that nonminority applicants who may have greater potential to

enhance student body diversity can be offered admission over minority applicants.⁶⁵ In other words, when race is considered a “plus” factor in the context of individualized review, as approved by *Grutter*, a nonminority candidate who was rejected “will not have been foreclosed from all consideration for that seat simply because he was not the right color.”⁶⁶ In an individualized, flexible, and nonmechanical review, all of the rejected applicant’s qualifications “would have been weighed fairly and competitively.”⁶⁷

If a race-conscious admissions program provides for an individualized, flexible, and nonmechanical review of all applicants, it will not unduly burden nonminority applicants.

d. Race-Conscious Admissions Programs Should Periodically Be Reevaluated

Finally, narrow tailoring requires that race-conscious admissions programs have a “logical end point” or “reasonable durational limits.”⁶⁸ As *Grutter* recognized, “[t]he requirement that all race-conscious admissions programs have a termination point assures all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself.”⁶⁹ Although the Court in *Grutter* announced its hope that race-conscious admissions policies will not be necessary in 25 years, it did not establish any set “logical end point.”⁷⁰ *Grutter* did, however, encourage educational institutions to perform periodic reviews of, or include sunset provisions in, their race-conscious admissions programs to ensure that such programs do not become outdated or unnecessarily harmful to nonminorities.⁷¹ Periodically reevaluating the efficacy of race-conscious admissions programs and adjusting them accordingly should ensure that such programs have “reasonable durational limits.”

To ensure that race-conscious admissions programs have a reasonable duration, educational institutions should reevaluate their programs periodically.

Some Salient Points About Considering Race in Admissions Decisions After *Grutter* and *Gratz*

CONSTITUTIONAL:

- ✓ Assigning a “plus” to the race of a candidate when it contributes to the diversity of the class
- ✓ Weighing race as heavily—or even more heavily—than other qualities if it contributes to the diversity of the class, but not so much as to guarantee admission
- ✓ Considering race after weighing several additional qualities of the candidate, as long as the consideration of race does not guarantee admission
- ✓ Striving for a flexible “critical mass” or variable goal of admitted minorities
- ✓ Conducting a full comparison of the candidate’s qualities—including his or her race—with those of other candidates
- ✓ Keeping and referring to the demographic composition of the admitted class to evaluate the status of goals or critical masses

UNCONSTITUTIONAL:

- ✗ Always giving a “plus” to a candidate’s race with no consideration of how it contributes to diversity
- ✗ Weighing race regardless of whether it contributes to the diversity of the class
- ✗ Basing a decision on race without any consideration or assessment of other qualities of the candidate
- ✗ Basing admissions decisions on attaining a predetermined, rigid number of minorities
- ✗ Insulating a candidate based on his or her race and making an admissions decision without comparison to the general applicant pool
- ✗ Relying on the demographic composition of the admitted class to determine whether a particular student is admitted or rejected

2. Narrow Tailoring When Remediating Past Discrimination Is a Compelling Interest

The discussion above is not meant to suggest that quotas, strict point systems, or more heavily weighted uses of race may never be appropriate in the educational context. The diversity rationale for an admissions program, as endorsed by the Supreme Court in *Grutter*, allows an educational institution to make race-conscious admissions decisions without regard to past or ongoing discrimination. Outside the educational realm, quotas have been recognized as a permissible approach when they serve as a remedy for identified past discrimination by certain sectors of society or institutions.⁷² Neither *Grutter* nor *Gratz* directly addressed the contours of narrowly tailored admissions programs that use quotas as a remedy for past discrimination.⁷³ In light of the Court's unwillingness to foreclose the use of quotas to remedy past discrimination in the educational context, educational institutions that have had a history of discrimination and can offer a strong basis in evidence may consider exploring stronger uses of race in employing race-conscious admissions policies.

Such a remedial program in the context of higher education might have the following characteristics to be considered narrowly tailored: In defending a remedial admissions program, an institution would most likely bear the high burden of demonstrating the program's necessity. For example, it may need to demonstrate that the institution's past discrimination existed against the beneficiary groups, and that such discrimination has resulted in the current lack of opportunity.⁷⁴ In that circumstance, the remedial program would most likely apply only to those groups that have actually been victims of discrimination in the institution, and would not likely extend to other minorities who may be victims of societal discrimination but have not actually suffered adverse treatment at a particular school.⁷⁵ In all likelihood, an institution would also need to explore workable race-neutral alternatives before adopting the remedial program,⁷⁶ periodically evaluate the necessity of the remedial program,⁷⁷ and avoid unnecessarily harming the rights of nonminority students.⁷⁸ For more discussion on the use of a remedial admissions program, see Chapter V (forthcoming).

Before adopting a remedial admissions program, it is advisable to consult with counsel to determine whether this option can apply to a specific institution.

D. State Statutory Requirements

Some states have passed laws that limit or prohibit the consideration of race in admissions and other contexts. In California and Washington, for example, voters passed initiatives that prohibit discriminating against or granting "preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."⁷⁹ California's Proposition 209 amended the state constitution while Washington's Initiative 200 enacted a statute into the state code.⁸⁰

The Washington Supreme Court recently interpreted the state's prohibition against preferential treatment on the basis of race and concluded that the act *does not prohibit all race-conscious government action*.⁸¹ The court recognized that diversity resulted in educational benefits and that a "core mission of public education" was to make an "equal, uniform, and enriching educational environment" available to all students.⁸² Therefore, it appears that public educational institutions in Washington *can* employ race-conscious measures so long as the institution does not use race to grant a "preference" in violation of the Washington statute.⁸³

In *Parents Involved in Community Schools v. Seattle School District*, the school district used a racial integration tiebreaker specifically designed to promote racial diversity in assigning students to high schools within the school district.⁸⁴ The Washington Supreme Court held that the tiebreaker did not violate the state's prohibition against preferential treatment on the basis of race, and that the statute did not prohibit all race-conscious government action.⁸⁵ California state courts, however, have found several programs, including outreach policies and school transfer policies to violate California's Proposition 209.⁸⁶

After a similar voter initiative to ban affirmative action failed in Florida,⁸⁷ the Board of Regents enacted a provision into the state's administrative code prohibiting "preferences in the admissions process for applicants on the basis of race, national origin or sex."⁸⁸ The Regents also enacted a percentage plan guaranteeing admission into a university in the Florida State University System to the top 20 percent of all state public high school classes.⁸⁹ The U.S. Supreme Court has openly criticized the Florida percentage plan for possibly precluding individualized assessment.⁹⁰

Public university administrators should be aware of state statutes limiting or prohibiting the consideration of race in their particular state. For further discussion on what institutions can do if they are prohibited from using race, see Chapter IV (forthcoming).

PART TWO: DEVELOPING ADMISSIONS PROCEDURES

Chapter II Admissions Programs

As discussed above, the Supreme Court has allowed considerable flexibility in constructing race-conscious admissions plans aimed at furthering student body diversity. Indeed, each educational institution will face a different set of goals and challenges when developing or modifying its admissions plan, and many factors will play a part in how each institution designs its admissions procedures.

This Chapter provides general principles and suggestions for institutions seeking to retool their race-conscious admissions procedures in compliance with the *Grutter* and *Gratz* decisions. The Chapter first sets out initial considerations, including “Articulating a ‘Diversity Rationale’” and “Evaluating Race-Neutral Options.” It then offers general guidelines on (1) flexibility, (2) moving away from a rigid, formulaic reliance on test scores and grades, and (3) periodic review, which should inform the entire process of developing or modifying an admissions policy. Finally, the Chapter provides more detailed recommendations on developing admissions criteria, engaging in individualized review, asking questions that will provide a more complete picture of a candidate, anticipating the increased burdens of individualized review, and attaining goals or reaching a “critical mass.”

A. Initial Considerations

Many institutions include enrolling a diverse student body as a fundamental component of their educational mission. In *Grutter*, the Supreme Court reaffirmed the special importance of diversity in higher education by noting that institutions of higher learning are quintessential arenas for a “robust exchange of ideas.” Diversity, in this regard, encompasses a number of different factors—including race—each of which contributes to the overall educational mission of the school.

The Supreme Court firmly upheld diversity as a “compelling state interest” and recognized that substantial, important, and laudable educational benefits flow from a diverse student body. It also ruled that race-conscious admissions programs are a proper means to further this compelling interest. But it is important that institutions tailor their admissions policies so that race is used only in a constitutionally permissible way.

1. Articulating a “Diversity Rationale”

A college or university needs a formal admissions policy statement. Such a statement should describe the goals and objectives of the admissions policy and should be tied directly to the mission statement of the institution. This policy should be crafted by the senior policy-making body, whether a faculty committee, a senior administrator committee, a combination of the two, or a committee of the board of trustees or regents. A campus then needs to develop an admissions plan or process that will enable the admissions office to carry out that admissions policy. The admissions plan or process is the operational means by which the campus achieves its admissions goals. There are three important reasons for this policy structure.

First, most schools find that a clearly articulated policy helps to harmonize and coordinate the admissions procedure for all admissions officers and the people reviewing applicant files. Second, it serves as a statement to those who may wish to challenge a school's admissions policy, and gives guidance to those who would question the school's motives. Third, if an admissions plan is challenged, a court will grant great deference to an institution's declaration that diversity is vital to accomplishing its educational mission. Articulating the diversity rationale for a race-conscious admissions program will help a judge and other individuals understand the goals of the program.

The policy statement should articulate how diversity plays a part in the admissions process. Specifically, the statement should explain how diversity furthers the educational goals of the institution and advances the mission of the school.

Note: Diversity should encompass a number of factors, and should not focus solely on race. It is acceptable, however, for an institution to declare that an important factor in achieving a diverse student body is to ensure that underrepresented minorities are adequately represented at that school. There is no need for an institution to shy away from declaring its support for an admissions policy that takes race into account.

There are many reasons why diversity in general and racial diversity in particular benefit every student at a school and the school as a whole.

Benefits of diversity in general:

- Promotes lively and spirited classroom discussion;
- Exposes students to a diversity of viewpoints and life experiences;
- Helps prepare students for a diverse workplace by, for example, exposing students to common goals and values, which is critical to many professions that are based on teamwork and mentoring;
- Encourages a belief that our society is more fair and just.

Benefits of racial diversity:

- Helps students avoid or overcome stereotypes by providing a range of experiences and viewpoints within a particular racial or ethnic group;
- Promotes cross-cultural understanding and helps students develop interpersonal skills for a multiracial world;
- Prepares students for a racially diverse workplace;
- Trains and educates a diverse group of leaders;
- Contributes to better decision making on issues affecting our multicultural society;
- Fosters diversity among civic and business leaders.

Describing the benefits of diversity also sends a message to potential applicants that the institution is committed to diversity, and will assist in attracting a diverse pool of applicants.

Note: The consideration of diversity should not be limited to the admissions process, but should be actively pursued in practice throughout the year. Certain policies or practices may prevent an institution from reaching its diversity goal, while others will foster that goal. For more information on continuing the commitment to diversity after completion of the admissions process, see Chapter VI (forthcoming).

Remedial Justification—An Alternative Rationale

In adopting a race-conscious program, an institution must be careful not to confuse a remedial justification with a diversity rationale. The Supreme Court has repeatedly struck down race-conscious programs that claimed to remedy past discrimination, yet sought to increase overall minority representation without regard to evidence of past discrimination. Because documenting prior discrimination can be an arduous undertaking, and because remedial programs may encompass only a limited range of beneficiaries, most institutions will pursue a diversity program. Given the broad authority the Court has provided educational institutions in *Grutter*, there appears to be little practical benefit in rejecting a diversity justification and exclusively employing a remedial justification. Nevertheless, it is still legal for an institution to take race into account under a remedial program pursuant to a federal court order, even in states that prohibit race-conscious admissions decisions. For a more detailed discussion of the remedial justification, see Chapter V (forthcoming).

2. Evaluating Race-Neutral Options

Before embarking on a race-conscious admissions program, an institution must assess whether race-neutral alternatives can be used to achieve its diversity goals. A school is required to undertake a good faith evaluation of race-neutral options, but it is not required to exhaust every possible non-racial means of increasing diversity.⁹¹ Nor must it implement a race-neutral program that might fail to meet its diversity objectives simply to prove compliance. The only race-neutral option that an institution must implement, therefore, is one that is both workable *and* achieves the institution's diversity goals.

Theoretically, creating a race-neutral plan that satisfies these criteria is possible. In practical terms, however, such a plan has proved to be elusive. Thus, while evaluating race-neutral options is a mandatory component of maintaining a constitutional race-conscious admissions program, it is important to note that an institution does not need to sacrifice its other admissions goals for the sake of race-neutrality.

a. Evaluating Alternative Plans

If an institution currently uses a race-conscious program, it should first evaluate its admissions policy to determine whether the student body would be racially diverse even if race were not taken into account. One way to make this determination is to conduct simulations based on the institution's most recent applicant pool. If sufficient minorities to meet an institution's particular admissions goals would be admitted under a race-neutral version of the policy, then the institution should consider ending race-conscious considerations.

Assuming an institution determines that its current, race-conscious policy contributes to the level of diversity it seeks, the next step is for the institution to consider whether alternatives exist that allow it to achieve its diversity objectives without using race as a factor.

When evaluating other options, an institution should make sure that the composition of the student body admitted under a race-neutral plan complies with the goals and objectives of its admissions policy statement.

Avoid: Lowering Admissions Standards. A race-neutral plan that will diminish an institution's reputation or sacrifice its educational goals is not constitutionally required. While a school may wish to alter the weight it gives to various application factors, it need not take steps that will reduce selectivity. If a school cannot achieve its desired diversity by race-neutral means, without diminishing its reputation or selectivity, it may adopt a race-conscious policy. Even if an institution adopts a "race-neutral" plan, it may want to examine whether the race-neutral selection criteria have a disparate impact upon minority groups.

Avoid: Plans That Are Not Workable. An institution is not required to adopt a race-neutral plan that cannot logically or effectively be applied. For example, percent plans are impractical for graduate and professional schools. Similarly, they are ineffective for use at private colleges, national universities, and state-run universities where significant numbers of out-of-state students apply. If such race-neutral plans would not work for a particular institution, even if they work for others, that institution may permissibly adopt a race-conscious admissions plan.

A school does not need to exhaust every possible race-neutral alternative. If, after reasonable study, the institution determines that no feasible race-neutral alternative will help it achieve *all* of its admissions goals, it may use a race-conscious admissions policy.

Example:

The University of Michigan Law School attempted to achieve diversity through minority recruitment programs, but found that recruitment alone was unsuccessful in obtaining the desired “critical mass” of minority students. Rejecting a lottery system, which would have required the law school to lower its admissions standards, the school adopted its race-conscious program. This evaluation of race-neutral alternatives was deemed sufficient by the Supreme Court.

Why Certain “Race-Neutral” Plans May Fail to Meet Diversity Objectives

“Percent plans” have received a lot of media attention. But these plans may not be workable alternatives because they do not allow an institution to fully meet *all* of its admissions goals.

- In the rare instance that institutions using a percent plan have been able to maintain existing levels of minority representation, that success has been attributable to vigorous recruitment and generous scholarships focused on minority candidates.
- In states that have many public institutions, percent plans admit minority students in the public school *system*. However, minority students continue to be underrepresented at the flagship universities of that system.
- The Supreme Court has criticized percent plans, insofar as they are purposely used to increase minority representation at an institution, because they do not allow for the kind of nonmechanical, flexible admissions decisions that the Court has stated are essential in any valid race-conscious program.
- Percent plans are unworkable in many settings, particularly in graduate and professional schools.

For a more detailed analysis and discussion of percent plans, see Appendix 4 (forthcoming).

B. Developing an Admissions Plan/Process

1. General Considerations

While there are specific things an institution can do when developing or modifying an admissions plan, there are general considerations that should inform the entire process: (a) flexibility; (b) moving away from a rigid, formulaic reliance on test scores and grades; and (c) periodically reviewing the admissions program. An admissions office should keep these in mind when developing its admissions policy.

a. Flexibility in Admissions

The hallmark of any constitutional race-conscious admissions plan is individualized review. A necessary component to such a review is flexibility.

An admissions process should be flexible enough to allow the consideration of a number of different factors that would contribute to diversity, including race. These factors can be weighted differently, and a single factor can and should be given more or less weight depending on the applicant. Rigid reliance on a mathematical formula will open an admissions policy to criticism.

Diversity includes more than just racial diversity. A school should be able to give a “plus” to any factor that it thinks would contribute to diversity.

Example: Many schools give a “plus” to factors such as race and ethnicity, gender, socioeconomic class, sexual orientation, geography, or residency. Many also give a “plus” for more intangible characteristics such as leadership qualities, artistic talent or musical abilities. For a list of other potential “plus” factors, see Chapter III.B.2.b., below.

Although a school should consider many factors in order to create a diverse student body, any “plus” factor—including race—may be given a bigger “plus” compared to other factors, although *no single factor* should dominate an application.

Example: An underrepresented minority may be given a bigger “plus” than an individual who is a concert cellist.

A school should allow flexibility in awarding a “plus” for any factor. The same factor may warrant a different “plus” for different applicants. Reviewers of applications should have the discretion to change the weights they give for any one factor.

Example 1: Applicant A is Latino. Applicant B is Black. Although both applicants are members of underrepresented minority groups, Latino students are more underrepresented than are Black students at this particular institution. Both applicants receive a “plus” for their race, but the reviewer should have the flexibility to give Applicant A a larger “plus” than Applicant B.

Example 2: Applicant A is a woman who expresses an interest in political science. Applicant B is a woman who expresses an interest in electrical engineering. The university reviewing their applications has noticed that female engineering students are underrepresented at the school, but female political science majors are adequately represented. A reviewer should have the discretion to give a “plus” to Applicant B, but not to Applicant A.

Avoid: Rigidity. A school should not direct reviewers to automatically give the same weight for a certain factor to all applicants who fit

the criteria, without allowing the reviewer discretion. For example, directing every reviewer to automatically give an underrepresented minority a “plus” that is the equivalent of raising an applicant’s G.P.A. by 0.5 points is likely to be unconstitutional. Reviewers should have the flexibility to (a) grant a “plus” for a certain characteristic, and (b) make a determination, on a case-by-case basis, of how much weight that “plus” factor will have in the final decision about the applicant, but not so much as to guarantee admission to that applicant.

Finally, having flexibility in an admissions program means that an institution cannot have a mechanical formula that allows race, by itself, to determine whether an applicant is admitted. In some limited cases, mechanical cutoffs may be appropriate. In most instances, however, mechanical formulas will hinder a school’s ability to individually review an applicant, and will subject the admissions policy to criticism.

Avoid:

Mechanical Formulas. Any admissions policy that employs a mechanical formula that automatically assigns points based on race, is much more likely to be challenged as unconstitutional.⁹² Automatic assignment of points to diversity characteristics appears rigid and does not allow for enough nuance and flexibility in the admissions decision. Moreover, a mechanical admissions policy will hinder an institution’s ability to individually review applications, and could hurt its efforts to create a diverse student body.

b. Moving Away From a Rigid and Formulaic Reliance on Test Scores and Grades to a Contextual Analysis of Test Scores and Grades

Institutions should take a critical look at factors that have traditionally been viewed as “objective,” including a formulaic reliance on test scores and grades. Test scores and grades are a valuable evaluation tool—when used properly—especially for an admissions office facing a large number of applications. But a simple focus on the “hard numbers” of a candidate prevents a reviewer from looking at those numbers in the context of the individual or at other admirable qualities of the candidate. Instead, an institution should evaluate a candidate’s grades and test scores in the context of the candidate’s experiences and background to better assess the applicant. When doing so, the following guiding principles from the 1995 University of California Report of the Task Force on Undergraduate Admissions Criteria may be helpful:

- Criteria in addition to grades and test scores should provide reviewers with additional indicators of each applicant’s academic promise or should reflect a student’s attributes and experiences that would be educationally valuable to the student body of a particular campus;
- Criteria other than standard, academic criteria should provide additional evidence of individual excellence in a variety of domains;

- Criteria should relate to the broader educational context and mission of the institution, e.g., provide evidence of individual personal traits and accomplishments that make a particular applicant a valuable contributor to the educational enterprise and to the make-up of the student body at a particular campus;
- Criteria should be demonstrable, although not necessarily quantifiable in an objective manner;
- Criteria (as a whole) should contribute to the overall goal of diversity;
- Criteria should enable campuses to meet institutional goals in conformity with local and university-wide policies, including the goal of diversity; and
- The application for admission should be the primary source for collecting information on which criteria will be assessed.⁹³

While test scores and grades provide information, they say different things about different people, and they should be viewed within the context of the candidate's entire background. A number of factors affect test scores and grades, including race, socioeconomic class, parental education, language, home environment, quality of school, and access to exam-preparatory courses. A candidate's test scores and grades should be viewed with these factors in mind.

A rigid, non-contextual emphasis on test scores and grades poses inherent problems. Studies have shown that the formulaic consideration of standardized test scores has a disparate impact on minorities even though standardized test scores may be poor or incomplete predictors for future performance past the first year. (*For a more complete description of these studies, see the inset on the following pages*).

Grades, while a better predictor of future performance than test scores, also are problematic. For example, some high schools offer far more AP courses than other high schools do. If a university or college admissions office gives extra points for AP courses, grade point averages may be deceptively skewed upward for those with more opportunity. Applicants at high schools that do not offer AP classes simply do not have the same opportunity to demonstrate their abilities and to achieve a weighted grade point average. Evaluating an applicant's grades, without looking at the context in which the applicant received those grades, does not give an admissions officer a full picture of the candidate.

A contextual analysis of test scores and grades will allow an institution to engage in a more holistic review of each candidate and account for those students whose lack of opportunity or whose scores on one-shot exams do not accurately reflect their academic potential.

The Problem With a Formulaic Reliance on Standardized Test Scores

Disparate Impact on Minority Students

Numerous recent studies document the negative impact that a formulaic consideration of standardized test scores in university admissions has on minority students. For instance, Christopher Jencks and Meredith Phillips conducted studies which showed:

- Minority students consistently score below their White counterparts, at every age level. African Americans score on average below 70 to 80 percent of White students of the same age.
- Among students entering college in 1999, African Americans' average SAT verbal scores were 93 points below White students' average scores. The average divide for SAT math scores was even greater (106 points).⁹⁴

This gap persists even in highly-selective universities. A study of applicants to "five highly-selective universities" indicated that "white candidates' average combined SAT score was 186 points higher than the corresponding SAT average for African American applicants. Close to 75 percent of the white applicants scored over 1200 on the SAT, while 29 percent of black applicants did."⁹⁵

Finally, the Intervenor in *Grutter* noted that "the LSAT gives white students an unearned advantage of 9.2 points over their black counterparts at the same college with the same GPA. The unearned advantage of white test-takers relative to Latinos and Native Americans is smaller but still highly significant in competitive law school admissions systems."⁹⁶

There are a number of theories about why this disparity persists. Economics is an obvious contributing factor, but is only part of the answer. Jencks and Phillips suggest that the problem is rooted in historic discrimination in housing, education, and employment.⁹⁷

An Incomplete Predictor of Future Performance

Placing undue weight on standardized tests is not a problem just because of its disparate impact on minorities. Standardized tests predict a student's performance during his or her *first year* in a college or graduate program. They are not an accurate predictor of (a) a student's overall performance in college or in a graduate program; (b) whether the student will graduate; or (c) whether a student will succeed after graduating.⁹⁸

Thus, the notion that standardized tests such as the SAT and LSAT are "the measuring stick" of academic ability has been steadily eroding in recent years. Even the Educational Testing Service itself recognizes the limits of its test, admitting that there is "no single, primary ordering of people as 'best-qualified' or 'most meritorious' as simple notions of merit require."⁹⁹

Too much reliance on standardized test scores may result in a *less* academically capable student body. For instance, Bates College, which has

moved to a “test score-optional” admissions policy, reports that the move “has had no visible negative impact on the quality of enrollees, and seems in fact to have had a positive impact.”¹⁰⁰ In fact, those who chose not to submit their test scores had a higher rate of “academic survival.” The same results have been found at large public institutions as well. In Oregon, 1990 data indicates that had the state institutions relied heavily on test scores, the admitted student body would have been somewhat less academically able.¹⁰¹

c. Periodic Review

Grutter establishes that any institution that uses a race-conscious admissions program should periodically review that program to see whether race-conscious policies are still necessary to achieve the goal of racial diversity. If race-conscious policies are not needed, the institution should stop considering race during the admissions process.

Note: The Supreme Court did not give any guidelines about how often a periodic review should take place. In fact, it has been willing to defer to the educational judgment of a particular institution. At the very least, however, an institution should probably review its admissions program every few years.

Evaluating race-neutral alternatives is not the only reason an institution should undertake a periodic review. Because so many different factors play a part in an individualized review of an applicant, reevaluating an admissions program will allow an institution to reassess its diversity goals and to tailor its admissions program to meet those goals. A school should seek to periodically reassess the different factors that will create a diverse student body, the criteria for admissions, and the different relative weights given to “plus” factors. An institution should also review its target goals for admitting minority students at the school. This type of periodic reevaluation will help an institution ensure that its diversity goals are advancing the educational mission of the school.

There is no 25-year sunset provision for race-conscious admissions programs.

Some opponents of race-conscious admissions programs seized upon language in the Supreme Court’s opinion that reflected an expectation that race-conscious admissions programs will be unnecessary 25 years from the date of the decision. That statement, however, merely expressed an aspiration. **As long as *Grutter* is good law, diversity, including racial diversity, will always be a compelling state interest.** As long as there is no workable race-neutral method of obtaining racial diversity, narrowly tailored race-conscious admissions policies are constitutional.

Flexibility also means that an institution’s policy should allow for different “plus” factors to take on different importance from year to year. As part of this process, an

admissions office should periodically reevaluate the criteria for admission, as well as the goals for diversity, to ensure that the institution is meeting new challenges.

Example 1: For a number of years, Mexican American students have been adequately represented at an institution, and no “plus” factor is given to Mexican American students. In recent years, however, the institution has noticed a drop-off in Mexican American students. The institution’s admission policy should be flexible enough to allow reviewers, in the coming years, to give a “plus” to Mexican American students.

Example 2: Another institution, which draws students from a given state, obtains data indicating that although the number of Vietnamese American students in that state has dramatically increased in recent years, that change in demographics is not reflected in admissions at the institution. At the same time, the institution recognizes that it has attained strong representation of Japanese Americans in its student body. The institution’s admission policy should be able to adjust to these changes.

2. The Admissions Process

a. Recruitment

Perhaps the most important stage in creating a diverse student body occurs before a single application is reviewed. If a school is able to recruit a diverse group of competitive candidates to apply, the admissions process is much easier because the school will have more candidates from which to make its admissions decisions.

Efforts such as targeted mailings, outreach programs, and recruiting at schools with greater proportions of minority students can help an institution obtain a diverse applicant pool. For more information on the constitutionality of these recruiting programs and others, see Chapter VI (forthcoming).

b. Developing Admissions Criteria

Developing admissions criteria is an integral part of the admissions process, since the criteria assist in shaping the class of admitted students. Along with grades and test scores, other factors that may play a part in admissions are personal statements, essays, activities, recommendations, and interviews. In addition, certain characteristics may give an applicant a “plus,” including race, gender, socioeconomic background, geography, leadership qualities, legacy status, and quality of the applicant’s high school or undergraduate institution.

Example: The following factors may be considered in addition to the student’s courses, grades, and test scores, and may more accurately reflect the potential contributions of the student:

- **Intellectual vitality:** as demonstrated in outstanding

achievement in the arts and sciences, original work in writing, leadership, public, or community service, or other special projects;

- **Evidence of academic promise:** as demonstrated by achievement in specific areas of study or recent marked improvement in academic performance;
- **Quality of performance relative to the educational context available in the school:** as evidenced by the extent to which an applicant has utilized what is available and/or by recognition of school officials;
- **Quality of effort:** as demonstrated in special projects undertaken by students either in the context of the high school curriculum or in conjunction with special school events or projects co-sponsored by the school, post-secondary institutions, community organizations, agencies or private firms;
- **Academic fit:** as demonstrated by special attributes, or achievements, or projects indicating applicants' ability to fit in or contribute to the particular academic environment or a campus or to a specific academic program on a campus;
- **Leadership qualities:** as evidenced by extracurricular participation in a variety of projects or events, service in the community or student government, and/or by the ability to manage difficult personal situations;
- **Persistence and determination:** as evidenced by attainment of academic success while overcoming challenges, such as poverty, disadvantaged social or educational environment, family circumstances, physical disability and other impediments, and
- **Cross-cultural experience:** as evidenced by participation in special programs offered by the school, such as exchange/education abroad programs, experience or proficiency in other languages, or by the demonstrated individual effort of an applicant to get to know and experience other cultures,¹⁰²
- **Special talent** as demonstrated in art, music, drama, debate, or athletics, and
- **Service** to others as demonstrated by volunteer or community service.

When an institution evaluates its admissions policy, it should also reevaluate the criteria for admissions. Of course, institutions employ admissions factors to further legitimate institutional goals other than diversity (such as factors that enhance fundraising). Many of those factors work against minority applicants, and, as a result, institutions must work even harder to achieve diversity. Having a race-conscious admissions program can help level the playing field.

As noted earlier, studies have shown that formulaic considerations of standardized test scores have a disparate impact on minorities. But other “plus” factors may also disproportionately disadvantage minorities.

Example 1: Many minority applicants do not have parents or grandparents who attended college or graduate school, thus removing them from the pool of applicants eligible to be considered as legacies. Legacy admissions favor White applicants.

Example 2: Many colleges and universities tend to favor applicants who have attended affluent, prestigious public and private high schools. Minority students are often underrepresented at these schools. Therefore, minority students do not have the same opportunity to receive the “plus” as other students.

There may be many reasons that a school needs to use factors that negatively impact minority enrollment. But if the admissions office is cognizant of the effect such factors have on admissions, it can take steps to counterbalance the impact with race-conscious policies. Therefore, an admissions office should evaluate all factors used in its admissions criteria and determine what effect they may have on the admission of minority applicants. When possible, an institution should consider avoiding criteria that place an undue burden on minorities.

When developing admissions criteria, a school should also determine which factors merit a “plus” to increase diversity at the school, and the relative weight or importance a certain factor will have on admissions. But as noted previously, an institution must ascribe a *relative* weight to each factor, and the weight must not be a hard, inflexible number.

When instructing reviewers about admissions criteria, the admissions office should stress that the weights are relative and not fixed for any group of candidates. Moreover, since an individualized review process is more subjective, there will probably be more variance between reviewers. An institution can reduce variance by spending more time training reviewers on the relative weight to be given to different admissions criteria.

c. Ask Questions That Will Provide a More Complete Picture of the Candidate

Developing new criteria will not help an institution’s admissions process if its application does not give the applicant the opportunity to provide relevant information. Formulating questions that will solicit this information will help an institution achieve its diversity goals.

Clearly, certain questions will tell a school about some of the factors that may play a part in the admissions decision. Asking about the race, gender, socioeconomic status, hometown, or highest level of education of an applicant's parents will give a school much of the pertinent information. But achieving a diversity goal and having individualized review involves more than demographics, grades, and test scores. Since schools are evaluating the individual, it is important to know who the applicant is.

Many schools discover more about the applicant by asking short essay questions. The information provided in essays may relate characteristics that the school feels will contribute highly to the diversity of its student body. Certain questions may be particularly helpful in achieving a diverse class:

- How do you stand out from other candidates?
- How can you contribute to the diversity of this institution?
- What obstacles or challenges have you faced or overcome in your life?

Questions such as these will allow an applicant to distinguish himself or herself from other candidates.

d. Engage in Individualized Review

Applications considered under a constitutional race-conscious admissions program must undergo an individualized review. This process is also referred to as a “whole-file” review, and contemplates a holistic review of the applicant's entire file, as well as a holistic evaluation of the candidate. An institution should consider all of the applicant's qualities, including any “plus” factors that indicate the student would contribute to diversity, and judge those factors in totality. A decision of whether to admit the applicant should be based on this complete evaluation.

Information about “plus” factors may be found in explicit questions on the application—examples include asking the race or gender of the applicant, asking where he or she is from, or asking if the applicant's parents attended college. Alternatively, information about “plus” factors may be found in the applicant's personal statement or essays. For example, an applicant may discuss several obstacles he has overcome in an essay. Or an applicant may describe in her personal statement a project she has undertaken that demonstrates leadership ability. All of these qualities may influence an admissions decision, and all should be considered.

No single factor, however, should dominate an application. For example, an institution should not give an applicant's race such undue weight that all other qualities of the applicant are subsumed under that single consideration. In practical terms, this means that an applicant's race should not automatically allow the applicant to gain admission, without considering other factors of that applicant or other applicants.

Avoid: “Automatic” admissions based on race. It would be illegal if every candidate with certain minimum test scores and grades automatically gained admission because each candidate belonged to an underrepresented minority group.

Even though one factor cannot dominate the selection process, *any factor, including race, can be determinative in a single admissions decision.*

Example: Applicants A and B have similar test scores and grades, have similar life experiences, and come from the same socioeconomic background. The applicants both have average recommendations, personal statements, and essays. Each applicant, after considering the entire file but before considering race, are borderline admits. Applicant B belongs to an underrepresented minority group while Applicant A does not. Applicant B may be admitted while Applicant A is not, *solely because of the “plus” factor given for Applicant B’s race.*

When reviewing applications, an institution should ensure that each applicant is considered on the same footing as every other candidate. Any two-track admissions program, in which applicants of one race compete only against applicants of the same race, is unconstitutional. Because each applicant is compared to all others, and because many factors are considered, some nonminority applicants may be admitted over minority candidates with better test scores and grades.

Example: Applicant A belongs to an underrepresented minority group, comes from a middle-class family, and has average grades and test scores. She is a solid, but unremarkable candidate. Applicant B has poorer grades and test scores, but comes from a disadvantaged background and is an accomplished jazz saxophonist. She is White. A reviewer may decide to admit Applicant B over Applicant A because Applicant B will contribute more to the diversity of the student body than Applicant A.

Note: Under an admissions policy that truly follows a flexible, individualized review selection process, admissions decisions similar to the example above would be expected to happen. The Supreme Court noted this expectation and credited the University of Michigan Law School’s evidence that showed nonminority applicants sometimes gained admission over minority candidates that had better grades and test scores.

Evaluating candidates using the “whole-file” method may be accomplished in a number of ways. The previous examples are simply illustrative and are not meant to be exhaustive. As long as files are reviewed properly, a school can and should develop a reviewing system that best suits its needs and capabilities. The University of California at

Berkeley, the University of Virginia, the University of Texas at Austin, and the University of Michigan all currently employ some form of individual review in their admissions processes.

e. Address and Anticipate the Increased Burdens of Individualized Review

Whatever method a school decides to undertake to individually review applications, such a review will probably impose added burdens on an admissions office. Although this individual review will likely require increased resources, the benefits of a vibrant educational environment are enormous in comparison. The main way to address the administrative burdens that may accompany an individualized review system is for universities to tap all potential resources available to it, both on campus and in the community, to assist in the review process.

At the very least, universities will need to expand their admissions committees by finding more people to review applications. First and foremost, a university should identify its own untapped resources, such as faculty members, who might serve as readers. Although the time commitment required of a reader may prevent some faculty from participating, faculty can be excellent application readers since they have firsthand knowledge of the type of student who is best suited for their institution. Universities might offer incentives to faculty members who are willing to serve as readers by releasing them from committee assignments or by giving them credit for service to the university.

Other potential volunteer readers include graduate or doctoral students, recent university graduates, former university admissions officers, and present and former high school guidance counselors. Doctoral students may be especially well suited for this task, given their obvious interest in the educational process. Recent graduates are already familiar with the requirements to succeed in the institution and may be especially willing to serve as volunteer readers for their alma mater. Former admissions officers generally understand the admissions process and have prior experience in reading applications efficiently.

Using high school guidance counselors as readers offers several potential benefits. For example, it can promote relationships between a particular university and the guidance counselor's high school. The guidance counselor may become known at his or her high school for having special knowledge about the admissions process. Counselors would thus be well positioned to assist the university with its recruitment efforts by identifying and encouraging a diverse group of students to apply to the university.

Institutions that have the resources to give each applicant an individualized review should do it. However, if that cannot be done, either by paid staff or by volunteer reviewers, there are still ways to design a workable, constitutional race-conscious program.

Paring down the applicant pool will ease the burden on an admissions office. But a school should carefully examine how it initially reduces the number of applicants under consideration. Mechanical cuts based on test scores and grades are easy, but they can be imprecise and counterproductive because an applicant with low numbers may still succeed as a student, and may contribute to the diversity of an institution's student body. Moreover,

as explained above, test scores are problematic when used mechanically as a significant factor in an admissions decision.

Nevertheless, making some sort of first cut may be advantageous, particularly for institutions that receive a large number of applications. The following are some examples of how to achieve that first cut:

Example 1: A school can use a mechanical cut to tentatively eliminate a certain percentage of applications. Then a group of reviewers can look at these applications to determine whether any of them should be moved back into the group receiving a second review. It is important that under this methodology, an application can be moved in the group for secondary review for any reason that would enhance diversity, not just because of the race of the applicant. This method has the advantage of allowing an admissions office to make individual assessments of *all* applications. But the office would avoid making initial assessments of all applications, including those that would clearly survive a first cut based solely on test scores and grades.

Example 2: Instead of employing a mechanical cut, a small group of reviewers may first quickly screen each application to determine whether the applicant should receive a more thorough review. This method allows reviewers to make individualized decisions about applicants. A reviewer will always be able to consider grades and test scores. But he or she can also quickly review the file to see if there are other reasons why an applicant should get a second review.

Avoid: A two-tier system. Any mechanical cut that sets one cutoff level for underrepresented minorities and a different cutoff level for other students is subject to challenge. Such a system would violate the Supreme Court's proscription against any two-tier admissions policy and would violate the requirement that each applicant must compete with every other applicant.

Each application that makes the first cut should still go through an individualized review. Note that if an individualized assessment is done at this initial stage (as in Examples 1 and 2), the reviewer should take into account any factor that may count as a "plus" under the admissions criteria the school has chosen, and the system for awarding a "plus" should be in accordance with the procedure outlined above.

Regardless of who is selected to participate in the admissions process, all readers must be trained in order to provide a consistent standard of review. This training would help ensure that the quality of the admissions process is not compromised. Such training must guard against potential reader bias and ensure that all readers are focused on the values articulated in the admissions policy and in the admissions process itself. The integrity of an

admissions process centered on individual review must be based on the experienced professional judgment of its readers. Because individualized review necessarily focuses on the nonquantifiable or subjective components of an application, it would be most efficient to train a group of readers that can participate in the admissions process over several seasons.

Schools that are willing to make a short-term investment with a long term payoff may wish to consider implementing an electronic application system. Many colleges and universities currently either offer students the option of submitting their entire application via the Internet or scan the applications and store them in electronic form. Not only does this type of system let the school quickly sort applications based on numeric scores and other criteria, it also allows readers in remote locations to access the applications, thus expanding the potential pool of readers available to a particular institution.

f. Setting and Reaching Goals

In *Grutter*, the Supreme Court held that setting goals for minority enrollment and making a “good faith effort” to reach those goals is *not* equivalent to a quota system. The goal of admitting a “critical mass” of minority students is aspirational rather than automatic. In a quota system, the outcome is predetermined and admissions decisions are based on the desire to satisfy that outcome. In a “critical mass” system, however, there is a desired outcome, but that outcome is not predetermined or mandated. As a result, a school will not necessarily reach the desired outcome from year to year, and in some years a school may even exceed its targets.

Note:

It is important to understand that even when a school seeks to admit a “critical mass” of minority students, it must be done through a flexible system that takes race into account—even by tracking admissions demographics—*without sacrificing individualized review*.

Many feel that admitting a “critical mass” of minority students is necessary to achieve true diversity and to combat problems that may occur when only a few individuals of a minority group are admitted at a school.

When only a few minorities are admitted, they may feel:

- Isolated or alienated;
- Unsafe or uncomfortable;
- Obligated to be a spokesperson for their race;
- Under pressure to prove the abilities of their race;
- Stereotyped or stigmatized.

There are benefits to achieving a “critical mass.” The Supreme Court acknowledged that a critical mass of minority students will promote livelier, more spirited, and more

enlightening and interesting classroom discussion. Students will no longer worry that they are being asked to “represent” their race or ethnicity. In addition, as students encounter *intragroup* diversity and recognize that races are not monolithic, racial stereotypes will break down.

When striving to admit a critical mass of minority students, an institution is permitted to set minimum *goals* for minority enrollment. The first step for an admissions office is to define what “critical mass” means for its institution.

Note: Because the definition is dependent on the location and circumstances of a particular institution, each institution’s definition of “critical mass” will be unique. Therefore, a school should not feel compelled to mirror the target enrollment goals of other institutions. *There is no one goal or “critical mass” for every institution at every point in time.*

The Court did not define “critical mass,” and stated that it would defer to a school’s determination of “critical mass.” It is unclear, however, whether schools have unlimited discretion in defining “critical mass.” Many institutions may wish to set their target goals for minority admissions based, in part, on the demographic composition of the community from which they recruit students. For example, a large state institution that mainly attracts a regional student body may choose its target partly based on the racial composition of the state. At the same time, it is important that the racial composition of a state or region not be presented in such a way as to be vulnerable to accusations that such figures serve as de facto quotas.

In setting its goals, an institution may also wish to refer to existing social science research or commission its own studies.

There is no requirement that a school announce specific numeric goals for minority enrollment. The more specific an institution makes its goals, the more the program may appear like a quota. If an admissions office chooses to set down written goals, it is better off having some fairly broad range of “acceptable” minority enrollment in mind as it enters the admissions process. By setting a target *range* the institution is explicitly acknowledging the practical reality that under a “critical mass” system, admissions demographics will vary from year to year.

Note: Over time, a school may find that its needs have changed, or that its initial assessment is deficient in some regard. If the goal is sufficiently broad, this may not be an issue, but a school should nonetheless be prepared to reassess its goals periodically.

During the admissions process, institutions are permitted to make a good faith effort to come within a range demarcated by the goal itself. The Supreme Court recognized that achieving a “critical mass” *necessarily* entails looking at minority enrollment numbers. An institution can look at statistics on race to track progress during the admissions process.

Moreover, this data will be very useful for an admissions office as it periodically assesses and contemplates changes in a diversity-admissions plan. The Court expressly stated that administrators can permissibly track the demographic statistics of admissions during the admissions process in order to assess how well they are doing at meeting their goals.

Example: The University of Michigan Law School's Dean of Admissions kept track of the evolving demographics of each admitted class and informed the Admissions Committee in daily reports so that admissions officers were generally aware of the makeup of the students who had already gained admission to the school. The Supreme Court held that this was constitutional.

Although admissions officers may be aware of the evolving demographics of those admitted to the school, that information may not be determinative as to whether an individual applicant is admitted. Although race can still be the determinative factor in an individual admissions decision, that decision must be based on the individual review of a candidate, not based on the fact that a school is falling behind in its goals for minority enrollment.

Example: Assume a school determines that to achieve a "critical mass" of Black students, they should comprise 10-15% of the incoming class. During the course of the admissions season, the admissions dean informs admissions officers that only 5% of admitted students are Black. The reviewers should not simply start accepting more Black students without regard to individual candidates' overall qualifications, in an effort to achieve the target. However, when reviewing an individual application of a borderline candidate who is Black, a reviewer may still decide to accept the applicant because of the "plus" awarded based on his or her race.

Although a school is permitted to make a good faith effort to reach its goal, that goal cannot become a mandate. Ultimately, each admissions decision must still be based on individualized review, not the more general goal of creating the critical mass.

Avoid: The appearance of a quota system. Consistent with the fact that the school is setting goals but not mandating a particular outcome, its results will probably vary over time. Of course, an institution does not automatically have a quota simply because its enrollment levels remain relatively constant. But where possible, a school should avoid even the appearance of a quota.

Finally, there are some long-term issues that should inform a school's consideration of a "critical mass." By tracking the admissions process over several cycles, a school will be able to assess how well its current plan meets its diversity goals. This long-term assessment will allow it to adjust its goals if necessary.

Over time, an institution should assess how close it has come to meeting its goal of creating and maintaining a critical mass for any underrepresented group.

Example:

An admissions office can conduct follow-up research by asking the same questions (about the level of classroom discourse, campus interaction, stereotyping, alienation, etc.) that it asked when it initially studied the meaning of a “critical mass” at the school. Ideally, the institution will hear that significant improvements have been made. It may find, however, that the current goals are not resulting in a critical mass and must be reassessed.

In addition to reassessing goals, a school may decide to change the weight given to race or the definition of underrepresented groups from year to year. Some institutions try to meet their diversity goals by:

- Keeping admissions officers aware of the demographic statistics from previous years. By being more conscious of the institution’s progress toward achieving its goal, admissions officers are more likely to properly account for race and ethnicity in the future.
- Indicating that greater emphasis should be placed on race and ethnicity in the upcoming admissions cycle, if the school is not meeting its goals. Of course, the school cannot demand a certain level of minority enrollment, but there is nothing improper about asking admissions officers to give race “more weight” in the upcoming year.
- Evaluating data on race and ethnicity in a sophisticated manner. The terms “Asian” and “Latino”, for example, include many communities that face different obstacles and reflect varying histories. Some may be underrepresented or disadvantaged while others are not. This can be understood only by reviewing the data in depth.

g. Extend Efforts Post-Admission to Recruiting and Financial Aid

As with pre-application recruiting, post-admission recruiting plays a very important role in creating a diverse student body. After all, there is no point in admitting a diverse group of students if many of the minority students admitted either decide not to attend or are unable to attend. Many schools have had success with programs aimed at convincing minority students to attend the school, such as minority admit weekends. Similarly, financial aid is another important factor that may convince minority students to attend a school.

For more information on the constitutionality of such programs and how an institution can use post-admission recruiting techniques and financial aid to create a diverse student body, see Chapter VI (forthcoming).

¹ Grutter v. Bollinger, 123 S. Ct. 2325, 2340 (2003) (citation and internal quotation marks omitted).

² The authors thank Brooks Allen, Angelo Ancheta, Jack Blackburn, Demetrius Chapin-Rienzo, Liz Eng, Nira Geevargis, Robert Laird, Spencer Overton, Susan Serrano, Christine Stuffer, Bill Villa, Bruce Walker, and Fane Wolfer for their contributions to this manual.

³ Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

⁴ See *id.* at 319-20.

⁵ *Grutter*, 123 S. Ct. at 2337.

⁶ U.S. CONST. AMEND. XIV, § 1.

⁷ *Id.* (targeting state action by declaring that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws,” and expressly overruling *Dred Scott v. Sandford*, 60 U.S. 393 (1857), by declaring “all persons born or naturalized in the United States” to be citizens).

⁸ See *Brown v. Board of Education*, 347 U.S. 483, 495 (1954).

⁹ See, e.g., *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979) (state rule prohibiting transit authority from hiring narcotic users classifies individuals as either users or non-users, triggering an Equal Protection claim); *Craig v. Boren*, 429 U.S. 190 (1976) (state statute prohibiting sale of beer to men under twenty-one and women under eighteen classifies individuals on the basis of gender, triggering an Equal Protection claim).

¹⁰ *Grutter*, 123 S. Ct. at 2337; *Gratz v. Bollinger*, 123 S. Ct. 2411, 2427-28 (2003); *Adarand Constructors v. Peña*, 515 U.S. 200, 223-24 (1995).

¹¹ *Grutter*, 123 S. Ct. at 2337-38 (emphasis added).

¹² *Id.*; *Gratz*, 123 S. Ct. at 2427.

¹³ *Grutter*, 123 S. Ct. at 2338 (citations and internal quotation marks omitted). According to the Court, strict scrutiny “provide[s] a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decision maker for the use of race *in that particular context.*” *Id.* (emphasis added).

¹⁴ *Grutter*, 123 S. Ct. at 2337 (affirming Justice Powell’s opinion in *Bakke*, 438 U.S. 265 (1978)); *Gratz*, 123 S. Ct. at 2427-28 (same). In the 5-4 *Grutter* decision, the Supreme Court upheld the University of Michigan Law School’s race-conscious admissions policy that was designed to promote student body diversity. In the 6-3 *Gratz* decision, however, the Court struck down the University of Michigan’s undergraduate admissions policy because it was not narrowly tailored to advance a compelling interest in diversity.

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- ¹⁵ 42 U.S.C. § 2000d (2003).
- ¹⁶ 42 U.S.C. § 1981(a) (2003).
- ¹⁷ See *Gratz*, 123 S. Ct. at 2431 n.23 (citing *Runyon v. McCrary*, 427 U.S. 160, 172 (1976)).
- ¹⁸ *Grutter*, 123 S. Ct. at 2347; *Gratz*, 123 S. Ct. at 2431; *Bakke*, 438 U.S. at 287.
- ¹⁹ *Grutter*, 123 S. Ct. at 2347; see also *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 389-91 (1982) (concluding that Equal Protection requirement of purposeful discrimination was also required to violate § 1981); *Bakke*, 438 U.S. at 287 (holding that Title VI prohibits only racial classifications that violate the Equal Protection Clause or Fifth Amendment).
- ²⁰ *Grutter*, 123 S. Ct. at 2337.
- ²¹ See, e.g., *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996) (finding that Justice Powell's opinion in *Bakke* that diversity is a compelling interest was not binding), *cert. denied*, 518 U.S. 1033 (1996), *overruled by Grutter*, 123 S. Ct. 2325 (2003).
- ²² See, e.g., *Smith v. University of Washington*, 233 F.3d 1188, 1201 (9th Cir. 2000) (rejecting *Hopwood* and adopting Justice Powell's view that educational diversity is a compelling governmental interest that meets the demands of strict scrutiny), *cert. denied*, 121 S. Ct. 2192 (1996).
- ²³ See *Bakke*, 438 U.S. at 313.
- ²⁴ *Grutter*, 123 S. Ct. at 2336 (quoting *Bakke*, 438 U.S. at 312).
- ²⁵ *Id.* at 2339 ("Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission, and that 'good faith' on the part of the university is 'presumed' absent a showing to the contrary.")
- ²⁶ *Id.* at 2340.
- ²⁷ *Id.* at 2334.
- ²⁸ *Id.* at 2340-41.
- ²⁹ *Id.* at 2340 (citing Brief of *Amici Curiae* American Educational Research Association, et al., at 3).
- ³⁰ Brief for *Amici Curiae* 65 Leading American Businesses in Support of Respondents, at 2, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (No. 02-241); see also *Grutter*, 123 S. Ct. at 2340.
- ³¹ *Grutter*, 123 S. Ct. at 2340 (citing Brief for Julius W. Becton, Jr. et al. as *Amici Curiae*, at 27).

³² See *Bakke*, 438 U.S. at 307 (“If petitioner’s purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid.”)

³³ *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492, 503-04 (1989).

³⁴ *Id.* at 492.

³⁵ *Wygant v. Jackson Board of Education*, 476 U.S. 267, 276 (1985) (plurality); *Croson*, 488 U.S. at 506.

³⁶ *Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277) (emphasis added).

³⁷ *Croson*, 488 U.S. at 507-08 (discussing *Fullilove v. Klutznick*, 448 U.S. 448 (1980)); *Fullilove*, 448 U.S. at 491-92 (upholding a flexible quota system established by Congress).

³⁸ *Grutter*, 123 S. Ct. at 2342 (citing *Shaw v. Hunt*, 517 U.S. 899, 908 (1996)).

³⁹ *Id.* at 2345 (citing *Croson*, 488 U.S. at 507) (emphasis added).

⁴⁰ *Id.* at 2344 (emphasis added).

⁴¹ Percent plans have been adopted by California, Texas, and Florida. Studies have indicated that these percent plans do not significantly increase campus diversity as compared to race-conscious plans. See Catherine L. Horn, et al., *Percent Plans in College Admissions: A Comparative Analysis of Three States’ Experiences*, The Civil Rights Project at Harvard University (2003), available at: <http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.pdf>.

⁴² See *id.* The Michigan Law School considered but rejected lottery and recruitment systems because it decided that an admissions program that did not explicitly consider race would not allow for the enrollment of a “critical mass” of minorities. See *Grutter v. Bollinger*, 288 F.3d 732, 750 (6th Cir. 2002).

⁴³ *Grutter*, 123 S. Ct. at 2344.

⁴⁴ *Id.* at 2345.

⁴⁵ *Id.*

⁴⁶ *Id.* at 2342. To be narrowly tailored, the program must, in part, evaluate each applicant individually. The *Grutter* Court found the University of Michigan Law School’s policy to be narrowly tailored, in part because it was “highly individualized,” clearly satisfying the Court’s standard. *Id.* at 2343.

⁴⁷ *Id.* at 2342 (quoting *Bakke*, 438 U.S. at 317).

⁴⁸ *Id.* (citation and internal quotation marks omitted).

⁴⁹ *Id.* at 2344.

50 *Id.*

51 *Gratz*, 123 S. Ct. at 2428-30.

52 *Id.* at 2428 (citing *Bakke*, 438 U.S. at 317).

53 *Bakke*, 438 U.S. at 275-76; *Gratz*, 123 S. Ct. at 2428-29.

54 *Grutter*, 123 S. Ct. at 2339.

55 *Id.*

56 *Id.* at 2342 (citation and internal quotation marks omitted).

57 *Bakke*, 438 U.S. at 323.

58 *Id.*

59 *Grutter*, 123 S. Ct. at 2333.

60 *Id.* at 2333-34.

61 *Id.* at 2343.

62 *Id.* At the University of Michigan Law School, the number of African American, Latino, and Native American students in each class varied from 13.5 to 20.1 percent between 1993 and 2000, a range the Court called “inconsistent with a quota.” *Id.*

63 *Id.* at 2345 (citation and internal quotation marks omitted).

64 *Id.* at 2342.

65 *Id.* (quoting *Bakke*, 438 U.S. at 317).

66 *Id.* at 2346 (quoting *Bakke*, 438 U.S. at 317).

67 *Id.* (quoting *Bakke*, 438 U.S. at 318).

68 *Id.* at 2346 (citation omitted).

69 *Id.* (quoting *Crosen*, 488 U.S. at 510) (internal quotation marks omitted).

70 *Id.* at 2347 (stating in dicta that “[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today”); *compare id.* at 2350 (Thomas, J., dissenting) (misconstruing the majority’s dicta by declaring that “racial discrimination in higher education will be illegal in 25 years”).

71 *Id.* at 2346.

72 See *Crosen*, 488 U.S. at 520; *U.S. v. Paradise*, 480 U.S. 149 (1987); *Fullilove*, 448 U.S. 448.

73 See *Bakke*, 438 U.S. at 300.

74 *Wygant*, 476 U.S. at 276-77.

75 *Croson*, 488 U.S. at 505-06.

76 *Paradise*, 480 U.S. at 171.

77 *Wygant*, 476 U.S. at 275.

78 *Paradise*, 480 U.S. at 183.

79 CAL. CONST. ART. 1, § 31(a) (West 2003); WASH. REV. CODE ANN. § 49.60.400(1) (West 2003).

80 *Id.*

81 See *Parents Involved in Cmty. Schools v. Seattle Sch. Dist.*, 72 P.3d 151, 153 (Wash. 2003) (emphasis added).

82 See *id.* at 162-63, 166.

83 See WASH. REV. CODE ANN. § 49.60.400(1) (West 2003); *Parents Involved in Cmty. Schools*, 72 P.3d at 166-67.

84 *Parents Involved in Cmty. Schools*, 72 P.3d at 153.

85 *Id.*

86 See *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537, 101 Cal. Rptr.2d 653 (2000) (holding that the city of San Jose's program to encourage public works projects participation by minority business enterprises (MBEs) and women business enterprises (WBEs) granted preferential treatment and thereby violated Proposition 209, because, among other things, under the outreach option of the program, contractors were required to "notify, solicit bids from, and negotiate with" MBEs and WBEs, but could exclude non-MBEs and non-WBEs); *Crawford v. Huntington Beach Union High School Dist.*, 98 Cal. App. 4th 1275, 121 Cal. Rptr.2d 96 (2002) (holding that a racial and ethnic balancing component of the Huntington Beach Union High School District's open transfer policy violated Proposition 209); *Connerly v. State Personnel Board*, 92 Cal. App. 4th 16, 112 Cal. Rptr. 2d 5 (2001).

87 Florida's voter initiative to amend the State Constitution—akin to California's Proposition 209—failed after the Florida Supreme Court struck the proposed constitutional amendment from the 2000 ballot. *Advisory Opinion to Atty. Gen. ex rel. Amendment to Bar Gov't from Treating People Differently Based on Race in Public Educ.*, 778 So. 2d 888 (Fla. 2000).

88 FLA. ADMIN. CODE ANN. R. 6C-6.002(7) (2000) (the "One Florida Initiative" program); see also FLA. STAT. ANN. § 1004.39 (West 2003) (prohibiting preferences on the basis of race, national origin, or gender in admissions at Florida International University College of Law).

89 FLA. ADMIN. CODE ANN. R. 6C-6.002(5) (the "Talented Twenty" program).

⁹⁰ *Grutter*, 123 S. Ct. at 2345.

⁹¹ *Id.* at 2344.

⁹² *Reaffirming Diversity: A Legal Analysis of the University of Michigan Affirmative Action Cases*, A Joint Statement of Constitutional Law Scholars, The Civil Rights Project at Harvard University 19-20 (2003), available at http://www.civilrightsproject.harvard.edu/policy/legal_docs/Diversity_%20Reaffirmed.pdf.

⁹³ Report of the Task Force on Undergraduate Admissions Criteria, Office of the President, University of California, December 1995, at 5-6.

⁹⁴ *The Test Score Gap*, PBS Frontline (citing THE BLACK-WHITE TEST SCORE GAP (Christopher Jencks & Meredith Phillips eds., 1998)), available at <http://www.pbs.org/wgbh/pages/frontline/shows/sats/etc/gap.html>.

⁹⁵ *Id.* (citing DEREK BOK & WILLIAM BOWEN, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998)).

⁹⁶ Brief for Respondents Kimberly James, et al., at 42, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (No. 02-241).

⁹⁷ The Intervenors' brief in *Grutter* points out a number of other reasons for this disparate impact in the context of the LSAT:

- The test's heavy use of "academic English."
- Minority students have less access to test prep classes.
- The "Stereotype Threat" phenomenon: Stanford Professor Claude Steele conducted studies indicating that "the racist stigma of intellectual inferiority with which black and other minority students constantly must contend . . . demonstrably, substantially, and artificially depresses minority students' performance on tests thought to measure intellectual ability." This research has been subsequently verified and is "widely accepted within the field of psychology."
- Test construction procedures reproduce existing biases. New test questions are "statistically normed in relation to prior results." Because of this, test questions on which black students score comparably well are rejected while those questions which comport with the generally better performance of white test-takers are used.

See Brief for Respondent Kimberly James, et al., at 43-44, *Grutter* (No. 02-241).

⁹⁸ See Charles Rooney, et al., *Test Scores Do Not Equal Merit: Enhancing Equity & Excellence in College Admissions by Deemphasizing SAT and ACT Results*, Sept. 1998, at 73, available at <ftp://ftp.fairtest.org/optrept.pdf>; see generally, Saul Geiser et al., *UC and the SAT: Predictive Validity and Differential Impact of the SAT I and SAT II at the University of California*, Oct. 29, 2001, available at http://www.ucop.edu/sas/research/researchandplanning/pdf/sat_study.pdf.

⁹⁹ Rooney, et al., *Test Scores Do Not Equal Merit*, *supra* note 98, at 3 (quoting Nancy Cole, *Merit and Opportunity: Testing and Higher Education at the Vortex*, NY TIMES, Sept. 19, 1997, at A25).

¹⁰⁰ *Id.* at 7 (quoting William Hiss, *Optional SATs: Six Years Later*, BATES: THE ALUMNI MAGAZINE, Sept. 1990, at 15-19).

¹⁰¹ *Id.* (citing Office of Academic Affairs, Oregon State System of Higher Education, *OSSHE Freshman Academic Performance by Admission Mode for 1988-89 Academic Year*, Dec. 21, 1989).

¹⁰² Report of the Task Force on Undergraduate Admissions Criteria, University of California, *supra* note 93, at 8-9.