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# **FEDERAL LAW AND FINANCIAL AID: A FRAMEWORK FOR EVALUATING DIVERSITY- RELATED PROGRAMS**

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**A Strategic Planning and Policy Manual**

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

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

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## About the Authors

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

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

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

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

## Foreword

For decades, colleges and universities have wrestled with how to achieve their diversity-related educational goals in a manner that meets federal legal requirements. Since 2003, when the U.S. Supreme Court in *Grutter v. Bollinger* and *Gratz v. Bollinger* embraced Justice Powell's conclusion in *Bakke* that the educational benefits of diversity could justify limited race-conscious practices<sup>1</sup>, higher education officials across the country have renewed their focus on diversity-related programs. Working to ensure that their diversity-related programs are educationally and legally sound, higher education officials face the risk of either underreacting or overreacting to the Supreme Court's opinions—underreacting by seeing the University of Michigan's victory as a justification for simply maintaining their own race- or ethnicity-conscious programs (with insufficient analysis), or overreacting by seeing the risks and complexities inherent in the University of Michigan cases as a justification for simply abandoning their own race- or ethnicity-conscious programs (again with insufficient analysis). These extremes may, on the one hand, expose institutions to unwarranted legal risk and, on the other hand, unnecessarily undermine the achievement of educational diversity goals.

At the same time, while *Grutter* and *Gratz* focused on the use of race and ethnicity in university admissions, attention has now shifted to other key areas, including financial aid, recruitment, and even employment. Indeed, race- and ethnicity-conscious financial aid and scholarship policies may be more widespread among colleges and universities than the use of race or ethnicity in making admissions decisions.

Recognizing these facts, leaders from the College Board convened a series of meetings to explore the unresolved issues remaining in the wake of the University of Michigan decisions and to determine how the College Board could best support the needs of the higher education community. The College Board's goal was simple: to frame a forward-thinking agenda designed to address the needs of college and university leaders who want to pursue institutional diversity-related goals in legally sound ways. As a result, and based on conversations with College Board members and other supporting organizations, the College Board launched a groundbreaking initiative: The Access and Diversity Collaborative on Enrollment Management and the Law. The Collaborative is supported by numerous sponsoring and cooperating organizations, sponsoring institutions, higher education systems, and foundations.<sup>2</sup> The Collaborative began its work by addressing financial aid and scholarships, the focus of this manual. Following this initial strand of the Collaborative, the College Board will initiate at least two additional strands, one with a focus on recruitment, outreach, and retention policies, and one on admissions selection policies.

As part of the Collaborative, we had the privilege of leading several conversations between July and December 2004 involving hundreds of enrollment management, financial aid, legal, and policy experts across the country. Based on what we learned through those conversations—as well as what the governing laws and court decisions tell us—we have attempted to craft practical and useful guidance to help higher education officials evaluate their race- and ethnicity-conscious financial aid and scholarship policies, and

take appropriate action to ensure that such policies are educationally and legally sound.<sup>3</sup> We hope that this manual meets the very high bar the College Board established when this initiative was first conceived.

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

In addition, we are grateful to those who have taken the time to review drafts of this manual and provide us with constructive ideas and direction. And certainly not least, we are grateful to the hundreds of participants in the College Board’s Access and Diversity Collaborative seminars. In those meetings, financial aid and scholarship, enrollment management, and other institutional leaders provided thoughtful observations and posed challenging questions—all of which helped inform the preparation of this manual. (Appendix G contains a list of institutions that participated in the various meetings.)<sup>4</sup>

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

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

## Foreword Endnotes

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1. See *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).
2. See Appendix F.
3. Principles and practices described in this manual were discussed during four day-long national seminars convened by the College Board between September and November, 2004. A total of 235 individuals representing 125 institutions and organizations attended those seminars. Also, a public draft of this manual was made available to higher education officials and others in January of 2005. Feedback provided about that draft has been incorporated in this version of the manual.  
  
In addition, we submitted a Freedom of Information Act request to the U.S. Department of Education in October of 2004, requesting all OCR decisions and correspondence involving complaints regarding the use of race or national origin in (among other things) financial aid and scholarship decisions by higher education institutions. In response to that request, we received documents relating to over fifty case investigations involving allegations of discrimination under Title VI of the Civil Rights Act of 1964 involving financial aid and scholarships; admissions; and recruitment, outreach, and retention policies in higher education. Many of those materials, which have informed the preparation of this document, are cited in this manual. Copies of all documents produced by the Office for Civil Rights in response to this request are on file with the College Board.
4. In addition, we should note that segments of this Manual are adapted from Coleman and Palmer, *Diversity in Higher Education: A Strategic Planning and Policy Manual Regarding Federal Law in Admissions, Financial Aid, and Outreach* (College Entrance Examination Board, 2004), with permission.

## **Section One: Background**



## I. Overview

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

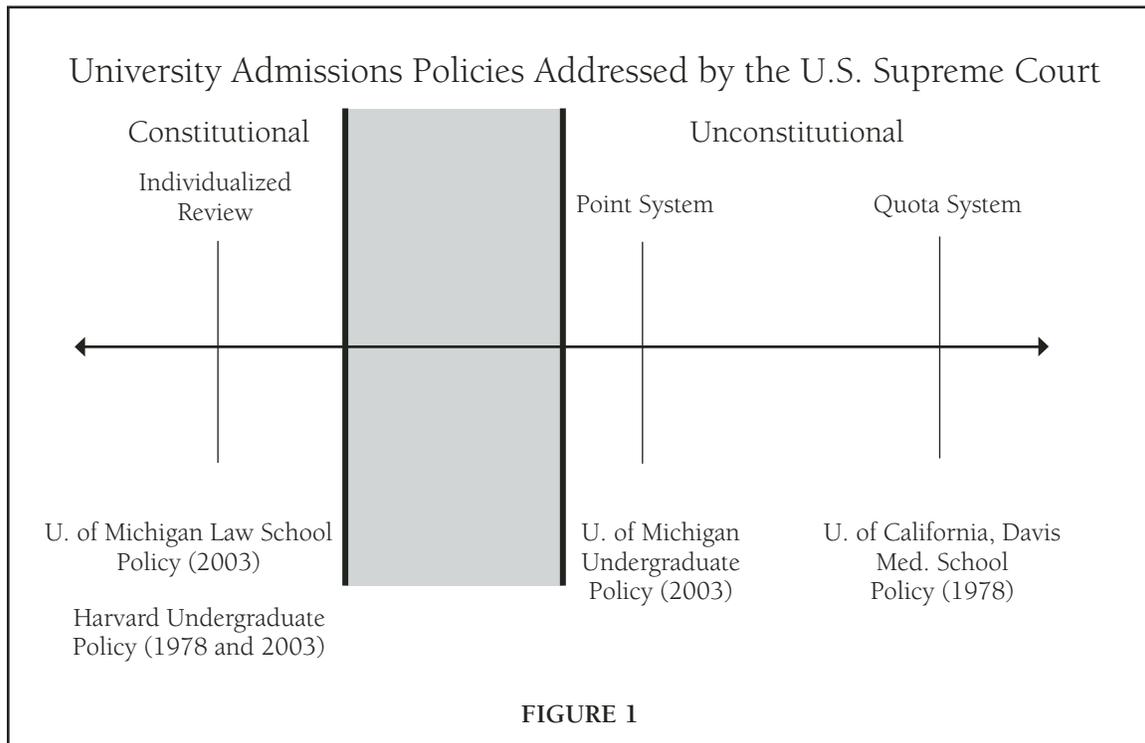
As explained in the text that follows, if institutional leaders commit the necessary resources toward effective strategic planning, implementation, and evaluation, federal law can help guide institutional efforts to meet diversity goals in legally sound ways. This manual provides a framework to inform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

In sum, the overarching goal of this manual is to provide one tool that can help college and university leaders (including educators, administrators, and attorneys) understand how to structure their financial aid and scholarship policies in a manner that best achieves their diversity-related goals and minimizes legal risk.

This manual has been written in light of prevailing federal law—including both federal court opinions and relevant U.S. Department of Education guidance. Obviously, the 2003 U.S. Supreme Court decisions in *Grutter v. Bollinger* and *Gratz v. Bollinger*, which were the first Supreme Court pronouncements on the use of race- and ethnicity-conscious practices in higher education in a quarter of a century, are primary foundations for the guidance that follows.<sup>1</sup> In addition, the U.S. Department of Education's 1994 Title VI Final Policy Guidance (Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964 (February 23, 1994)) regarding race- and ethnicity-conscious financial aid and scholarship practices (and the subsequent OCR decisions implementing that policy) provide important sources of information for this manual.

This body of relevant case law and administrative policies and decisions provides significant information that can help guide institutions in their efforts to effectively and legally promote their interests in the educational benefits of diversity, including through the use of race- and ethnicity-conscious financial aid and scholarships. At the same time, it should be noted that existing federal law does not provide all of the answers to all of the hard questions that higher education officials are likely to pose. For example, while the Supreme Court's two landmark decisions in *Grutter* and *Gratz* are valuable in their elaboration on the long-standing legal standards that govern the use of race and ethnicity when conferring education opportunities or benefits, nowhere do they mention (let alone analyze) financial aid or scholarship practices. Thus, higher education officials addressing race- and ethnicity-conscious financial aid and scholarship practices are operating in “the space” in

which we know key principles that are likely transportable from the admissions context to the financial aid world, but which cannot provide definitive answers. [See Figure 1.]



In addition, the Department’s Title VI Policy—while focused on financial aid and scholarship practices, and having adopted the basic principles regarding diversity that the University of Michigan cases endorsed—is over a decade old. Thus, while it remains in effect, it does not reflect recent court decisions that may bear on some of its conclusions.

This manual is organized around the basic legal questions that relate to the use of race and ethnicity in financial aid and scholarship decisions.

Chapter II provides an overview of the purpose of financial aid and scholarships, along with a general description of relevant practices. In addition, it provides an introduction to the relevant legal standards, federal case law, and U.S. Department of Education policy that relate to race- and ethnicity-conscious financial aid and scholarships.

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

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

- **Strict scrutiny** is the most rigorous standard of judicial review. It is applicable to race- and ethnicity-conscious decisions that confer benefits, because distinctions based on race and ethnicity are “inherently suspect.” To “pass” strict scrutiny, institutional policies must serve a “compelling interest” and be “narrowly tailored” to achieve that interest. Chapter IV addresses the circumstances in which strict scrutiny is (and is not) applicable.
- A **compelling interest** is the end that must be established as a foundation for maintaining lawful race- and ethnicity-conscious policies that confer benefits. Federal courts have expressly recognized a limited number of interests that are sufficiently compelling to justify the consideration of race or ethnicity, including a university’s interest in promoting the educational benefits of a diverse student body.<sup>2</sup> Chapter V examines compelling interest issues in detail, providing information about the kinds of evidentiary and program design principles that must be considered.
- **Narrow tailoring** refers to the requirement that the means used to achieve the compelling interest must “fit” that interest precisely, with the consideration of race or ethnicity only in the most limited manner possible. Federal courts examine several interrelated criteria in determining whether a given program is narrowly tailored, including the flexibility of the program, the necessity of using race or ethnicity, the burden imposed on nonbeneficiaries, and whether the policy has an endpoint and is subject to periodic review. Chapter VI examines these issues in detail, providing information about key design elements associated with financial aid and scholarship decisions that bear on whether those policies are narrowly tailored.

Based on the federal law associated with these concepts (which, as a general rule, apply to financial aid and scholarship decisions just as they apply to admissions and other decisions), this manual essentially examines three basic questions:

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

Taken together, an examination of these questions can help colleges and universities identify the policies that should be subject to an institution-specific analysis and ensure that their race- and ethnicity-conscious financial aid and scholarship policies promote their diversity-related educational goals with minimal legal risk.

## Chapter I Endnotes

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1. Pursuant to the Equal Protection Clause of the United States Constitution, Title VI of the Civil Rights Act of 1964, and a post-Civil War federal statute (42 U.S.C. § 1981), the Court in those decisions upheld the University of Michigan Law School's admissions program, while striking down the University of Michigan's undergraduate admissions program. In essence, those decisions: (1) affirmed that the educational benefits of diversity constitute a compelling interest that can justify the limited consideration of race in admissions decisions; and (2) emphasized the need for such admissions decisions to involve an individualized review of applicants (rather than the automatic award of points) in the pursuit of diversity goals.
2. A key premise of this manual—and the body of law it examines—is that racial or ethnic diversity is not an end in itself, but is, rather, a means to broader educational goals. Correspondingly, the term “diversity” is not, in the first instance, one to be defined by lawyers or judges—or, for that matter, one that can be explained in some formulaic or standardized way. It is a term that should derive its meaning from its institutional or programmatic origins, as it did in the University of Michigan cases. It may, therefore, relate to (and be defined according to) programs and practices that are as varied as the institutional missions and goals that comprise the higher education community. As a result, this manual does not attempt to offer a single definition of the term “diversity.” To do so would be to ignore the very academic foundations from which the concept has evolved.

## II. Federal Law Applicable to Race- and Ethnicity-Conscious Financial Aid: An Introduction

### A. The Role and Purpose of Financial Aid and Scholarships

Like other educational practices that may implicate federal “strict scrutiny” analysis, financial aid and scholarship policies must be evaluated in light of institutional goals. As discussed in subsequent chapters, federal legal standards require that institution-specific “compelling interests” support any race- or ethnicity-conscious policies—including those relating to financial aid and scholarships.

Although institution-specific financial aid and scholarship policies tend to reflect a complex mix of both institutional and public goals<sup>1</sup> (especially given the federal government’s focus on financial aid for low-income students), core goals associated with financial aid and scholarships tend to be:

1. Expanding access to higher education by providing critical support for students who would otherwise not be able to attend college, reaching, in particular, those students from low-income backgrounds; and
2. Helping colleges and universities promote their core missions by enrolling students who can best help institutions achieve their educational goals.

Notably, these goals are not mutually exclusive, and they frequently operate to reinforce each other. That point notwithstanding, the objectives and program designs associated with the goal of attracting students based on need tend as a general rule not to implicate strict scrutiny, for reasons explained in subsequent chapters.<sup>2</sup> By contrast, the objectives and program designs associated with helping institutions meet their core educational goals may implicate strict scrutiny when they include a focus on promoting the educational benefits of diversity.

To the extent that financial aid and scholarship policies are established (at least in part) as a means to help institutions meet their enrollment management goals (including those related to racial and ethnic diversity), then they should be viewed as similar to (and extensions of) admissions policies that have comparable (or identical) aims.<sup>3</sup> In short, both are strategies that are designed to help achieve the institution’s broader educational goals by enrolling certain students. This may seem obvious, but it is also of great importance because whether a given race- or ethnicity-conscious financial aid policy is legally sustainable will likely depend to a substantial degree on the extent to which the policy is necessary and appropriate to achieve the goal(s) that it advances—including enrollment management. And it is crucial that each college and university evaluate its diversity-related policies holistically, in light of those goals.

## B. Standards of Review

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

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

Strict Scrutiny = Compelling Interest + Narrow Tailoring

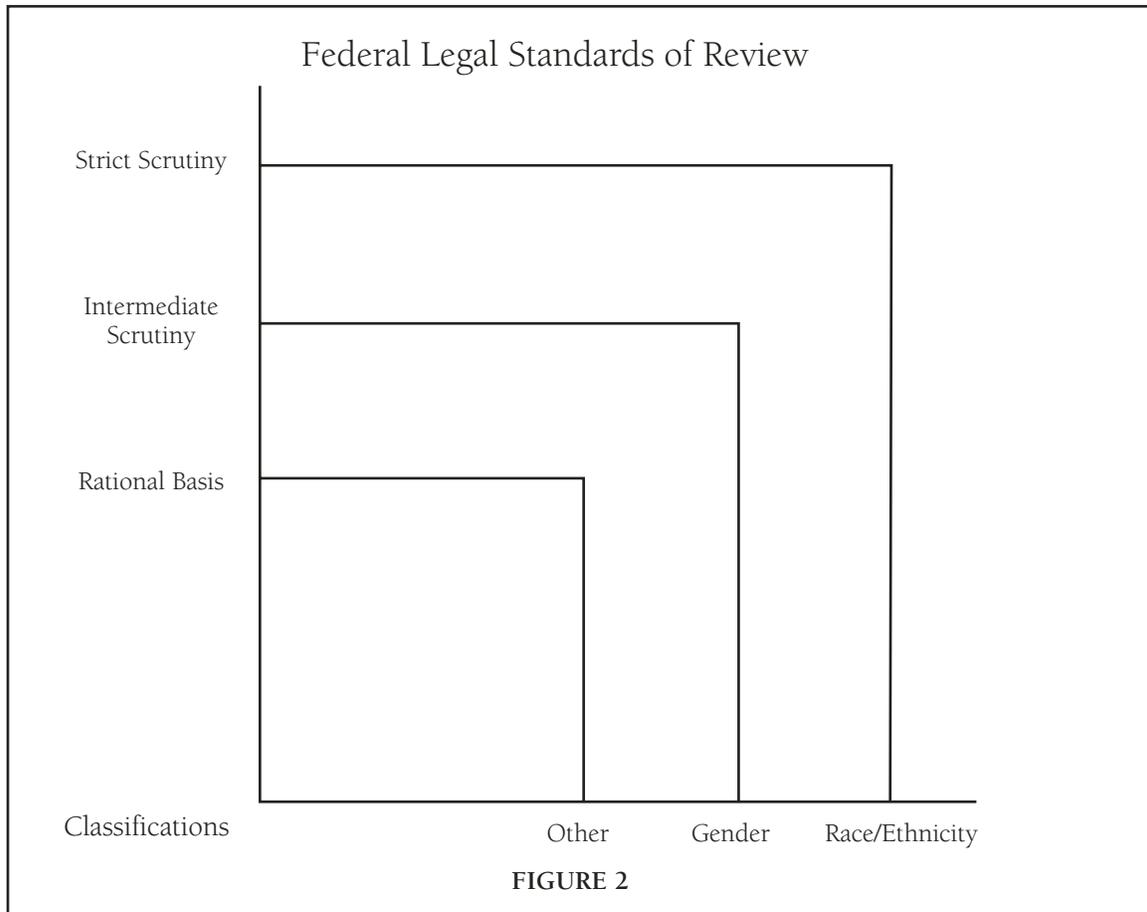
As discussed below (see Chapter V), courts have recognized at least two compelling interests in education that can be sufficient to justify race- or ethnicity-conscious practices: the remedial interest in curing the present effects of past discrimination; and the nonremedial interest in promoting the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

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

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

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

equal employment opportunity’...[and] to advance full development of the talent and capacities of our Nation’s people.”<sup>4</sup>



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

### C. Federal Court Opinions

Several federal court opinions have addressed the use of race and ethnicity in university admissions, most notably including the U.S. Supreme Court’s decisions in *Grutter* and *Gratz*. In contrast, outside of a mandatory desegregation setting, only two federal decisions have been reported that specifically involve challenges to race- or ethnicity-conscious financial aid or scholarships. Neither of those cases involved arguments that the challenged policies were supported by the educational benefits of diversity.<sup>6</sup>

In 1994, the Fourth Circuit Court of Appeals in *Podberesky v. Kirwan*<sup>7</sup> invalidated a race-exclusive scholarship program designed to remedy the present effects of past discrimination, on the grounds that the University of Maryland did not prove that the present effects it identified were caused by the University's own prior discrimination and that the scholarship program was designed to cure those present effects. Specifically, the court ruled that the University of Maryland failed to establish a sufficient connection between present conditions (poor reputation in the African American community; a racially hostile campus climate; and the underrepresentation of African Americans, who also had low retention and graduation rates) and past discriminatory practices. The court also found that the scholarship program was not limited to its stated goals: students eligible for the program included individuals who had not suffered discrimination and students from other states.

And, in a case predating *Bakke*, the District of Columbia federal district court in *Flanagan v. President and Directors of Georgetown College*<sup>8</sup> upheld a challenge to an affirmative action program at Georgetown University Law Center designed to increase enrollment at the law school of certain minority students by providing sixty percent of available scholarship funds to eleven percent of its students who were "minority." In that case, the challenged program provided for the distribution of scholarship funds based on an applicant's financial need. However, an application for a scholarship was not reviewed by Georgetown until the prospective student was accepted for admission; if accepted, the applicant would qualify for the requested aid if he demonstrated need and funds were available. The case giving rise to the legal challenge involved a student who was not accepted until late in the year, by which time all funds available for "non-minority" applicants (forty percent of the total) had been exhausted. The court characterized that limitation as "arbitrary," and ruled it to be in violation of Title VI of the Civil Rights Act of 1964.

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

The U.S. Department of Education in 1994 issued final policy guidance ("Title VI Policy Guidance") outlining the standards that its Office for Civil Rights ("OCR") would follow in its enforcement of Title VI of the Civil Rights Act of 1964 regarding financial aid and scholarships.<sup>9</sup> Applying federal court precedent, the Department established five principles that would guide its Title VI analysis applicable to financial aid awarded in whole or part based on race or ethnicity. In this context, it is important to note the following:

- The five principles set forth by the Department (and summarized below) reflect the only available, comprehensive statement of federal policy applicable to the use of race or ethnicity in financial aid and scholarship decisions.<sup>10</sup>
- No court of record has ever specifically addressed the principles and standards set forth in the Department's Title VI Policy Guidance, which is non-regulatory guidance.
- The Title VI Policy Guidance substantially pre-dates *Grutter* and *Gratz*, as well as other relevant cases (although the Title VI Policy Guidance relied substantially on Justice Powell's opinion in *Bakke*, which the Supreme Court in both *Grutter* and *Gratz* endorsed).

The five principles set forth in the Department's Title VI Policy Guidance are the following:

1. **Financial Aid for Disadvantaged Students**—A college may make awards of financial aid to disadvantaged students without regard to race or national origin even if that means that these awards go disproportionately to minority students.

Pursuant to Principle 1, the Department stated that higher education institutions are “free to define the circumstances under which students will be considered to be disadvantaged, as long as that determination is not based on race or national origin.” The Department noted that such policies might have “a disproportionate effect on students of a particular race or national origin,” but (consistent with Title VI and the 14th Amendment to the U.S. Constitution) disproportionate effect alone does not implicate strict scrutiny. The Department concluded by expressing:

[the] view that awarding financial aid to disadvantaged students provides a sufficiently strong educational purpose to justify any racially disproportionate effect the use of this criterion may entail. In particular, the Department believes that an applicant's character, motivation, and ability to overcome...disadvantage are educationally justified considerations...in financial aid decisions. Therefore, the award of financial assistance to disadvantaged students does not violate Title VI.

2. **Financial Aid Authorized by Congress**—A college may award financial aid on the basis of race or national origin if the aid is awarded under a federal statute that authorizes the use of race or national origin.

Pursuant to Principle 2, the Department recognized that “financial aid programs for minority students that are authorized by a specific federal law cannot be considered to violate another Federal law, *i.e.*, Title VI.” The Department observed, however, that: (1) this principle would not insulate public colleges and universities from challenges pursuant to federal constitutional (versus statutory) principles; and (2) any federal authorization of race-conscious financial aid programs would not “serve as an authorization for States or colleges to create their own [race-conscious aid] programs.”

3. **Financial Aid to Remedy Past Discrimination**—A college may award financial aid on the basis of race or national origin, if the aid is necessary to overcome the present effects of past discrimination.

Pursuant to Principle 3, the Department adopted the long-standing principle that the use of race- or ethnicity-conscious measures may be justified in the name of “ensuring the elimination of discrimination on the basis of race or national origin.” In this context, the Department reaffirmed the applicability of strict scrutiny to such measures. In addition, the Department explained that while the use of race- or national origin-conscious financial aid measures might further remedial objectives based on court or administrative agency findings, such findings were not a necessary predicate of such aid. The Department concluded:

Allowing colleges to implement narrowly tailored remedial affirmative action if there is strong evidentiary support for it—without requiring that it be delayed until a finding is made by OCR, a court or a legislative body—will assist in ensuring that Title VI’s mandate against discrimination based on race or national origin is achieved.

4. **Financial Aid to Create Diversity**—A college should have discretion to weigh many factors, including race and national origin, in its efforts to attract and retain a student population of many different experiences, opinions, backgrounds, and cultures—provided that the use of race or national origin is a narrowly tailored means to achieve the goal of a diverse student body.

Pursuant to Principle 4, and based on the application of principles derived from Justice Powell’s opinion in *Bakke*, the Department concluded that a higher education institution can consider race and national origin as: (1) “one factor, with other factors, in awarding financial aid if necessary to promote diversity”; and (2) “as a condition of eligibility in awarding financial aid if it is narrowly tailored to promote diversity.”<sup>11</sup>

The Department also observed that there were “important differences” between financial aid and admissions decisions that might affect relevant legal analyses regarding the use of race or ethnicity. Specifically, the Department noted that the burden on those students “excluded from the benefit conferred by the classification based on race” in financial aid and scholarship decisions might be less severe than the burden associated with certain admissions decisions. For example, the Department observed:

- Unlike admissions policies which have “the effect of excluding applicants...on the basis of race,” race-conscious financial aid “does not, in and of itself, dictate that a student would be foreclosed from attending a college solely on the basis of race.”
- Unlike with respect to “the number of admissions slots,” the amount of financial aid available to students is not necessarily fixed.

5. **Private Gifts Restricted by Race or National Origin**—Title VI applies to colleges and universities that award race-conscious financial aid and scholarships but does not apply to individuals or organizations that are not recipients of federal financial assistance.

Pursuant to Principle 5, the Department affirmed that higher education institutions that award privately donated aid must ensure that their practices comport with Title VI principles (as “all of the operations of a college are covered by Title VI if the college receives any Federal financial assistance”), but that Title VI does not prohibit private, nonrecipients of federal financial assistance from directly giving scholarships or other forms of financial aid to students based on their race or ethnicity.<sup>12</sup>

## ***About OCR***

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

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

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

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

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

*Note:* In addition to references to U.S. Department of Education policy guidance, this manual includes references to OCR correspondence relevant to various case investigations (which include requests for case-specific information). These references can provide insight into OCR's application of relevant federal laws and U.S. Department of Education policies. However, while illustrative of OCR's action in cases involving race- and ethnicity-conscious financial aid and scholarship practices, OCR's case-specific correspondence does not necessarily represent federal policy or controlling precedent.<sup>13</sup>

## Chapter II Endnotes

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1. Coomes, *The Role Student Aid Plays in Enrollment Management* in *New Directions for Student Services* (vol. 89) (Jossey-Bass Publishers, Spring 2000).
2. See Chapter IV, Section B. This manual covers both need-based and merit-based aid issues, defined as the following:
  - Need-Based Aid refers to college-funded or college-administered financial aid given to students to help meet the difference between their “total student expense budget” and “expected family contribution” (determined by a need-analysis formula). Need-based aid can include monetary grants, scholarships, loans, or job opportunities.
  - Merit-Based Aid refers to scholarships given to students based on academic performance or potential, special talents, and/or personal characteristics (which may include race and ethnicity). Numerous factors may be considered together in making these awards.

As discussed below, it is possible that need-based aid determinations and the relative mix of the kind of aid provided (frequently referred to as “preferential packaging”) may be affected by other factors, including race. (In many cases, this kind of practice is referred to as “merit-within-need” financial aid.) Thus, in limited circumstances, need-based aid may implicate strict scrutiny issues.
3. Moreover, the benefits to students who attend higher education institutions are significant and wide ranging. The College Board has documented, in fact, the personal, financial and other lifelong benefits that inure to students who attend institutions of higher education. In addition, society as a whole “derives a multitude of direct and indirect benefits when citizens have access to postsecondary education”—including lower levels of unemployment and poverty (resulting in decreased demand on public budgets); enhanced levels of civic participation; and more. Baum and Payea, *Education Pays: The Benefits of Higher Education for Individuals and Society*, (The College Entrance Examination Board, 2004) at 7, 8.
4. *United States v. Virginia*, 518 U.S. 515 (1986).
5. See, e.g., *Williamson v. Lee Optical Co.*, 348 US 483 (1955); *New Orleans v. Dukes*, 427 U.S. 297 (1976); see generally, Lockhart, Kamisar, Choper, and Shiffrin, *Constitutional Law: Cases-Comments-Questions 6th Ed.*, 1986.
6. In addition, in *Pollard v. State of Oklahoma* (W.D. Okla., complaint filed October 20, 1998), a white male student at the University of Tulsa filed a class action suit against the Oklahoma State Regents for Higher Education in federal district court, challenging the legality of a scholarship program that conditioned awards based upon different test scores for members of different racial groups, and for men and women. The case was settled in 1998 before reaching a trial on the merits, and in June 1999, the Regents eliminated the race- and gender-specific features of the program.
7. 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995).
8. 417 F. Supp. 377 (D. D.C. 1976).
9. 59 Fed. Reg. 8,756 (February 23, 1994). The Office for Civil Rights enforces several federal civil rights laws that prohibit discrimination in programs or activities that receive federal financial assistance from the Department of Education. Discrimination on the basis of race, color, and national origin is prohibited by Title VI of the Civil Rights Act of 1964; discrimination on the basis of gender is prohibited by Title IX of the Education Amendments of 1972; discrimination on the basis of disability is prohibited by Section 504 of the Rehabilitation Act of 1973; and discrimination on the basis of age is prohibited by the Age Discrimination Act of 1975. These civil rights laws enforced by OCR extend to all state education agencies, elementary and secondary school systems, colleges and universities, vocational schools, proprietary schools, state vocational rehabilitation agencies, libraries, and museums that receive U.S. Department of Education funds. Areas covered may include, but are not limited to: admissions, recruitment, financial aid, academic programs, student treatment and services, counseling and guidance, discipline, classroom assignment, grading, vocational education, recreation, physical education, athletics, housing, and employment. OCR also has enforcement responsibilities under Title II of the Americans with Disabilities Act of 1990, which prohibits discrimination on the basis of disability by public entities, whether or not they receive federal financial assistance. See generally, <http://www.ed.gov/about/offices/list/ocr/index.html> for a comprehensive description of OCR’s mission and scope of authority.

10. The issuance of this guidance followed a process involving notice and significant comment, but could be modified by the Department as long as changes are consistent with federal law.

The background of the Department's financial aid policy is the following:

In December of 1990, a Department official declared that "Title VI categorically prohibited colleges and universities from awarding scholarships on the basis of race." That declaration was soon followed by a press release announcing a substantially more tolerant policy on minority scholarships. Subsequently, Secretary of Education Lamar Alexander announced in a press conference that he had withdrawn both policy statements and indicated that the Department of Education would "continue to interpret Title VI as permitting federally funded institutions to provide minority scholarships." Then, on December 10, 1991, the U.S. Department of Education issued for notice and comment Proposed Policy Guidance on Title VI's applicability to race- and national-origin-conscious scholarship awards. That guidance indicated that:

- The Department's few previous statements regarding race-exclusive scholarships were "inconsistent;"
- There had never been a "full policy review and clear set of principles" regarding the use of race-exclusive scholarships; and
- The Department would continue to interpret Title VI "as permitting race-based scholarships in a variety of instances."

See *Washington Legal Foundation v. Alexander*, 984 F.2d 483 (D.C. Cir. 1993).

In January of 1994, the Department issued its final policy guidance, which followed the publication of a report by the United States General Accounting Office: U.S. General Accounting Office, Report to Congressional Requesters: *Information on Minority Scholarships* (B-251634, January 14, 1994). That report, issued in response to a Congressional inquiry that occurred during the development of the U.S. Department of Education's Title VI policy, was designed to "inform policymakers about the current use and perceived benefits of [minority-targeted] scholarships." That report concluded:

- Although many schools used race- or ethnicity-conscious scholarships, a "relatively small proportion of scholarship dollars" were devoted to race- or ethnicity-conscious scholarships. At undergraduate schools, the proportion was about four percent.
- Higher education institutions reported that such scholarships were "valuable tools for recruiting and retaining" minority students. (They identified the help scholarships provided in "overcom[ing] the traditional difficulties...in enrolling and graduating minority students, such as financial hardships and a perception of cultural isolation.")
- Some higher education officials concluded that such scholarships "help[ed] build a critical mass of minority enrollment and sen[t] a message that the school sincerely want[ed] to attract [minority] students."

See GAO Report at 11.

The U.S. Department of Education subsequently concluded that the GAO report did "not indicate the existence of serious problems of noncompliance with the law in postsecondary institutions," finding that "race-targeted scholarships constitute[d] a very small percentage of the scholarships awarded to students at postsecondary institutions." See Title VI Policy Guidance at 8,756. See also *Financial Aid Professionals at Work in 1999–2000: Results from the 2001 Survey of Undergraduate Financial Aid Policies, Practices, and Procedures* (The College Board and National Association of Student Financial Aid Administrators, 2002) at 18 (Reporting (based on 1999–2000 data) that 47% of four-year public colleges, 43% of four-year private colleges and one-quarter of community colleges based their non-need awards (at least in part) on students' race or ethnicity.)

11. The distinction between the two articulated standards is apparently premised upon the Department's presumption that "a college's use of race or national origin as a plus factor, with other factors, is narrowly tailored to further the compelling governmental interest in diversity, as long as the college periodically reexamines whether its use of race or national origin as a plus factor continues to be necessary to achieve a diverse student body." *Id. at n. 10*. Thus, while adopting both the necessity and periodic review prongs of narrow tailoring analysis for race-as-a-factor aid, the Department as a matter of its administrative enforcement responsibilities presumed flexibility and minimal adverse impact on non-qualifying students, based on the "as-a-factor" operation of such policies.
12. However, as discussed later in this manual, 42 U.S.C. § 1981 may apply to such conduct by non-recipients of federal funds. See Chapter IV.
13. See also n. 9, above.



## **Section Two: Action Steps**

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

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

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

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

#### A. In General

When it comes to the use of race and ethnicity-conscious policies, including financial aid and scholarship policies, process matters—and it matters a lot. It is important that each institution administer a thorough and thoughtful process to reach good policy decisions. Also as a matter of federal law, it is crucial to establish a process that will support deference to educational judgments shaping those policy decisions.<sup>1</sup>

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

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

First and foremost in terms of process, an institution's pursuit of diversity-related goals and its analysis of race- or ethnicity-conscious policies should reflect a strong institutional commitment. Although that commitment can take many forms, the importance of support from the highest levels of the institution (as well as throughout the institution) cannot be underestimated—for at least three fundamental reasons. First, in cases where diversity interests are implicated, the policy goals must be mission-related. Without a strong connection to the core institutional mission, such policies are less likely to be deemed by federal courts as compelling to the institution. Second, the design and implementation of such policies cannot be evaluated in a vacuum, consistent with prevailing legal standards.

In other words, an examination limited to all financial aid policies is unlikely to suffice in an effort to establish that a particular race-conscious financial aid policy is narrowly tailored. Rather, all policies that support relevant diversity goals are likely to be important—including admissions and student affairs policies, among others. Third, without the necessary institutional support, the challenge of administering an appropriately resourced process of rigorous, periodic review of race- and ethnicity-conscious policies becomes more daunting. And, absent that process, race- and ethnicity-conscious financial aid and scholarship policies are at substantially greater risk of successful legal challenge.

## **B. Action Steps**

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

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

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

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

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

With respect to financial aid and scholarship programs, in particular, officials should ensure that all need- and merit-based policies and programs are included in the inventory. Higher education officials should also include externally-funded race- or ethnicity-conscious programs in cases where the higher education institution supports (through, e.g., the administration of the program) the operation of those programs. These may include scholarship programs that are funded by private sources, as well as programs that are authorized and funded by federal or state law.

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

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

The composition of an institution's evaluation team should be carefully considered. In particular, the team should involve representatives from the college or university's top administrative levels, and include representatives of specific programs and of institutional perspectives that have a bearing on diversity-related goals and strategies (from the top down). Also, individuals who can help assemble the research bases upon which policies can be evaluated should be included. In addition, because the use of race or national origin in financial aid or scholarships (as elsewhere) inevitably raises questions of federal (and frequently state) legal compliance, lawyers with an understanding of these issues should be included in the process.

Higher education officials should also consider the extent to which decisions regarding the establishment of diversity goals and the corresponding the use of race or ethnicity in financial aid and scholarships merit broader public engagement. In many cases, broader community input (including, for instance, perspectives of employers of university graduates) can be useful as part of the ongoing process of policy development and evaluation.

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

As federal law makes abundantly clear, race- and ethnicity-conscious policies will only survive under strict scrutiny if the justifications for those policies are well developed and supported by evidence.

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

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

- Institution-specific policies, including relevant mission statements and strategic goals;
- Institution-specific research and analysis (e.g., student surveys, student data, etc.), including information that reflects assessments about the relative need for and success of the policies in question;

- Social science research (regarding, for example, the educational benefits of diversity) that supports institution-specific goals; and
- Statements or opinions by institutional leaders, professors, students, and employers, which are based on actual experience and which shed light on the educational foundations that support the institution's diversity-related goals.

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

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

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

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

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

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

## **KEY QUESTIONS**

1. Have you assembled all written policies and procedures related to the provision of student financial assistance?
2. For each policy document, can you:
  - Identify each committee and the name and title of each person that was involved in its development, with copies of related meeting minutes; and
  - Locate copies of documents related to all reviews of each financial aid policy document after its adoption, and identify staff that conducted each review?
3. Have you assembled all documents that define or regulate financial aid, including faculty resolutions, policy documents, candidate rating sheets, grids or matrices, and written guidelines for staff involved in financial aid decisions?
4. Can you identify the mission-driven diversity interests associated with your race- and ethnicity-conscious financial aid and scholarship policies?
5. How do you define diversity, and how do you know it when you see it?
6. If financial aid is used to pursue diversity objectives, can you identify the diversity objectives pursued by the financial aid programs?
7. Do you have evidence that educational benefits of diversity at your institution are the result of your race- and ethnicity-conscious financial aid and scholarship policies?
8. Can you describe the relationship between how diversity objectives are pursued in the financial aid program and efforts to attract, enroll, and retain a diverse student body through admissions, recruitment, retention and other programs?
9. How are the goals of your financial aid and scholarship policies aligned with other policies (including, for example, admissions and student affairs policies), and do you know how they work together to achieve your goals?
10. How do you know that the race and ethnicity elements of your financial aid and scholarship policies are necessary for you to achieve your diversity-related goals? What evidence supports your conclusion?
11. Have all feasible race-neutral alternatives been tried or considered—including those outside the realm of financial aid and scholarships? What were the bases for adopting or rejecting those alternatives? How thoroughly were the alternatives evaluated, and against what criteria?
12. Is the consideration of race or ethnicity in the policy sufficiently flexible? In cases where race or ethnicity is a condition of financial aid or scholarship eligibility, can you establish that race- or ethnicity-as-a-factor policies would not as effectively help achieve your diversity goals?

13. What is the impact of your race- or ethnicity-conscious financial aid and scholarship policies on non-qualifying students? Are otherwise eligible students denied aid because of their race or ethnicity?
14. How frequently do you review and evaluate your race- and ethnicity-conscious financial aid and scholarship policies? Does that review involve multiple institutional stakeholders who examine those policies in light of clear educational goals and relevant legal rules?

Derived from OCR Title VI Information Request and *Diversity in Higher Education: A Strategic Planning and Policy Manual Regarding Federal Law in Admissions, Financial Aid, and Outreach* (College Entrance Examination Board, 2004).<sup>2</sup>

### Chapter III Endnotes

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1. Federal courts addressing a wide range of legal challenges in the education setting have, in fact, repeatedly inquired about the foundations (both in terms of process and substance) supporting positions advanced by higher education institutions. Nowhere is this focus more visible than in the context of race- and ethnicity-conscious policies, where the requirement of “periodic review” is a specific element of the narrow tailoring standard that must be satisfied in order to demonstrate compliance with federal law. See Chapter VI.
2. Note: Throughout this manual, questions posed by OCR in its investigations of complaints of discrimination (or derivations from OCR inquiries) have been included to illustrate the kinds of evidence that may be called for in certain instances. These questions do not represent relevant inquiries in all cases. Rather, they are intended to provide information that can guide and support institutional planning and policy development over time.

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

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

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

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

## IV. Strict Scrutiny: What Financial Aid and Scholarship Practices Might Be Subject to Rigorous Legal Review?

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

### A. In General

Federal courts have consistently applied strict scrutiny to policies that treat individuals differently based on their race or ethnicity. Classifications based on race or ethnicity that result in the unequal treatment of individuals trigger strict scrutiny.

It is important to recognize that the application of strict scrutiny to a particular financial aid or scholarship practice (as discussed in detail in the following chapters) does not mean that the practice is unlawful. While the standard is high, to be sure, Justice O'Connor observed that "strict in theory does not mean fatal in fact."<sup>1</sup> Indeed, in *Grutter* (which upheld the University of Michigan Law School's admissions program under a strict scrutiny analysis), she observed:

Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and sincerity of the reasons advanced by the governmental decision-maker for the use of race in that particular context.<sup>2</sup>

In addition, the status of the entity responsible for making the race- or ethnicity-conscious financial aid or scholarship decisions is unlikely to affect the level of legal scrutiny applied. The Fourteenth Amendment to the U.S. Constitution (which applies to "state actors" or public entities) is coextensive with Title VI of the Civil Rights Act of 1964 ("Title VI") (which applies to any recipient of federal education funds, public or private). Therefore, a college or university's status as public or private is, in most cases, unlikely to affect the determination regarding whether strict scrutiny applies to a particular policy or practice. Moreover, though an issue of continuing debate in the federal courts, strong arguments support the extension of strict scrutiny principles to purely private conduct under 42 U.S.C. §1981. That statute applies to both public and private entities (irrespective of their status as recipients of federal funds) in cases in which they make or enforce race- and ethnicity-conscious contracts.<sup>3</sup> (Several federal courts have ruled that scholarships conferred by colleges and universities are "contracts" within the meaning of §1981.)

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

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

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

Thus, financial aid and scholarship policies that expressly include race or ethnicity as a factor in aid will likely trigger strict scrutiny.<sup>4</sup> In addition, though less developed in the most relevant case law, strict scrutiny is also likely to be triggered by facially race- or ethnicity-neutral policies in cases where the intent of those policies is predominantly motivated by race or ethnicity.<sup>5</sup> In short, when financial aid or scholarship practices are facially discriminatory or when they reflect intentional (though facially neutral) discrimination, then strict scrutiny principles likely apply. (This should be distinguished from race- or ethnicity-neutral policies that may have only a disparate impact based on race or ethnicity, which generally do not implicate strict scrutiny.)

### Scholarships for international students.

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

That conclusion should be considered in light of the U.S. Supreme Court authority that addresses discrimination on the basis of alienage—another classification that is subject to strict scrutiny review, at least in certain contexts. In *Nyquist v. Mauclet*,<sup>6</sup> the Court established principles that apply to discrimination *against* resident aliens in student financial aid programs, striking down a state statute that barred resident aliens from eligibility for scholarships (and other financial assistance) under a strict scrutiny analysis. Importantly, however, the reach of that decision may be limited. Although federal rules have not been definitively established, the prevailing view is that discrimination against non-resident aliens may not trigger strict scrutiny review, whereas discrimination against resident aliens will.<sup>7</sup>

### Scholarships for Native American and Native Hawaiian students.

Given the unique status and history of Native Americans and Native Hawaiians, questions have arisen regarding the application of strict scrutiny to financial aid and scholarships that benefit those two groups. As a general rule, there appear to be limited arguments supporting the exclusion of such awards from strict scrutiny review. The extent to which such

arguments can be pressed likely depends on whether the award of financial aid actually distinguishes among students upon race or ethnicity (and would likely be subject to strict scrutiny), or whether the award is based on political affiliations (or related and specific congressional authorization) associated with the unique status of those groups (and may not be subject to strict scrutiny).

Although definitive guidance in this area does not exist, both federal court decisions and the Department's Title VI policy are instructive. First, the U.S. Supreme Court has suggested that in most circumstances Native American and Native Hawaiian classifications are likely to be viewed as racial classifications.<sup>8</sup> In 2000, the Court concluded that voting restrictions in favor of Native Hawaiians in fact were racial classifications. In that case, the Court cited cases involving Native American classifications, concluding that such classifications could only be deemed non-racial when the classification at issue related to "members of a federally recognized tribe" (and not Native Americans, generally), and the preference at issue was directly associated with fulfilling Congress' "unique obligation toward the Indians" and "further[ing] Indian self government."<sup>9</sup> Correspondingly, in its Title VI Policy Guidance, the U.S. Department of Education stated that it had "found no legal authority for treating affirmative action by recipients of Federal assistance any differently if the group involved is Native Americans or Native Hawaiians," but acknowledged that its policy did not "address the authority of tribal governments or tribally controlled colleges to restrict aid to members of their tribe."<sup>10</sup>

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

Financial aid and scholarship decisions confer benefits and opportunities that are sufficient to trigger strict scrutiny if those benefits are race- or ethnicity-conscious.<sup>11</sup> These decisions can be need-based or merit-based. Moreover, the source of the aid in question (whether institutional or external aid) is unlikely to affect the application of strict scrutiny to the higher education institution awarding the aid, so long as that institution is the entity responsible for making the determination about which student receives the aid.

### **Need-based aid.**

Need-based aid, which can include grants, scholarships, loans and work-study assistance, is designed to provide financial assistance to students based on the difference between their projected expense budget and the expected family contribution—typically determined by a need analysis formula. Need-based aid can be provided from many sources and can be subject to different administrative rules and standards,<sup>12</sup> as well as different institutional practices.

As a general rule, to the extent that need-based aid decisions adhere exclusively to need-related criteria or formulas (which, by definition, do not consider distinctions based on race or ethnicity), those decisions will not trigger strict scrutiny. In the event, however, that the consideration of race or ethnicity becomes a factor in an institution's need analysis and/or its corresponding decisions about the actual amount or mix of financial aid a student receives, then strict scrutiny will likely be triggered.

Strict scrutiny can apply in several ways. First, if the determination regarding who is eligible for need-based aid or what amount of aid is awarded is affected by consideration

of the race or ethnicity of eligible students, then that determination is likely subject to strict scrutiny. For instance, if an institution applies different standards or “cut points” for students of different races when making determinations about the amount of aid students should receive, then strict scrutiny likely applies. Similarly, if an institution considers certain factors in the determination of need (such as home equity information or the ability of non-custodial parents to help fund the student’s education) for some students and not others based on the students’ ethnicity, then that practice is probably subject to strict scrutiny.

Second, once an initial determination regarding need is made, financial aid practices can also trigger strict scrutiny when they lead to different “packages” of aid (e.g., a higher ratio of grants to loans within the overall aid package) based on race or ethnicity. Thus, if an institution awards a higher ratio of grants-to-loans to all of its Hispanic admittees when compared to all other admittees, for example, then that practice is likely to be subject to strict scrutiny.

In the context of these judgments, it is important to distinguish between practices that treat students differently based on race or ethnicity, and those that do not. For example, a higher education institution’s decision to confer a preferential package to a particular student who happens to be black would be unlikely to trigger strict scrutiny in a situation where the practice: (1) was not pursuant to a more comprehensive policy reflecting such consideration for black students; (2) was not predominantly motivated by efforts to enhance the racial diversity on campus by attracting more black students; and (3) was, instead, a reflection of an effort to “meet the competition”—to match the kind of package that the student was offered from another higher education institution. In short, it is important to keep in mind that not all decisions that may positively affect students of particular racial or ethnic backgrounds are automatically transformed into race- or ethnicity-conscious decisions that are subject to strict scrutiny.<sup>13</sup>

### **Merit-based aid.**

In contrast to need-based aid decisions, merit-based aid decisions are designed to provide financial assistance to students based on certain characteristics or aspects of their background that are important to the awarding institution. Particular scholarship awards may, for instance, reflect a desire to attract students who exhibit advanced academic potential (as evidenced by test scores or class rank) or athletic skills; or to students who have a particular socioeconomic background, race, or ethnicity. Scholarships that are based upon a student’s race or ethnicity in whole (race- or ethnicity-exclusive) or in part (race- or ethnicity-as-a-factor) are likely to be subject to strict scrutiny. Stated differently, when determining whether specific scholarships are likely subject to strict scrutiny, it does not matter if the scholarship operates as race- or ethnicity-exclusive or if it only includes consideration of race or ethnicity as one factor among others.<sup>14</sup> For example, if an institution offers a “Martin Luther King” scholarship, which includes the consideration of race or ethnicity among other factors such as community service and leadership, that scholarship will be subject to strict scrutiny just as a “State Scholars” scholarship, for which only underrepresented minority students are eligible.

## C. Program Funding and Administration

### 1. *External, private funding of race- and ethnicity-conscious scholarships.*

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

First, in cases where higher education institutions are directly involved in the administration of private, externally funded scholarships, then those institutions are likely to be subject to strict scrutiny liability for those private practices, given their role in actively supporting those scholarships. In particular, Title VI prohibits discrimination “directly or through contractual or other arrangements” and “in the administration” of financial aid programs.<sup>15</sup> As applied by the U.S. Department of Education’s Office for Civil Rights, potential Title VI liability (and, consequently, the application of strict scrutiny) extends to situations in which higher education institutions fund, administer, or significantly assist in the administration of private financial aid. In such cases, that action will likely be deemed to be “within the operations of the college” and, therefore, subject to strict scrutiny.<sup>16</sup>

U.S. Department of Education regulations highlight the kinds of practices that are likely to subject higher education institutions to potential liability pursuant to strict scrutiny for the operation of private race- or ethnicity conscious scholarships. These include:

- Institutional assistance in setting criteria for the selection of students eligible for the private scholarship;
- Institutional assistance in selecting qualifying students for the private scholarship; and
- Institutional assistance in supporting the external funder through advertising (beyond the general assistance provided to any outside entity that seeks to advertise its scholarship programs).<sup>17</sup>

Second, even where there is no issue of whether the higher education institution is providing significant assistance to the private scholarship award, issues arise regarding the potential strict scrutiny liability of the private entity itself (even though not a recipient of federal funds). As discussed above, federal courts (including, recently, the U.S. Supreme Court in *Gratz* and *Grutter*) have indicated that even private donors may be subject to strict scrutiny in cases where they make or enforce contracts (which may include scholarships) that discriminate based on race or ethnicity. Given the potential strict scrutiny standard that is triggered by 42 U.S.C. §1981, private funders should be advised of the need to evaluate their race- or ethnicity-conscious scholarships under the standards described in this manual.

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

Questions have also arisen regarding whether strict scrutiny applies to congressionally and state-authorized race- or ethnicity-conscious scholarships. Case law and U.S. Department of Education policies make it clear that in certain cases, while subject to strict scrutiny standards as a matter of constitutional law (applicable to public entities), congressionally authorized aid may not be subject to that review as a matter of federal statutory law (e.g., Title VI). Specifically, the U.S. Department of Education's Title VI Policy Guidance affirms that a college may award race- or ethnicity-conscious financial aid without the prospect of strict scrutiny review in cases where the aid is awarded pursuant to a federal statute that specifically authorizes the award of such aid.<sup>18</sup> Thus, while congressionally authorized race- and ethnicity-conscious financial aid and scholarships remain subject to strict scrutiny when awarded by public entities (state actors), they may not be subject to that review when awarded by private institutions of higher education.

By contrast, any state-sanctioned award of race- or ethnicity-conscious financial aid or scholarships by both public and private institutions of higher education will likely be subject to strict scrutiny. State entities that are responsible for the funding or administration of those programs will likely be (independently) subject to strict scrutiny liability, as well.

## Chapter IV Endnotes

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1. *Grutter*, 539 U.S. at 326.
2. *Grutter*, 539 U.S. at 327. “[S]trict scrutiny is not blind to context...[T]o determine whether a particular racial classification offends the equal protection guarantee, a reviewing court must factor any and all relevant contextual considerations into the decisional calculus.” *Adarand*, 515 U.S. at 228.
3. In both *Grutter* and *Gratz*, the U.S. Supreme Court ruled that the reach of 42 U.S.C. §1981 was the same as that of the U.S. Constitution’s Equal Protection Clause (citing *General Building Contractors Assn., Inc. v. Pennsylvania*, 458 U.S. 375 (1982)). In *Gratz*, the Court observed that §1981 “proscribes discrimination in the making or enforcement of contracts against, or in favor of, any race,” and that a “contract for educational services is a ‘contract’ for purposes of §1981.” This position has been challenged as, among other things, nonbinding dicta, in *Doe v. Kamehameha Schools*, 295 F. Supp. 2d 1141 (D.Haw. 2003), in which a federal district court has applied a standard less than strict scrutiny to a non-recipient private school pursuant to §1981.
4. Ethnicity, or national origin, refers to heritage, nationality group, lineage, or country of birth of the person or the person’s parents or ancestors before their arrival in the United States. See American Community Survey, U.S. Census Bureau, *Subject Definitions*, [www.census.gov/acs/www/UserData/Del/Hispanic.htm](http://www.census.gov/acs/www/UserData/Del/Hispanic.htm). See also *Dawavendewa v. Salt River Project*, 154 F.3d 1117 (9th Cir. 1998) (ruling that “national origin” includes “the country of one’s ancestors” in a Title VII employment discrimination case); *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 Fed. Reg. 58,782 (October 30, 1997) issued by the Office of Management and Budget.
5. Policies that are neutral on their face may trigger strict scrutiny in the event that “discriminatory intent or purpose” is a motivating factor behind the policy. See *Village of Arlington Heights v. Metro. Housing Develop. Corp.*, 429 U.S. 252, 265 (1977); *Hunter v. Underwood*, 471 U.S. 222, 225 (1985). The impact of the questioned policy (whether, e.g., it “bears more heavily on one race than another,” *Washington v. Davis*, 426 U.S. 229, 242 (1976)), standing alone, is generally insufficient to demonstrate a constitutional violation, but it “may provide an important starting point” in the analysis. See *Village of Arlington Heights*, 429 U.S. at 266. See generally, Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 Baylor L. Rev. 289 (2001).
6. 432 U.S. 1 (1977).
7. See, e.g., *Leclerc v. Webb*, 270 F. Supp. 2d 779 (E.D. La. 2003) (“Non-immigrant aliens ...are sufficiently different from citizens and immigrant aliens in relevant respects that distinctions between them should not call for heightened scrutiny.”); *Wallace v. Calogero*, 286 F. Supp. 2d 748 (E.D. La. 2003) (Nonimmigrant resident aliens as a class are a “prime example of a ‘discrete and insular’ minority for whom...heightened judicial solicitude is appropriate.”) (emphasis added.); *Ahmed v. University of Toledo*, 664 F. Supp. 282 (N.D. Ohio 1987) (“International students (nonimmigrant alien students) are not a suspect classification.” (citations omitted).) See generally Kaplan and Lee, *The Law of Higher Education* (Third Edition, 1995) at pp. 436-441.
8. *Rice v. Cayetano*, 528 U.S. 495 (2000). The Court’s decision was rendered pursuant to the Fifteenth Amendment of the U.S. Constitution, which (among other things) prohibits states from denying or abridging the right to vote based on race. Correspondingly, at least one federal court has ruled that alleged discrimination on the basis of tribal affiliation falls within the definition of national origin (which includes “the country of one’s ancestors”). See *Dawavendewa v. Salt River Project*, 154 F.3d 1117 (9th Cir. 1998). See also *Booker v. Special School District No. 1*, 585 F.2d 347 (8th Cir. 1978). But see *Arakaki v. Cayetano*, 2003 U.S. App. Lexis 9169 (9th Cir. 2003) (observing that the Supreme Court in *Rice* did not “address the merits of Native Hawaiians’ equal protection claim” and avoided that “difficult terrain”).
9. See *Rice*, citing *Morton v. Mancari*, 417 U.S. 535 (1974).
10. 59 Fed. Reg. 8,756. In the context of this rule, OCR in 1995 resolved *In re Northwest Indian College*, OCR Case No. 10952002, which involved a claim that providing reduced tuition for students who were members of a federally recognized tribe was forbidden by Title VI. OCR concluded that the college’s policy, which provided that preference, was a “permissible” distinction because “it [was] a political rather than a racial distinction,” and Title VI did not apply. OCR also observed that the Tribally Controlled Community Colleges Act provided federal assistance to Northwest Indian College “based on the number of Indians [attending and] defined as ‘members of federally recognized tribes.’” Thus, OCR concluded that a tuition preference for students who could “demonstrate Indian ancestry” was within the bounds of tribal authority to define and control membership [...] consistent with the purpose of the Tribally Controlled Community Colleges Act.”
11. By contrast, the fact that a college or university may have diversity goals, standing alone, does not trigger strict scrutiny review. See *In re University of Wisconsin System*, OCR Case No. 05012066 (July 27, 2001) (finding an insufficient factual basis upon which to initiate a Title VI investigation where: (1) the evidence was that higher education system had established broad diversity objectives—including to “increase the number of students of color who apply, are accepted, and enroll;” but (2) there was no evidence of, e.g., race-conscious admissions policies conferring opportunities for students in furtherance of those objectives.)
12. According to the U.S. Department of Education’s “The Student Guide,” federal student aid falls into three categories:  
 Grants—financial aid that the student does not need to repay. Generally, the student must be an undergraduate, and the amount he/she receives depends on need, cost of attendance, and enrollment status (i.e., part-time or full-time). Federal Pell Grants for the 2003–2004 award year (July 1, 2003 to June 30, 2004) ranged from \$400 to \$4,050. Federal Supplemental Educational Opportunity Grants (FSEOGs) ranged from \$100 to \$4,000.  
 Work-Study—money a student earns while enrolled in school that helps defray educational expenses. The Federal Work-Study Program, available to both undergraduates and graduate students, encourages community service work and work related to one’s course of study.

Loans—borrowed money that one must repay with interest. Federal loans are available to both undergraduate and graduate students. Parents are also allowed to borrow to pay the educational expenses of their dependent undergraduate children. Federal Perkins Loans are offered by participating schools to students who demonstrate the greatest financial need (Federal Pell Grant recipients get top priority). These loans are repaid directly to the school. Stafford Loans are made to students and PLUS loans are made to parents through the William D. Ford Federal Direct Loan Program (“Direct Loan”) and the Federal Family Education Loan Program (“FFEL”). Eligible Direct Loan students and Parents borrow directly from the federal government at participating schools. Direct Loans consist of Direct Stafford Loans, Direct PLUS Loans, and Direct Consolidation Loans. These loans are repaid directly to the U.S. Department of Education. FFEL Loans are guaranteed through private lenders. FFELs consist of Federal Stafford Loans, Federal PLUS Loans, and Federal Consolidation Loans.

To be eligible for any of the federal loans discussed above, a student must meet the following criteria: (1) demonstrate financial need, except for loan programs; (2) demonstrate qualification to enroll in postsecondary education (high school diploma, GED, *etc.*); (3) be enrolled or accepted for enrollment as a regular student working toward a degree or certificate in an eligible program; (4) be a U.S. citizen or eligible noncitizen; (5) have a valid Social Security Number, unless the student is from the Republic of the Marshall Islands, the Federated States of Micronesia, or the Republic of Palau; (6) meet satisfactory academic progress standards set by the post secondary school the student is attending; (7) certify that the student will use the financial aid for educational purposes and certify that the student is not in default on a federal student loan; (8) and comply with Selective Service registration requirements. See *The Student Guide: Financial Aid from the U.S. Department of Education 2004-2005*, [http://studentaid.ed.gov/students/attachments/sitesources/StudentGuideEnglish2004\\_05.pdf](http://studentaid.ed.gov/students/attachments/sitesources/StudentGuideEnglish2004_05.pdf).

13. In this regard, questions have arisen about different treatment of students when conferring need-based financial aid, based on research that indicates students of a particular race or ethnicity are more likely to react predictably to increases or reductions in grant aid (e.g., as the level of grant aid declines and work-study or loan aid increases, the group’s enrollment declines). See *Cultural Barriers to Incurring Debt: An Exploration of Borrowing and Impact on Access to Postsecondary Education*, ECMC Group Foundation, March 2003, <http://www.ecmcfoundation.org/documents/CulturalBarriersDocument.pdf> (reporting that women and Hispanics have been found to have less favorable attitudes toward educational loans than men and whites, and that minority students, in general, have been shown to be more sensitive to price and less willing to use educational loans to pay for college when making their college decisions). Although such research *might* affect ultimate judgments about federal compliance, it is unlikely that such research foundations would affect the initial determination regarding whether a specific practice triggers strict scrutiny. Simply stated, if the policy or practice is race- or ethnicity-conscious, it will likely trigger strict scrutiny—regardless of the justification for the different treatment of students.
14. When addressing these two categories of scholarships, it is important to distinguish between the questions of *whether* strict scrutiny principles apply in the first instance (the issue addressed in this Chapter) and *the result* of the application of those principles (the issues addressed in Chapters V and VI).
15. 34 C.F.R. 100.3. The Department has also confirmed that “individuals or organizations not receiving Federal funds are not subject to Title VI.” See Title VI Policy Guidance at n.12. Note, however, that OCR may examine the relationship among potential “external” funders or administrators to ensure that they are, in fact, separate from the higher education institution. In one case, OCR rejected as “not a good choice” a proposal by a college to allow a separate foundation to administer race-conscious scholarships that were funded from another external source. OCR indicated that the college’s “extensive ties” to the foundation were problematic and would raise Title VI concerns. See *In re Northern Virginia Community College*, OCR Case No. 03962088 (August 1, 1997).
16. At the same time, if scholarship programs are externally funded and administered—without significant assistance from the higher education institution—then higher education institutions are unlikely to be subject to strict scrutiny review related to those programs. See *In re Northern Virginia Community College*, OCR Case No. 03962088 (August 1, 1997) (approving the transfer of the “administration and award” of race-conscious scholarships to a private entity, where the higher education institution also “returned the funds for the scholarships to the [external] donors.”)
17. See 34 C.F.R. 106.37 (explaining rules related to sex discrimination prohibitions of Title IX of the Education Amendments of 1972).
18. The Department, applying long-standing rules of statutory construction, has concluded that financial aid programs authorized under one federal statute cannot be considered to violate another federal statute. As a foundation for that conclusion, the Department has cited the “canon of construction under which the specific provisions of a statute prevail over the general provisions of the same or a different statute.” Title VI Policy Guidance at 8,759 (citing 2A N. Singer, *Sutherland Statutory Construction* section 46.05 (5th ed. 1992); *Radzanower v. Touche Ross and Co.*, 426 U.S. 148, 153 (1976); *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974); *Fourco Glass Co. v. Transmira Products Corp.*, 353 U.S. 225, 228-29 (1957)). A key question that must be addressed with respect to specific scholarships is the level of specificity pursuant to which the congressional authorization is deemed to exist. Correspondingly, when institutions of higher education implement policies designed to adhere to federal statutory authority, they should take steps to ensure that their policies closely track federal rules so as not to restrict opportunities or benefits based on race or ethnicity more than called for in federal law.



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

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

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

## V. Compelling Interests: When Might Race-Conscious Financial Aid and Scholarship Practices Be Justified by the Educational Benefits of Diversity (or Other Compelling Reasons)?

If a financial aid or scholarship policy is deemed to be race- or ethnicity-conscious such that it triggers strict scrutiny, then the second issue to be examined is whether that particular practice is supported by a compelling interest. Thus, the second area of focus by higher education officials should be on the justifications for their consideration of race and ethnicity when making financial aid and scholarship awards.

### A. In General

As discussed in Chapter II, the mission-driven diversity-related interests to be achieved by financial aid and scholarships are similar (if not, in many cases, identical) to the interests in admissions practices. Thus, many of the principles regarding compelling interests that apply in the admissions context will likely apply to the financial aid and scholarship setting, as well.

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

In *Grutter*, the U.S. Supreme Court resolved the issue that had vexed numerous federal courts for almost a decade, ruling that a university's interest in promoting the educational benefits of diversity can be sufficiently compelling to justify the limited consideration of race and ethnicity in admissions.<sup>2</sup>

The Court reached this conclusion based on several principles:

- **Educational mission-driven judgments are entitled to deference.** Colleges and universities are entitled to deference in their judgments that the benefits of diversity are essential to their mission, and federal courts should presume good faith by the given institution, absent a showing to the contrary.
- **The educational benefits of diversity are “substantial” and “real.”** Abundant evidence establishes that the educational benefits of diversity (including enhanced learning, improved civic values, and better preparation for the workforce) are “substantial” and “not theoretical but real.”

- **Diversity may be defined with respect to an educational goal of attracting a critical mass of minority students.** Higher education institutions may define their diversity goals with reference to the aim of achieving a “critical mass” of underrepresented students—a flexible numerical goal associated with the educational benefits the institution seeks to achieve.
- **Principles of access and equity complement educational diversity goals.** It is important that higher education institutions—and corresponding pathways to leadership—be visibly open and accessible to students from all backgrounds (including students of all races and ethnicities) in order for higher education institutions to serve their fundamental role.

## B. Mission-Driven Educational Judgments Merit Deference

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

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

## C. The Educational Benefits of Diversity Are Substantial and Real

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

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

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

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

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

The Court in the University of Michigan cases also affirmed that higher education institutions may define their diversity goals with respect to the aim of enrolling “a critical mass” of underrepresented students. In the view of the Court, this “critical mass” goal is defined with specific “reference to the educational benefits that diversity is designed to produce.” Notably, Justice O’Connor did not describe critical mass with precision, other than to reference trial testimony that it meant “meaningful numbers” or “meaningful representation” or “a number that encourages underrepresented minority students to participate in the classroom and not feel isolated.”<sup>4</sup> (At the same time, Justice O’Connor carefully distinguished the “goal of attaining a critical mass of underrepresented minority students” from an impermissible quota.)

In reaching these conclusions, the Court confirmed that the educational interests served by race- and ethnicity-conscious admissions practices cannot exclusively be those related to race and ethnicity, observing that the University’s goal was not to assure “some specified percentage of a particular group merely because of its race or ethnic origin,” but rather to achieve “the educational benefits that diversity is designed to produce.”<sup>5</sup> Thus, there were sufficient foundations for the Court to embrace the University of Michigan’s conceptualization of diversity according to a critical mass theory, which established concrete goals (but not rigid quotas) linked to the educational interests in diversity.

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

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

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

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

“[T]he diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity...[E]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective....And, ‘[n]owhere is the importance of such openness more acute than in the context of higher education.’ Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized....In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity....[L]aw schools ‘cannot be effective in isolation from the individuals and institutions with which the law interacts.’”<sup>6</sup>

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

Access...must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.<sup>7</sup>

Thus, colleges and universities might consider the way in which principles of access and equity may complement their goals regarding the educational benefits of diversity. In addition, in cases where the educational benefits of diversity may not, in fact, provide an appropriate justification for a race- or ethnicity-conscious financial aid or scholarship practice, higher education officials may consider the potential that principles of access and equity, standing alone, might provide a compelling justification for those practices.<sup>8</sup>

## **KEY QUESTIONS**

1. Describe the goals of the university's admissions process and the goals of its financial aid program. If the university contends that, its use of race and national origin in awarding financial aid is justified by a compelling interest in student body diversity, indicate:
  - a. The university's definition of diversity.
  - b. Each element, factor, or criterion that define diversity.
  - c. The university's mission.
  - d. The university's core educational objectives.
  - e. Any university policy or decision documents that describe or analyze why student body diversity is deemed a compelling interest associated with the university's mission.
  
2. If the university has indicated that diversity produces educational benefits:
  - a. Identify each educational benefit the university produced by diversity.
  - b. Identify each educational benefit produced by racial and ethnic diversity.
  - c. Provide copies of all research, analyses, studies, or other information the university relies on to substantiate its claim that including race or national origin as elements of diversity produces educational benefits at the university.
  
3. If the university has determined or decided that it needs a critical mass of students from particular races or national origins as a condition for achieving the educational benefits of diversity, indicate:
  - a. How the university defines critical mass.
  - b. How the university's definition of critical mass relates to:
    - i. The university's mission and core educational objectives.
    - ii. Each educational benefit described above.
    - iii. The ability of students to make unique contributions to the character of the university.
    - iv. How the university determines the numbers of students needed to establish a critical mass.
    - v. How the financial aid decisions are aligned with and closely tailored to the critical mass needs.
  
4. For each element of diversity identified above:
  - a. Describe how that diversity factor is identified in making financial aid decisions.
  - b. Describe the information used by financial aid staff to measure and track that diversity factor in determining the composition of the group of students to whom financial aid awards are made.
  - c. Describe all efforts to measure and evaluate the effect of this diversity factor on the production of educational benefits.

## Chapter V Endnotes

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1. Race- or ethnicity-conscious measures can be used to remedy the present and continuing effects of past discrimination, but only upon satisfying strict scrutiny standard and upon a “strong basis in evidence.” (This evidence may—but need not in all cases—stem from court, legislative, or administrative findings of discrimination. *See generally* 59 Fed. Reg. 36 at 8759-60 (summarizing relevant federal law).) The evidentiary burden for establishing a remedial justification, particularly with respect to the link between present race- or ethnicity-conscious policies and past discrimination, is very high.

Several federal courts have approved race-conscious or diversity-related financial aid or scholarship practices in a remedial context—in *federal cases involving compliance with higher education desegregation obligations* under the Equal Protection Clause of the U.S. Constitution or Title VI. They include:

- *Knight v. Alabama*, 900 F. Supp. 272, 357 (N.D. Al. 1995): The court ordered that the State of Alabama fund scholarships to be administered at HBCUs to assist in “the diversification of student bodies.”
- *United States v. Louisiana*, 718 F. Supp. 499, 519 (E.D. La. 1989) *vacated on other grounds*: The court ordered that the State Board “develop a program of scholarships designed to attract other-race students to both primarily white and primarily black institutions,” and that a “fixed percentage of each institution’s overall operating budget” be set aside for this purpose. The court also ordered that the State Board establish a state-wide other-race scholarship program.
- *Geier v. Sundquist* (M.D. Tenn. 2001): As part of a consent decree with the U.S. Department of Justice, the State of Tennessee agreed to form a partnership with the University of Tennessee (UT) system and Tennessee Board of Regents (TBR) institutions “to increase the availability of financial aid for other-race students” attending UT and TBR institutions, and agreed to make funds available for five years to support “minority financial aid programs” in the UT system and at TBR institutions. (*See* U.S. Department of Justice settlement at [www.usdoj.gov/crt/edo](http://www.usdoj.gov/crt/edo).)

2. “At bottom,” according to one federal court of appeals, “*Grutter* plainly accepts that constitutionally compelling internal and external societal benefits flow from the presence of racial and ethnic diversity in educational institutions.” *Parents Involved in Community Schools v. Seattle School District No. 1*, 377 F.3d 949, 964 (9th Cir. 2004).

Cases decided after the University of Michigan decisions have extended the reach of the conclusion that the educational benefits of diversity are compelling to the elementary and secondary setting. *See id.* (the “internal educational and external societal benefits [that] flow from the presence of racial and ethnic diversity in educational institutions” are “as compelling in the high school context as they are in higher education.”); *Lynn School Committee*, 2004 U.S. App. LEXIS 21791 at 42 (1st Cir. 2004) (observing that the issue of racial diversity as compelling in the K–12 context presents “a closer question” but concluding that contextual differences notwithstanding and based on facts presented, “a public school system has a compelling interest in obtaining the educational benefits that flow from a racially diverse student body”).

*Note:* As this manual went to press, the Ninth and First Circuit Courts of Appeal had not yet issued anticipated en banc opinions in these two cases, in which the panel opinions described had been withdrawn pending further court action. However, for the purposes of illustrating potential applications of *Grutter* and *Gratz*, several references to these decisions are included in this and subsequent endnotes.

3. The Ninth Circuit Court of Appeals has expanded on this ruling in two cases. Cautioning against an overly expansive extension of deference in a strict scrutiny analysis, the court in *Seattle School District* refused to extend the deference to educational policymakers called for in *Grutter* in an “unfettered” manner. Specifically, the court refused to defer to educational judgments that (among other things) were not “internal to the school environment” or “within the special expertise of school administrators.” Expanding on its conclusion, the court observed that while limited deference might be appropriate when schools pursue “core goals,” such deference is “entirely unwarranted when they court tangential ones.” In addition, the court stated:

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

Five months later, the Ninth Circuit Court of Appeals in a higher education context (and with a different panel of judges) stated that when determining if a law school had met its obligation with respect to strict scrutiny, “we must assume that it acted in good faith in the absence of a showing to the contrary and defer to its educational judgments.” *Smith v. University of Washington Law School*, 392 F.3d. 367,372 (9th Cir. 2004).

4. *Grutter*, 539 U.S. at 318; see also White, L., *One Year After the Michigan Cases: What Are We Doing? With Special Emphasis on Provocative Questions Raised or Left Unanswered By the Michigan Cases* (2004) at 20. A very enlightening discussion of the antecedents and underpinnings of the critical mass theory are chronicled by Mr. White, see *id.* at 21–28.

Note also that the critical mass theory put forth by the University of Michigan was a central point of contention within the Court, with four justices highly critical of the concept. In particular, Justice Rehnquist challenged the fact that a different critical mass might exist for different sub-populations, as the University of Michigan maintained: "... From 1995 through 2000, the Law School admitted between 1,130 and 1,310 students. Of those, between 13 and 19 were Native American, between 91 and 108 were African-Americans, and between 47 and 56 were Hispanic. If the Law School is admitting between 91 and 108 African-Americans in order to achieve 'critical mass,' thereby preventing African-American students from feeling 'isolated or like spokespersons for their race,' one would think that a number of the same order of magnitude would be necessary to accomplish the same purpose for Hispanics and Native Americans. ... [O]ne would have to believe that the objectives of 'critical mass' ... are achieved with only half the number of Hispanics and one-sixth the number of Native Americans as compared to African-Americans. But [Michigan officials] offer no race-specific reasons for such disparities. Instead, they simply emphasize the importance of achieving 'critical mass,' without any explanation of why that concept is applied differently among the three underrepresented minority groups." 539 U.S. at 365-66.

5. At the same time, policies established in the name of diversity are unlikely to survive strict scrutiny when the goals themselves are "too amorphous" or "too ill defined" to reflect authentic—and compelling—institutional interests. See, e.g., *Wessman v. Gittens*, 160 F3d 790,796 (1st Cir. 1998); *Johnson v. Board of Regents*, 263 F3d. 1234, 1239 (11th Cir. 2001).
6. *Grutter*, 539 U.S. at 331-32.
7. *Grutter*, 539 U.S. at 332-33.
8. Though some judicial hostility to expanding the list of compelling interests is apparent, see *Grutter*, 539 U.S. at 395 (Kennedy dissenting) (approving consideration of race in "this one context"); *Grutter*, 539 U.S. at 349-378 (Thomas dissenting) (expansive discussion of hostility to racial classifications); see also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989), the U.S. Supreme Court in the University of Michigan decisions did not address (and, therefore, did not rule out) other interests that might justify race-conscious practices in the higher education context. Moreover, in its race-conscious financial aid policy, the U.S. Department of Education declined to "foreclos[e] the possibility that there may be other bases [in addition to remedial and diversity-related interests] on which a college may support its consideration of race or national origin in awarding financial aid." Title VI Policy Guidance at n.1.



## VI. Narrow Tailoring: Under What Circumstances Might Race-Conscious Financial Aid and Scholarship Practices Be Viewed As Sufficiently Limited So As to Lawfully Support Compelling Interests?

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

### A. In General

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

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

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

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

- **Flexibility.** Is the use of race or ethnicity sufficiently flexible to ensure individualized consideration of all students? More specifically, does the use of race: (1) ensure competitive consideration among all students (and not operate as a quota, which insulates

certain students from competition with others); and (2) ensure that each applicant is “evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application.”<sup>4</sup>

- **Necessity.** Is the consideration of race or ethnicity necessary to achieve the institution’s compelling interest[s]? In other words, have race-neutral programs or strategies been considered and, where appropriate and feasible, tried?
- **Burden.** Does the operation of the race- or ethnicity-conscious policy minimize harm to members of non-favored racial or ethnic groups? Stated differently, does the policy unduly burden individuals who are not members of the favored racial and ethnic groups?
- **Limits in Duration.** Is the use of race or ethnicity in the policy limited in time, with a logical end point? Has a process for periodic review and evaluation been established so that the continuing need for race- and ethnicity-conscious practices can be determined in light of federal legal standards?

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

## B. Flexibility in the Use of Race or Ethnicity in Financial Aid and Scholarship Policies

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

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

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

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

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

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

First, and perhaps most predominantly, questions have arisen regarding the use of race- and ethnicity-exclusive scholarships—scholarships that, by definition, condition the award of aid on a student being a member of a particular racial or ethnic group. As an initial matter, it is obvious that if a scholarship is structured so that, for example, race is one factor among others (such as community service, special talents, or academic promise), and the consideration of race when making the award is pursuant to a whole-file, individualized review, then the practice is much more likely to be sustained as lawful—consistent with both the University of Michigan decisions and the Department's Title VI Policy Guidance. At the same time, there is no federal case or Department rule that categorically rejects all race- or ethnicity-exclusive aid under strict scrutiny standards.<sup>11</sup> In fact, the Department's Title VI Policy Guidance expressly includes race- and ethnicity-exclusive aid among the kinds of practices that can be sustained under Title VI, *if* they satisfy strict scrutiny. Moreover, in its discussion of race- and ethnicity-exclusive aid, the Department highlighted the many comments received from colleges and universities during the development of its Title VI Policy Guidance, which indicated that "the use of race or national origin as a plus factor in awarding financial aid may be inadequate to achieve diversity...[and] in some cases, it may be necessary to designate a limited amount of aid for students of a particular race or national origin." It stated that certain circumstances might justify race- or ethnicity-exclusive aid, including: (1) When a college or university could not recruit sufficient minority applicants to meet their goals, even with race- or ethnicity-as-a-factor programs;

(2) when a disproportionate number of minority applicants rejected offers of admission; and (3) when special challenges existed with respect to graduate programs, where “almost all” students might be able to establish financial need.<sup>12</sup>

Perhaps more to the point, the core principles set forth by the Court suggest (in a manner very much in line with the Department’s Title VI Policy Guidance) that higher education officials should evaluate—and sustain—any race- or ethnicity-conscious aid policy *only* if they can establish that the exclusive nature of that policy is necessary to achieve their goals and that no less extreme or categorical use of race or ethnicity will allow the institution to achieve its goals.<sup>13</sup>

In addition, the manner in which the strict scrutiny analysis operates suggests clearly that financial aid and scholarship practices should be evaluated in the context of all other policies and practices that are designed to operate in tandem as part of the effort to achieve diversity goals. As a consequence, the prospect that the use of race in financial aid or scholarship practices might result in less burden on nonqualifying students than other uses of race or ethnicity should not be ignored. For instance, and as the Department has suggested, a race-conscious scholarship may in fact impose less burden on nonqualifying students than an otherwise lawful race-conscious admissions policy. Therefore, in some contexts, it is possible that the limited use of race-exclusive aid to achieve clear and compelling diversity goals might in fact operate as the less discriminatory alternative.

Finally, the need for an independent, individualized review in the award of race- or ethnicity-conscious financial aid may be less significant to the legal sustainability of such programs where the given financial aid program is part of a lawfully administered admissions program that includes a holistic, individualized review of all applicants (based on the standard established by the Supreme Court in *Grutter*). In fact, while there is no direct legal authority on point, in cases where race or ethnicity are considered in admissions as part of an individualized review that is linked to financial aid, it is possible to construct an argument under which such financial aid policies should not independently be subjected to strict scrutiny at all, such as where admissions policies assign admittees to priority levels (e.g., tier 1, tier 2) and financial aid decisions are made to insure certain matriculation rates at each of those levels. In this broader, enrollment–management approach, the admissions and priority determinations may be subject to strict scrutiny, but the particular financial aid decisions may not be.

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

As with other elements of the narrow tailoring analysis, the necessity of maintaining race- or ethnicity-conscious financial aid and scholarship policies must be evaluated in the context of the goals the institution seeks to achieve with those practices. Specifically, race and ethnicity may be used as factors in financial aid and scholarship decisions only to the extent necessary to achieve the institution’s compelling interest—in many cases, the educational benefits of diversity. In this context, federal courts have demanded that institutions give “serious, good faith consideration [to] workable race-neutral alternatives that will achieve the diversity they seek.”<sup>14</sup> The Supreme Court in *Grutter* admonished that higher education institutions “draw on the most promising aspects of ...race-neutral alternatives as they develop”—

specifically pointing to experimentation in states where race- and ethnicity-conscious admissions practices had been banned as a matter of state law. Depending on the mission of the program involved and the circumstances of that institution, a college or university may consider factors such as the following (either in lieu of, or in addition to, the consideration of race or ethnicity), which *may not* be subject to strict scrutiny:

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

A broad range of strategies incorporating various race- and ethnicity-neutral factors that should be considered as part of this analysis are included in two U.S. Department of Education publications: *Inclusive Campuses: Diversity Strategies for Private Colleges* (2005) and *Achieving Diversity: Race-Neutral Alternatives in American Education* (2004).

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

In the context of financial aid and scholarships, it is important that the specific race- and ethnicity-conscious practices at issue actually help the institution achieve its goals. If in fact they fail in that endeavor, those practices are likely to be rejected as not narrowly tailored. A finding by OCR makes this point, expressly. In *In re Northern Virginia Community College*, OCR evaluated a scholarship program that was designed to enhance student diversity on campus by “improving retention and graduation rates of minority students.” The relevant evidence indicated, however, that the scholarship program had no effect on those rates; thus, OCR concluded that the program was not necessary to achieve the college's goals and violated Title VI. Elaborating on its conclusion, OCR stated that the fact that minority students might have lower graduation rates than others did not, standing alone, justify the scholarship program. Rather, the college was obligated to demonstrate “the relationship between [its race-conscious] scholarships and the graduation rates

of minority students,” as well as the connection between minority students’ graduation rates and the college’s diversity goals. Because it failed with respect to both issues, OCR required a modification of the challenged program.<sup>17</sup>

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

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

With respect to financial aid and scholarships, in particular, the Department in its Title VI Policy Guidance distinguished financial aid and admissions practices on this point. It recognized that race- and ethnicity-conscious financial aid “does not, in and of itself, dictate that a student would be foreclosed from attending a college solely on the basis of race” and that “[i]n contrast to the number of admissions slots, the amount of financial aid available to students is not necessarily fixed.” In the overall analysis of whether a particular aid practice may meet narrow tailoring requirements, and consistent with Justice O’Connor’s admonition that “context matters” when making strict scrutiny judgments, these principles have several implications for financial aid and scholarship policies.

First, the total amount of financial aid (need- and merit-based) available for other, non-qualifying students should be determined. If, in fact, the amount of the race- or ethnicity-conscious program (when coupled with similar programs, by race or ethnicity) represents only a fraction of the total aid available to all students, then arguments may exist to support the position that the “burden” on nonqualifying students is small and diffuse, supporting a finding of legal compliance.<sup>19</sup>

Second, in cases where race- or ethnicity-conscious aid is provided from external sources, but once received by the higher education institution is merely “pooled” with all other comparable aid (either need- or merit-based), strong arguments can be made regarding the minimal burden of that practice. In fact, when a college or university does not confer race- or ethnicity-conscious aid pursuant to a separate qualifying program, but rather: (1) includes that earmarked funding as part of a larger, pool of money available for all students who meet certain (race- and ethnicity-neutral) criteria and (2) then matches the funding to eligible students based on race or ethnicity once race-neutral qualifying decisions have been made, then an argument can be made that such practice does not confer benefits based on race or ethnicity and should not be subject to strict scrutiny at all.

Third, and somewhat relatedly, the question of what would occur if the race- or ethnicity-conscious aid were eliminated may bear on the burden question. For instance, and as suggested by the Department in its Title VI Policy Guidance, if the effect of such aid is to expand the pool of dollars available to students—and the elimination of race or ethnicity

as a factor would result in the withdrawal of that funding in its entirety—then making the case that the race- or ethnicity-conscious aid operates to unduly burden a non-qualifying student may be more of a challenge. In the Department’s words: “[A] decision to bar [a race-targeted] award...will not necessarily translate into increased resources for students from non-targeted groups.”<sup>20</sup>

## E. End Point and Periodic Review

The Supreme Court in the *University of Michigan* decisions, recognizing that a “core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race,” ruled that “all governmental use of race must have a logical end point.” In the context of higher education, the Court established that this durational requirement” can be met by sunset provisions and “periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity.”<sup>21</sup>

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

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

## Chapter VI Endnotes

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1. *Grutter*, 539 U.S. at 333.

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

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

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

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

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

10. Justice O'Connor's concurrence in *Gratz* highlighted the key distinctions between Michigan's law school and undergraduate programs:  
The law school considers the various diversity qualifications of each applicant, including race, on a "case-by-case basis" while the undergraduate program "relies on a selection index to assign *every* underrepresented minority applicant the same, *automatic* 20-point bonus without consideration of the particular background, experiences, or qualities of each individual applicant," which operates to "by and large [ ] automatically determine[ ] the admissions decision for each applicant." (O'Connor, J., concurring) (emphasis in original).
11. Although the admissions policies operate differently than financial aid and scholarship policies and therefore are distinguishable on potentially numerous fronts (see Title VI Policy Guidance; see also *Grutter*, 539 U.S. at 970 ("Context matters when reviewing race-based governmental action under the Equal Protection Clause"), it is important to recognize that the Court's rejection of a point system in an admissions context (in which underrepresented minorities were awarded 20 points out of a possible total of 150 points based on a range of academic and nonacademic factors) provides support for arguments that race- or ethnicity-exclusive practices are highly suspect and unlikely to survive strict scrutiny.
12. See Title VI Policy Guidance at 8,761.
13. In *Florida Atlantic University*, Case No. 04-90-2067, OCR in 1997 specifically approved of a scholarship program "restricted to black applicants on the basis of their race" in the context of a resolution that recognized that transforming the program to one involving "race-as-a-plus-factor" (if successful in meeting diversity interests) could "strengthen the legal support" for the program. In that case, OCR cited as support for its conclusion the following evidence:
  - Black students indicated that they could not have attended the University without the aid in question;
  - The State of Florida Board of Regents found that "black student recruitment and retention [were] heavily dependent upon financial assistance programs" and the provision of financial aid was "among one of the most important criteria [for] black college-bound high school seniors in choosing a college";
  - The University had implemented "numerous non-race exclusive measures," which were successful in recruiting students of other races and ethnicities, but "not...as successful in recruiting black students"; and
  - Only 7-8% of the University's scholarship financial aid was allocated to race-targeted programs, and there was "no indication that these programs created an undue burden" on the University's ability to offer scholarship aid to non-minority students.
14. *Grutter*, 539 U.S. at 339 (internal citations omitted).
15. At least one federal circuit court of appeals has concluded that "the use of socioeconomic status instead of race would not trigger strict scrutiny." *Lynn School Committee*, 2004 U.S. App. LEXIS 21791 at 58, n.11.
16. The Court in *Grutter* specifically rejected any notion that the University of Michigan was obligated to consider: (1) adopting a lottery system (which would have eliminated the nuanced individual consideration of applicants and "sacrifice[d] all other educational values"); (2) lowering admissions standards (which, as a "drastic remedy," would have required the University to "become a much different institution and sacrifice a vital component of its educational mission"); and (3) implementing percentage plans (which did not appear to "work for graduate and professional schools" and might have precluded "individualized" student assessments necessary to achieve a student body that was "diverse along all the qualities valued by the university").
17. *In re Northern Virginia Community College*, OCR Case No. 03962088 (August 1, 1997) (emphasis added).
18. *Grutter*, 539 U.S. at 341, quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 630 (1990) (O'Connor, J., dissenting).
19. Notably, the Department in its Final Title VI Guidance framed the question as one whether the effect of the use of race or ethnicity (in this case, for minority students) was "sufficiently small and diffuse so as not to create an undue burden on [non-qualifying, majority students'] *opportunities to receive financial aid*." Title VI Policy Guidance at 8,757 (emphasis added).
20. Title VI Policy Guidance at 8,762.
21. Notably, the Court did not establish a sunset requirement as one applicable in all cases. In fact, no such policy existed at the University of Michigan Law School, and that policy was ruled to be lawful under federal nondiscrimination laws.



## APPENDIX A. Questions and Answers

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

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

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

2. **What financial aid and scholarship policies should be identified as potentially subject to strict scrutiny review, and therefore included in self-assessments or audits conducted by higher education institutions?**

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

3. **Are there differences in the ways that need- and merit-based aid should be evaluated under strict scrutiny standards?**

In general, the basic rule of federal law applies regardless of the nature of the aid. If students are receiving need- or merit-based aid that involves some consideration of race or ethnicity, then in either case strict scrutiny principles likely apply.

Of course, as is true with respect to the evaluation of any policy under strict scrutiny standards, context matters. Thus, particular facts relating to the use of race in connection with need-based aid, on the one hand, or merit-based aid, on the other, will

affect ultimate judgments about whether those practices *actually satisfy* strict scrutiny standards.

**4. How should my institution address issues regarding race- and ethnicity-conscious scholarships in cases where external, private donors want to provide such funding to my institution?**

In the event that external donors want your institution to help administer or otherwise administratively support the award of their race- and ethnicity-conscious scholarships, you should analyze that aid under the very same standards that would apply to programs that your institution funds and administers, directly. In addition, funders should be advised of the potential need to evaluate their actions (independent of your institution's legal concerns), given the potential application of certain federal nondiscrimination laws that may reach purely private conduct that involves race-conscious contracts. (See Chapter IV.)

**5. What are the kinds of interests that might justify the use of race or ethnicity when making financial aid or scholarship decisions?**

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

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

**6. What are the key factors that I should consider when structuring my race- and ethnicity-conscious financial aid and scholarship programs?**

In general, several key factors merit careful consideration:

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

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

No court has ever ruled that race-exclusive scholarships are categorically illegal, and the current governing policy of the U.S. Department of Education (promulgated in 1994) with respect to its enforcement of Title VI of the Civil Rights Act of 1964 expressly provides that such scholarships may pass legal muster so long as they satisfy strict scrutiny standards. (See Appendix C.)

While not *per se* illegal under prevailing law, race-exclusive scholarships in most cases are likely to present more of a legal challenge to sustain than race-as-a-factor scholarships. One central question to address in the context of all of the relevant strict scrutiny inquiries is whether the race-exclusive policy is necessary to achieve its stated goals, or whether a less extensive use of race can as effectively achieve those goals. (See Chapter VI.)

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

For decades federal law has demanded that institutions using race or ethnicity to confer educational opportunities or benefits do so only after serious consideration of neutral alternatives. In Justice O'Connor's words, higher education institutions should give "serious, good faith consideration [to] workable race-neutral alternatives that will achieve the diversity they seek." Institutions are not required to exhaust "every conceivable race-neutral alternative." They should, however, pay careful attention to "the most promising aspects of...race-neutral alternatives as they develop." As Justice O'Connor suggests, these alternatives can only be meaningfully evaluated in light of relevant institutional goals.

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

SUPREME COURT OF THE UNITED STATES

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

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

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

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

JUSTICE O’CONNOR delivered the opinion of the Court.

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

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

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

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

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

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

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

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

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

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

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

## B

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

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

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

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

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

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

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

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

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

That a race-conscious admissions program does not operate as a quota does not, by itself, satisfy the requirement of individualized consideration. When using race as a “plus” factor in university admissions, a university’s admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount. See *Bakke*, *supra*, at 318, n. 52 (opinion of Powell, J.) (identi-

fyng the “denial...of th[e] right to individualized consideration” as the “principal evil” of the medical school’s admissions program).

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

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

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

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

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

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

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

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

considered race-neutral alternatives currently capable of producing a critical mass without forcing the Law School to abandon the academic selectivity that is the cornerstone of its educational mission.

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

We are satisfied that the Law School’s admissions program does not. Because the Law School considers “all pertinent elements of diversity,” it can (and does) select nonminority applicants who have greater potential to enhance student body diversity over under-represented minority applicants. See *Bakke, supra*, at 317 (opinion of Powell, J.). As Justice Powell recognized in *Bakke*, so long as a race-conscious admissions program uses race as a “plus” factor in the context of individualized consideration, a rejected applicant

“will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname...His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.” 438 U. S., at 318.

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

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

In the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity. Universities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law, are currently engaged in experimenting with a wide variety of alternative approaches. Universities in other States can and should draw on the most promising aspects of these race-neutral alternatives as they develop. Cf. *United States v. Lopez*, 514 U. S. 549, 581 (1995) (KENNEDY, J., concurring) (“[T]he States may perform

their role as laboratories for experimentation to devise various solutions where the best solution is far from clear”).

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

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

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

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

be expected on behalf of minority groups intentionally shortchanged in the institution's composition of its generic minority "critical mass." I do not look forward to any of these cases. The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.

## SUPREME COURT OF THE UNITED STATES

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

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

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

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

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

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

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

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

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

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

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

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

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

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

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

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

It is so ordered.

JUSTICE O'CONNOR, concurring.\*

I

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

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

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

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

In 1999, the University added another layer of review to its admissions process. After an admissions counselor has tabulated an applicant's selection index score, he or she may "flag" an application for further consideration by an Admissions Review Committee, which is composed of members of the Office of Undergraduate Admissions and the Office of the Provost. App. to Pet. for Cert. 117a. The review committee meets periodically to discuss the files of "flagged" applicants not already admitted based on the selection index parameters. App. 275. After discussing each flagged application, the committee decides whether to admit, defer, or deny the applicant. *Ibid.*

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

## II

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

The only potential source of individualized consideration appears to be the Admissions Review Committee. The evidence in the record, however, reveals very little about how the review committee actually functions. And what evidence there is indicates that the committee is a kind of afterthought, rather than an integral component of a system of individualized review. As the Court points out, it is undisputed that the "[committee] reviews only a portion of all the applications. The bulk of admissions decisions are executed based

on selection index score parameters set by the [Enrollment Working Group].” *Ante*, at 26 (quoting App. to Pet for Cert. 117a). Review by the committee thus represents a necessarily limited exception to the Office of Undergraduate Admissions’ general reliance on the selection index. Indeed, the record does not reveal how many applications admissions counselors send to the review committee each year, and the University has not pointed to evidence demonstrating that a meaningful percentage of applicants receives this level of discretionary review. In addition, eligibility for consideration by the committee is itself based on automatic cut-off levels determined with reference to selection index scores. And there is no evidence of how the decisions are actually made—what type of individualized consideration is or is not used. Given these circumstances, the addition of the Admissions Review Committee to the admissions process cannot offset the apparent absence of individualized consideration from the Office of Undergraduate Admissions’ general practices.

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

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19. JUSTICE SOUTER recognizes that the LSA’s use of race is decisive in practice, but he attempts to avoid that fact through unsupported speculation about the self-selection of minorities in the applicant pool. See *Post*, at 6 (dissenting opinion).
  20. JUSTICE SOUTER is therefore wrong when he contends that “applicants to the undergraduate college are [not] denied individualized consideration.” *Post*, at 6. As JUSTICE O’CONNOR explains in her concurrence, the LSA’s program “ensures that the diversity contributions of applicants cannot be individually assessed.” *Post*, at 4.
  21. JUSTICE SOUTER is mistaken in his assertion that the Court “take[s] it upon itself to apply a newly formulated legal standard to an undeveloped record.” *Post*, at 7, n. 3. He ignores the fact that the respondents have told us all that is necessary to decide this case. As explained above, respondents concede that only a portion of the applications are reviewed by the ARC and that the “bulk of admissions decisions” are based on the point system. It should be readily apparent that the availability of this review, which comes after the automatic distribution of points, is far more limited than the individualized review given to the “large middle group of applicants” discussed by Justice Powell and described by the Harvard plan in *Bakke*. 438 U. S., at 316 (internal quotation marks omitted).
  22. JUSTICE GINSBURG in her dissent observes that “[o]ne can reasonably anticipate...that colleges and universities will seek to maintain their minority enrollment...whether or not they can do so in full candor through adoption of affirmative action plans of the kind here at issue.” *Post*, at 7-8. She goes on to say that “[i]f honesty is the best policy, surely Michigan’s accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises.” *Post*, at 8. These observations are remarkable for two reasons. First, they suggest that universities—to whose academic judgment we are told in *Grutter v. Bollinger*, *post*, at 16, we should defer—will pursue their affirmative-action programs whether or not they violate the United States Constitution. Second, they recommend that these violations should be dealt with, not by requiring the universities to obey the Constitution, but by changing the Constitution so that it conforms to the conduct of the universities.
  23. We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI. See *Alexander v. Sandoval*, 532 U. S. 275, 281 (2001); *United States v. Fordice*, 505 U. S. 717, 732, n. 7 (1992); *Alexander v. Choate*, 469 U.S. 287, 293 (1985). Likewise, with respect to §1981, we have explained that the provision was “meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race.” *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295-296 (1976). Furthermore, we have explained that a contract for educational services is a “contract” for purposes of §1981. See *Runyon v. McCrary*, 427 U.S. 160, 172 (1976). Finally, purposeful discrimination that violates the Equal Protection Clause of the Fourteenth Amendment will also violate §1981. See *General Building Contractors Assn., Inc. v. Pennsylvania*, 458 U.S. 375, 389-390 (1982).

**Appendix C. The United States Department of  
Education's Final Policy Guidance  
Regarding Race-Conscious  
Financial Aid (1994)**

**federal register**

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Wednesday  
February 23, 1994

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**Part VIII**

**Department of  
Education**

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

**DEPARTMENT OF EDUCATION****Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964**

**AGENCY:** Department of Education.

**ACTION:** Notice of final policy guidance.

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

**EFFECTIVE DATE:** This policy guidance takes effect on May 24, 1994, subject to the transition period described in this notice.

**FOR FURTHER INFORMATION CONTACT:** Jeanette Lim, U.S. Department of Education, 400 Maryland Avenue, SW., room 5036-I Switzer Building, Washington, DC 20202-1174. Telephone (202) 205-8635. Individuals who use a telecommunications device for the deaf (TDD) may call the TDD number at 1-800-358-8247.

**SUPPLEMENTARY INFORMATION:** On December 10, 1991, the Department published a notice of proposed policy guidance and request for public comment in the *Federal Register* (56 FR 64548). The purpose of the proposed guidance and of this final guidance is to help clarify how colleges can use financial aid to promote campus diversity and access of minority students to postsecondary education without violating Federal anti-discrimination laws. The Secretary of Education encourages continued use of financial aid as a means to provide equal educational opportunity and to provide a diverse educational environment for all students. The Secretary also encourages the use by postsecondary institutions of other efforts to recruit and retain minority students, which are not affected by this policy guidance.

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

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

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

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

The Department will use the principles described in this final policy guidance in making determinations concerning discrimination based on race or national origin in the award of financial aid. These principles describe the circumstances in which the Department, based on its interpretation of Title VI and relevant case law, believes consideration of race or national origin in the award of financial aid to be permissible. A financial aid program that falls within one or more of these principles will be, in the Department's view, in compliance with Title VI.<sup>1</sup> This guidance is intended to assist colleges in fashioning legally defensible affirmative action programs to promote the access of minority students to postsecondary education. The Department will offer technical assistance to colleges in reexamining their financial aid programs based on this guidance.

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

<sup>1</sup> In identifying these principles, the Department is not foreclosing the possibility that there may be other bases on which a college may support its consideration of race or national origin in awarding financial aid. The Department will consider any justifications that are presented during the course of a Title VI investigation on a case-by-case basis.

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

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

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

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

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

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

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

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

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

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

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

#### Principles

##### Definitions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

college is remedying its past discrimination pursuant to Principle 3 or attempting to achieve a diverse student body pursuant to Principle 4. In addition, a college may use privately donated funds that are not restricted by their donor on the basis of race or national origin to make awards to disadvantaged students as described in Principle 1.

#### Additional Guidance

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

Historically black colleges and universities (HBCUs), as defined in Title III of the Higher Education Act (Title III), 20 U.S.C. 1061, are unique among institutions of higher education in America because of their role in serving students who were denied access to postsecondary education based on their race.<sup>2</sup> Congress has made numerous findings reflecting the special role and needs of these institutions in light of the history of discrimination by States and the Federal Government against both the institutions and their students and has required enhancement of these institutions as a remedy for this history of discrimination.

Based upon the extensive congressional findings concerning HBCUs, and consistent with congressional and Executive Branch efforts to enhance and strengthen HBCUs, the Department interprets Title VI to permit these institutions to participate in student aid programs established by third parties that target financial aid to black students, if those programs are not limited to students at the HBCUs. These would include programs to which HBCUs contribute their own institutional funds if necessary for participation in the programs. Precluding HBCUs from these programs would have an unintended negative effect on their ability to recruit talented student bodies and would undermine congressional actions aimed at enhancing these institutions. HBCUs may not create their own race-targeted programs using institutional funds, nor may they accept privately donated race-targeted aid limited to students at the HBCUs, unless they satisfy the requirements of any of the other principles in this guidance.<sup>3</sup>

<sup>2</sup> Title III states a number of requirements that an institution must meet in order to be considered an historically black college or university, including the requirement that the college or university was established prior to 1964. 20 U.S.C. 1061. In regulations implementing Title III, the Secretary has identified the institutions that meet these requirements. 34 CFR 608.2(b).

<sup>3</sup> For example, an HBCU might award race-targeted aid to Mexican American students or to

#### Transition Period

Although the Department anticipates that most financial aid programs that consider race or national origin in awarding assistance will be found to be consistent with one or more of the principles in this final policy guidance, there will be some programs that require adjustment to comply with Title VI. In order to permit colleges time to assess their programs and to make any necessary adjustments in an orderly manner—and to ensure that students who already have either applied for or received financial aid do not lose their student aid as a result of the issuance of this policy guidance—there will be a transition period during which the Department will work with colleges that require assistance to bring them into compliance.<sup>4</sup>

The Department will afford colleges up to two academic years to adjust their programs for new students. However, to the extent that a college does not need the full two years to make adjustments to its financial aid programs, the Department expects that the adjustments will be made as soon as practicable.

No student who is currently receiving financial aid, or who has applied for aid prior to the effective date of this policy guidance, should lose aid as a result of this guidance. Thus, if a college determines that a financial aid program is not permissible under this policy guidance, the college may continue to provide assistance awarded on the basis of race or national origin to students during the entire course of their academic program at the college, even if that period extends beyond the two-year transition period, if the students had either applied for or received that assistance prior to the effective date of this policy.

#### Legal Analysis

##### *Introduction*

The Department of Education is responsible for enforcing Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, at institutions receiving Federal education funds. Section 601 of Title VI provides that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or

white students to promote diversity under Principle 4.

<sup>4</sup> This transition period also applies to recipients of Federal financial assistance that are not colleges, e.g., a nonprofit organization that operates a scholarship program.

activity receiving Federal financial assistance. 42 U.S.C. 2000d.

The Department has issued regulations implementing Title VI that are applicable to all recipients of financial assistance from the Department. 34 CFR part 100. The regulations prohibit discrimination in the administration of financial aid programs. Specifically, they prohibit a recipient, on the basis of race, color, or national origin, from denying financial aid; providing different aid; subjecting anyone to separate or different treatment in any matter related to financial aid; restricting the enjoyment of any advantage or privilege enjoyed by others receiving financial aid; and treating anyone differently in determining eligibility or other requirements for financial aid. 34 CFR 100.3(b)(1); see also 34 CFR 100.3(b)(2).

In addition to prohibiting discrimination, the Title VI regulations require that a recipient that has previously discriminated "must take affirmative action to overcome the effects of prior discrimination." 34 CFR 100.3(b)(6)(i). The regulations also permit recipients to take voluntary affirmative action "[e]ven in the absence of such prior discrimination \* \* \* to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin" in the recipient's programs. 34 CFR 100.3(b)(6)(ii); see 34 CFR 100.5(i).

The permissibility of awarding student financial aid based, in whole or in part, on a student's race or national origin involves an interpretation of the preceding provisions concerning affirmative action. The Supreme Court has made clear that Title VI prohibits intentional classifications based on race or national origin for the purpose of affirmative action to the same extent and under the same standards as the Equal Protection Clause of the Fourteenth Amendment.<sup>5</sup> *Guardians Ass'n v. Civil Service Commission of the City of New York*, 463 U.S. 582 (1983); *Regents of the University of California v.*

<sup>5</sup> Some commenters suggested that Native Americans and Native Hawaiians—because of their special relationship with the Federal Government—should be exempt from the restrictions outlined in the policy guidance. The Department has found no legal authority for treating affirmative action by recipients of Federal assistance any differently if the group involved is Native Americans or Native Hawaiians. Thus, the principles in this policy guidance—including Principle 2, which states that a college may award financial aid on the basis of race or national origin if authorized by Federal statute—apply to financial aid that is limited to Native Americans and Native Hawaiians. However, the policy does not address the authority of tribal governments or tribally controlled colleges to restrict aid to members of their tribes.

*Bakke*, 438 U.S. 265 (1978). Thus, the Department's interpretation of the general language of the Title VI regulations concerning permissible affirmative action is based on case law under both Title VI and the Fourteenth Amendment.

The following discussion addresses the legal basis for each of the five principles set out in the Department's policy guidance.

#### 1. Financial Aid for Disadvantaged Students

The first principle provides that colleges may award financial aid to disadvantaged students. Colleges are free to define the circumstances under which students will be considered to be disadvantaged, as long as that determination is not based on race or national origin.

As some commenters noted, the Title VI regulations prohibit actions that, while not intentionally discriminatory, have the effect of discriminating on the basis of race or national origin. 34 CFR 100.3(b)(2); see *Guardians Ass'n v. Civil Service Commission of the City of New York*, *supra*; *Lau v. Nichols*, 414 U.S. 563 (1974). However, actions that have a disproportionate effect on students of a particular race or national origin are permissible under Title VI if they bear a "manifest demonstrable relationship" to the recipient's educational mission. *Georgia State Conference of Branches of NAACP v. State of Georgia*, 775 F.2d 1403, 1418 11th Cir. (1985). It is the Department's view that awarding financial aid to disadvantaged students provides a sufficiently strong educational purpose to justify any racially disproportionate effect the use of this criterion may entail. In particular, the Department believes that an applicant's character, motivation, and ability to overcome economic and educational disadvantage are educationally justified considerations in both admission and financial aid decisions. Therefore, the award of financial assistance to disadvantaged students does not violate Title VI.

#### 2. Financial Aid Authorized by Congress

This principle states that a college may award financial aid on the basis of race or national origin if the use of race or national origin in awarding that aid is authorized by Federal statute. This is because financial aid programs for minority students that are authorized by a specific Federal law cannot be considered to violate another Federal law, *i.e.*, Title VI. In the case of the establishment of federally funded financial aid programs, such as the

Patricia Roberts Harris Fellowship, the authorization of specific minority scholarships by that legislation prevails over the general prohibition of discrimination in Title VI.<sup>6</sup> This result also is consistent with the canon of construction under which the specific provisions of a statute prevail over the general provisions of the same or a different statute. See 2A N. Singer *Sutherland Statutory Construction* section 46.05 (5th ed. 1992); *Radzanower v. Touche Ross and Co.*, 426 U.S. 148, 153 (1976); *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974); *Fourco Glass Co. v. Transmira Products Corp.*, 353 U.S. 225, 228-29 (1957).

Some commenters argued that the existence of congressionally authorized race-targeted financial aid programs supports the position that all race-targeted financial aid programs are permissible under Title VI. However, the fact that Congress has enacted specific Federal programs for race-targeted financial aid does not serve as an authorization for States or colleges to create their own programs for awarding student financial aid based on race or national origin.

#### 3. Financial Aid To Remedy Past Discrimination

Classifications based on race or national origin, including affirmative action measures, are "suspect" classifications that are subject to strict scrutiny by the courts. *Regents of the University of California v. Bakke*, 438 U.S. at 292. The use of those classifications must be based on a compelling governmental interest and must be narrowly tailored to serve that interest. *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).

The Supreme Court has repeatedly held that the Government has a compelling interest in ensuring the elimination of discrimination on the basis of race or national origin. To further this governmental interest, the Supreme Court has sanctioned the use of race-conscious measures to eliminate discrimination. *United States v. Fordice*, \_\_\_ U.S. \_\_\_ (1992); *United States v. Paradise*, 480 U.S. 149, 167 (1987); *Swann v. Charlotte-Mecklenberg Board*

<sup>6</sup>Of course, an individual may challenge the statute under which the aid is provided as violative of the Constitution. The statute would then be evaluated under the constitutional standards for racial classifications authorized by Federal statute that were established in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) and *Fullilove v. Klutznick*, 448 U.S. 448 (1980). However, as explained previously, such a suit would not be viable under Title VI, for which the Department has enforcement responsibility.

*of Education*, 402 U.S. 1, 15-16 (1971); *McDaniel v. Barresi*, 402 U.S. 39 (1971); *Green v. County School Board of New Kent County*, 391 U.S. 430, 438 (1968). Most recently, in *United States v. Fordice*, *supra*, the Court found that States that operated *de jure* systems of higher education have an affirmative obligation to ensure that no vestiges of the *de jure* system continue to have a discriminatory effect on the basis of race.

The implementing regulations for Title VI provide that a recipient of Federal financial assistance that has previously discriminated in violation of the statute or regulations must take affirmative action to overcome the effects of the past discrimination. 34 CFR 100.3(b)(6)(i). Thus, a college that has been found to have discriminated against students on the basis of race or national origin must take steps to remedy that discrimination. That remedial action may include the awarding of financial aid to students from the racial or national origin groups that have been discriminated against.

The proposed policy guidance provided that a finding of past discrimination could be made by a court or by an administrative agency, such as the Department's Office for Civil Rights. It also could be made by a State or local legislative body, as long as the legislature requiring the affirmative action had a strong basis in evidence identifying discrimination within its jurisdiction for which that remedial action is required.

A number of commenters argued that colleges should be able to take remedial action without waiting for a formal finding by a court, administrative agency, or legislature. The Department agrees. The final policy guidance provides that, even in the absence of a finding by a court, legislature, or administrative agency, a college—in order to remedy its past discrimination—may implement a remedial race-targeted financial aid program. It may do so if it has a strong basis in evidence for concluding that this affirmative action is necessary to remedy the effects of its past discrimination and its financial aid program is narrowly tailored to remedy that discrimination. Permitting colleges to remedy the effects of their past discrimination without waiting for a formal finding is consistent with the approach taken by the Supreme Court in *Wygant v. Jackson Board of Education*, *supra*. In *Wygant*, the Court clarified that a school district's race-conscious voluntary affirmative action plan could be upheld based on subsequent judicial findings of past discrimination by the

district. *Wygant v. Jackson Board of Education*, 476 U.S. at 277.

In the *Wygant* case, teachers challenged their school board's adoption, through a collective bargaining agreement, of a layoff plan that included provisions protecting employees from layoffs on the basis of their race. The school board contended, among other things, that the plan's race-conscious layoff provisions were constitutional because they were adopted to remedy the school board's own prior discrimination. *Id.*, at 276, 277. Justice Powell, in a plurality opinion, stated that a public employer must have "convincing evidence" that an affirmative action plan is warranted by past discrimination before undertaking that plan. *Id.*, at 277. If the plan is challenged by employees who are harmed by the plan, the court must then make a determination that the employer had a "strong basis in evidence for its conclusion that remedial action was necessary." *Id.*

In a concurring opinion, Justice O'Connor agreed that a "contemporaneous or antecedent finding of past discrimination by a court was not a constitutional prerequisite to a public employer's voluntary agreement to an affirmative action plan." *Id.*, at 289. She explained that contemporaneous or antecedent findings were not necessary because "A violation of Federal statutory or constitutional requirements does not arise with the making of findings; it arises when the wrong is committed." Moreover, she explained that important values would be sacrificed if contemporaneous findings were required because "a requirement that public employers make findings that they engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations." *Id.*, at 289, 290 (citations omitted).

In *Richmond v. J.A. Croson*, *supra*, the Court again emphasized that remedial race-conscious action must be based on strong evidence of discrimination. That case involved the constitutionality of a city ordinance establishing a plan to remedy past discrimination by requiring prime contractors awarded city construction contracts to subcontract at least 30% of the dollar amount of each contract to minority-controlled businesses. The Court found that the city council had failed to make sufficient factual findings to demonstrate a "strong basis in evidence" of racial discrimination "by anyone in the Richmond construction

industry." *Richmond v. J.A. Croson*, 488 U.S. at 500.

Evidence of past discrimination may, but need not, include documentation of specific incidents of intentional discrimination. Instead, evidence of a statistically significant disparity between the percentage of minority students in a college's student body and the percentage of qualified minorities in the relevant pool of college-bound high school graduates may be sufficient. Such an approach is analogous to cases of employment discrimination where the courts accept statistical evidence to infer intentional discrimination against minority job applicants. See *Hazelwood School District v. United States*, 433 U.S. 299 (1977).

Based on this case law, Principle 3 provides that a college may award race-targeted scholarships to remedy discrimination as found by a court or by an administrative agency, such as the Department's Office for Civil Rights. OCR often has approved race-targeted financial aid programs as part of a Title VI remedial plan to eliminate the vestiges of prior discrimination within a State higher education system that previously was operated as a racially segregated dual system. As indicated by the *Croson* decision, a finding of past discrimination also may be made by a State or local legislative body, as long as the legislature has a strong basis in evidence identifying discrimination within its jurisdiction. The remedial use of race-targeted financial aid must be narrowly tailored to remedy the effects of the discrimination.

As revised, Principle 3 also allows a college to award student aid on the basis of race or national origin as part of affirmative action to remedy the effects of the school's past discrimination without waiting for a finding to be made by OCR, a court, or a legislative body, if the college has convincing evidence of past discrimination justifying the affirmative action. The Department's Title VI regulations, like the Fourteenth Amendment, do not require that antecedent or contemporaneous findings of past discrimination be made before remedial affirmative action is implemented, as long as the college has a strong basis in evidence of its past discrimination. Allowing colleges to implement narrowly tailored remedial affirmative action if there is strong evidentiary support for it—without requiring that it be delayed until a finding is made by OCR, a court, or a legislative body—will assist in ensuring that Title VI's mandate against discrimination based on race or national origin is achieved.

#### 4. Financial Aid To Create Diversity

The Title VI regulations permit a college to take voluntary affirmative action, even in the absence of past discrimination, in response to conditions that have limited the participation at the college of students of a particular race or national origin. 34 CFR 100.3(b)(6)(ii); see 34 CFR 100.5(i). In *Regents of the University of California v. Bakke*, *supra*, the Supreme Court considered whether the University could take voluntary affirmative action by setting aside places in each medical school class for which only minority students could compete.<sup>7</sup>

The Court considered four rationales provided by the University of California for taking race and national origin into account in making admissions decisions: (1) To reduce the historic deficit of traditionally disfavored minorities in medical schools and the medical profession. (2) To counter the effects of societal discrimination. (3) To increase the number of physicians who would practice in communities lacking medical services. (4) To obtain the educational benefits of a diverse student body. Similar arguments have been advanced in response to the Department's proposed policy guidance on student financial assistance awarded on the basis of race or national origin.

The Court rejected the first three justifications. The first reason was rejected as facially invalid because setting aside a fixed number of admission spaces only to ensure that members of a specified race are admitted was found to be racial "discrimination for its own sake." *Regents of the University of California v. Bakke*, 438 U.S. at 307. In rejecting the second contention that the effects of societal discrimination warranted the racial preferences, the Court recognized that the State had a substantial interest in eliminating the effects of discrimination, but that interest was found to be limited to "redress[ing] the wrongs worked by specific instances of discrimination." *Id.* The third contention, concerning the provision of health care services to underserved communities, was rejected by the *Bakke* Court as an evidentiary matter because the State had "not carried its burden of demonstrating that it must prefer members of particular ethnic groups over all other individuals in order to

<sup>7</sup>The Court noted that the University "does not purport to have made" a determination that its affirmative action plan was necessary to remedy any past discrimination at the medical school. *Regents of the University of California v. Bakke*, 438 U.S. at 309.

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

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

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

*Id.*, at 311, 312. Thus, colleges have a First Amendment right to seek diversity in admissions to fulfill their academic mission through the "robust exchange of ideas" that flows from a diverse student body. *Id.*, at 312-313.<sup>8</sup> However, the means to achieve this "countervailing constitutional interest" under the First Amendment must comport with the requirements of the Fourteenth Amendment. The Medical School's policy of setting aside a fixed number of admission spaces solely for minorities was found not to pass the Fourteenth Amendment's strict scrutiny test, because the policy's use of race as a condition of eligibility for the slots was not necessary to promote the school's diversity interest. *Id.*, at 315-316.

Justice Powell found that the Medical School could advance its diversity interest under the First Amendment in a narrowly tailored manner that passed the Fourteenth Amendment's strict scrutiny test by using race or national origin as one of several factors that would be considered as a plus factor for an applicant in the admissions process. *Id.*, at 317-319.

Following the *Bakke* decision, the Department reexamined its Title VI regulations to determine whether any changes were necessary. In a policy interpretation published in the *Federal Register* (44 FR 58509), the Department concluded that no change was warranted. The Department determined that the Title VI regulatory provision authorizing voluntary affirmative action was consistent with the Court's decision and that the provision would be interpreted to incorporate the limitations on voluntary affirmative

<sup>8</sup>The Secretary believes that a college's academic freedom interest in the "robust exchange of ideas" also includes an interest in the existence of a diverse faculty and, more generally, in diversity of professors nationally, since scholars engage in the interchange of ideas with others in their field, and not merely with faculty at their particular school. A university could contribute to this interest by enrolling graduate students who are committed to becoming professors and who will promote the overall diversity of scholars in their field of study, regardless of the diversity of the students who are admitted to the university's own graduate program.

action announced by the Court.<sup>9</sup> Thus, if a college's use of race or national origin in awarding financial aid meets the Supreme Court's test under the Fourteenth Amendment for permissible voluntary affirmative action, it will also meet the requirements of Title VI.

In the Department's proposed policy guidance on financial aid, a principle was included permitting the use of race or national origin as a "plus" factor in awarding student aid. The basis for the principle was the *Bakke* decision and the Department's assessment that using an approach that had been approved by the Supreme Court as narrowly tailored to achieve diversity in the admissions context also would be permissible in awarding financial aid.<sup>10</sup>

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

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

<sup>9</sup>The present policy guidance on student financial assistance supplements the 1979 policy interpretation.

<sup>10</sup>The Department will presume that a college's use of race or national origin as a plus factor, with other factors, is narrowly tailored to further the compelling governmental interest in diversity, as long as the college periodically reexamines whether its use of race or national origin as a plus factor continues to be necessary to achieve a diverse student body.

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

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

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

The Court in *Bakke* indicated that race or national origin could be used in making admissions decisions to further the compelling interest of a diverse student body even though the effect might be to deny admission to some students who did not receive a competitive "plus" based on race or ethnicity.<sup>11</sup> However, the use of a set-aside of places in the entering class was impermissible because it was not necessary to the goal of diversity. In cases since *Bakke*, the Supreme Court has provided additional guidance on the factors to be considered in determining whether a classification based on race or national origin is narrowly tailored to its purpose. These factors will be

<sup>11</sup>*Bakke* was the Supreme Court's first decision in an affirmative action case. Since that time, the Court has decided a number of affirmative action cases, none of which have invalidated Justice Powell's opinion in *Bakke* that the promotion of diversity in the higher education setting is a compelling interest.

considered by the Department in assessing whether a college's race-targeted financial aid program meets the requirements of Title VI.

First, it is necessary to determine the efficacy of alternative approaches. *United States v. Paradise*, 480 U.S. at 171. Thus, it is important that consideration has been given to the use of alternative approaches that are less intrusive (e.g., the use of race or national origin as a "plus" factor rather than as a condition of eligibility). *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. at 583; *Richmond v. J.A. Croson*, 488 U.S. at 507. Financial aid that is restricted to students of a particular race or national origin should be used only if a college determines that these alternative approaches have not or will not be effective.

Second, the extent, duration, and flexibility of the racial classification must be addressed. *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. at 594; *United States v. Paradise*, 480 U.S. at 171. The extent of the use of the classification should be no greater than is necessary to carry out its purpose. *Richmond v. J.A. Croson*, 488 U.S. at 507. That is, the amount of financial aid that is awarded based on race or national origin should be no greater than is necessary to achieve a diverse student body.

The duration of the use of a racial classification should be no longer than is necessary to its purpose, and the classification should be periodically reexamined to determine whether there is a continued need for its use. *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. at 594. Thus, the use of race-targeted financial aid should continue only while it is necessary to achieve a diverse student body, and an assessment as to whether that continues to be the case should be made on a regular basis.

In addition, the use of the classification should be sufficiently flexible that exceptions can be made if appropriate. For example, the Supreme Court in *United States v. Paradise* found that a race-conscious promotion requirement was flexible in operation because it could be waived if no qualified candidates were available. 480 U.S. at 177. Similarly, racial restrictions on the award of financial aid could be waived if there were no qualified applicants.

Finally, the burden on those who are excluded from the benefit conferred by the classification based on race or national origin (i.e., non-minority students) must be considered. *Id.*, at 171. A use of race or national origin may impose such a severe burden on particular individuals—for example, eliminating scholarships currently

received by non-minority students in order to start a scholarship program for minority students—that it is too intrusive to be considered narrowly tailored. See *Wygant v. Jackson Board of Education*, 476 U.S. at 283 (use of race in imposing layoffs involves severe disruption to lives of identifiable individuals). Generally, the less severe and more diffuse the impact on non-minority students, the more likely a classification based on race or national origin will address this factor satisfactorily. However, it is not necessary to show that no student's opportunity to receive financial aid has been in any way diminished by the use of the race-targeted aid. Rather, the use of race-targeted financial aid must not place an undue burden on students who are not eligible for that aid.

A number of commenters argued that race-targeted financial aid is a minimally intrusive method to attain a diverse student body, far more limited in its impact on non-minority students, for example, than race-targeted admissions policies. Under this view, and unlike the admissions plan at issue in *Bakke*, a race-targeted financial aid award could be a narrowly tailored means of achieving the compelling interest in diversity.

The Department agrees that there are important differences between admissions and financial aid. The affirmative action admissions program struck down in *Bakke* had the effect of excluding applicants from the university on the basis of their race. The use of race-targeted financial aid, on the other hand, does not, in and of itself, dictate that a student would be foreclosed from attending a college solely on the basis of race. Moreover, in contrast to the number of admissions slots, the amount of financial aid available to students is not necessarily fixed. For example, a college's receipt of privately donated monies restricted to an underrepresented group might increase the total pool of funds for student aid in a situation in which, absent the ability to impose such a limitation, the donor might not provide any aid at all.

Even in the case of a college's own funds, a decision to bar the award of race-targeted financial aid will not necessarily translate into increased resources for students from non-targeted groups. Funds for financial aid restricted by race or national origin that are viewed as a recruitment device might be rechanneled into other methods of recruitment if restricted financial aid is barred. In other words, unlike admission to a class with a fixed number of places, the amount of

financial aid may increase or decrease based on the functions it is perceived to promote.

In summary, a college can use its financial aid program to promote diversity by considering factors other than race or national origin, such as geographic origin, diverse experiences, or socioeconomic background. In addition, a college may take race or national origin into account as one factor, with other factors, in awarding financial aid if necessary to promote diversity. Finally, a college may use race or national origin as a condition of eligibility in awarding financial aid if it is narrowly tailored to promote diversity.

#### 5. Private Gifts Restricted by Race or National Origin

The fifth principle sets out the circumstances under which a recipient college can award financial aid provided by private donors that is restricted on the basis of race or national origin.

As noted by many commenters, pursuant to the Civil Rights Restoration Act of 1987, all of the operations of a college are covered by Title VI if the college receives any Federal financial assistance. 42 U.S.C. 2000d-4a(2)(A). Since a college's award of privately donated financial aid is within the operations of the college, the college must comply with the requirements of Title VI in awarding those funds.<sup>12</sup>

A college may award privately donated financial aid on the basis of race or national origin if the college is remedying its past discrimination pursuant to Principle 3 or attempting to achieve a diverse student body pursuant to Principle 4. In other words, Principles 3 and 4 apply to the use of privately donated funds and may justify awarding these funds on the basis of race or national origin in accordance with the wishes of the donor. Similarly, under Principle 1, a college may award privately donated financial aid that is restricted to disadvantaged students.

Some commenters were uncertain whether it is permissible under Title VI for a college to solicit private donations of student financial aid that are restricted to students of a particular race or national origin. If the receipt and award of these funds is permitted by Title VI, that is, in the circumstances

<sup>12</sup> Similarly, other organizations that receive Federal financial assistance must comply with Title VI in their award of student financial aid. On the other hand, individuals or organizations not receiving Federal funds are not subject to Title VI. They may thus, as far as Title VI is concerned, directly award financial aid to students on the basis of race or national origin.

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

*Financial Aid at Historically Black Colleges and Universities*

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

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

Congress has repeatedly made findings that recognize the unique historical mission and important role that HBCUs play in the American system of higher education, and particularly in providing equal educational opportunity for black students. 20 U.S.C. 1051, 1060, and 1132c. Congress has created programs that strengthen and enhance HBCUs in Titles II through VII of the Higher Education Act, as amended by Public Law 99-498, 20 U.S.C. 1021-1132i-2. It has found that "there is a particular national interest in aiding institutions of higher education that have historically served students who have been denied access to postsecondary education because of race or national origin . . . so that equality of access and quality of postsecondary education opportunities may be enhanced for all students." 20 U.S.C. 1051. "A key link to the chain of expanding college opportunity for African American youth is

strengthening the Nation's historically Black colleges and universities." House Report No. 102-447, 1992 U.S. Code Cong. and Adm. News p. 353.

Congress has found that "the current state of HBCUs is partly attributable to the discriminatory action of the States and the Federal Government and this discriminatory action requires the remedy of enhancement of Black postsecondary institutions to ensure their continuation and participation in fulfilling the Federal mission of equality of educational opportunity." 20 U.S.C. 1060. See also, House Report No. 102-447, 1992 U.S. Code Cong. and Adm. News p. 353; House Report No. 99-383, 1986 U.S. Code Cong. and Adm. News 2592-2596. This includes providing access and quality education to low-income and minority students, and improving HBCUs' academic quality. 20 U.S.C. 1051.

For these same reasons, every Administration in recent years has recognized the special role and contributions of HBCUs and expressed support for their enhancement. See "Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education," 43 FR 6658 (1977); Exec. Orders Nos. 12232, 45 FR 53437 (1980); 12320, 46 FR 48107 (1981); 12677, 54 FR 18869 (1989); and 12876, 58 FR 58735 (1993). The Department's own data indicate that HBCUs continue to play a vital role in providing higher education for many black students. In 1989 and 1990, more than one in four black bachelor's degree recipients received their degree from an HBCU (26.7%). See, "Historically Black Colleges and Universities, 1976-90" (U.S. Department of Education, Office of Educational Research and Improvement, July 1992).

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

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

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

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

<sup>13</sup>This provision is limited to HBCUs as defined in Title III of the Higher Education Act. It does not apply generally to predominantly black institutions of higher education. The reason for this distinction is that Congress has made specific findings concerning the unique status of the HBCUs that serve as the basis for this provision.

that they not restrict aid to black students if using their own funds or funds from private donors that wish to set up financial aid programs at these institutions. However, because the applicant pool that is attracted to HBCUs presently consists primarily of black students, HBCUs would be placed at a distinct disadvantage with regard to other colleges in attracting talented students if they could not participate in financial aid programs set up by third parties for black students. Thus, the Department interprets Title VI to permit an HBCU to participate in race-targeted financial aid programs for black students that are created by third parties, if the programs are not restricted to students at HBCUs.

The participation by HBCUs in those race-targeted aid programs will be subject to periodic reassessment by the Department. The Department will regularly review the results of enhancement efforts at HBCUs, including the annual report to the President on the progress achieved in enhancing the role and capabilities of HBCUs required by Section 7 of Executive Order 12876. If an HBCU has been enhanced to the point that the institution is attractive to individuals regardless of their race or national origin to the same extent as a non-HBCU, then that institution may participate in only those race-targeted aid programs that are consistent with the other principles in this policy guidance.

#### *Transition Period*

The proposed policy guidance would have provided a four-year transition period for individual students to ensure that they did not lose their financial aid as a result of the guidance. Commenters pointed out that, in some cases, four years may not be a sufficient time for a student to complete his or her academic program at a college. In addition,

commenters expressed concern that revising the policies and procedures used in recruiting minority students and in providing student financial assistance would require time to develop and implement. The revisions that have been made to the final policy guidance should result in far fewer instances in which colleges will be required to change their financial aid programs. However, the Department recognizes that colleges may need to conduct extensive reviews of their current programs and that in some cases adjustments to those programs may be necessary. As a result, the Department is expanding the proposed transition period.

The Department is providing colleges a reasonable period of time to review and, if necessary, adjust their financial aid programs in an orderly manner that causes the least possible disruption to their students. Colleges must adjust their financial aid programs to be consistent with the principles previously set out no later than two years after the effective date of the Department's policy guidance. However, colleges may continue to provide financial aid awarded on the basis of race or national origin to students who had either applied for or received that assistance prior to the effective date of this guidance during the full course of those students' academic program at the college, even though, in many cases, this will extend beyond the two-year period and, in some cases, the four-year period identified in the proposed policy.

Although some commenters questioned the Department's authority to create a transition period, such a period for adjustments is consistent with the Department's approach in the past under other civil rights statutes it enforces. See 34 CFR 106.41(d) (transition period to permit recipients to

bring their athletic programs into compliance with Title IX of the Education Amendments of 1972); 34 CFR 104.22(e) (transition period to permit recipients to make facilities accessible to individuals with disabilities, as required by Section 504 of the Rehabilitation Act of 1973). It is based on the Department's recognition of the practical difficulties that some colleges may face in making changes to their recruitment and financial aid award processes.

The transition period also is consistent with the Department's policy, in approving plans for the desegregation of State systems of higher education, that students who have been the beneficiaries of past discriminatory conduct not be required to bear the burden of corrective action. For example, while the Department requires State higher education systems to take remedial action to increase the enrollment of previously excluded students, it does not require the expulsion of any student in order to permit admission of those previously excluded. See *Wygant v. Jackson Board of Education*, 476 U.S. at 282-85.

Finally, the transition period is consistent with the Department's obligations under Title VI to seek voluntary compliance by recipients that have been found in violation of the statute. 42 U.S.C. 2000d-1. During the transition period, the Department will provide colleges with technical assistance to help them make any necessary changes to their financial aid programs in order to achieve compliance with Title VI.

**Program Authority:** 42 U.S.C. 2000d.

Dated: February 17, 1994.

**Richard W. Riley,**

*Secretary of Education.*

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BILLING CODE 4000-01-P

## Appendix D. Sample OCR Data/Information Request

The following questions are derived from one comprehensive OCR data and information request in response to a complaint of discrimination, which alleged that a university granted “a preference to some applicants for financial aid based on the applicants’ identified race and/or national origin.” This information is provided to illustrate the kinds of inquiries that can surface in response to complaints of discrimination to assist in institutional planning and policy development. It is not intended to represent federal policy or reflect relevant inquiries in all cases.

1. Provide copies of all written policies and procedures related to the provision of student financial assistance. For each policy document:
  - a. Identify each committee and the name and title of each person that was involved in its development, with copies of related meeting minutes.
  - b. Provide copies of documents related to all reviews of each financial aid policy document after its adoption and identify staff that conducted each review.
2. Provide copies of all documents that define or regulate financial aid, including faculty resolutions, policy documents, candidate rating sheets, grids or matrices, and written guidelines for staff involved in financial aid decisions.
3. Provide a copy of an illustrative financial aid candidate file that reflects the type of information requested, reviewed, or considered in acting on an application for financial aid. Also provide a copy of the application form for each financial aid program, and, for each one, identify each component or office that uses it.
4. Identify by name and title the university personnel most familiar with how financial aid data are entered and stored in computerized form.
5. Describe or list all student financial aid information retained in computerized format by the university for the above years. Provide a sample of the data entry format and identify all data fields.
6. Identify each formula, criteria, or standard used to determine student need for financial aid and provide a copy of illustrative documents.
7. Identify each university component or office that makes or is involved in student financial aid decisions. For each component, identify each staff member (by name and title) that participates in such decisions and a brief statement of his or her role in the process. Identify the dates and content of training provided each staff member regarding the provision of financial aid and provide copies of substantive training documents.
8. For each component or office that makes financial aid decisions:
  - a. Describe how and by whom financial aid award packages are determined.
  - b. Identify the location(s) of student financial aid files for the above years and provide the name and title of the custodian of those records.

9. List each financial aid program that is funded by university resources, including but not limited to grants, loans, interest subsidies, and work-study opportunities. For each listed program:
  - a. Specify each eligibility criterion and describe the application and selection process; provide copies of all applications used and all other illustrative program documents.
  - b. Describe whether and how the program is used:
    - i. To meet financial need
    - ii. To recognize merit
    - iii. To confer prestige or distinction
    - iv. To meet other institutional objectives (specify each objective)
  - c. Identify all written or other information that is considered in making awards under each program. State whether race or national origin is considered, and if so:
    - i. describe the racial/ethnic groups that receive favorable consideration; and
    - ii. whether race/ethnicity is a condition of eligibility or a plus factor.
10. List each financial aid program that is funded, in whole or in part, by private, third-party resources (e.g., foundations, trusts, organizations not controlled by the university), including but not limited to grants, loans, interest subsidies, and work-study opportunities. For each listed program:
  - a. Specify the university's involvement with the program, if any, in advertising, promoting, funding, selection of students to receive awards, or otherwise in administering or providing support or assistance to the program.
  - b. List each eligibility criterion and provide copies of documents describing the program.
  - c. State whether race or national origin is considered, and if so, describe the racial/ethnic groups that receive separate, special, or affirmative consideration; whether race/ethnicity is a condition of eligibility or a plus factor; and the weight given race/ethnicity; and
  - d. List each recipient by race and national origin for the above years; for each recipient, list amount and type of aid.
11. In order to understand the relationship between the university's financial aid and admission policies and the university's goal of achieving a diverse student body or remedying the effects of historical information, we are requesting information about the university's specific financial aid and admissions practices. To place the aid programs in proper context, we are also seeking information about the opportunities to receive financial aid that the university's financial aid program actually provides to all students. Please identify each newly admitted student, by race and national origin, for the years specified above. For each student:
  - a. Identify the program that admitted the student
  - b. State whether the student applied for financial aid
  - c. State whether the student did not apply for financial aid but was considered for financial aid
  - d. State whether the student received an offer of financial aid. If so, indicate:
    - i. The office(s) or component(s) that determined the offer

- ii. Amount of need, if any, as determined by the institution's need formulae
  - iii. Each financial aid program for which the recipient was considered eligible
  - iv. Each financial aid program for which the recipient was considered ineligible
  - v. The total amount of the financial aid award and for each award:
    1. Total need-based dollars and funding source(s) used.
    2. Total merit-based dollars and funding source(s) used.
    3. Total dollars and funding sources used for each category of aid (as defined by the institution) awarded that student.
  - vi. Date of the award letter or other notification
  - vii. Amount of grant money, loan money, work-study aid, and other types of aid and the source for each type of assistance received
  - viii. Whether the student enrolled
  - ix. All yield data or estimates considered in determining the award, including the mix of aid types used in the student's aid package
  - x. For each award, identify each instance where race or national origin was used or considered and, if so, whether as a factor or an eligibility requirement:
    1. To determine eligibility for aid
    2. To set the amount of the total award package
    3. To determine the mix of types of aid, e.g., grants versus loans in funding the total financial aid award
    4. To determine the timing of the award; and/or
    5. In any other way (specify)
12. Describe the interrelationship between financial aid determinations and the admissions process. Specifically:
- a. Identify by name, title, and university component all staff involved in financial aid and all staff involved in admissions.
  - b. Describe the timing of financial aid decisions in relation to admissions decisions.
  - c. Describe in detail the purpose and frequency of communications between financial aid officers and admissions officers.
13. Describe the goals of the university's admissions process and the goals of its financial aid program and provide copies of all documents that state such goals.
14. For the above years, provide by race and national origin for all university undergraduate programs:
- a. The number of applicants.
  - b. The number of students who were offered admissions.
  - c. The number of students who enrolled.

15. If the university contends that its use of race and national origin in awarding financial aid is justified by a compelling interest in student body diversity, please indicate:
  - a. The university's definition of diversity.
  - b. Each element, factor, or criterion that define diversity.
  - c. The university's mission.
  - d. The university's core educational objectives.
  - e. Any university policy or decision documents that describe or analyze why student body diversity is deemed a compelling interest associated with the university's mission.
  - f. Provide copies of mission statements, strategic plans, or any other university document(s) that include any of the information requested in this paragraph.
16. If the university has indicated that diversity produces educational benefits, please:
  - a. Identify each educational benefit the university produced by diversity.
  - b. Identify each educational benefit produced by racial ethnic diversity.
  - c. Provide copies of all research, analyses, studies, or other information the university relies on to substantiate its claim that including race or national origin as elements of diversity produces educational benefits at the university.
17. If the university has determined or decided that it needs a critical mass of students from particular races or national origins as a condition for achieving the educational benefits of diversity, please indicate:
  - a. How the university defines critical mass.
  - b. How the university's definition of critical mass relates to:
    - i. The university's mission and core educational objectives
    - ii. Each educational benefit described above
    - iii. The ability of students to make unique contributions to the character of the university
    - iv. How the university determines the numerical numbers of students needed to establish a critical mass
    - v. How the financial aid decisions are aligned with and closely tailored to the critical mass needs
    - vi. Provide copies of any documents that support or illustrate the responses to this paragraph.
18. For each element of diversity identified above
  - a. Describe how that diversity factor is identified in making financial aid decisions.
  - b. Describe the information used by financial aid staff to measure and track that diversity factor in determining the composition of the group of students to whom financial aid awards are made.
  - c. Describe all efforts to measure and evaluate the effect of this diversity factor on the production of educational benefits.

19. Provide student enrollment data for the university, including all undergraduate programs, graduate programs, and professional schools:
  - a. By race and national origin.
  - b. For each diversity factor identified above.
20. If admissions and financial aid are used to pursue diversity objectives:
  - a. State the diversity objectives pursued by the admissions and/or financial aid programs.
  - b. Describe the relationship between how the admissions process pursues diversity objectives and how the university uses financial aid to pursue diversity objectives.
21. Describe the relationship between how diversity objectives are pursued in the financial aid program and efforts to attract, enroll, and retain a diverse student body through:
  - a. Recruitment programs.
  - b. Retention programs.
  - c. Other programs.
22. Identify each recruitment, retention, and/or other program that uses or considers race or national origin and each such program that is operated race neutrally. For each program, describe the contribution it makes to the achievement of any of the educational benefits cited above and supply supporting documents.
23. Identify each effort by any university component or office to consider the continued necessity for the use of race and national origin and/or whether there are workable race-neutral alternatives to the use of race and national origin in any aspect of the financial aid program. For each such effort:
  - a. Identify the process, participants involved, and dates of each activity.
  - b. Identify each race-neutral alternative considered.
  - c. Identify all other information considered.
  - d. State the reasons for rejection of each alternative.
  - e. Provide all written records of the effort.
24. Has the university established a specific timeline or end date for the use of race or national origin in any financial aid program? If so, identify the program and the assigned termination point.
25. For all financial aid programs for which no termination date has been determined, list all efforts that have been and will be taken to ensure that the use of race and national origin in financial aid is closely aligned and tailored to compelling needs and how its consideration will be reduced and/or terminated as soon as is practicable.

## Appendix E. Resources

### In General

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

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

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

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

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

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

Bowen, William G. and Neil L. Rudenstine, *Race-Sensitive Admissions: Back to Basics* ([http://www.mellon.org/publications/Admissions/WGB\\_NLR\\_Back\\_to\\_Basics\\_with\\_citations.pdf](http://www.mellon.org/publications/Admissions/WGB_NLR_Back_to_Basics_with_citations.pdf)) (February 2003).

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

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

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

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

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

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

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

## Government Publications

*Inclusive Campuses: Diversity Strategies for Private Colleges*, U.S. Department of Education Office for Civil Rights (2005).

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

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

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

## Web Sites (as of March 17, 2005)

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

### **Diversity Web:**

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

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

### **College Board Web Site on Achieving Diversity in Higher Education**

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

(This Web site contains information on the College Board's Access and Diversity Collaborative and other resources.)

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

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

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

### **National Association of College and University Attorneys**

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

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

### **The American Association of University Professors**

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

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

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

### **Sponsoring Institutions and Systems**

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

### **Sponsoring Organizations**

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

### **Cooperating Organizations**

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

### **Foundations**

The Goldman Sachs Foundation  
 Nellie Mae Education Foundation

## Appendix G. Participants in National Seminars on “Federal Law and Financial Aid and Scholarships”

A total of 235 individuals representing more than 120 institutions and organizations attended national seminars held in New York (9/27/2004), Houston (10/7/2004), Chicago (10/29/2004), and San Francisco (11/11/2004). The majority of attendees were administrators responsible for financial aid and scholarships; however, individuals from many other areas—including enrollment management, admissions, student affairs, marketing and communications, multicultural development, institutional advancement, general counsels, provosts, deans, and faculty—also attended. In addition to undergraduate programs, a number of graduate and professional schools were also represented.

Allan Hancock College, California	James Madison University, Virginia
American University, District of Columbia	Kalamazoo College, Michigan
Austin College, Texas	Kent State University, Ohio
Baylor School of Law, Texas	Kenyon College, Ohio
Bowling Green State University, Ohio	Law School Admission Council, Pennsylvania
California State University: Chico	Macalester College, Minnesota
California State University: Sacramento	Marquette University, Wisconsin
Carleton College, Minnesota	Memphis University School, Tennessee
Case Western Reserve University, Ohio	Miami University, Ohio
Chicago-Kent College of Law, Illinois	Michigan State University, Michigan
Claremont McKenna College, California	Millersville University of Pennsylvania
College Broadband, New York	Moravian College, Pennsylvania
College of New Rochelle, New York	National Association of Student Financial Aid
College of Saint Benedict, St. Johns University, Minnesota	Administrators, District of Columbia
Columbia University, New York	New School University, New York
Cornell University, New York	New York Law School, New York
Dartmouth College, New Hampshire	New York University, New York
DePaul University, Illinois	North Central College, Illinois
DePauw University, Indiana	Northeastern University, Massachusetts
DeSales University, Pennsylvania	Northern Arizona University
Edgewood College, Wisconsin	Northwestern University, Illinois
Edison Community College, Ohio	Oberlin College, Ohio
FastWeb, California	Occidental College, California
Franklin & Marshall College, Pennsylvania	Oklahoma State University
Goldman Sachs & Company, New York	Orange Coast College, California
Harvard College, Massachusetts	Pomona College, California
Harvey Mudd College, California	Purdue University, Indiana
Hofstra University, New York	Rice University, Texas
Holland & Knight, District of Columbia	Rhodes College, Tennessee
Humboldt State University, California	Saint Mary's College of California
Idaho State University, Idaho	Samford University—Cumberland School of
Illinois Wesleyan University, Illinois	Law, Alabama
Indiana University	San Diego State University, California
	Scripps College, California

Seattle University, Washington  
Seton Hall University School of Law,  
New Jersey  
Siena College, New York  
Southern Methodist University, Texas  
St. Joseph's College, New York  
State University of New York at Stony Brook  
Stonehill College, Massachusetts  
Suffolk University Law School, Massachusetts  
Texas A&M University  
Texas Christian University  
Texas Guaranteed Student Loan Corporation  
Texas Tech University  
The College Board  
The Colorado College  
The Ohio State University  
The University of Texas at San Antonio  
Tomball College, Texas  
Tufts University School of Medicine,  
Massachusetts  
United States Coast Guard Academy,  
Connecticut  
University of Arizona  
University of California: Santa Cruz  
University of California: Los Angeles  
University of Georgia  
University of Houston, Texas  
University of Iowa  
University of Louisville, Kentucky  
University of Maryland at College Park  
University of Maryland Eastern Shore  
University of North Carolina at Chapel Hill  
University of Notre Dame, Indiana  
University of Oklahoma  
University of Oregon  
University of Puget Sound, Washington  
University of Richmond, Virginia  
University of Rochester, New York  
University of San Diego, California  
University of San Francisco, California  
University of Scranton, Pennsylvania  
University of Southern California Law School  
University of Southern California  
University of St. Thomas, Texas  
University of Tennessee  
University of Texas at Austin  
University of the Pacific, California  
University of Toledo, Ohio  
University of Utah  
University of Washington  
University of Wisconsin–Madison  
Valparaiso University, Indiana  
Vassar College, New York  
Ventures in Education, New York  
Villanova University, Pennsylvania  
Washington State University  
Wayne State University, Michigan  
Wesleyan University, Connecticut  
Wheaton College, Illinois  
Whittier College School of Law, California





