



ADMISSIONS AND DIVERSITY AFTER MICHIGAN: The Next Generation of Legal and Policy Issues

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

**Arthur L. Coleman and Scott R. Palmer
Holland & Knight LLP**

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

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About the Authors

Arthur L. Coleman and **Scott R. Palmer** are partners and co-leaders of Holland & Knight LLP's education policy practice. They provide legal, policy, strategic planning, and advocacy services to education leaders throughout the country. With a focus on preventive law and policy development, they help 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, policy counseling, program reviews/audits, litigation support (including with respect to OCR investigations), 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.

Foreword

In 2003, the United States Supreme Court's *Grutter v. Bollinger* and *Gratz v. Bollinger* decisions affirmed that the educational benefits of diversity could justify limited race-conscious admissions practices and, as a consequence, generated a renewed focus on both the means and ends associated with higher education's diversity-related goals. In the immediate wake of these landmark decisions, leaders from the College Board convened a series of meetings to explore issues that were not definitively resolved by the Court, in an effort to determine how the College Board could best support the higher education community in lawfully achieving its diversity-related goals. The College Board's objective was simple: to frame a forward-thinking agenda designed to address the needs of college and university leaders who want to pursue institutional diversity-related goals in legally sound ways. 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 (see Appendix B).

The Collaborative's work has involved three distinct but related phases. In 2004, the Collaborative convened four national seminars on diversity-related financial aid issues, which culminated in the April 2005 publication of *Federal Law and Financial Aid: A Framework for Evaluating Diversity-Related Programs*. Synthesizing the first phase of the Collaborative, that manual addresses federal nondiscrimination laws and principles applicable to diversity-related financial aid and scholarship practices. The second phase of the Collaborative, which addressed recruitment, outreach and retention issues, convened three national seminars and produced the publication *Federal Law and Recruitment, Outreach and Retention: A Framework for Evaluating Diversity-Related Programs* in August 2005.

This publication represents the culmination of the third phase of the Collaborative's work, which has focused on student selection in admissions. As part of the preparation of this manual, we had the privilege of leading five national seminars between August 2005 and May 2006 involving more than 350 enrollment management, admissions, 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 moved beyond the broad compliance focus of the first two publications of the Collaborative and turned to the identification of likely critical second-generation policy and evidence issues that should be addressed by higher education officials responsible for helping institutions achieve their diversity-related goals. For example, higher education leaders should be posing questions such as: What are the concrete features of admissions models that are most likely to withstand legal scrutiny over time, and how aligned are my practices with those models? What is the concept referred to as “critical mass,” and should it be part of my institutional assessment? What action steps should I take when evaluating race-neutral alternatives? These questions and more are the focus of this manual, where we have attempted to synthesize what we know as a matter of federal law and highlight

points of importance in the admissions setting that the federal courts have not yet comprehensively addressed—points that may well be on the horizon in future litigation.

We are grateful for the support and input of many individuals who have worked tirelessly to help guide the work of the Collaborative and the development of this manual. We are particularly indebted to Fred Dietrich, Andre Bell, Larry Griffith, 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 important, 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 over the course of more than two years speaks volumes about her commitment to these issues and their importance to the higher education community.

In addition, we are grateful to those who helped identify at the inception of this phase of work the key “on the ground” challenges that higher education admissions officials face. This volume could not have been written without the valuable input of the admissions “brain trust,” which helped set the agenda for the admissions national seminars and the structure of this manual. We are especially grateful for the contributions of Jonathan Alger and Larry White, who have provided important insights that helped shaped the conclusions reflected in this manual. And certainly not least, we want to acknowledge the hundreds of participants in the College Board’s Access and Diversity Collaborative seminars. In those meetings, institutional leaders provided thoughtful observations and posed challenging questions—all of which helped inform the preparation of this manual.

We are proud to have been part of an effort that, to date, has reached over 500 higher education institutions and organizations through national seminars, and thousands of others through the dissemination of written guidance. In every phase of its work, the Collaborative’s important work has been shaped by three overarching principles for which the *Bollinger* cases stand: (1) Federal law should affirm educationally sound judgments, which are supported by 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. On this third anniversary of the *Bollinger* decisions, we should reflect upon these principles, which should shape institution-specific analyses regarding the use of race and ethnicity in the admissions selection process.

Arthur L. Coleman
Scott R. Palmer
Holland & Knight LLP
Washington, D.C.
June 2006

Section One: Background

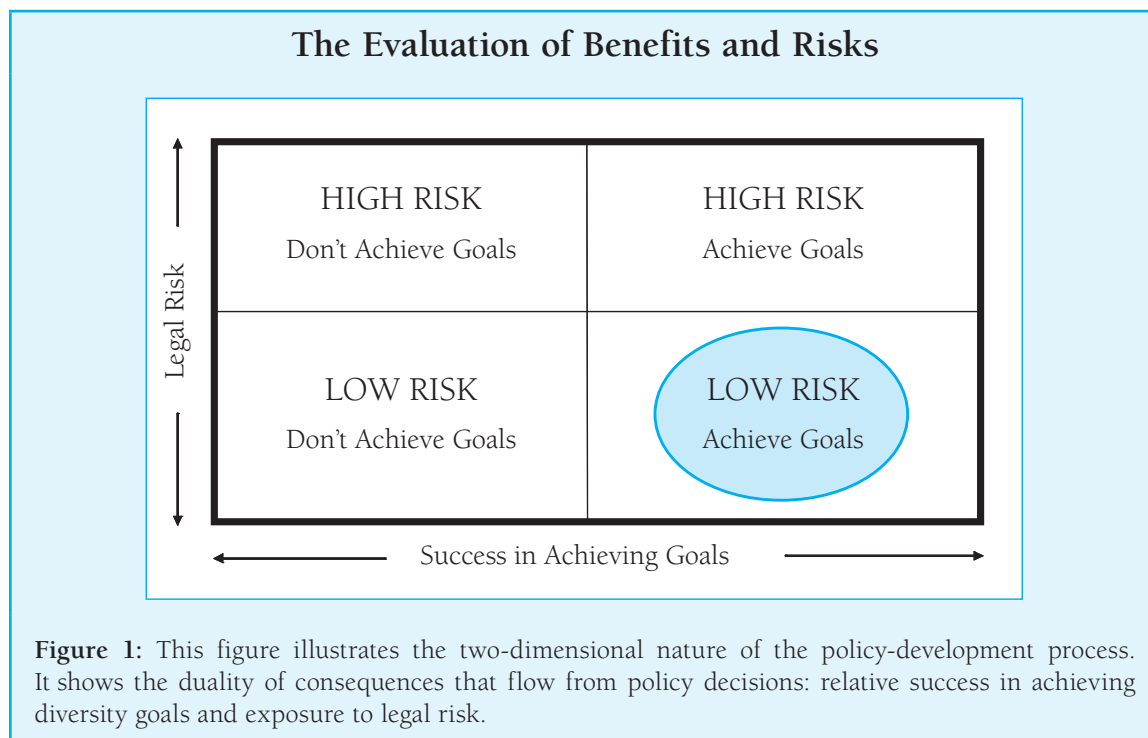
"Justice must satisfy the appearance of justice."

Justice Lewis Powell, *Bakke* (1978).

I. Overview of Relevant Principles

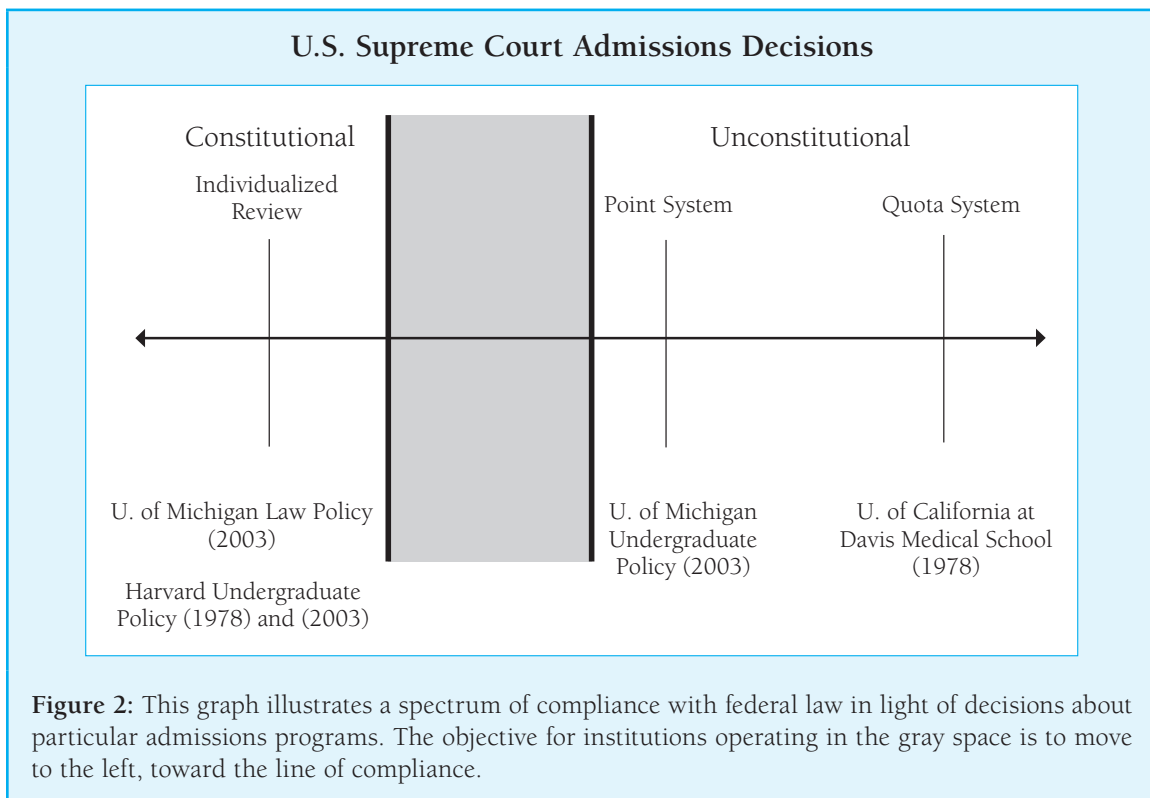
A. The Manual: Purpose, Foundations and Structure

With a focus on key policy and evidence issues, this manual provides higher education leaders with a practical tool that can help guide institutional decision making regarding diversity and the use of race and ethnicity in the admissions selection process. As institutional leaders commit the necessary resources toward effective strategic planning, implementation, and evaluation, federal law can operate to help them enhance their efforts to achieve the diversity they seek. It can, in essence, ensure that legally relevant (and educationally appropriate) questions are addressed as part of institutional efforts to help achieve diversity-related goals while minimizing legal risk. Notably, the appropriate evaluation of legal risk is not a one-dimensional exercise. Rather, the legal risk associated with diversity-related goals should be assessed in light of the likelihood of achieving overall success in achieving these core educational aims—with the ultimate objective of achieving those goals while minimizing legal risk. (See Figure 1.)



This manual has been written in light of prevailing federal law.¹ The 2003 U.S. Supreme Court decisions in *Grutter v. Bollinger* and *Gratz v. Bollinger* (collectively hereafter, the *Bollinger* decisions), which were the first Supreme Court pronouncements on the use of race- and ethnicity-conscious practices in higher education admissions in a quarter of a century, are primary foundations for the guidance that follows. These decisions are valuable in their elaboration on the long-standing legal standards that govern the use of race and ethnicity, many of which emanate from Justice Powell's 1978 *Regents of the University of*

California v. Bakke opinion. However, given their University of Michigan-specific focus, they do not provide the answers to all of the hard questions that may surface within a higher education admissions office. In particular, these landmark rulings do not (among other things) specifically address variations of the admissions policies considered that may be implemented at other campuses throughout the nation; discuss the ways in which critical mass theory might be applied at institutions that do not resemble the University of Michigan; or outline in detail pragmatic steps that institutions should take to enhance the legal sustainability of their programs over time. Thus, higher education officials are, in effect, operating in the space in which questions arise about the extension of key principles discussed in a University of Michigan-specific setting to other admissions settings. In that space, despite the important foundations that the *Bollinger* and *Bakke* decisions provide, we lack definitive answers. (See Figure 2.) And, it is that space of key policy and evidence questions that this manual addresses.



Based on legal foundations that are briefly explained in this chapter, this manual first provides an action blueprint for higher education institutions that are addressing issues of race and ethnicity in the context of their admissions policies. Chapter II provides that blueprint, focusing on the “big picture” of enrollment management and the identification of key steps and important questions that should be considered in any institutional evaluation of diversity-related policies.²

This manual then addresses the key diversity-related issues that should surface in the development and implementation of policies that affect the selection of students for admission to higher education institutions, focusing on:

- Background principles that are clear as a matter of federal law with respect to key admissions issues;
- Insights into federal case-specific facts and arguments that shed light on the meaning of those principles and their potential extension to other settings; and
- “Second generation” policy and evidence issues that have not been comprehensively addressed by federal courts, but that (as logical extensions of settled principles) are important to consider.

The specific topics addressed in this manual are:

Admissions Models. Chapter III discusses the admissions process, generally, as a foundation for examining the actual parameters of admissions programs that have been analyzed by the U.S. Supreme Court. That analysis informs key policy and evidence questions, outlined in the chapter, which should accompany the development and implementation of any diversity-related higher education admissions policy.

Critical Mass. Chapter IV addresses the benchmark by which the University of Michigan gauged success toward the achievement of its diversity-related goals: critical mass. It focuses on the nature of the critical mass theory, the particular arguments asserted by the University of Michigan in the *Grutter* and *Gratz* litigation, and key issues and evidence to consider (including several issues raised by dissenting Justices).

The Educational Benefits of Diversity, and More. Chapter V provides an overview of the federal court treatment of various asserted compelling interests. It focuses on the educational benefits of diversity in the context of potentially complementary access and equal opportunity interests, describing the kind of potentially relevant evidence that institutions should develop and assemble as foundations for sustaining their diversity interests.

Race-Neutral Alternatives. Chapter VI provides relevant legal background and includes an explanation of the terms “race-neutral” and “race-conscious,” which are frequently not as simple as they appear. This legal overview serves as the foundation for an examination of actual alternatives federal courts have recently assessed, as well as relevant policy and evidence considerations that should accompany any institutional evaluation of race-neutral alternatives.

Making the Case. Chapter VII concludes the discussion of key topics with a focus on the importance of institutional leadership, effective communications, and evidence in achieving institutional goals associated with the educational benefits of diversity.

B. Key Policy Principles and Federal Legal Standards

A number of principles that have informed the development of this manual will surface throughout the chapters that follow. These serve as “first principles”—to provide contextual background and enhance understanding about the specific topics addressed.

Education Matters. Properly understood, federal law should affirm sound educational judgments. Any federal decision involving a discrimination challenge to admissions policies inevitably turns upon two key questions: (1) why, as a matter of educational policy, an institution decides to pursue race- or ethnicity-conscious strategies; and (2) how it designs and implements its policies to achieve those aims. In each instance, the basic answers to these questions, which are inherently educational, drive conclusions about the legal soundness of the policies in question.

Goals Matter. Both as a legal matter and as a matter of sound educational decision making, the implementation of admissions policies must be preceded by a clear vision of the educational goals those policies are designed to serve, and how those particular policies work individually and collectively to achieve those goals. In fact, the focus on institutional goals was the key foundation for the *Grutter* Court’s emphasis on the mission-driven nature of the University’s diversity interests and, in turn, the basis for the Court’s deference to inherently academic judgments about the value of diversity at the University of Michigan. (Notably, the Court also applied narrow tailoring principles, discussed below, with regard to the *specific* diversity goals that the University of Michigan sought to achieve.)

Evidence Matters. The U.S. Supreme Court’s deference in the *Bollinger* cases to the University of Michigan regarding its judgment that diversity was “essential to its educational mission” did not obviate the need for the University of Michigan to produce relevant evidence. Indeed, it is important that higher education institutions develop evidence regarding both the “substantial” and “real” educational benefits of diversity (i.e., improved teaching and learning, enhanced civic values, and better preparation for the workforce) on their campuses, along with evidence about the appropriate design of their race- and ethnicity-conscious policies.

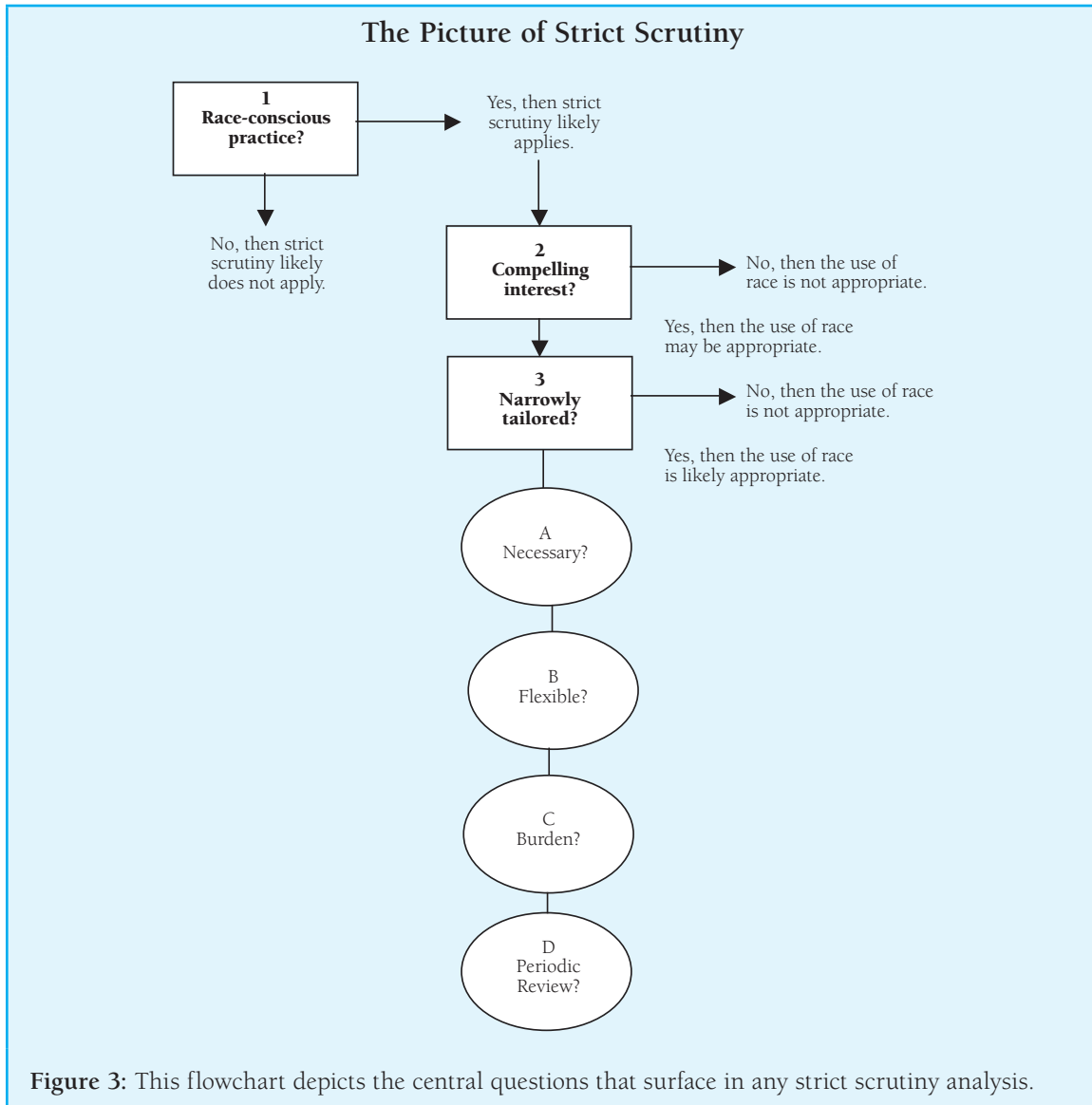
Process Matters. In addition to the evidence that supported its substantive policy choices, the University of Michigan was also able to establish in *Grutter* that it satisfied a key legal requirement—that it had a process involving key institutional stakeholders through which its race- and ethnicity-conscious policies were periodically evaluated and refined to ensure that race and ethnicity were considered only to the extent necessary to achieve its compelling goal. With the legal requirement that race- and ethnicity-conscious policies be “limited in time,” higher education institutions must take steps to periodically review, evaluate, and refine (as necessary) their race- and ethnicity-conscious policies.

The Law Matters. At the risk of stating the obvious, it is also important to remember that institutions act at their peril if they do not heed the lessons of the Michigan cases and other federal law when pursuing diversity-related admissions policies. Based upon federal constitutional principles (which apply to public higher education institutions) and identical principles of Title VI of the Civil Rights Act of 1964 (which apply to any recipient of federal funding, public or private), it is clear that race- and ethnicity-conscious admissions policies must satisfy “strict scrutiny” standards in order to withstand any legal attack:

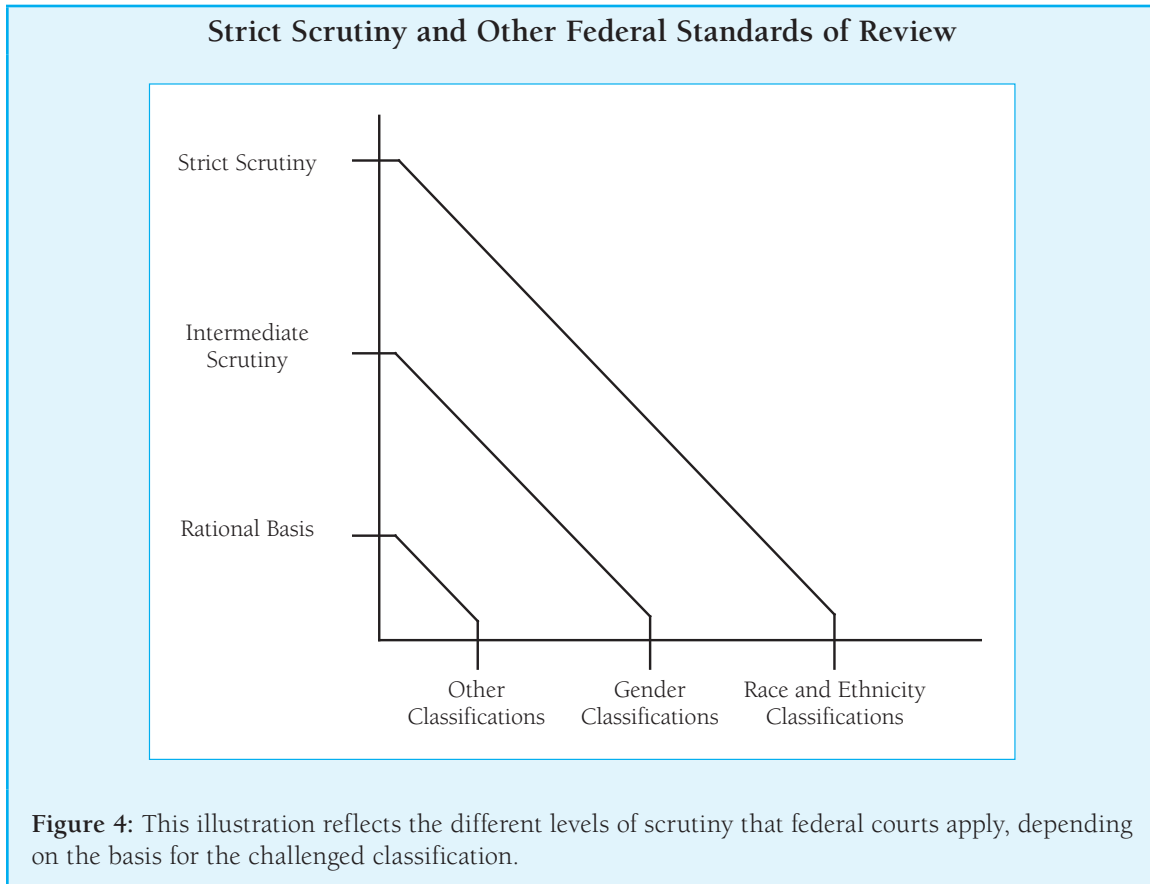
- **Strict scrutiny** is the most rigorous standard of judicial review. It is applicable to race- and ethnicity-conscious decisions that confer opportunities or benefits because distinctions based on race and ethnicity are “inherently suspect” under federal law. To satisfy strict scrutiny, institutional policies must serve a “compelling interest” and be “narrowly tailored” to achieve that interest.
- **A compelling interest** is the end that must be established as a foundation for maintaining lawful race- and ethnicity-conscious programs that confer opportunities or benefits. Federal courts have expressly recognized a limited number of interests that can be sufficiently compelling to justify the consideration of race or ethnicity in a higher education setting, including a university’s interest in promoting the educational benefits of a diverse student body.
- **Narrow tailoring** refers to the requirement that the means used to achieve the compelling interest must “fit” that interest precisely, with race or ethnicity considered 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 of the racial/ethnic preference, and whether the policy has an end point and is subject to periodic review.

Taken together, an understanding of these principles (see Figure 3) can help colleges and universities identify the policies and programs that should be subject to an institution-specific analysis, and ensure that their race- and ethnicity-conscious policies and programs both promote their diversity-related educational goals and minimize institutional legal risk—which are complementary, not competing goals.³

It is also important to remember that 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 the federal law’s guarantee of equal opportunity and equal treatment regardless of race or ethnicity, and its resistance to distinctions based on race or ethnicity except in the most limited—and compelling—circumstances. The task for college and university officials is to understand the legal principles associated with the strict scrutiny analysis and to ensure that any consideration of race and ethnicity comports with those principles.



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

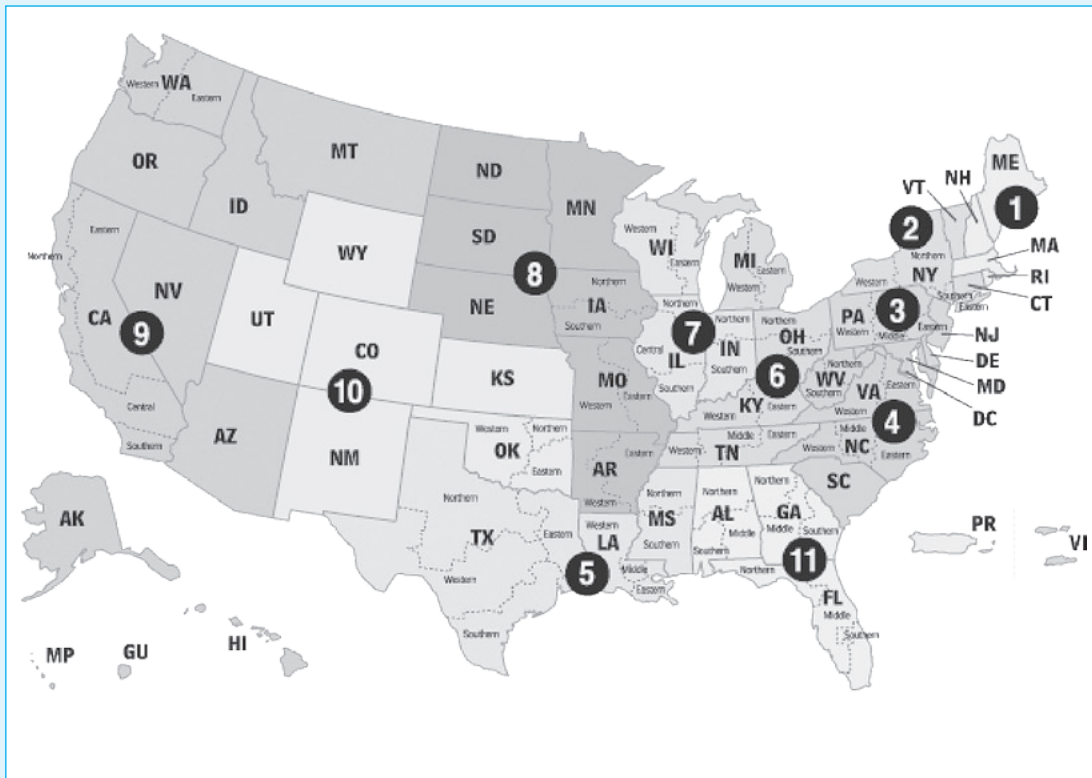


Still further removed from the rigor of strict scrutiny review, federal courts will employ a “rational basis” standard for most other classifications (such as when students receive opportunities or benefits based on income or special talents). As the least rigorous federal standard of review applicable 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.

The Federal Court System

Geographic Boundaries of United States Courts of Appeals and United States District Courts

The U.S. Supreme Court has on only two occasions addressed the use of race and ethnicity in university admissions. Additional relevant authorities regarding race- and ethnicity-conscious selection practices in admissions can also be found at the federal appellate (circuit) and district court levels.



Source: Administrative Office of the Courts, Office of Public Affairs, Washington, D.C.

Absent directly controlling authority from the U.S. Supreme Court on the subject, it is important to consider particular federal circuit-specific decisions that should inform institutional judgments regarding race- and ethnicity-conscious admissions practices. At the same time, because federal law creates what is essentially a “floor” (and not a “ceiling”) of protection against discrimination, more restrictive state laws may bear on the question regarding the lawfulness of a particular practice.

II. Key Strategies and Action Steps

A. In General

This chapter provides an action blueprint for higher education institutions that are addressing issues of race and ethnicity in the context of their admissions policies, with a focus on the big picture of enrollment management and the corresponding key steps and important questions that should be addressed.

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

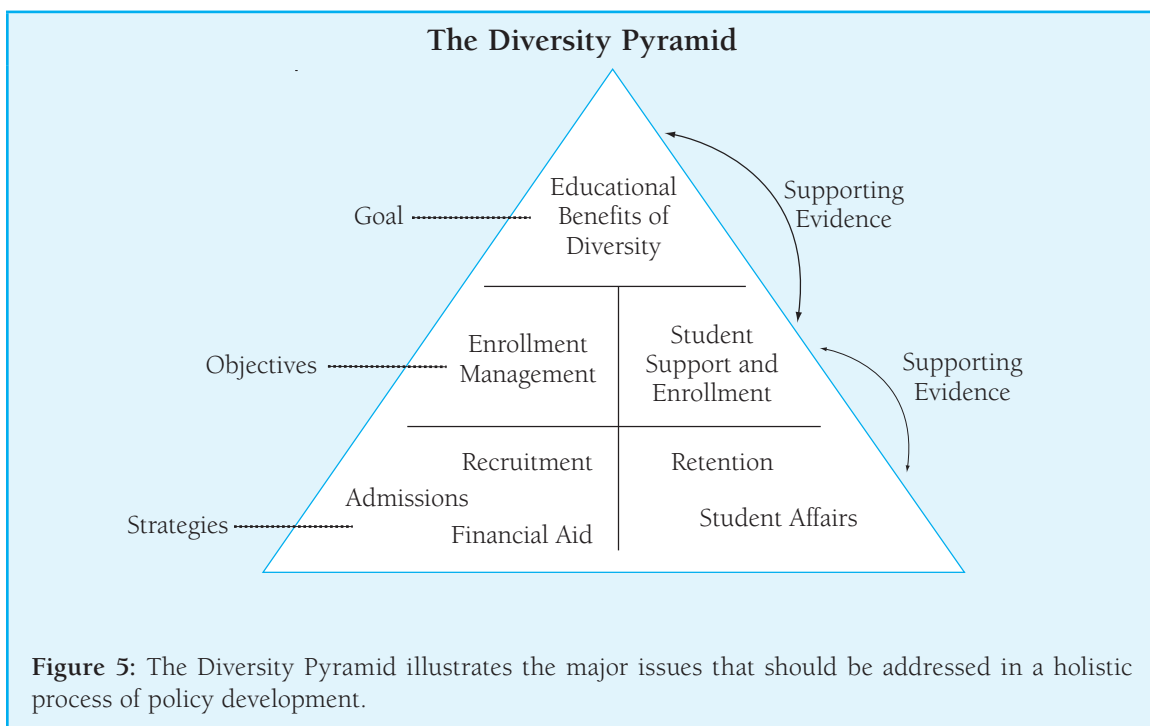
1. **Establishing clear goals and objectives.** Higher education institutions must be able to justify their race- and ethnicity-conscious programs with compelling interests, which are clearly defined and central to the achievement of each institution's educational mission.
2. **Devising appropriate strategies.** Higher education institutions must be able to demonstrate that the means used to achieve their compelling goals are in fact designed and implemented in ways that materially advance those goals, and consider race and ethnicity in the most limited manner possible to achieve 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 race- or ethnicity-conscious 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).

An institution's pursuit of diversity-related goals and its analysis of race- or ethnicity-conscious policies should also 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, 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 programs are at substantially greater risk of successful legal challenge. (Correspondingly, it is crucial to establish a process that will encourage federal court deference to educational judgments—

even in cases where the courts might not agree with every facet of the institution’s ultimate education judgments.) Third, the design and implementation of particular diversity-related policies cannot be lawfully evaluated in a vacuum. In other words, an examination limited to an admissions policy is unlikely to suffice in an effort to establish that a particular race-conscious element of that policy is (among other things) narrowly tailored. Rather, all policies and practices that support diversity goals advanced by the admissions policy are likely to be important in any determination about the relative need for the particular race-conscious element of that policy (a determination that requires consideration of possible race-neutral alternatives). Effective institutional leadership can be critical in the success of such a wide-ranging review.

To visually capture the concept of a holistic process of review, think of a pyramid in which the pinnacle represents core mission-related educational goals—in this context, the educational benefits of diversity. These benefits (such as those of improved teaching and learning in the classroom or of enhanced civic values) are broad, nonoperational interests that drive policy choices. As Figure 5 suggests, these interests reflect core institutional interests from which objectives and strategies are developed. By definition, objectives (such as critical mass) are concrete operational aims that promote broader goals. Correspondingly, strategies are plans of action designed to achieve objectives. Strategies such as the consideration of race as part of an admissions process, the allocation of certain funds for race-conscious scholarships, or the establishment of a range of recruitment and retention programs should be evaluated in light of overarching goals defined by concrete objectives, with evidence that supports and links each stage of the institution-specific theory of action. In sum, there should be both a “vertical alignment” (in which diversity-related strategies are clearly mapped against institutional objectives and goals) and a “horizontal alignment” (in which various strategies across the institutional spectrum that are linked to common diversity goals operate effectively in tandem).



B. Action Steps

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

Although the law has not spelled out all of 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 logic of particular uses of race and ethnicity within discrete programs is well understood.

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

Officials should also include externally funded race- or ethnicity-conscious programs in cases where the higher education institution supports (through, for example, the administration of the program) the operation of those programs. These may include programs that are funded by private sources, as well as programs that are authorized by or funded pursuant to federal or state law.

2. ASSEMBLE: *Establish an Interdisciplinary Team.*

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

The composition of an institution's evaluation team should be carefully considered. In particular, the team should involve representatives from the college or university's top administrative levels, and include representatives of specific programs and of institutional perspectives that have a bearing on diversity-related goals and strategies (from the top down). Also, individuals who can help assemble the research bases upon which policies can be evaluated should be included. In addition, because the consideration of race or ethnicity origin 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 considerations of race or ethnicity merit broader public engagement. Communications experts may be a valuable team addition to facilitate this process. In many cases, broader community input (including, for instance, perspectives of employers of university graduates) can be useful as part of the ongoing process of policy development and implementation.

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

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

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

Second, 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, shedding light on the educational foundations and justifications that support the institution's diversity-related goals.

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

4. ASSESS: Evaluate the Design and Operation of the Policies in Light of Institutional Goals.

Once relevant information has been gathered regarding an institution's race- and ethnicity-conscious policies, and institutional goals are clearly defined and grounded in relevant evidence, the design and operation of those policies should be 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 (or less race-restrictive) 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. As part of that process, institutions should consider ways to address key stakeholder groups in order to facilitate their understanding about the legal standards that must inform any institutional action.

C. Key Questions

As part of this five-step process, a series of 15 key questions can serve as a basis for meaningful programmatic evaluation—in both educational and legal terms. Although no one set of questions can completely address the many nuances and variables that enter the realm of evaluating and managing legal risk related to the achievement of diversity-related goals, these questions can provide a practical frame of reference around which to structure that evaluation. Although the focus of this manual is on selection on admissions, the questions listed below are framed in most instances more generally—to ensure that the substantive focus suggested by these questions reflects the process recommendations set forth in Action Step 1, above, which contemplates a holistic review of all diversity-related policies and programs.

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

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

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

- *Identify individuals involved in their development; and*
- *Locate copies of documents related to the establishment and implementation of those policies after their adoption?*

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

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

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

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

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

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

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

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

WHY does an institution consider race or ethnicity?

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

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

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

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

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

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

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

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

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

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

The authenticity of the interests articulated as a justification for race- and ethnicity-conscious policies and programs will likely receive scrutiny by those who challenge them. As a consequence, courts can be expected to examine the institutional commitment to the diversity-related interests that serve as a predicate for race or ethnicity-conscious practices. Therefore, attention to those goals and an across-the-board implementation of diversity policies are important.

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

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

From a federal legal standpoint, the term “diversity” must include more than a reference to race or ethnicity. Moreover, the educational goals associated with diversity should be defined with reference to benchmarks against which success can be assessed.

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

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

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

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

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

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

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

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

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

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

The Bottom Line... Your race- or ethnicity-neutral programs should be evaluated to determine the extent to which they are effective in helping you meet your diversity-related educational goals.

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

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

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

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

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

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

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

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

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

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

Under federal standards, race- or ethnicity-conscious programs are expected to have a “logical end point” once the goals associated with the program are met and can be sustained without the consideration of race or ethnicity, or once it is determined that the program does not materially advance diversity-related goals.

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

Section Two: *Bakke, Bollinger, and Beyond*

"A boundary line...is none the worse for being narrow."
Justice Lewis Powell, *Bakke* (1978)

Bakke, Bollinger, and Beyond: The U.S. Supreme Court and Admissions in Higher Education

On only two occasions in its history has the U.S. Supreme Court addressed the consideration of race or ethnicity in the selection process involving the admission of students to higher education institutions. In 1978, the U.S. Supreme Court in *Regents of the University of California v. Bakke* struck down a medical school admissions program under the Equal Protection Clause and Title VI of the Civil Rights Act of 1964, ruling that the program's reservation of 16 spaces out of 100 for underrepresented minority students was unlawful. At the same time, the Court refused to forbid the University of California at Davis Medical School from considering race as part of the admissions process in the future (as the lower court had done). In an opinion that became a blueprint for many colleges and universities (and that was ultimately reaffirmed by a majority of the U.S. Supreme Court 25 years later), Justice Powell recognized that race and ethnicity might appropriately be considered as part of the selection process in higher education admissions decisions when attempting to achieve the educational benefits of diversity. He said:

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation...

The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues [rather] than through any kind of authoritative selection"....

The atmosphere of "speculation, experiment and creation"—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body... [And] it is not too much to say that the "Nation's future depends upon leaders trained through wide exposure" to the ideas and mores of students as diverse as this Nation of many peoples....

The *Bakke* "split decision" (striking down the overly rigid consideration of race but preserving its lawfulness in appropriate cases) was mirrored in the Court's two opinions in 2003, involving challenges to distinct but related University of Michigan admissions policies. Pursuant to the Equal Protection Clause of the U.S. Constitution, Title VI of the Civil Rights Act of 1964, and a post-Civil War federal statute (42 U.S.C. § 1981), the Supreme Court in *Grutter v. Bollinger* and *Gratz v. Bollinger* reaffirmed and expanded upon Justice Powell's *Bakke* opinion, upholding the University of Michigan Law School's admissions program, while striking down the University of Michigan's undergraduate admissions program. In essence, those decisions affirmed that the educational benefits of diversity can constitute a compelling interest justifying the limited consideration of race in higher education admissions decisions, while emphasizing the need for such admissions decisions to involve an individualized review of applicants (reflective of the law school's process), rather than the automatic award of points based on race or ethnicity (reflective of the undergraduate school's process) in the pursuit of diversity goals.

Read together, those decisions provide important, practical guidance for higher education institutions that seek to achieve the educational benefits of diversity through race- or ethnicity-conscious selection decisions in the admissions process. This section thus sets

forth those guiding principles along with related policy and evidence issues that should surface in the evaluation of diversity-related admissions goals, objectives, and strategies. Some important legal principles that inform the discussion of these topics include:

1. **Goals.** Diversity goals should be mission driven. In fact, in *Grutter*, the Court deferred to the University of Michigan’s educational judgment that diversity was essential to its mission, given the evidence about the imperative that it attract and retain a racially and ethnically diverse student body. In addition, goals associated with a diverse student body should be framed and implemented with a focus on the *educational benefits* of diversity—not merely on diversity itself.

Correspondingly, any definition of diversity must be multifaceted—embracing a variety of student qualities that are believed to help create an optimal learning atmosphere in higher education, typically characterized by differences (and similarities), challenges, and experimentation—all of which contribute to the “robust exchange of ideas” and enhanced student learning and development. As Justice Powell first recognized, “[t]he diversity that furthers a compelling...interest encompasses a far broader array of qualifications and characteristics of which racial and ethnic origin is but a single though important element.”

2. **Objectives.** Institutions seeking to achieve the educational benefits of diversity through race- or ethnicity-conscious selection practices in the admissions process should ensure that they have established appropriately flexible but sufficiently defined benchmarks for gauging the success of their diversity-related efforts. Just as federal courts will reject practices that resemble quotas or rigid point systems (as in *Bakke* and *Gratz*), they are also unlikely to find educational interests that are “ill-defined” and “amorphous” as compelling. In short, objectives should not be based merely on some undefined notion about the value of diversity itself, on the one hand, or on some rigid numerical objective, on the other.
3. **Strategies.** Race and ethnicity may be considered as one factor among many in the admissions process—a process that must provide for the whole-file, individualized review of applicants. Race and ethnicity also may well operate as a “tipping point” in individual cases in favor of certain applicants. At the same time, race cannot be the driving force that makes “race a decisive factor for virtually every minimally qualified underrepresented minority applicant” in a given pool of applicants.

Also, institutions also have a legal obligation to give “serious, good faith consideration [to] workable race-neutral alternatives that will achieve the diversity they seek.” This means that they must rigorously evaluate viable race-neutral alternatives (and try them where feasible)—but they do not need to sacrifice core institutional goals when making judgments about which strategies to follow.

III: Admissions Models

This Chapter discusses some important characteristics of the selection process in admissions at many institutions, as a foundation for examining the actual parameters of admissions policies that have been analyzed by the U.S. Supreme Court. The discussion of Court-reviewed policies is designed to help inform some of the key judgments—involving both policy and evidence issues—associated with the development, refinement and implementation of any higher education admissions process.

A. Background

The goals and processes associated with the selection of students to attend higher education institutions vary greatly from institution to institution. Those differences notwithstanding, there are several principles that tend to characterize the work of admissions officers, regardless of the institution at which they serve.

The admissions process is a complex process that reflects in each institution a “unique compromise among competing values and priorities.”⁵ Moreover:

The task of admissions offices is not simply to decide which applicants offer the strongest credentials as separate candidates for college; the task, rather, is to assemble a total class of students, all of whom will possess the basic qualifications, but who will also represent, in their totality, an interesting and diverse amalgam of individuals who will contribute through their diversity to the quality and vitality of the overall educational environment.⁶

In other words, for colleges and universities, the evaluative criteria typically associated with admissions decision making are both *individual focused* (for instance, with an examination of the student’s capacity to perform and to benefit from the contemplated educational experience) and *institution focused* (for instance, with an examination of the student’s potential to contribute to the learning environment and institutional goals).

This dual “lens” is an important foundation for considering the issues most directly associated with the achievement of diversity-related goals. Specifically, to the extent that higher education institutions seek to achieve the educational benefits of diversity (as the University of Michigan did), then they must, by definition, remain focused on the mix of students they admit—to ensure that the mix significantly contributes to the educational outcomes (inside and outside of the classroom) that the institutions seek. The robust array of factors that may be considered to achieve such mission-related goals provides a clear rebuttal to any claim that (as to those institutions) the merit of an applicant can be judged entirely with reference to objective factors such as test scores and grade point averages. The admissions programs described below provide important illustrations that confirm that reality.

B. Admissions Models

The admissions models that follow are taken from the four admissions programs that the U.S. Supreme Court has addressed in detail. The programs are described, along with relevant observations by the Court.⁷ The first two programs are examples of Court-approved programs; the last two have been found to be unlawful.

1. The Harvard Undergraduate Policy (*Bakke*, *Grutter*, and *Gratz*)

Background

Perhaps the most important model to consider when designing or refining admissions policies is a policy that was never the target of a legal challenge that led to a U.S. Supreme Court decision. Harvard College's admissions policy first gained prominence in legal circles when it was described by parties who filed a "friend of the court" brief in the *Bakke* appeal in an effort to demonstrate how (in contrast to the challenged University of California at Davis Medical School policy) race might appropriately be used in an admissions setting. That policy description was attached as an appendix to Justice Powell's *Bakke* opinion, as an "illuminating example" demonstrating that the "assignment of a fixed number of places to a minority group is not a necessary means toward" the goal of achieving the educational benefits of diversity. As importantly, the Harvard policy was cited 25 years later in Justice O'Connor's majority opinion in *Grutter*—just as it was cited in Justice Rehnquist's opinion in *Gratz*—as a foundation upon which to evaluate the lawfulness of challenged policies at the University of Michigan.

Policy Description

- **In general.** The policy reflected that the admissions decision involved both the evaluation of the student and consideration of how best to create the desired educational experience for all students.
- **Academic criteria.** The policy focused on academic criteria—test scores, high school records, and teacher recommendations—that were determinative of who had "the academic ability to do adequate work...and perhaps do it with distinction." Those criteria, however, were not determinative of who should be admitted. Rather, Harvard distinguished between academically qualified students and students who should be admitted to Harvard College.
- **Other criteria.** Harvard's policy provided for the consideration of multiple factors when making judgments about which students to admit, based on the "belief...that if scholarly excellence were the sole or even predominant criterion, Harvard College would lose a great deal of its vitality and intellectual excellence and that the quality of the educational experience offered to all students would suffer." Those factors included student interests, talents, backgrounds, and career goals. In addition, diversity "add[ed] an essential ingredient to the educational process" and was a factor in the admissions selection process. Specifically, race could operate as one factor among many in some admissions decisions and in some cases might "tip the balance" in favor of an applicant. Correspondingly, criteria "associated with" but not "dependent on" race were considered.

Key Points

- The policy reflected what was, in essence, a two-dimensional admissions process by which students were first screened based on academic qualifications and, then, for those deemed qualified, evaluated pursuant to an expanded array of criteria (including those associated with diversity goals) relevant to ultimate admissions decisions.
- The consideration of race/ethnicity—as factors among other diversity factors considered—was sufficiently flexible to place all applicants “on the same footing,” although not with all diversity-related factors accorded “the same weight” for all applicants.
- Race and ethnicity might have been outcome determinative for many minority students (essentially tipping the balance for those students) but did not operate to virtually guarantee admission for all minimally qualified minority students.

2. The University of Michigan Law School Policy (*Grutter*)

Background

The federal narrow tailoring requirement that race- and ethnicity-conscious policies be sufficiently flexible was, in the context of the University of Michigan’s goal of achieving the educational benefits of diversity, the single most important factor distinguishing the Court’s acceptance of the University of Michigan Law School’s admissions policy from its rejection of the undergraduate admissions policy. The Court focused its inquiry into the flexibility of the admissions programs on two distinct but related elements:

- 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”; and
- Whether the use of race or ethnicity ensured “competitive consideration” among all students (thereby not insulating certain students from competition with others).

Policy Description

- **In general.** The Law School admissions policy, developed through a process that included faculty, involved the individualized review of all applications, with a focus on academic criteria, likely contributions to the institution, and contributions to diversity designed to enrich the education of all students. The policy required an examination “beyond grades and test scores to other criteria that are important to the Law School’s educational objectives.”
- **Academic criteria.** The policy provided for the consideration of grades, test scores, strength of recommendations, the quality of the undergraduate institution, and the areas/difficulty of the undergraduate course selection. In addition, the policy provided that “no applicant should be admitted unless we expect that applicant to do well enough to graduate with no serious academic problems.” At the same time, high scores did not guarantee admission and low scores did not “automatically disqualify an applicant.”

- **Other criteria.** The policy provided for the consideration of multiple diversity factors including race/ethnicity, travel/residence abroad, language fluency, overcoming hardship, community service, and successful careers in other fields. Personal statements, letters of recommendation, and essays were ways in which students could highlight their potential diversity contributions. In addition, the Law School reviewed daily tracking reports reflecting the race, ethnicity, gender, and residency of the admitted class, but that review did not affect the weight afforded race or ethnicity in the admissions process.

Key Points

- Applicants' files in the admissions process were appropriately subject to a "highly individualized, holistic review," with "serious consideration" to "all the ways an applicant might contribute to a diverse educational environment."
- Data demonstrated the authenticity of the consideration of multiple diversity factors. For example, the Law School's frequent acceptance of nonminority applicants with grades and test scores lower than underrepresented minority applicants demonstrated that non-race/-ethnicity diversity factors could "make a real and dispositive difference for nonminority applicants," notwithstanding the outcome determinative nature of race for those who were not in the upper range of test scores and grades.⁸

3. The University of Michigan Undergraduate Policy (*Gratz*)

Background

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

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

Policy Description

- **In general.** In 1998 and the years following, the undergraduate policy provided for the individual review and evaluation of all applications, but that review was characterized by an index system in which (in 1999 and 2000) race and ethnicity (in addition to two other criteria) were awarded 20 points out of a possible maximum of 150 points. It was "undisputed" that the University admitted "virtually every qualified...applicant" who was an underrepresented minority (African American, Hispanic, and Native American).

- **Academic criteria.** A maximum of 110 points out of the 150 could be assigned for academic performance, based on factors such as high school grades, test scores, high school academic quality, and high school curriculum strength.
- **Other criteria.** A maximum of 40 points out of the 150 could be awarded for nonacademic factors, including in-state residence, alumni relationships, essays, personal achievement or leadership, and public service. In 1999 and 2000, 20 points were automatically awarded for underrepresented minority students, for students attending predominantly minority or disadvantaged high schools, and for athletes. (Students were not permitted to receive more than 20 points if they had more than one of these characteristics.)

Key Points

- An admissions policy in which points are awarded based on the race or ethnicity of the applicant—and nothing more—fails to provide for the required “nuanced” and “individualized” consideration of each applicant, with a corresponding de-emphasis on how differing backgrounds, experiences, and characteristics of different students might benefit a higher education institution.
- An admissions policy in which the distribution of points based on the race of the ethnicity of applicants “has the effect of making ‘the factor of race...decisive’ for virtually every minimally qualified underrepresented applicant” is likely to be unlawful.
- 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.”

4. The University of California at Davis Medical School Policy (*Bakke*)

Background

In *Bakke*, the U.S. Supreme Court ruled that the special admissions program for certain minority medical school applicants administered by the University of California at Davis was unlawful.

Policy Description

- **In general.** The University of California at Davis Medical School adhered to a “two-track” admissions process, with two programs operating separately. Both involved academic screening based on objective criteria, file reviews, and interviews (for certain candidates), which informed a “benchmark score” awarded to each applicant. The standard program was responsible for making admissions offers to fill 84 of 100 incoming first-year positions; the special program (limited to minority candidates) was responsible for making admissions offers to fill 16 of 100 first-year positions. A separate “special admissions committee,” while evaluating factors similar to those used as part of the standard admissions process, did not apply the same standards to its minority applicants. (For instance, a grade point cutoff applicable to the standard program did not apply to the special program. Also, admitted applicants in the special

program had benchmark scores “significantly lower than many students...rejected in the [standard program].”) At no point were candidates in the two separate groups compared with each other before final admissions decisions were made.

- **Academic criteria.** Academic criteria considered by both programs included: overall grade point averages, grade point averages in science courses, standardized test scores, and letters of recommendation.
- **Other criteria.** Other criteria considered by both programs included extracurricular activities and “other biographical data.” Candidates who asked to be considered as members of a minority group (“Black,” “Chicano,” “Asian,” and “American Indian”) were considered in the special program.

Key Points

- The compelling interest in diversity is broader than “simple ethnic diversity.” As a consequence, a special admissions program that is “focused solely on ethnic diversity” would “hinder rather than further attainment of genuine diversity.”
- The assignment of a “fixed number of places to a minority group” in the admissions process is not a necessary means toward authentic diversity-related goals.
- Applicants must be treated as individuals in the admissions process, with each applicant subject to competitive consideration with all other applicants, regardless of race or ethnicity. A two-track or multi-track admissions policy (based on race or ethnicity), with a prescribed number of seats set aside for each identifiable racial or ethnic category of applicants, is inconsistent with the aim of achieving educational diversity-related goals.

Practice Pointers

Regarding Admissions Models

Read together, the U.S. Supreme Court's analysis of the four higher education admissions programs discussed in this chapter suggests that the following principles should be considered by institutions that consider race and ethnicity in their admissions process:

1. Admissions policies should be fully aligned with institutional mission-related goals.
2. Faculty and other key institutional leaders should be involved in helping establish admissions policies and, where feasible, participate in the admissions process.
3. "Merit," as a concept that defines the kind and caliber of student the institution seeks to admit, should be a well-developed and understood concept. In particular:
 - When describing the kinds of students the institution wants to attract and the relevant criteria the institution evaluates, avoid making arbitrary distinctions between academic and nonacademic factors. If, *in fact*, multiple academic and nonacademic factors are important in the institutional decisions regarding student selection, then ensure that the relevance of those factors is well described and understood as part of a "big picture" holistic conceptualization and description of merit.
 - As part of the admissions process, itself, consider distinguishing between "who is qualified" and "who should be admitted"—much in the same way as reflected in the Harvard College policy discussed above. Consider, as well, possible communications to stakeholders that explain the sound education reasons for such a distinction in the broader context of assembling a class of students who will achieve the institution's goals.
4. A process should be established by which the actual implementation of admissions practices can be evaluated, after the fact, with respect to policy statements and legal issues of concern (such as ensuring legitimate individualized review, authentic consideration of multiple diversity factors, and appropriate weighting of race and ethnicity in that process).

IV. Critical Mass

This Chapter addresses the basis upon which the University of Michigan gauged success toward the achievement of its diversity-related goals: its ability to attract and retain a critical mass of underrepresented minority students. In particular, this chapter focuses on the nature of the critical mass theory, the specific arguments asserted by the University of Michigan in the *Grutter* and *Gratz* litigation, and key policy and evidence issues associated with the potential specific application of the critical mass theory to institutions of higher education.

A. Background

The Court in *Grutter* affirmed that higher education institutions may define their diversity goals with respect to the objective of enrolling “a critical mass” of underrepresented students. In reaching its conclusion, the Court confirmed that the educational interests served by race- and ethnicity-conscious admissions practices cannot exclusively be those related to race and ethnicity, observing that the university’s goal was not to assure “some specified percentage of a particular group merely because of its race or ethnic origin,” but rather to achieve “the educational benefits that diversity is designed to produce.” Thus, there were sufficient foundations for the Court to embrace the University of Michigan’s conceptualization of diversity according to a critical mass theory, which established clear objectives (but not rigid quotas) linked to the educational interests in diversity.

Notably, Justice O’Connor in *Grutter* did not describe critical mass with great precision, other than to reference trial testimony that it meant “meaningful numbers” or “meaningful representation” or “a number that encourages underrepresented minority students to participate in the classroom and not feel isolated.” Thus, a review of the underlying record before the Court can help illuminate key factors for institutions to consider when evaluating the applicability of the critical mass theory to their diversity-related programs.⁹

As a foundation for that review, it is important to understand that the theory of “critical mass” is not one that has its roots in federal law. Corresponding to principles associated with the educational benefits of diversity, the critical mass theory is, rather, based upon education and social science foundations. Simply put, although the critical mass issue may in some cases merit legal review (as it did in the *Bollinger* cases), the relevant federal legal analysis will be largely dependent upon social science and related evidence associated with the development and justification for institution-specific critical mass objectives.

Critical Mass

Definitions

“Critical mass is...neither a rigid quota nor an amorphous concept defying definition. Instead, it is a contextual benchmark that allows [higher education institutions] to exceed token numbers within [their] student bod[ies] and to promote the robust exchange of ideas and views that is so central to [their] mission.”

Ancheta A. and C. Edley Jr., Brief of the American Educational Research Association, *et al.*, filed in *Grutter v. Bollinger*.

“A minority group (especially one that has been discriminated against) is easily marginalized when only a small percentage in a larger population....As the group’s presence and level of participation grows, at a particular point the perspective of members of the minority group and the character of relations between minority and non-minority changes qualitatively....The discrete point [at which this occurs] is known as ‘critical mass.’”

H. Etkowitz, *et al.*, “The Paradox of Critical Mass for Women in Science: Change in Workplace Structure Needed to Integrate Women Successfully in Academic Science Departments”, *Science* 266 (1994): 51.

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

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

Not Quotas. In addition, the Law School framed its objective as wanting “enough students so that every minority student [didn’t] feel that . . . their race is being evaluated every time they speak.” In this context, the Law School carefully distinguished the concept of critical mass from quotas, pointing to testimony that the Law School did not seek a “specific number of students of particular races,” that it did not “employ a numerical target or range of targets,” and that there was “no hard and fast number” that would ultimately define critical mass. (Data showed that between 1992 and 2000, the percentage of underrepresented minority students enrolled varied from 13.5 to 20 percent.)¹⁰

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

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

In sum, although the Court in the University of Michigan cases did not mandate that higher education institutions establish their diversity goals based on the theory of critical mass, it affirmed that theory as one legally acceptable way to give meaning to diversity-related goals.

Critical Mass

Expert Reports

Two experts, among other witnesses, provided important information related to the association between critical mass objectives and the goals associated with the educational benefits of diversity at the University of Michigan.

Dr. Patricia Gurin provided testimony about the importance of increasing the numerical representation of various racial/ethnic groups in order to achieve educational benefits, describing this “first essential step in the process of creating a diverse learning environment.” She explained that “structural diversity” (primarily the racial and ethnic composition of the student body) improved opportunities for interaction, with positive effects on learning and other outcomes. According to Gurin, structural diversity was a necessary but not a sufficient condition for achieving the educational benefits that the University of Michigan sought to attain.

Dr. Stephen Raudenbush provided testimony about the institution-specific conclusions he reached with respect to the University of Michigan’s critical mass and diversity goals. His opinions were based on an examination of the impact of alternative admissions models on the racial and ethnic student composition at the University of Michigan in both academic and social settings.

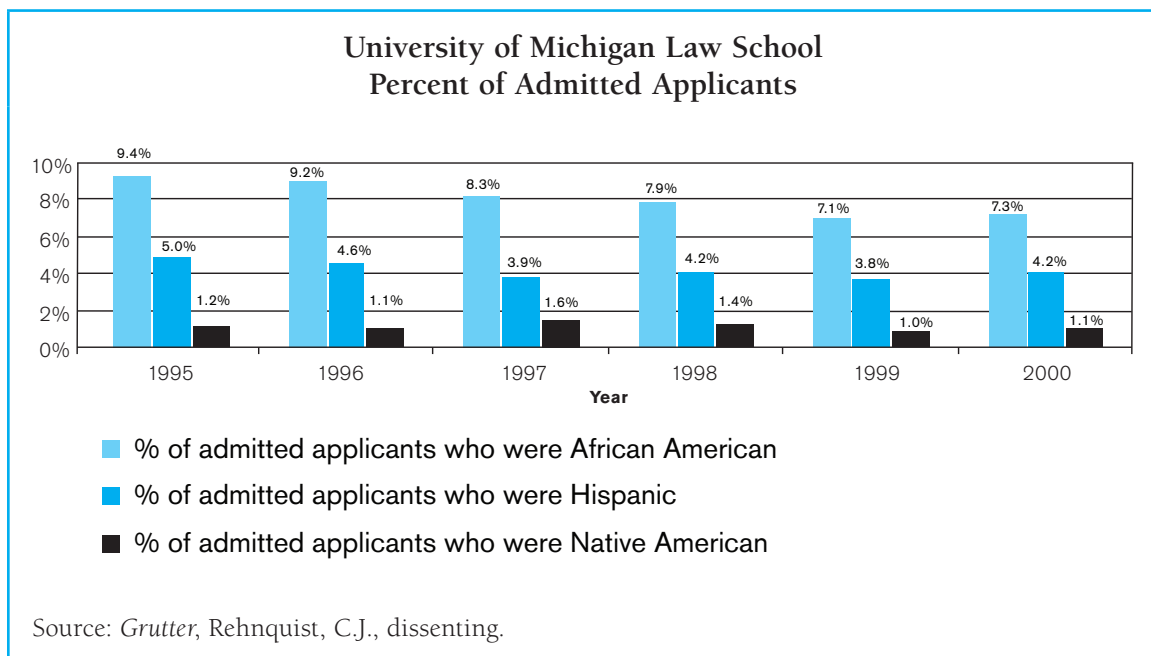
These reports may be found at
www.umich.edu/~urel/~admissions/research/expert

Dissenting Views. The relatively sparse record before the Court on the issue of critical mass—coupled with the robust dissenting opinions of four Justices—reflects the need for institutions to give serious attention to the critical mass theory (if applicable) as part of their effort to develop policies related to the achievement of the educational benefits of diversity. Notably, the dissenting Justices regarded the critical mass goals of the Law School to be “a naked effort to achieve racial balancing,” a characterization reflecting their perception about the lack of satisfactory answers to several major questions. In particular, three challenges to the University of Michigan’s critical mass arguments can be found among the opinions of the dissenting Justices in *Grutter*. Each, in one way or another, is associated with the concern that the concept of individualized review was being trumped by an over reliance on race/ethnicity in the admissions process (driven by efforts to achieve critical mass objectives). In other words, the dissenting Justices were concerned that race and ethnicity operated at the University of Michigan’s Law School (at least in effect) as an automatic qualifying factor—being “outcome determinative” for too many minority group applicants. In Justice Kennedy’s words,

About 80 to 85 percent of the places in the entering class are given to applicants in the upper range of [test scores] and grades. An applicant with these credentials likely will be admitted without consideration of race or ethnicity. With respect to the remaining 15 to 20 percent of the seats, race is likely outcome determinative for many members

of minority groups. That is where the competition becomes tight and where any given applicant's chance of admissions is far smaller if he or she lacks minority status. At this point the numerical concept of critical mass has the real potential to compromise individual review.¹¹

Challenge One: Subgroup Variations. The dissenting Justices in *Grutter* viewed the variation *among* underrepresented minorities in enrollment at the University of Michigan as likely reflecting a different application of the critical mass theory among the three underrepresented minority groups—a pattern that led to unanswered questions about whether the theory was (or should be) applied differently among the three underrepresented groups. Reflecting upon what he believed to be “dramatically” differing admissions practices among the racial subgroups, Justice Rehnquist asserted that they could not be “defended under any consistent use of the term ‘critical mass.’” (One response to that argument was that the failure to reach a particular objective related to particular applicant subgroups was not a valid reason to question the objective itself.)

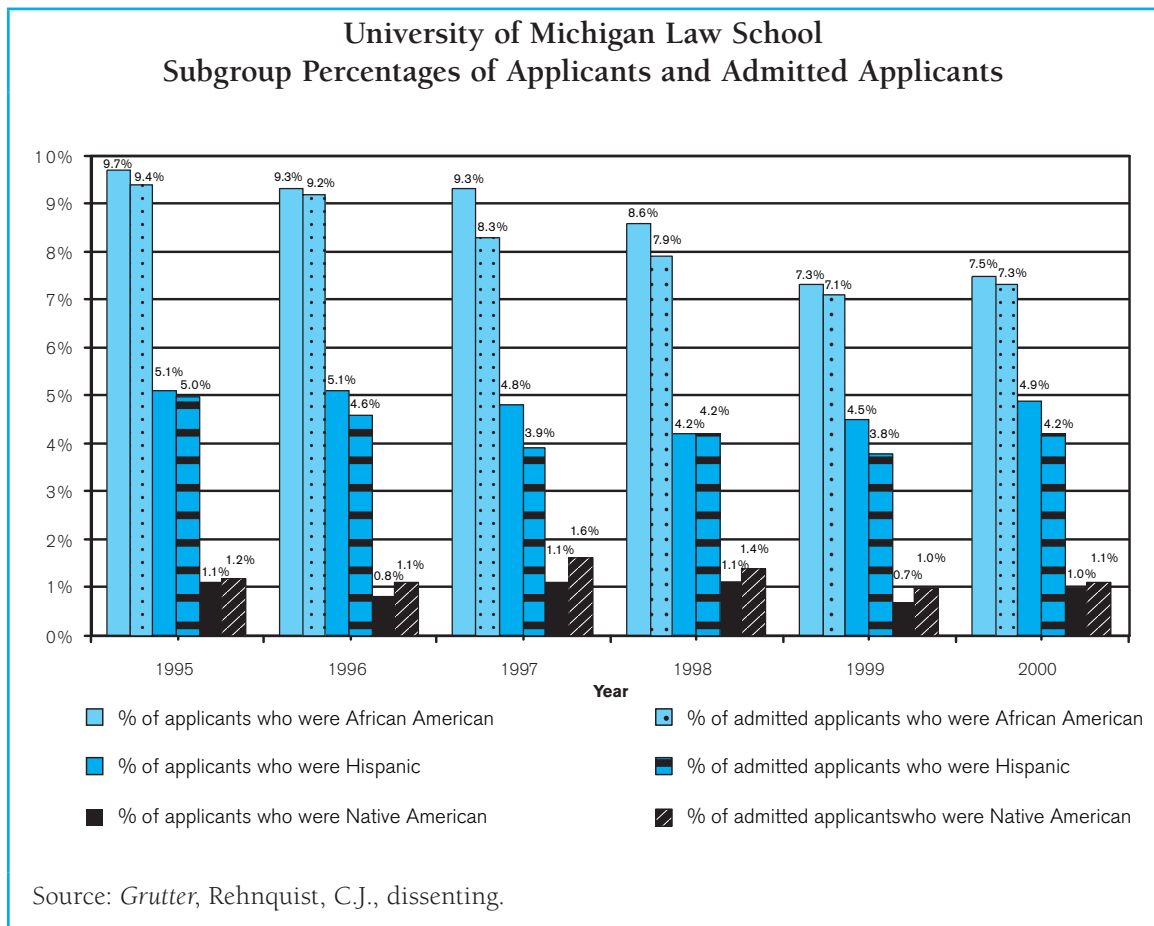


Although remaining a point of unresolved debate among the Justices, this challenge raises important questions about how institutions should frame their critical mass objectives. Is the objective to attain a critical mass of underrepresented minority students *as a whole*? Is the objective to attain a critical mass of minority subgroups, *subgroup by subgroup*? Might the theory of critical mass apply (but apply differently) *both* with respect to underrepresented minority students as a group *and* to relevant subgroups within that population? Simply put, is there a different critical mass for different minority groups?¹²

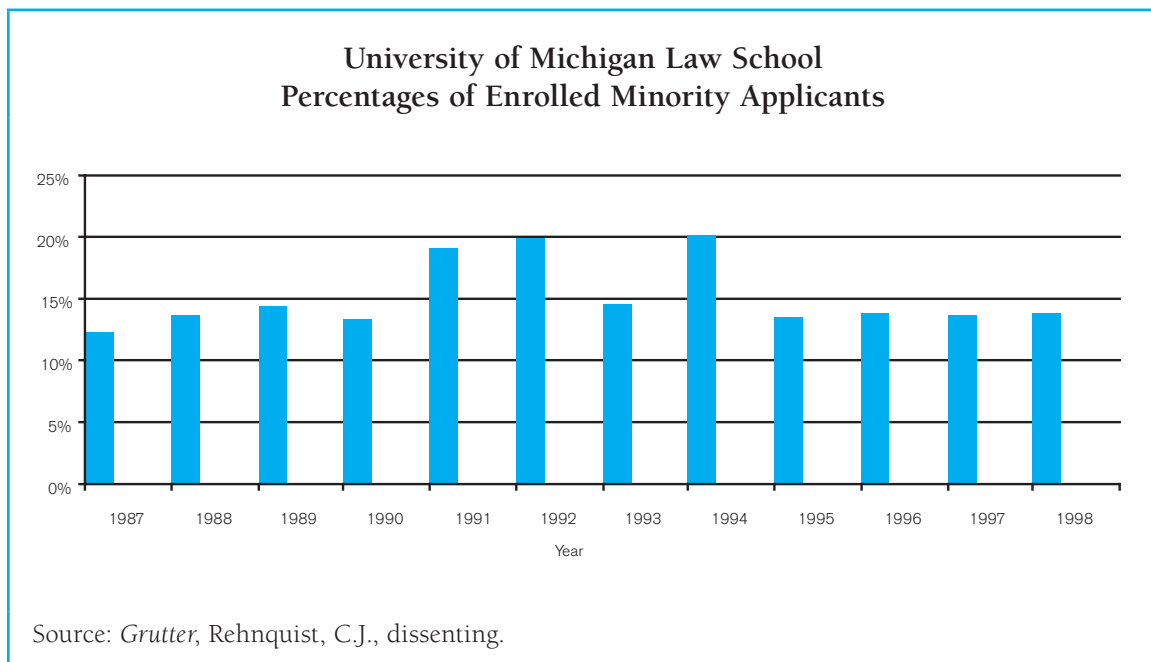
Challenge Two: Applicant/Admitted Student Correlations. The dissenting Justices also asserted that the narrow “correlation between the percentage of the Law School’s pool of applicants...and the percentage of the admitted applicants” who were underrepresented minorities was not sufficiently explained. They posited that the “tight correlation” between

admittees and applicants of a given race “must result from careful race-based planning,” reflecting a “formula for admission based on the . . . proportion of each group being admitted [being] the same as the proportion of the applicant pool.” Justice Kennedy observed that this “close correlation” “require[d] the Law School either to produce a convincing explanation or to show it has taken adequate steps to ensure individual assessment,” and that the Law School did neither. (One argument made in response was that the Law School’s minority enrollment percentages “diverged from the percentages in the applicant pool by almost 18 percent from 1995 to 2000.”)

The correlation question—also unresolved among all Justices—similarly merits consideration in the context of institutional planning. In sum, where patterns comparable to those reflected in the figure below emerge at other institutions, are there ways in which those institutions can effectively rebut any inference that the individualized review of applicants has been sacrificed to an overriding goal of achieving some sort of proportional representation?



Challenge Three: The Constancy of Enrolled Minority Students. Justice Kennedy (separately among the dissenting Justices) raised the concern that the constancy of enrolled minority students suggested that individualized review was subverted in the admissions process in favor of an overreliance on race. Observing that there was little deviation in the percent of enrolled minority students, Justice Kennedy asserted that the University of Michigan was required—but had failed—to overcome the inference that race and ethnicity considerations trumped the legitimate individualized review of applicants. (Justice O’Connor, responding for the majority, observed that Justice Kennedy had conceded that between 1993 and 2000 the number of underrepresented minority students in each class at the Law School varied from 13.5 to 20.1 percent, “a range inconsistent with a quota.”)



As with the other issues raised, this question merits attention as part of the policy development and implementation efforts by higher education officials. In instances where the percentages of enrolled minority applicants (collectively, or by subgroup) are arguably relatively constant, what evidence can be established that shows that a racial and ethnic focus in the admissions process did not compromise the effect of an authentic individualized review process?

B. Key Framing Issues and Evidence

When evaluating prospects regarding the establishment of diversity-related critical mass objectives and the implementation of policies designed to further those objectives, institutions should consider the following principles derived from the University of Michigan’s arguments and the U.S. Supreme Court’s treatment of the critical mass issue:

Critical mass objectives should be:

- Directly associated with and framed in light of core educational goals;
- Not tied to rigid numerical targets (although a focus on a truly flexible range of underrepresented minority students likely to achieve critical mass goals may well provide a stronger basis in evidence than objectives not associated with any such range);
- Associated with the existing underrepresentation of minority students on campus—with the concept of “underrepresentation” being defined specifically with respect to ranges of minority/subgroup students at which the educational benefits of diversity can be achieved *on campus* (rather than with respect to external data regarding, for instance, numbers or percentages of minority high school students in an institution’s service area);
- Based on an institution-specific analysis, which may include data regarding the stages (and ranges) at which critical mass benefits are likely to be achieved in both classroom and social settings; and
- Factored into the admissions process in the context of multiple, and sometimes competing, objectives.

Higher education officials should also consider the relevance of both institution-specific evidence and more general research and data that relate to their critical mass objectives. The Supreme Court in *Grutter* did not specifically address the question regarding the kind or quality of evidence that an institution must have in order to sustain a claim about the need to achieve a critical mass of underrepresented students. Nonetheless, multiple evidentiary bases may serve to establish good institution-specific foundations for making the case that critical mass objectives are appropriate benchmarks by which to gauge success with respect to the achievement of the educational benefits of diversity. These include:

- Social science evidence that defines the critical mass theory and explains its potential application in higher education settings with respect to minority student groups; and
- Evidence that establishes the nature of the critical mass theory as it likely applies to a specific institution, including:
 - Research that demonstrates the necessary conditions for achieving the educational benefits of diversity, possibly including an explanation of the points at which institutional “structural diversity” has been or is likely to be achieved,¹³ in what settings, and among what groups; and
 - Institution-specific research that provides educational perspectives about critical mass, which may include (among other things) statements from professors describing in multiple settings the points at which they have observed and experienced the attainment of the educational benefits associated with a critical mass of minority students.

Practice Pointers

Regarding Critical Mass

Some of the key lessons to consider, derived from the University of Michigan decisions, relate to the potential application of the critical mass theory to higher education institutions:

1. Baselines for evaluating success in achieving diversity-related goals should be established. If those baselines depend upon the critical mass theory, then be sure that the theory is well understood, based on social science research applicable to your institution.
2. If the theory of critical mass is a basis for the establishment of diversity-related goals, then:
 - Research-based foundations should support institutional goals and objectives;
 - Critical mass objectives should be framed in educational, diversity-related terms;
 - Critical mass objectives should neither be ill defined or amorphous, on one hand, nor rigidly quota-like, on the other; and
 - Critical mass objectives should be pursued in light of all relevant (and sometimes competing) enrollment management objectives.
3. If the theory of critical mass is a basis for the establishment of diversity-related goals, then important policy issues should be evaluated, including:
 - Are critical mass objectives framed with reference to “underrepresented minority students” (as in the *Bollinger* cases)? Are they framed with reference to specific subgroups of students (where, for instance, critical mass ranges may vary from subgroup to subgroup)? Are they framed with respect to both?
 - How are critical mass objectives implemented over time? Has the selection process in admissions rigorously adhered to principles of individualized review? Has the consideration of race and ethnicity (in the name of achieving critical mass objectives) as part of the admissions process threatened to compromise a process in which multiple diversity-related factors are evaluated with respect to each student, individually?
 - Are clear goals and objectives also associated with the many non-race/-ethnicity facets of diversity the institution says that it values? Are objectives associated with non-racial/-ethnic diversity pursued in ways that are comparable to race and ethnicity objectives? By what measures are those efforts evaluated?

V. The Educational Benefits of Diversity, and More

This chapter provides an overview of the way that federal courts have addressed various asserted compelling interests in educational settings. It focuses on the educational benefits of diversity (in the context of potentially complementary access and equity interests), highlighting the kinds of evidence institutions should consider when attempting to satisfy threshold legal requirements.

A. Background

Race- and ethnicity-conscious admissions practices must be supported by a compelling interest—an interest that is of such weight that it operates as a matter of law to justify race- or ethnicity-conscious action. Although there is no precise legal formula for determining whether a particular asserted interest is compelling under federal law, federal courts have tended to examine, with respect to asserted compelling interests, their (1) relationship to core constitutional values and court-recognized compelling interests; (2) relationship to mission-related institutional interests being asserted; and (3) related institution-specific evidence that affirms the claim regarding the compelling nature of the interest.¹⁴

Rejected Interests. The federal courts have not closed the door on establishing other compelling interests that may justify race- or ethnicity-conscious practices, but they have squarely rejected several interests, including:

1. **Curing societal discrimination.** In several cases, the U.S. Supreme Court has observed that efforts to cure societal discrimination are not as a matter of law compelling interests that can justify race- or ethnicity-conscious practices. The Court has viewed such interests as: unlimited in reach and time; so ill defined that success with respect to the achievement of the goal cannot be readily assessed; and too broadly based for any institution or agency to have a realistic chance of having a positive impact on the goal.¹⁵
2. **Providing role models to help cure societal discrimination.** The U.S. Supreme Court has rejected the interest in providing role models to alleviate the effects of societal discrimination, based on a determination that such a justification would (among other things) permit discriminatory practices “long past the point required by any legitimate remedial purpose” and would risk colliding with “separate but equal” principles, rejected since the *Brown v. Board of Education* decision in 1954.¹⁶
3. **Racial balancing.** In several cases, the U.S. Supreme Court has ruled that efforts to achieve some sort of racial balance constitutes little more than discrimination for its own sake and will not be permitted as a foundation for race- or ethnicity-conscious practices. In short, institutional goals associated with numbers for numbers’ sake are not likely to survive legal review.¹⁷

Possible Interests. In a middle category—interests that the Court has not yet fully embraced as compelling, but for which there is the potential to make the case based on what the Court has said— at least two interests merit attention:

1. **Serving underserved communities.** Justice Powell’s *Bakke* opinion addressed the interest advanced by the University of California at Davis in “improving the delivery of health-care services to communities currently underserved.” Without ruling on the question about the compelling nature of that interest, Justice Powell stated: “It may be assumed that in some situations a State’s interest in facilitating the health care of its citizens is sufficiently compelling to support [the use of race in admissions]. But there is virtually no evidence in [this] record indicating that [the challenged admissions program] is either needed or geared to promote that goal.” Thus, although Justice Powell never ruled that the interest in serving underserved communities was compelling, he recognized the prospect that (given the right evidence) that case might successfully be made.
2. **Access and equal opportunity.** The interest in promoting access to higher education for all students—with open doors for “talented and qualified individuals of every race and ethnicity”—is an interest that (at the very least) complements and supports the interest in the educational benefits of diversity, affirmed by the U.S. Supreme Court in *Grutter*. In that opinion, Justice O’Connor recognized:

[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.’

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.

The *Grutter* Court did not rule that the access and equal opportunity interests were compelling interests, standing alone. However, the Court’s recognition of the complementary nature of those interests and the core interests in the educational benefits of diversity raises the prospect that successful arguments about the compelling nature of access and interests might be made in future cases.

Recognized Interests. Federal case law confirms at least two interests that can be sufficiently compelling to justify an institution’s use of race or ethnicity as part of the selection process in higher education admissions. One is an institution’s interest in remedying the present effects of its prior or present discrimination. The other is an institution’s interest in securing the mission-based educational benefits of a diverse student body.

Although these two interests may have foundations in common, they are distinctly different. One is (as the name suggests) *remedial*: it is an interest that may justify some race- or ethnicity-conscious measure in order to cure a past or present wrong. Frequently, such interests are not mere choices; rather, they often reflect court- or federal agency-imposed obligations. By contrast, the interest in the educational benefits of diversity evolves from an inherently forward-looking, mission-driven educational choice, as in the University of Michigan cases.

The interest in diversity first articulated by Justice Powell in his *Bakke* opinion, and then embraced by the Court in *Grutter* a quarter of a century later, is clearly an interest that institutions may establish as compelling. In *Grutter*, the majority ruled that the freedom of a university to select students who would contribute to the “robust exchange of ideas”—if of “paramount importance” in the fulfillment of its mission—represented an area of decision making entitled to “autonomy,” as one directly associated with the “special niche in our constitutional tradition” enjoyed by higher education institutions. The Court stated: “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 mission.”

The Court in *Grutter* also evaluated the evidence related to the University of Michigan’s asserted compelling interest in the educational benefits of diversity. 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.” The Court observed in this context that that campus diversity helped in promoting cross-racial understanding, in breaking down stereotypes, and enabling students to better understand persons of different races.

University of Michigan Goals

The University of Michigan Law School’s admissions goals were to admit students:

- Who “individually and collectively [were] among the most capable”;
- With “substantial promise for success in law school”;
- With a “strong likelihood of succeeding in the practice of law and contributing in diverse ways to the well-being of others”; and
- With “varying backgrounds and experiences who [would] respect and learn from each other.”

B. Key Framing Issues and Evidence

Some of the important issues that should be considered when institutions seek to establish the educational benefits of diversity as a foundation for race- and ethnicity-conscious selection practices in admissions include the following:

- The interest in student diversity should be central to the higher education institution's mission;
- The interest in diversity should be framed in *educational* terms that relate directly to the kinds of outcomes the higher education institution seeks, and over which it has some degree of control. (Courts may more readily defer goals framed in the context of institutional benefits of diversity than they do to external societal benefits, such as social justice.)¹⁸ and;
- Diversity goals should be well defined and operationalized so that relative success can be assessed over time; however, those goals should not focus only on race and ethnicity, only on numbers or percentages, or (without more) be limited to addressing problems of underrepresentation of subgroups of students (see Chapter IV).

When evaluating relevant information that can provide support for institutional efforts to establish educational benefits of diversity as compelling, higher education officials should consider the relevance of both institution-specific evidence and more general research and data that relate to their goals. Although the Supreme Court in *Grutter* 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 institution-specific bases in evidence must exist as foundations for any claim that the educational benefits of diversity are compelling at a particular institution. Certainly, such claims may be supported by other, more general research documenting the benefits associated with the diversity interests that the institution is advancing. Stated differently, many kinds and sources of evidence can help: (1) reaffirm the *Grutter* Court's finding that the educational benefits of diversity can be compelling, as a matter of law; and (2) establish institution-specific foundations for making the case that those benefits are central to the academic mission of the particular institution, as a matter of fact.

General social science evidence that documents the educational benefits of diversity can serve as an important foundation for analyzing the institution-specific case about the importance of those benefits to the particular institution, including with respect to:

- Improved teaching and learning for all students;
- Better preparation for students in the workforce; and
- Enhanced civic values of students.

Institution-specific evidence that demonstrates the relevance and centrality of the educational benefits of diversity to the institution's core mission may include:

- Mission, strategic planning, and related policy statements that express the institution's commitment to diversity-related goals;
- Information about relevant curricular strategies and offerings, student affairs activities, etc., that demonstrate the authenticity and integration of mission-related diversity goals in the day-to-day lives of students, professors and relevant staff;¹⁹
- Institutional survey data (students, professors, etc.) that reflect the impact of a diverse student body on teaching, learning, and other educational outcomes;
- Opinions from professors, students, etc., regarding their experiences, which are focused on the impact of diverse learning situations on students and on the learning environment overall.
- Information from employers regarding the importance of their employees having had diverse learning experiences, and the impact of institutional diversity efforts toward the preparation of better-qualified employees in the workforce.

Practice Pointers

Regarding the Educational Benefits of Diversity

The following major points derived from the University of Michigan decisions and other federal law should be foundations for institutional discussions related to goals that may support race- and ethnicity-conscious practices:

1. Clear institutional goals should be associated with any race- or ethnicity-conscious admissions policy. To the extent appropriate, institutions should align those policies with the kinds of interests established as compelling in the *Grutter* decision.
2. To the extent that interests in the educational benefits of diversity (as set forth in *Grutter*) do not support race-conscious policies, possibilities that other interests that the Court has endorsed (or that it has raised the prospect of endorsing), should be carefully evaluated.
3. Relevant evidence that establishes an institution-specific foundation for asserting that the diversity-related interests the institution seeks to achieve are compelling—based on existing social science research and institution-specific research—should be developed and assembled.

VI. Race-Neutral Alternatives

This Chapter provides an overview of relevant legal principles (including an examination of the important distinction between “race-neutral” and “race-conscious” practices) as a foundation for an examination of federal court treatment of some potentially viable race-neutral alternatives analyzed in recent federal education-related cases. This chapter also highlights relevant policy considerations that should inform the evaluation of such alternatives.

A. Background

Pursuant to the strict scrutiny standard, race and ethnicity may be used as factors in the admissions process only to the extent necessary to achieve the institution’s compelling interest—in many cases, the educational benefits of diversity. Based on that general standard, a major issue to be addressed is whether, when compared to existing race- and ethnicity-conscious admissions strategies, there are less discriminatory means—including race-neutral means²⁰—that will as effectively achieve the goals advanced by those strategies.

1. Defining “Race-Neutral”

A critical (and often overlooked) step in assessing diversity practices and evaluating potentially viable race-neutral alternatives is determining if the practices in question are actually “neutral” in the first place. Importantly, the fact that admissions-related policies may be *facially* race-neutral does not necessarily mean that they are *as a matter of law* race-neutral. In fact, federal law likely treats two kinds of policies as race-conscious: (1) those that involve explicit racial classifications (such as the University of Michigan Law School’s race-as-a-factor policy or the University of California at Davis’s admissions set aside for underrepresented minority students); *and* (2) those that are neutral on their face but that are primarily motivated by race-conscious goals (such as, arguably, the Texas Ten Percent Plan, which was designed to boost minority enrollment at Texas higher education institutions following the “fallout” of the *Hopwood* decision).²¹ Notably, the *Grutter* majority was apparently unwilling to conclude, based on arguments presented, that the “percentage plans” adopted in Texas, Florida, and California (“to guarantee admission to all students above a certain class rank threshold in every high school in the State”) were race-neutral. In rejecting arguments pressed by the United States on the merits of these race-neutral plans, Justice O’Connor began her analysis with the following words: “[E]ven assuming such plans are race-neutral....”

Thus, in some settings, facially neutral policies may in fact serve as viable race-neutral alternatives, whereas in others (given the underlying motivation) they may qualify as race-conscious. In short, specific facts in specific settings are likely to control the determination about how facially race-neutral policies are ultimately characterized by federal courts.

2. Pursuing Race-Neutral Alternatives

The law regarding the pursuit of race-neutral alternatives in the context of maintaining race-conscious strategies is clear: Higher education institutions must give “serious, good faith consideration [to] workable race-neutral alternatives that will achieve the diversity they seek.” The Supreme Court in *Grutter* specifically admonished higher education institutions to “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.

Higher education institutions should assess the viability and appropriateness of race-neutral alternatives with specific reference to their institutional goals, including those associated with diversity. What may work as a viable alternative in one setting—or on one campus—may not work in another. Moreover, 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 a Hobson’s choice—choosing between their diversity goals and other core institutional goals.

At the same time, neither is it true that higher education institutions are faced with nothing more than an “either-or” choice when it comes to the use of race-neutral alternatives in an effort to achieve diversity-related goals. On many campuses where educational goals associated with student body diversity are paramount, enrollment management, student affairs, and academic officials are pursuing *both* race-neutral *and* race-conscious practices. The two can often work together to help institutions achieve their diversity-related goals *and* to help institutions demonstrate that their strategies are narrowly tailored toward the achievement of their goals.

Finally, to ensure that race is used only to the extent necessary to further an interest in the educational benefits of diversity over time, institutions must regularly review their race- and ethnicity-conscious policies to determine whether the use of race or ethnicity continues to be necessary and, if necessary, if the policies merit refinement in light of relevant institutional developments. 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.

B. Possible Race-Neutral Alternatives

Some of the possible race-neutral alternatives that have been recently addressed by federal courts in educational settings are set forth below, with brief descriptions of relevant observations and conclusions.²²

Recruitment and Outreach Programs

In general. “Inclusive” recruitment and outreach programs—even when expressly race-/ethnicity-targeted—have been determined by several federal courts (in multiple contexts) to be “race-neutral.” In those cases, the federal courts have determined that where

recruitment or outreach programs do not confer tangible benefits or provide specific opportunities to some individuals to the exclusion of others, and where the information or assistance they provide is otherwise more generally available, then “different treatment” among different individuals based on their race or ethnicity has not occurred.²³

Grutter (2003). Although not discussed in the U.S. Supreme Court opinion, the record in *Grutter v. Bollinger* reflects that the University of Michigan Law School “engaged in both pre- and post-admission recruiting activities but that such activities were not enough to enroll a ‘critical mass’ of underrepresented minority students.”

Percentage Plans

In general. Percentage plans may in some cases operate as race-neutral alternatives, depending on the specific context and facts. Their formulaic operation may not be well aligned with authentically nuanced and multifaceted higher education diversity goals on individual campuses, however.

Grutter (2003). The U.S. Supreme Court in *Grutter v. Bollinger* rejected the United States’ argument that the University of Michigan could have used percentage plans instead of considering race as an admissions factor, concluding that such plans: (1) might preclude the necessary individualized assessment required to satisfy the University of Michigan’s diversity goals; and (2) did not demonstrate the efficacy of satisfying graduate and professional school diversity goals.

(Additional arguments pressed in the *Bollinger* appeal (not addressed by the Court) were that percentage plans, by design, would not be effective at small, academically selective universities, and that they would not work where segregation in secondary schools was not present.)

Socioeconomic Status

In general. Whether socioeconomic status may in some cases operate as a viable race-neutral alternative to achieve racial and ethnicity diversity goals is a topic of much debate. Any determination about the viability of such an alternative in a university-specific context will depend on particular facts, including how socioeconomic status factors that favor applicants are defined. For instance, there may be significant differences in the impact on racial and ethnic diversity goals depending on whether family income or family wealth is the factor favored in the admissions process.

Comfort (2005). The First Circuit Court of Appeals in *Comfort v. Lynn School Committee*, involving a challenge to a race-conscious elementary and secondary school transfer plan, ruled that the school district “need not prove the impracticability of every conceivable model for racial integration” so long as it “demonstrate[d] a good faith effort to consider feasible race-neutral alternatives.” The court found that socioeconomic status as an alternative to the use of race in the transfer plan was “seriously considered and plausibly rejected” because a system conditioning transfers on socioeconomic status “would exacerbate [the] existing racial imbalance” based on residential patterns in the school district.

Parents Involved In Community Schools (2005). In *Parents Involved in Community Schools v. Seattle School District No.1*, the Ninth Circuit Court of Appeals addressed the lawfulness of a race-conscious high school assignment plan. In its discussion of the relevant standard of evaluating race-neutral alternatives to race-conscious measures, it determined that “implicit in the [U.S. Supreme] Court’s analysis [in *Grutter*] was a measure of deference toward the university’s identification of values central to its mission.” The court ruled that the use of poverty in lieu of race by the school district would not, based on the school board’s determination, achieve its diversity interests and it would have “other adverse effects.” Despite the absence of a “formal study” of poverty as an alternative, the court found two “legitimate reasons” explaining the board’s rejection of poverty as a viable alternative: (1) The board found that the use of poverty would be “insulting to minorities” and often would not correlate with minority status; and (2) where correlation might exist, implementation of the poverty alternative “would have been thwarted by high school students’ understandable reluctance to reveal their socioeconomic status to their peers.” In sum, the court refused to require the district “to conceal its compelling interest in achieving racial diversity and avoiding racial concentration or isolation through the use of ‘some clumsier proxy device’ such as poverty.”

Altering Selection Criteria

In general. Race-neutral alternatives can also involve the reevaluation of existing admissions criteria. Specifically, in the context of making admissions decisions about who is qualified and who should be admitted, the choice of and the weight associated with selection criteria can have an impact on the racial and ethnic composition of a particular class—as discussed in detail in Chapter III. Importantly, although federal law would likely encourage (if not require) modifications toward race neutrality if consistent with core institutional goals and interests, federal law does not require those changes if they are at odds with core institutional values, as explained in *Grutter*.

***Grutter* (2003).** The Supreme Court in *Grutter v. Bollinger* rejected the argument that the University of Michigan should have decreased its emphasis on GPA/test scores in the admissions process, as an alternative to its race-conscious admissions policy. It concluded that such action would constitute a “drastic remedy” that would transform the institution and force abandonment of academic selectivity, a “cornerstone” and “vital component” of the university’s mission.

Lottery Systems

In general. Advocates in several cases have asserted that lottery systems are viable alternatives to race-conscious admissions measures. Even though the success of such arguments is inherently fact specific, the simple nature of a lottery—formulaic and random—may undermine such claims in any higher education setting where officials pursue varied diversity interests that are authentically nuanced, inherently student-focused, and tied to particular mission interests.

***Grutter* (2003).** The Supreme Court in *Grutter v. Bollinger* rejected the alternative of an admissions lottery system as a viable race-neutral alternative to Michigan’s race-conscious

admissions policy, concluding that such a policy might diminish the quality of admitted students and might not produce sufficient educational diversity on campus.

McFarland (2005). The Sixth Circuit Court of Appeals in *McFarland v. Jefferson County Public Schools* affirmed a lower court's decision upholding a race-conscious student assignment plan. The lower court found that an "assignment lottery" was not required, where such a system would require "dramatic sacrifice" in "student choice, geographic convenience, and program specialization," and could only be achieved "at a huge financial cost" to the district.

Parents Involved In Community Schools (2005). In *Parents Involved in Community Schools v. Seattle School District No.1*, the Ninth Circuit Court of Appeals addressed the lawfulness of a race-conscious high school assignment plan. The court ruled that the use of a lottery to assign students to oversubscribed schools would not achieve the district's diversity goals, concluding (based on district testimony) that "random sampling from such a racially skewed pool would produce a racially skewed student body." One board member testified: "If applicants are overwhelmingly majority and you have a lottery, then your lottery—the pool of your lottery kids are [sic] going to be overwhelmingly majority. We have a diversity goal."

Practice Pointers

Regarding Race-Neutral Alternatives

The following practice pointers should be considered by higher education institutions that seek to promote their diversity-related goals with an array of strategies reflective of serious, good faith consideration of race-neutral alternatives:

1. A body with the responsibility and authority for examining and making policy recommendations regarding race-neutral alternatives should be charged with periodically researching and evaluating possible race-neutral alternatives in light of institution-specific, diversity-related goals.
2. A record of practices considered, along with the accompanying evaluations regarding their viability, should be maintained. In addition, evidence-based foundations for making judgments about which practices to try and which to reject should be documented. (Research studies that include projections about likely results over time may also be useful, especially where comprehensive historical foundations for those conclusions do not exist.)
3. The entire array of race-neutral practices pursued by the institution should be well documented, along with an ongoing record of research regarding the effectiveness of those practices in achieving institutional diversity goals.

Over time, a pattern that reflects serious consideration, experimentation, and evaluation leading to research-based policy changes is more likely to reflect the kind of deliberate and earnest consideration of alternatives that may justify some federal court deference to academic judgments regarding race-neutral alternatives.

VII: Making the Case

Throughout the discussion of each of the topics addressed in this manual, one theme has repeatedly surfaced: legal success is ultimately predicated upon educational soundness, and educational sound decisions should be the product of deliberative judgments informed by relevant evidence and experience. Regardless of whether the question is one of the institution's ability to establish the educational benefits of diversity as compelling or of the design and implementation of its selection policies in admissions, the focus is the same: Are there research-based foundations that support key academic judgments regarding, in the famous words of Justice Frankfurter, “[W]ho may be admitted to study”?²⁴

Corresponding to the very clear picture of what we know we need with respect to research and evidence (based on existing case law) is the somewhat less developed set of questions that are the logical outgrowth of existing law. These are questions that institutions may appropriately consider as a matter of prudence in their efforts to achieve their mission-related goals and to anticipate (and prepare for) the possible next wave of legal challenges. The previous chapters have set forth a description of key relevant framing and evidence issues and principles that can assist higher education institutions in such efforts.

As daunting and resource intensive as the undertaking of periodic review and evaluation might seem, higher education leaders should not lose sight of three important points:

First, institutions of higher education are not operating in isolation in their efforts to achieve the educational benefits of diversity. There is much research and analysis under way that can inform institutional policies from campus to campus. Thus, the effort of assembling relevant research and information that should inform good policy does not mean that institutions have to “reinvent the wheel.” They may well have to adjust its size or tire pressure to meet institution-specific goals, but the work has begun—and on many key issues, that work is extensive. (Appendix A provides a bibliography of some relevant references.)

Second, to the extent that the law demands that institutions have institution-specific foundations that support the application of more general social science theories (or key legal principles often associated with those theories), that demand comes because the institutions, themselves, have asserted (in one way or another) that their diversity-related interests are “compelling.” If, in fact, that is the case, then a corresponding investment to make those goals a reality is called for—in both educational and legal terms. Otherwise, the interest really isn't “compelling” after all.

Finally, as suggested at the outset of this manual, the ultimate questions for which federal courts demand satisfactory answers are not far removed from the very sorts of questions that higher education leaders should address in any effort to promote mission-driven goals through effective and efficient strategies: What are my goals? By what measures can I evaluate success in achieving those goals, over time, as a basis for correcting or enhancing my policies? Are my policies working as planned—are they effective in helping me achieve my goals?

In the end, efforts to establish clearer bases for understanding diversity-related goals and objectives and the theory of action associated with strategies designed to help achieve those aims also have the beneficial effect of promoting better communications among higher education stakeholders—students, faculty, staff, employers, and the public at large. The period leading up to the U.S. Supreme Court decisions in the University of Michigan cases (one of intense, often heated, and ill-informed discussions about “affirmative action”) demonstrated a communications imperative—that higher education leaders do a better job of communicating regarding their vision and their efforts to attract and enroll the kind of students they seek to admit (who are both academically qualified and likely to contribute to the robust learning experience for *all* students on campus). That challenge remains. The heightened public interest in higher education admissions reflected during that period, as well as the continued focus on higher education admissions in the wake of the University of Michigan decisions, affirms an observation made at the close of the last century:

Although impossible to predict, it is likely that admissions as it has been practiced during the last years of the twentieth century will become more pragmatic and more open than has been the case in the past. We are moving from a blind “trust us” mentality to an atmosphere of public interest and inquiry.²⁵

Indeed, higher education leaders should embrace the opportunity to talk more forthrightly and concretely about the kinds of students they want to serve—who they are; why they are important to their mission; and the educational, economic, and social imperatives of enrolling those students.

The tendency to attempt to remain in the shadows with respect to the admissions selection process, while understandable in a climate of litigation threats, ultimately misses the mark. Transparency about the human exercise of making tough admissions decisions can help ensure that the entire higher education community and the public at large have a better understanding of the role of professional judgment, how institutions define merit (who is admitted, and why) and, in that context, the vitally important (if limited) role that race and ethnicity may play in making those mission-critical decisions.

Importantly, the key judgments that lay at the foundation of institutional diversity efforts cannot be based on generalizations, at least if there is to be any real hope of significantly achieving diversity-related goals with minimal legal risk. In fact, a key principle that guides federal courts in their analyses of race- and ethnicity-conscious policies appropriately frames the charge for higher education leaders who seek to create the environment of learning, characterized by the “robust exchange of ideas” that Justice Powell recognized as so central to higher education institutions over two decades ago. As one federal court has said, in a related context:

[One] cannot content [oneself] with abstractions...[W]e must look beyond the [institution's] recital of the theoretical benefits of diversity and inquire whether the concrete workings of the [p]olicy merit...sanction. Only by such particularized attention can we ascertain whether the [p]olicy bears any necessary relation to the noble ends its espouses. In short the devil is in the details.²⁶

Those details, associated with goals, objectives, and strategies, are critically important foundations for higher education institutions to address over time as they seek to enhance their student body diversity and to do so in legally appropriate ways.

Endnotes

1. In addition to reflecting an analysis of federal case law, this manual also is based upon an analysis of relevant case investigation and resolution documents obtained from the U.S. Department of Education Office for Civil Rights (OCR), the federal agency charged with enforcement of Title VI of the Civil Rights Act of 1964. Those materials were obtained through a Freedom of Information Act request, and are on file with the College Board.
2. This blueprint is very similar to the blueprint provided in Coleman, et al., *Federal Law and Recruitment, Outreach, and Retention: A Framework for Evaluating Diversity-Related Programs* (The College Board, 2005). Given that the overarching principles it explains can be an important foundation for effective policy development, it has been included in this manual.
3. Although not squarely addressed in the University of Michigan cases, it is also important to note that “concepts matter.” Specifically, higher education institutions should use great care when attaching ill-defined labels to their diversity-related policies. For example, strong arguments can be made that the overused term “affirmative action” actually does not apply to race- or ethnicity-conscious policies that, as at the University of Michigan, advance mission-driven, forward-looking educational goals. (Notably, neither majority opinion in *Grutter* or *Gratz* directly referred to the challenged policies as “affirmative action” policies.) Historically, “affirmative action” has referred to race- and ethnicity-conscious efforts designed to address the effects of past or present discrimination. As explained later in this manual, there are fundamental differences between policies that promote forward-looking educational goals and those that (required or voluntary) are remedial (with a focus on correcting for past or present wrongs).
4. *United States v. Virginia*, 518 U.S. 515 (1986).
5. G. Peretto, et al., *Toward a Taxonomy of the Admissions Decision-Making Process* (The College Board, 1999); see also *Best Practices in Admissions Decisions* (The College Board, 2002).
6. W. Bowen, *The Compelling Need for Diversity in Higher Education* (1999).
7. The descriptions of the programs are based on U.S. Supreme Court opinions, relevant lower court opinions, and briefs filed by parties and amici in the relevant cases.
8. This kind of evidence has been central in the resolution of several federal appellate decisions, as well.

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) cert. denied, 126 U.S. 334 (2005), the court upheld the use of an admissions process by which candidates for admission were designated (based on an index score) as “presumptive admits” or “presumptive 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 Admissions Test score) that were considered by the University of Washington included: (1) race and ethnicity (the “most significant factors” in the admissions decision next to the index score, with the amount of preference differing “depending on an applicant’s particular race or ethnicity”); and (2) nonracial diversity factors (including cultural background, activities or accomplishments, career goals, life experiences, and special talents).

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

Correspondingly (but with a different result), a pre-*Bollinger* appellate decision found that a diversity-based admissions policy that did not permit the favorable treatment of white applicants whose “personal backgrounds

or skills...undeniably promoted diversity” violated federal law. In *Johnson v. Bd. of Regents of Univ. of Ga.*, 263 F.3d 1234 (11th Cir. 2001), the court emphasized that “when a university, in the name of student body diversity, grants preferential treatment to some applicants based on race, it must ensure that applicants are fully and fairly examined as individuals for their potential contributions beyond race to diversity.” A university that fails to do so “unfairly burden[s] ‘innocent’ third parties...particularly white applicants who may have greater potential to enhance student body diversity” than minority applicants.

9. Unless otherwise noted, quotations and references throughout this chapter are taken from the lower court record, briefs filed by parties and amici, and the U.S. Supreme Court’s majority and dissenting opinions in *Grutter v. Bollinger*.
10. The theory of critical mass does not apply like a light switch: there is no single point at which critical mass is achieved, or not. Rather, the educational benefits of diversity are attained along a continuum. See *Comfort v. Lynn School Committee*, 418 F.3d 1, 20-21 (1st Cir.), cert. denied, 126 S.Ct. 798 (2005). (“Critical mass is the point at which educational benefits begin to accrue...[G]ains occur along a continuum: as the racial composition of school populations creeps closer to balanced, racial stereotyping and tension is reduced and racial harmony and understanding increase.”)
11. This concern echoes that of Circuit Judge Boggs, who dissented from the Sixth Circuit Court of Appeals’ decision upholding the law school policy:

At the very least,...the Law School’s admission plan seems far from employing the mere ‘plus’ or ‘tip’ that the majority characterizes its racial preference to be.

In order for the language of ‘plus’ or ‘tip’ to have real meaning, there would have to be some indication that the other, allegedly similar, plus factors were also of a strength that were anywhere near the potency of the preference here. After all, Justice Powell himself contended that, to be only his ‘plus,’ race would need to be just one among many factors....The majority is content to accept the Law School’s claim that it considers some of those ‘soft’ factors....I would ask whether any of them are remotely comparable in weight. While not every factor would be required to bear equal weight under the Powell view, it seems clear that at least some of these other factors would need to be capable of taking a student’s chances from virtual certainty of rejection to virtual certainty of admission. There is no such evidence as to any race-neutral factor, but there is repeated and consistent evidence of such a treatment of race and ethnicity.

Grutter v. Bollinger, 288 F.3d. 732,782, 803 (6th Cir. 200) (en banc) (Boggs, J., dissenting).

12. Larry White in *One Year After the Michigan Cases: What Are We Doing* (2004) frames the question, concretely:

[I]f race-conscious affirmative action is predicated on the notion that it’s desirable to have a critical mass of underrepresented class members among matriculated students, then shouldn’t the *number* that constitutes a critical mass be the same from minority group to minority group? Or to put it another way, if it’s necessary that eight percent of the student body be African American because that’s the percentage that constitutes critical mass, then why is it necessary to admit a class that’s only four percent Latino and one percent Native American?

In his *Hopwood v. Texas* deposition, then-Dean Bollinger testified that he thought that there was a different critical mass for different minorities, which had to do with the “sense of identification and with a...psychological sense of what it means to be a member of that minority community within a larger community that is quite different.” See *id.*

13. See Expert Report of Patricia Gurin, discussed above in “Critical Mass: Expert Reports.”
14. See S. Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication*, 68 Boston Univ. L. Rev. 917 (1988). See also *Petit v. City of Chicago*, 352 F.3d 1111 (7th Cir. 2003) (extending diversity rationale to the composition of a police force, recognizing a “compelling public safety concern”); *Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996) (upholding a nonremedial race-conscious promotion decision in a correctional “boot camp,” based on evidence about the mission-related need supporting that practice).
15. See, e.g., *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986); *Regents of the University of California v. Bakke*,

- 438 U.S. 265 (1978).
16. See, e.g., *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996).
17. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003) ; *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).
18. See *Parents Involved in Community Schools v. Seattle School District, No. 1*, 426 F. 3d 1162, 1208-09 (9th Cir. 2005) (Bea, J., dissenting).
19. See Expert Report of Patricia Gurin at www.umich.edu/~urel/~admissions/research/expert.
20. Federal nondiscrimination law treats “race” and “ethnicity” interchangeably. Thus, a reference to “race-neutral alternatives” should be understood in a legal context to include “ethnicity-neutral alternatives” (when relevant to the discussion), as well.
21. See B. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 Baylor L. Rev. 289 (2001). See generally Coleman, et al., *Federal Law and Recruitment, Outreach, and Retention: A Framework for Evaluating Diversity-Related Programs* at 31–35 (The College Board, 2005).
22. Cases referenced in this chapter include *Grutter v. Bollinger*, 539 U.S. 306 (2003) and three federal circuit decisions in the elementary and secondary school setting that followed *Grutter* and *Gratz*:
- *Comfort v. Lynn School Committee*, 418 F.3d 1 (1st Cir.) (en banc), cert. denied, 126 S.Ct. 798 (2005).
 - *McFarland v. Jefferson County Public Schools*, 416 F. 3d 513 (6th Cir. 2005), affirming 330 F. Supp. 2d 834 (W.D. Ky. 2004), cert. granted, 74 U.S.L.W. 3437 (U.S. June 5, 2006).
 - *Parents Involved in Community Schools, v. Seattle School District, No. 1*, 426 F.3d 1162 (9th Cir. 2005) (en banc), cert. granted, 74 U.S.L.W. 3425 (U.S. June 5, 2006).
23. See Coleman, et al., *Federal Law and Recruitment, Outreach, and Retention: A Framework for Evaluating Diversity-Related Programs* (The College Board, 2005), which provides a comprehensive overview of relevant federal cases on this point.
24. *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in result).
25. G. Peretto, et al., *Toward a Taxonomy of the Admissions Decision-Making Process* (The College Board, 1999).
26. *Wessman v. Gittens*, 160 F. 3d 790, 797-98 (1st Cir. 1998) (addressing elementary and secondary race-and ethnicity-conscious admissions policy).

Appendix A. Resources

In General

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Race-Neutral Alternatives

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Government Publications

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 (February 1994) (<http://www.ed.gov/about/offices/list/ocr/docs/racefa.html>).

Web Sites (as of June 8, 2006)

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

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

The American Association of University Professors

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

(This Web site has specific information on affirmative action in higher education.)

Appendix B. 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
 Andrew W. Mellon Foundation

Appendix C. Participants in National Seminars on “Federal Law and Admissions (Selection)”

More than 350 individuals representing more than 155 institutions and organizations attended national seminars held in New York (11/1/2005); Chicago (11/16/2005); Atlanta (12/14/2005); Dana Point, California (1/9/2006); and Washington, D.C. (5/4/2006). The majority of attendees were administrators responsible for enrollment management, admissions, and student affairs; however, individuals from many other areas—including financial aid, marketing and communications, multicultural development, institutional advancement and research, and law—also attended. Attendees also included faculty members, deans, and provosts. In addition to undergraduate programs, a significant number of graduate and professional schools were also represented.

Albert Einstein College of Medicine	DePauw University
American Dental Education Association	Emory University
Anderson College	Emory University School of Law
Appalachian State University	Fairfield University
Arizona State University	Florida State University
Association of American Medical Colleges	George Washington University School of Medicine & Health Sciences
Barry University School of Law	Georgia College
Baylor College of Dentistry- Texas A&M Health Science Center	Gettysburg College
Baylor College of Medicine	Harvey Mudd College
Boston College	Higher Education Student Assistance Authority
Boston University	Hofstra University School of Law
Boston University School of Law	Holland & Knight, LLP
Brandeis University	Indiana University–Purdue University at Indianapolis
Butler University	Jefferson Medical College
California Institute of Technology	John A. Burns School of Medicine
California State University, Chico	Kalamazoo College
California Western School of Law	Lake City Community College
Carleton College	Law School Admission Council
Chapman University	Louisiana State University Law School
Columbia College Chicago	Loyola Marymount University Law School
Columbia University College of Physicians & Surgeons	Loyola University Chicago Stritch School of Medicine
Connecticut College	Marlboro College
Cornell University	Marquette University
Creighton University	Mayo Foundation–Mayo Medical School
Dartmouth College	Mercer University School of Law
Davidson College	Michigan State University
DePaul University	

Michigan State University College of Human
Medicine

Michigan State University College of Law

Mississippi College School of Law

Montreat College

Moravian College

Mount Sinai School of Medicine

New College of Florida

New York Medical College

New York University

North Carolina Agricultural and
Technical State University

North Georgia College & State University

Northeastern Ohio Universities College of
Medicine

Northeastern University

Northern Kentucky University

Northern Kentucky University, Chase
College of Law

Northwestern University

Pace University

Penn State University, Dickinson School of Law

Pepperdine University

Pomona College

Rhodes College

Rice University

Ripon College

Robert Wood Johnson Medical School

Santa Clara University

Sarah Lawrence College

Seattle University

Southern Methodist University

Southern University Law Center

State University of New York Health Science
Center at Syracuse

State University of West Georgia

Syracuse University

Texas A&M University

Texas Christian University

Texas Southern University

Texas Southern University
Thurgood Marshall School of Law

Texas Tech University

Texas Tech University School of Law

The California State University, Chancellor's Office

The College Board

The Ohio State University

The University of North Carolina
School of Dentistry

The University of South Carolina, Leiber College

Thomas Jefferson School of Law

UCLA School of Law

University at Buffalo

University of Alabama at Birmingham

University of Alabama School of Medicine

University of Arizona/Arizona Health
Sciences Center

University of Arizona College of Medicine

University of California, Berkeley, School of Law

University of California, Davis

University of California, Los Angeles,
School of Law

University of Chicago, Pritzker School of Medicine

University of Connecticut

University of Connecticut School of Dental
Medicine

University of Connecticut School of Law

University of Denver Sturm College of Law

University of Georgia

University of Houston

University of Illinois at Chicago

University of Illinois at Chicago College of
Dentistry

University of Illinois at Chicago College of
Medicine

University of Illinois at Springfield

University of Illinois at Urbana-Champaign

University of Iowa

University of Kentucky

University of Maryland at College Park

University of Michigan

University of Minnesota Law School

University of Missouri-Columbia

University of Nevada-Reno

University of North Carolina at Chapel Hill
University of North Carolina at Wilmington
University of North Dakota School of Law
University of Notre Dame
University of Richmond
University of Rochester
University of San Francisco
University of South Florida College of Medicine
University of Texas at Austin
University of Utah School of Medicine
University of Washington
University of Washington School of Medicine
University of Wisconsin
University of Wisconsin Medical School
University of Wisconsin at La Crosse
University of Wisconsin at Milwaukee
University of Wisconsin at River Falls
University of Wisconsin System Administration
University of Texas Medical School at San Antonio
Vanderbilt University
Ventures in Education
Virginia Commonwealth University
 School of Medicine
Wabash College
Washington State University
Washington University in St. Louis
Weill Medical College of Cornell University
Wesleyan University
Western New England College