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Race-Neutral Policies in Higher Education:

From Theory to Action

A Policy Paper Prepared in Conjunction with the College Board's Access & Diversity Collaborative

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About the Access & Diversity Collaborative

The Access & Diversity Collaborative was created by the College Board in 2004—in the wake of the University of Michigan U.S. Supreme Court decisions—to assist colleges and universities in developing and implementing their diversity-related policies in light of core institutional goals and federal nondiscrimination law. The Collaborative has provided extensive training to higher education institutions nationwide. In just a few years, 26 national seminars (with more than 1,200 representatives from 350 institutions and organizations in attendance) have been conducted; and numerous guides and policy papers that address key strategic planning and policy development issues in light of federal law have been published and widely distributed. All publications may be downloaded from the Collaborative Web site at **www.collegeboard.com/diversitycollaborative**.

In addition to the College Board, four other national education organizations and more than 30 institutions of higher education have been supporters of the Collaborative. EducationCounsel LLC provides core legal and policy services in support of the Collaborative's efforts in national seminars and through written guidance for higher education institutions. They may be reached at www.educationcounsel.com.

Key background information relevant to the area of focus in this policy paper can be found in Coleman and Palmer, *Admissions and Diversity After Michigan: The Next Generation of Legal and Policy Issues* (College Board, 2006).

This policy paper is the fourth in a series of policy documents published by the Collaborative for the purpose of helping inform education policy development and implementation.

- *Not Black and White: Making Sense of the United States Supreme Court Decisions Regarding Race-Conscious Student Assignment Plans*, September 2007
- *Echoes of Bakke: A Fractured Supreme Court Invalidates Two Race-Conscious K-12 Student Assignment Plans But Affirms the Compelling Interest in the Educational Benefits of Diversity*, July 2007
- *From Federal Law to State Voter Initiatives: Preserving Higher Education's Authority to Achieve the Educational, Economic, Civic, and Security Benefits Associated with a Diverse Student Body*, March 2007.

Introduction

In the ongoing national debate regarding ways to enhance access for underserved students and promote the educational, economic, civic, and security benefits associated with a diverse student body, few topics have generated as much heat and as little light as "race-neutral alternatives." The ever-raging war of words—what's working, what's not; what's required, what's not—is not likely to abate anytime soon, particularly in the wake of (and in anticipation of) state voter initiatives that prohibit race-conscious action by public higher education institutions. Moreover, even in states without such prohibitions, higher education institutions are obligated as a matter of federal law to focus on race-neutral alternatives: Institutions that pursue race- or ethnicity-conscious policies when conferring educational opportunities,[1] such as making admissions decisions or awarding scholarships, must give "serious, good faith consideration [to] workable race-neutral alternatives that will achieve the diversity they seek."[2] Otherwise, those policies are likely to be judged unlawful.

(Lest there be any doubt regarding the legal relevance of the issue, one need look no further than the U.S. Supreme Court's June 2007 decision regarding K–12 race-conscious student assignment policies, in which one of the grounds for striking down the policies as unconstitutional was the Court's determination that the school districts adopting those policies had failed to seriously consider and evaluate possible race-neutral policies as alternatives.[3])

Unfortunately, several critical legal and policy issues that should inform the national debate, as well as institutional policy decisions, have been missing in action. This policy paper attempts to fill that void. The central goal of this paper is to provide a more comprehensive and principled basis to guide higher education officials in their access and diversity policy efforts, as they work to achieve mission-related goals with minimal legal risk. To achieve this aim, this paper highlights key, operationally relevant principles that should guide institutional policy development and implementation, based on a brief overview of relevant law and lessons learned through practice. In particular, this paper addresses the following key issues related to race-neutral policies:

I. The Definition: What are race-neutral policies?

II. Key Foundations: What are the established federal rules that apply to race-neutral policies?

III. What Experience Teaches: What are the lessons learned as a result of efforts related to the use of race-neutral policies?

IV. The Checklist: What key questions should higher-education institutions address with respect to race-neutral policies when seeking to achieve their access and diversity goals?

I. What Are Race-Neutral Policies?

You can't judge a book by its cover. And, despite much public rhetoric to the contrary, you can't definitively judge a supposed race-neutral policy by its language. In other words, the fact that policies may be *facially* race-neutral does not necessarily mean that they are *as a matter of law* race-neutral. Thus, before reaching the question of how federal law might treat a particular policy, it is important to know whether a policy identified as "race-neutral" really is "race-neutral."

As a foundation for making this judgment, it is important to understand that, in broad terms, federal law establishes two categories of policies that may bear on access and diversity goals: race-conscious policies, which trigger "strict scrutiny" review (summarized in the chart, below), and race-neutral policies, which do not:

- ***Race-conscious policies*** include two types of policies: (1) those that involve explicit racial classifications (such as the University of Michigan Law School's race-as-a-factor admissions policy, where race was an express factor used in evaluating applicants); *and* (2) those that are neutral on their face but that are motivated by a racially discriminatory purpose, resulting in racially discriminatory effects.[4] Thus, facially neutral policies may in some cases actually qualify as race-conscious, given the underlying motivation. (The question that the U.S. Supreme Court has not definitively addressed in a higher education enrollment management setting is "how much" of a racially discriminatory motivation is necessary in order for such policies to qualify as race-conscious. An overview of the issue is provided in the chart below.)

- ***Race-neutral policies*** include two types of policies: (1) those that, with respect to both operation (read: language) and intent, are neutral; and (2) those "inclusive" outreach and recruitment policies that expand efforts to generate additional applicant interest, which may be facially race-conscious and/or race-conscious in intent, but which do not confer material benefits to the exclusion of non-targeted students.[5]

What is behind the seeming inconsistency that, on the one hand, some facially neutral policies may not as a matter of federal law qualify as "race-neutral," while on the other hand, some facially race-conscious policies may not qualify as "race-conscious"? The simple point is this: Federal courts for decades have insisted on the "strict scrutiny" of any policy that does two things: (1) actually treats individuals differently because of their race or ethnicity (whether that intent is on the face of a policy, or not); and (2) confers opportunities or benefits that actually amount to something of consequence, based on that different treatment.[6] Where those two conditions are present, rest assured, federal courts will insist on engaging in a strict scrutiny analysis.

Strict Scrutiny and Federal Decisions Regarding Facially Race-Neutral Policies

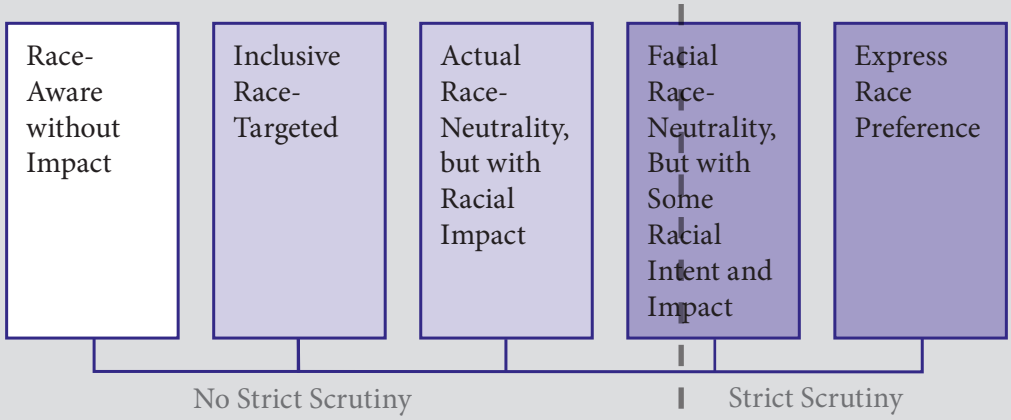
Federal law establishes the most rigorous standard of judicial review—the "strict scrutiny" standard—for any race-conscious practice that confers educational benefits or opportunities by public institutions or private institutions that are recipients of federal funds. Under this standard, race-conscious practices are lawful only if they: (1) serve a "compelling interest," and (2) operate in a way that is "narrowly tailored" to achieve that interest (an inquiry that includes an assessment of the necessity of the use of the race-conscious policy).

Under federal law, facially race-neutral policies are subject to strict scrutiny (and qualify as legally "race-conscious") *only if they are motivated by a racially discriminatory purpose and result in a racially discriminatory effect*. That much seems clear.

What is less clear is the kind or dimension of the motivation that triggers that strict scrutiny. Broadly speaking, there are seemingly three standards that have been adopted by federal authorities: A "but for" standard (explained in row one), a "predominant factor" standard (explained in row two), and a "deliberate use" standard (applied by the U.S. Department of Education's Office for Civil Rights (OCR), explained in row three). Given the absence of definitive federal guidance in this area, it would be prudent for higher education institutions considering the issue to contemplate the potential application of each of these three standards to relevant institutional policies.

The Standard **A facially race-neutral policy that results in discriminatory effects is subject to strict scrutiny in cases where…**	**Federal Application of the Standard**	**Commentary**
…it would not have been promulgated but for the motivation for achieving segregation or racial impact.	This standard has been applied in two lines of cases—involving efforts to promote racial segregation and efforts leading to more positive impact on one racial group than another (disparate impact).[7]	• This standard implicates a "burden shifting" analysis. Once a plaintiff establishes that a discriminatory purpose was "a motivating factor" behind the challenged policy, then the defendant may prevail if it can establish that that same policy would have been adopted "even had the impermissible purpose not been considered."
…race is the predominant motivating factor behind the policy.	This standard has been applied in cases challenging the gerrymandering of electoral districts.[8]	• Justice Kennedy cited to authority applying this standard when discussing viable race-neutral alternatives in *Seattle School District No. 1*, the Supreme Court's 2007 student assignment case.
…there is a deliberate use of race-neutral criteria as a proxy for race.	This standard was applied by OCR in one case resolution involving a Title VI challenge to a district's use of socioeconomic status as, allegedly, a race proxy.[9]	• OCR case-specific resolutions are not binding or precedential, but may be persuasive in other cases.

The Strict Scrutiny Spectrum: What Practices are Subject to Heightened Review?



II. What Are the Federal Rules Relevant to Race-Neutral Policies?

In its broadest terms, it is important to understand the relationship between "strict scrutiny" and race-neutral policies on two levels—one relating to the threshold question of whether the policy is, in fact, neutral (in legal terms) so that strict scrutiny is *not* triggered (*see* chart on the previous page); and one relating to the legal obligation to evaluate race-neutral policy alternatives that may mitigate the need for existing or contemplated race-conscious policies (that do trigger strict scrutiny).

First, are my institution's policies race-neutral or race-conscious, and does strict scrutiny apply? This threshold question must be addressed, with attention to the ways in which federal law distinguishes between the two categories of policies (discussed in Section I). If the policies are, in fact, race-neutral, then the probing strict scrutiny inquiry won't be relevant. (The much less demanding legal inquiry is whether such a policy has a "rational basis.") By contrast, if the policies are race-conscious, then the strict-scrutiny inquiry is triggered… leading to a second question regarding those policies.

Second, has my institution evaluated and (as appropriate) tried race-neutral policies that may mitigate the need for race-conscious policies? The legal standard regarding the pursuit of race-neutral alternatives is straightforward: Higher-education institutions pursuing access and diversity goals must give "serious, good faith consideration [to] workable race-neutral alternatives that will achieve the diversity they seek." In *Grutter v. Bollinger*, the Supreme Court 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.

Key Questions to Be Addressed as Part of the Strict-Scrutiny Analysis

Is race used only to the extent necessary to achieve the institution's compelling interest, such as the benefits associated with a diverse student body? Compared to existing race-conscious policies, are there less discriminatory means—including race-neutral means—that will as effectively achieve the goals advanced by those race-conscious strategies?

As framed by the U.S. Supreme Court, this means that higher education institutions must assess the viability and appropriateness of race-neutral policies with specific reference to their institutional goals. Stated differently, what may work as a viable alternative in one setting—or on one campus, or in one department—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.

Similarly, higher education institutions are not faced with an "either-or" choice when it comes to the use of race-neutral alternatives when pursuing access and 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.

III. What Are the Lessons Learned As a Result of Efforts Related to the Use of Race-Neutral Policies?

Based on federal case law, and informed by institutional practice, four lessons have emerged in the wake of renewed attention to the pursuit of access and diversity goals through race-neutral means.

A. Language matters: Institutions of higher education should not be too casual when referencing race-neutral policies.

Given the federal rules that apply to the overt use of race (just as they apply to the covert use of race), institutional leaders should exercise great care before too quickly reaching conclusions about the lawfulness of a policy that appears to be neutral. In short, a bit of digging regarding the intent of the policy is in order. Indeed, in any conversation about strategies designed to meet access and diversity goals, the term "proxy" should be a flag. As the term is frequently used, it can literally refer to a substitute for a race-conscious policy or program, where the racial diversity goal is precisely the same. In that circumstance, the mere shift to a potentially viable "proxy" for race may mitigate some risk of being sued (nothing on the face of the policy would indicate that race was a factor in relevant decisions)—but, with evidence that racial goals were driving the development and implementation of the policy, such a shift would not likely insulate the "proxy" policy from strict scrutiny review.

Case Highlight: U.S. Department of Education Case Resolution Involving Alleged SES Proxy: *In re Wake County Public School System*, OCR Complaint Nos. 11-02-1044, 1104, and 1111 (Aug. 29, 2003)

OCR resolved in favor of the school district a complaint that the district had adopted socioeconomic status [SES] as a discriminatory proxy for race and national origin in the assignment of students to schools. It opined that strict scrutiny would be applied to the use of the facially race-neutral factor of SES if the district "intended to use a race-neutral factor, such as SES, as a racial definition and for a racial purpose." Elaborating, OCR stated:

> If the evidence shows a deliberate use of race-neutral criteria as proxies for race…OCR would then apply Title VI strict scrutiny standards….[P]roxy allegations raise issues of intentional discrimination, [for which certain]…factors may be evidence of intent to discriminate, [including]: the impact of the official action (i.e., whether it impacts more heavily upon one racial group than another); a pattern of discrimination unexplainable on grounds other than race; the historical background of a decision, particularly the specific sequence of events leading to the challenged policy; departure from the normal procedural sequence; and the legislative or administrative history, particularly contemporaneous statements of members of the decision-making body.

Applying these factors, OCR concluded that the district adopted SES "as a student assignment factor to further legitimate educational goals and not as a proxy or racial definition, or for a racial purpose." Evidence indicated that administrators "acted on the basis of educational research showing the relationship between student and school performance and the results of concentrations of economically disadvantaged students"; and all board members denied that SES was adopted "as a racial balancing technique." Despite the fact that "race was not absent from the district's considerations," and that there was a correlation between SES and race, OCR found that "improvement of education for all students, not the continuation of racial balancing, was the basis for" the district's decision.

B. Context matters: Justice O'Connor's admonition fully applies to race-neutral policies, which seldom (if ever) operate in isolation.

If any lesson of relevance emerges from the U.S. Supreme Court's University of Michigan decisions (consistent with lessons from other federal decisions), it is that race-neutral policies are not categorically good or bad, viable or useless. Race-neutral policies seldom succeed in a vacuum; they typically work (or not) depending on the institutional context in which they are pursued and, depending on the array of complementary efforts with which they are associated.

On the point of context, Justice O'Connor's majority opinion for the Court in *Grutter v. Bollinger* is instructive. The Court addressed—and rejected—three discrete "race neutral alternatives,"[10] based on facts associated with the University of Michigan Law School's mission-related goals:

> ***Percentage Plans:*** The U.S. Supreme Court 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 particular diversity goals; and (2) did not demonstrate the efficacy of satisfying graduate and professional school diversity goals.
>
> ***Altering Selection Criteria:*** The Supreme Court 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, concluding 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:*** The Supreme Court 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 consistent with University of Michigan goals.

C. Process matters: Transparency regarding deliberations of race-neutral alternatives can demonstrate good faith legal compliance, just as it likely advances educational success.

Given the federal requirement that institutions give "serious, good faith consideration [to] workable race-neutral alternatives that will achieve the diversity they seek," it is advisable for institutions to engage in a sustained dialogue over time, reflecting serious consideration, research, and evaluation leading to research-based policy changes as circumstances demand. Such a pattern of action—likely to reflect the kind of deliberate consideration of alternatives that may justify some federal court deference to academic judgments—should reflect:

1. Establishment of a body with the responsibility and authority for examining and making policy recommendations regarding race-neutral policies, charged with periodically researching and evaluating possible race-neutral alternatives in light of institution-specific diversity-related goals.
2. Maintenance of a record of practices considered, along with the accompanying evaluations regarding their viability. 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. Documentation of the entire array of race-neutral practices pursued by the institution, along with an ongoing record of research regarding the effectiveness of those practices in achieving institutional diversity goals.

D. Research matters: Research related to race-neutral policies should be aligned with federal definitions and be framed with the aim of promoting replicability in similar settings.

Social science research regarding the viability and effectiveness of race-neutral strategies that might enhance student diversity and/or improve access for historically underserved students is broadly relevant to institutional policy judgments, just as it is relevant to how federal courts are likely to evaluate those policies. To maximize the prospect for applying such research to the institution-specific, practical judgments that higher education officials must make (and to the legal scrutiny that might follow), social science research must do at least three things:

1. It must ensure that its framing of key issues comports with basic federal definitions, so that "race-neutral" in one setting isn't deemed "race-conscious" in another. While definitive legal definitions in a limited number of settings are admittedly unresolved, efforts to better align definitions (given what we do know) is important. For example, consider the potential that research hailing a "race-neutral alternative" as a key solution lulls higher education officials into a sense of false security as they pursue that alternative, when, as it turns out, the alternative doesn't qualify as "neutral," at least in legal terms.

2. It must be framed and explained with respect to key contextual factors that indicate the likely success (or not) of subject policies in achieving core goals. The simple point? All race-neutral alternatives are not created equal—and do not work in the same way at all institutions. What works for a large, public flagship institution in the Midwest is not a surefire recipe for success for a medium-sized, private liberal arts institution in the Southeast. What works for an institution pursuing core educational benefits of diversity in the classroom may not correspondingly advance efforts to enhance the delivery of services by graduates to a designated underserved population (for instance, in medical schools).

3. It must address the key factors of scale and replicability, so that institutions adhering to the Supreme Court's admonition that they monitor developments and pursue race-neutral alternatives appropriate for their institutions can do so in an informed and efficient manner. Transparency regarding the potential replication of key operational elements is a driving force of any inquiry regarding the potential transportability of one strategy at one institution to another.

Categories of Race-Neutral Policies

Collectively, social science research, federal case law, and policy experience illustrate categories of possibly race-neutral policies that may be considered (and, as appropriate, pursued) when seeking to advance access and diversity goals. (The qualifying "possibly" is important because, as discussed in this paper, the race-neutral label of a policy (e.g., socioeconomic status) doesn't automatically resolve the question of whether that policy is in fact race-neutral under federal law. The intent or motivation behind the policy is also a relevant consideration in that legal analysis.)

Selection Criteria

Student Academic Qualifications

- Establishing Academic Standards, including with respect to the weighting of grades, standardized test scores, etc., in evaluation

Student Background Characteristics and Abilities

- Geographical background
- Socioeconomic status (family income, wealth, etc.)
- Parental education
- Non-English proficiency
- Cultural competence/awareness
- High school/community demographics
- Exposure to diversity in secondary education
- History of overcoming adversity
- Athletic, artistic, and similar abilities

Institutional Action

- Inclusive, targeted recruitment and outreach activities
- Summer bridge programs
- Need-based financial aid
- Joint institutional recruitment and pipeline programs (e.g., with community colleges)
- Student-centered retention programs

IV. What Key Questions Should Higher Education Institutions Address Regarding Race-Neutral Policies When Seeking to Promote Access and Diversity Goals?

With the preceding principles and lessons learned in mind, institutions considering the viability of race-neutral policies should ensure that they have answers to the following questions:

1. **Are institutional diversity-related goals clearly stated and understood?** *If goals are not clear, then the viability of race-neutral policies can't be evaluated with any precision. The determination of the viability of a policy designed to achieve some goal is dependent on the goal itself.*

2. **Is it likely that pursuit of contemplated race-neutral alternatives will positively affect those diversity-related goals?**

   - **What research- or practice-based evidence suggests that achievement of goals is likely to be furthered by the implementation of the alternative?** *Absent such evidence, it is unlikely that an institution would be required to pursue the alternative.*

   - **Do the research- and/or practice-bases that indicate that the alternative is viable also reflect the feasibility of its replication at the institution, with comparable results?** *As a practical matter, issues of replicability, scale, and setting are critical when evaluating alternatives. Federal law does not embrace cookie-cutter solutions. Context matters.*

3. **Is it likely that pursuit of the contemplated race-neutral alternative will positively affect (or, at least, not undermine) mission-related institutional goals (including related diversity goals)?** *Not all conceivable alternatives need to be tried, especially in cases where those alternatives would undermine other core institutional values or goals.*

4. **Is the "neutrality" of the contemplated race-neutral alternative authentic?**

   - **Is the facially race-neutral alternative not motivated by race considerations?** *If race is a motivation behind a facially race-neutral alternative, then it is* possible *that the alternative is not truly race-neutral.*

   - **Even if the alternative is race-conscious on its face, does it operate in an "inclusive" manner—so that benefits and opportunities are actually not conferred (or denied) based on race?** *"Inclusive" race-conscious outreach and recruitment programs have been viewed as race-neutral, given the absence of their denial of opportunities and benefits to nonbeneficiaries of these programs.*

V. Conclusion

As institutions of higher education continue their mission-driven efforts to promote increased access among historically underserved students and to enhance the diversity among their students, it is imperative that they fully evaluate viable race-neutral strategies that may help them achieve educational success. The pursuit of these strategies—if driven by clear, focused, mission-related goals—may advance the development of more effective policies and, at the same time, mitigate litigation-related risk. Importantly, however, any assessment or evaluation of these strategies (like others associated with effective enrollment management policies) must be conducted with a clear focus on the context in which they operate (or may operate). Federal law doesn't encourage simplistic "cut-and-paste" analyses, and arriving at answers to hard questions demands a rigorous, institution-specific focus.

Endnotes

1. 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.

2. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

3. *Parents Involved in Community Schools v. Seattle School District*, __ U.S. __ (2007).

4. *See* B. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 Baylor L. Rev. 289 (2001). This law review article is an excellent resource for readers interested in further legal analysis of this topic.

5. *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. 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."

6. In some cases, federal courts have actually conflated these elements. Notably, in certain recruitment and outreach cases, racially motivated efforts that did not confer material benefits (and, therefore, were not deemed to be subject to strict scrutiny) were characterized as "race-neutral" under federal law. *See generally Coleman*, et al., *Federal Law and Recruitment, Outreach, and Retention: A Framework for Evaluating Diversity-Related Programs* (The College Board, 2005) (summarizing relevant cases).

7. B. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 Baylor L. Rev. 289 (2001). *See also Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

8. B. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 Baylor L. Rev. 289 (2001). *See also Shaw v. Reno*, 509 U.S. 630 (1993).

9. *In re Wake County Public School System*, OCR Complaint Nos. 11-02-1044, 1104 & 1111 (Aug. 29, 2003).

10. Justice O'Connor didn't blanketly accept the position of the U.S. Solicitor General that percentage plans were by definition "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…." (emphasis added).