

Summary of Best Practices from *Preserving Diversity in Higher Education: A Manual on Admissions Policies and Procedures After the University of Michigan Decisions*, Bingham McCutchen LLP, Morrison & Foerster LLP, and Heller Ehrman White & McAuliffe LLP (2004) (hereinafter the “Diversity Manual”)

I. Governing Legal and Constitutional Frameworks

In *Grutter v. Bollinger*, the United States Supreme Court upheld as constitutional the University of Michigan Law School’s admissions policy under the 14th Amendment to the U.S. Constitution.¹ Most commonly, we hear about the 14th Amendment’s *equal protection clause*, which provides that: “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”² A law or policy enacted and/or implemented by the government or governmental institution (such as a public university) may be challenged under the equal protection clause when that law or policy classifies individuals based on categories, such as race or gender. A court reviewing an equal protection challenge must evaluate the reason for the government’s categorical classification, based on an analytical framework that the Supreme Court set forth in a series of opinions it issued in the early and mid 20th century. This framework is a three-tiered one, and different levels of “scrutiny” are applied to the challenged law or policy depending upon the classification used therein.

Under the 14th Amendment’s equal protection clause, the lowest level of scrutiny and the one that is easiest for the government to overcome is called rational basis review, and it applies to classifications such as age. The next level of scrutiny, intermediate scrutiny, is as its name implies the mid-level tier of review and applies to, most notably, governmental classifications based on gender. Finally, the highest level of scrutiny, strict scrutiny, applies to governmental classifications based on race or national origin.³ Because many university admissions policies classify, in part, some of their applicants based on their race or national origin, those policies when challenged, such as in the *Grutter* case, are subject to strict scrutiny.

Under strict scrutiny review, “racial classifications are constitutional only if they are **narrowly tailored** to further **compelling governmental interest**.”⁴ As has been stated in several Supreme Court opinions, including *Grutter*, one compelling governmental interest that justifies racial classifications is the remedying of past discrimination by the governmental institution employing the classification. *Grutter* is an important equal protection decision because it resolved a 30 year-old national legal controversy⁵ in holding that diversity is also a compelling interest because diversity provides well-defined educational benefits in law school and university classrooms.

¹ *Grutter v. Bollinger*, 539 U.S. 306 (2003). See also *Gratz v. Bollinger*, 539 U.S. 244 (2003) (holding undergraduate admissions program into university’s liberal arts college unconstitutional, where program assigned in rigid and formulaic manner set number of points to applicants belonging to underrepresented minority groups, because it was not narrowly tailored to serve compelling state interest).

² U.S. Const. amend. XIV, § 1.

³ Diversity Manual at 3.

⁴ Diversity Manual at 3.

⁵ See *Bakke v. Regents of the Univ. of California*, 438 U.S. 265 (1978) (Justice Powell in plurality opinion stated that diversity in context of higher education is a compelling state interest).

While the equal protection clause of the 14th Amendment applies to public university admissions programs, two federal statutes are implicated when private universities and colleges similarly employ, in part, racial classifications to diversify their student bodies. First, Title VI of the Civil Rights Act of 1964 provides that: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”⁶ Title VI is implicated because almost all state and private universities and colleges receive some form of federal funding. Second, section 1981 of the Civil Rights Act of 1866 provides that: “All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens”⁷ Section 1981 is implicated because the Supreme Court has held elsewhere that the provision of educational services constitutes a contract for the purposes of its applicability.⁸

II. Some Guidelines About Narrow Tailoring Under the Equal Protection Clause of the 14th Amendment

The following is excerpted directly from *Preserving Diversity in Higher Education: A Manual on Admissions Policies and Procedures After the University of Michigan Decisions*, Bingham McCutchen LLP et al. 8 (2004).⁹ This excellent manual can be accessed in full in Adobe format at: www.equaljusticesociety.org/compliancemanual

- **Narrow Tailoring – Diversity.** A narrowly tailored race-conscious admissions policy:
 1. Takes race into account in a **flexible** and **nonmechanical** way.¹⁰
 - a. Institutions may use race as a “**plus**” factor and adopt goals, targets, or “critical masses.”
 - b. Institutions may not adopt quotas and determinative point systems.
 2. Requires a serious and good faith consideration of whether **workable race-neutral alternatives** will effectively further diversity.
 - a. Educational institutions need not use a race-neutral alternative that will harm their educational values or their interest in diversity.¹¹
 3. Does **not otherwise unduly burden** nonminority applicants.
 - a. If a race-conscious admissions program provides for an individualized, flexible, and nonmechanical review of all applicants, it will not unduly burden minority applicants.¹²
 4. Is **periodically reevaluated** for its necessity.
 - a. To ensure that race-conscious admissions programs have a reasonable duration, educational institutions should reevaluate their programs

⁶ 42 U.S.C. § 2000d (2003); *see* Diversity Manual at 4.

⁷ 42 U.S.C. § 1981(a) (2003); *see* Diversity Manual at 4.

⁸ *Runyon v. McCrary*, 427 U.S. 160, 172 (1976).

⁹ Diversity Manual at 7.

¹⁰ Diversity Manual at 7-8.

¹¹ Diversity Manual at 9.

¹² Diversity Manual at 10.

periodically (the 25 years mentioned by Justice O'Connor in *Grutter* is *not* a sunset provision).¹³

III. Diversity: What Is Constitutional and What Is Not

The following is excerpted directly from the Diversity Manual.¹⁴

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

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

IV. State Statutes and Constitutions

You should also be aware that a few states, like California, Washington, and Florida, have adopted laws that either limit or prohibit the consideration of race in admissions and other contexts, such as government contracting and employment.¹⁵ As such, public university administrators should be aware of such state statutes and develop admissions policies accordingly.¹⁶

¹³ Diversity Manual at 10.

¹⁴ Diversity Manual at 11.

¹⁵ Diversity Manual at 12-13.

¹⁶ Diversity Manual at 12-13.

V. Developing Diversity-Building Admissions Programs

The “Diversity Rationale”

Because the *Grutter* Court held that diversity is a compelling state interest under strict scrutiny review, it is important for universities and colleges to “narrowly tailor” their admissions policies in a constitutionally permissible way. First, a university or college should formalize an admissions policy statement, which in turn should be tied to the institution’s general mission statement. This policy should be developed and approved by a senior policy-making body (like a faculty committee, committee of the board of regents, etc.), and it should explicitly state the role of diversity in the admissions process. While the meaning of “diversity” should encompass many different factors in addition to race, there is no reason for an institution to avoid emphasizing that an important component of diversity involves ensuring that underrepresented minorities are adequately represented at the school. For a short list of examples of the ways in which both general and racial diversity benefit all students as well as colleges and universities, see the Diversity Manual at pp. 15-16.

Evaluating Race-Neutral Options – Why Certain “Race-Neutral” Plans May Fail to Meet Diversity Objectives¹⁷

“Percentage Plans,” such as the 10% Plan currently being used in the state of Texas, are receiving a lot of media play; however, they cannot completely displace or supplant broader affirmative action plans because they are narrow in scope and often ineffective in meeting broader goals. For example:¹⁸

- When schools using percentage plans have been able to maintain existing levels of minority representation, that has been attributable to vigorous recruitment and generous scholarships focused on minority candidates.
- In states where there are many public colleges and universities, percentage plans admit minority students into the public school *system*; however, minority students continue to be underrepresented at the flagship universities within the system.
- The Supreme Court has criticized percentage plans because they are in fact overly-mechanical; they do not allow for the kind of flexible, holistic admissions decisions that the Court has stated are essential in any *valid* race-conscious program.
- Percentage plans are not workable in many contexts – for example, in graduate and professional schools.
- For a detailed analysis of percentage plans, see Appendix 4 of the Diversity Manual.

Developing a Diversity-Focused Admissions Plan

Generally speaking, admissions programs and processes aimed in part at increasing diversity should be flexible. Admissions plans should evaluate things like standardized test scores and grades in context, rather than in an overly rigid and formulaic way. And finally, admissions offices should review their plans and processes on a periodic basis.

First, constitutional race-based admissions plans require individualized review of each and every application. As such, the process should be flexible in its consideration of many different

¹⁷ See Diversity Manual at 16-19.

¹⁸ The list is excerpted directly from the Diversity Manual at 19.

diversity factors, including race. In no case should a rigid or mathematical formula be used in an admission decision.

Diversity includes more than racial diversity. **For example:** “Many schools give a ‘plus’ to factors such as race and ethnicity, gender, socioeconomic class, sexual orientation, geography, or residency. Many also give a ‘plus’ for more intangible characteristics such as leadership qualities, artistic talent, or musical abilities”¹⁹

Also, any “plus” factor can be weighted more heavily when compared to other factors, but no single factor should dominate an admissions decision. **For example:** “An underrepresented minority may be given a bigger ‘plus’ than an individual who is a concert cellist.”²⁰

Admissions administrators have discretion and should be flexible in how they weigh “plus” factors, depending on the individual applicant. **For example:** “Applicant A is Latino. Applicant B is Black. Although both . . . are members of underrepresented minority groups, Latino students are more underrepresented than Black students at this particular institution. Both applicants receive a ‘plus’ for their race, but the reviewer should have the flexibility to give Applicant A a larger ‘plus’ than Applicant B.”²¹ **Another example:** “Applicant A is a woman who expresses an interest in political science. Applicant B is a woman who expresses an interest in electrical engineering. The [reviewer] . . . has noticed that female engineering students are underrepresented at the school, but female political science majors are adequately represented. A reviewer should have the discretion to give a ‘plus’ to Applicant B, but not to Applicant A.”²²

What to Avoid

Avoid *rigidity*. Admissions reviewers should not be automatically required to give the same weight for a certain diversity factor to all applicants who possess that diversity factor. The reviewers should be given discretion. **For example,** a reviewer should **not** be required to award a “plus” factor to every Latino applicant that is equivalent to raising each Latino applicant’s GPA by 0.5 points.²³ This would likely be overly rigid and constitutionally impermissible.

Avoid *mechanical formulas*. Avoid any process that uses a mechanical formula that automatically assigns points based on race, such as the College of Letters, Arts, and the Sciences at Michigan in *Gratz* (which policy was struck down as unconstitutional and is likely to be challenged as unconstitutional).

Moving Away From a Rigid and Formulaic Reliance on Test Scores and Grades to a Contextual Analysis of Test Scores and Grades²⁴

Colleges and universities should also avoid overly rigid and formulaic reliance on such “objective” factors as standardized test scores and grades, which have proven to be “deceptively skewed upward for those with more opportunity” and have a negative impact on minority

¹⁹ Diversity Manual at 20.

²⁰ Diversity Manual at 20.

²¹ Diversity Manual at 20.

²² Diversity Manual at 20.

²³ Based on example given at Diversity Manual at 21.

²⁴ Diversity Manual at 21-24.

students.²⁵ Instead, admissions offices should consider these factors in a contextual and holistic manner. That is, test scores and grades should be understood as being impacted by things such as: “race, socioeconomic class, parental education, language, home environment, quality of school, and access to exam-preparatory courses.”²⁶

Periodic Review

Importantly, *Grutter* requires colleges and universities using race-conscious admissions programs to review them periodically in order to determine whether such programs are required to achieve diversity; however, the Court did not specify how often such review should occur. It is advised that an institution should review its admissions program every few years.

It is also important to note that, contrary to popular belief, **there is no 25-year sunset provision for race-conscious admissions programs**. Although many who are opposed to affirmative action have asserted that Justice O’Connor in her majority opinion set forth a 25-year sunset provision, that statement merely expressed an aspiration. **“As long as *Grutter* is good law, student body diversity in higher education will always be a compelling state interest.”**²⁷

VI. The Admissions Process

Recruitment is crucial to creating a diverse student body. For example, schools should engage in targeted mailings, outreach programs, and recruiting at schools with greater proportions of students of color to help develop a diverse pool of potential applicants.²⁸

Developing Admissions Criteria

There are many “plus” factors that should be considered in the admissions process. **For example:** race, gender, socioeconomic background, geography, leadership potential, legacy status, quality of the applicant’s high school or undergraduate institution, intellectual vitality, evidence of academic promise, quality of performance relative to the education context available at the school, quality of effort, academic fit, leadership qualities, persistence and determination, cross-cultural experience, special talent, and service. (For more detailed descriptions of these factors, see Diversity Manual at pp. 26-27.)

Ask questions that will provide a more complete picture of the candidate, such as: How do you stand out from other candidates? How can you contribute to the diversity of the institution? What obstacles or challenges have you faced or overcome in your lifetime?²⁹

Engage in Individualized Review

For example: “Applicants A and B have similar test scores and grades, . . . similar life experiences, and come from the same socioeconomic background. The applicants both have average recommendations, personal statements, and essays. Each applicant, after considering the entire file but before considering race, are borderline admits. Applicant B belongs to an

²⁵ Diversity Manual at 23.

²⁶ Diversity Manual at 22.

²⁷ Diversity Manual at 25.

²⁸ See Diversity Manual at 26.

²⁹ Diversity Manual at 28-29.

underrepresented minority group while Applicant A does not. Applicant B may be admitted while Applicant A is not, *solely because of the 'plus' factor given for Applicant B's race.*"³⁰

For example: "Applicant A belongs to an underrepresented minority group, comes from a middle class family, and has average grades and test scores. She is a solid, but unremarkable candidate. Applicant B has poorer grades and test scores, but comes from a disadvantaged background and is an accomplished jazz saxophonist. She is White. A reviewer may decide to admit Applicant B over Applicant A because Applicant B will contribute more to the diversity of the student body than Applicant A."³¹

Address and Anticipate the Increased Burdens of Individualized Review

Individualized review of the nature described here will impose burdens on the admissions office and will very likely require additional institutional resources. However, the comparative benefits of a diverse student body are enormous and well outweigh these burdens. First and foremost, colleges and universities will need to expand their admissions committees and staff by finding more people to review applications. More faculty should be tapped to be reviewers, and they should be given incentives to serve as reviewers (such as release time from other committee work). Admissions offices can also tap into other reviewer pools, such as graduate students, recent university graduates, former university admissions officers, and high school guidance counselors.³²

Colleges and universities that have the resources to give each and every applicant an individualized review should do so. However, many institutions will not have these kinds of resources. Yet, they can still employ a constitutionally permissible race-conscious admissions program that allows them to pare down the applicant pool and, thus, ease the burden on the admissions office. **For example:**

"A school can use a mechanical cut to tentatively eliminate a certain percentage of applications. Then a group of reviewers can look at these applications to determine whether any of them should be moved back into the group receiving a second review. *It is important that under this methodology, an application can be moved into the group for secondary review for any reason that would enhance diversity, not just because of the race of the applicant.* This method has the advantage of allowing an admissions office to make individual assessments of *all* applicants. But the office would avoid making initial assessments of all applications, including those that would clearly survive a first cut based solely on test scores and grades."³³

"Instead of employing a mechanical cut, a small group of reviewers may first quickly screen each application to determine whether the applicant should receive a more thorough review. This method allows reviewers to make individualized decisions about applicants. A reviewer will always be able to consider grades and test scores. But he or

³⁰ Diversity Manual at 30.

³¹ Diversity Manual at 30.

³² Diversity Manual at 31.

³³ Diversity Manual at 32.

she can also quickly review the file to see if there are other reasons why an applicant should get a second review.”³⁴

Admissions offices should **avoid two-tiered systems**, which set one mechanical cut for underrepresented minorities and a different mechanical cut for other students. Such a system would be unconstitutional.³⁵

Setting and Reaching Goals

The *Grutter* Court held that schools should make good faith attempts to reach a diversity goal of admitting a “critical mass” of minority students and that this goal is *not* equivalent to a quota. In seeking to admit this critical mass, however, schools must use race-conscious admissions plans that are flexible and that do not forego individualized review.

In the absence of a critical mass of minority students – that is when only a few minorities are admitted – those students may feel “isolated or alienated; unsafe or uncomfortable; obligated to be a spokesperson for their race; under pressure to prove the abilities of their race; [and] stereotyped and stigmatized.”³⁶

The concept of a “critical mass” is contextual and institution-specific. As such, “. . . each institution’s definition of ‘critical mass’ will be unique. Therefore, a school should not feel compelled to mirror the target enrollment goals at other schools. *There is no one goal or ‘critical mass’ for every institution at every point in time.*”³⁷ Achieving a critical mass requires an admission office to keep track numerically of its minority enrollment numbers and the *Grutter* Court held Michigan Law School’s Dean of Admissions acted constitutionally in doing so.³⁸ Thus, if a school’s enrollment numbers for Black students are falling, it may consider race as a determinative factor in admitting a Black applicant; however, it must do so based on an individualized review of the applicant and not based on the fact that its numbers are falling. **For example:** “Assume a school determines that to achieve a ‘critical mass’ of Black students, they should comprise 10-15 percent of the incoming class. During the course of the admissions season, the admission dean informs admissions officers that only 5 percent of the admitted students are Black. The reviewers should not simply start accepting more Black students without regard to individual candidates’ overall qualifications, in an effort to achieve the target. However, when reviewing an individual application of a borderline candidate who is Black, a reviewer may still decide to accept the applicant because of the ‘plus’ awarded based on his or her race.”³⁹

An admissions office should **avoid even the appearance of a quota system.**

Schools can further their efforts to achieve their diversity goals by:

³⁴ Diversity Manual at 32-33.

³⁵ See Diversity Manual at 33.

³⁶ Diversity Manual at 34.

³⁷ Diversity Manual at 34.

³⁸ See Diversity Manual at 35.

³⁹ Diversity Manual at 36.

- Keeping their admissions officers aware of demographic statistics from previous years, which will help them gain an historically contextualized understanding of those goals in the first place.⁴⁰
- Evaluating race and ethnicity data in a sophisticated manner. For example, the terms “Asian” and “Latino” refer to “many communities that face different obstacles and reflect varying histories. Some may be underrepresented or disadvantaged, while others are not. This can be understood only by reviewing the data in depth.”⁴¹

Extend post-admission efforts in recruiting and financial aid

For more information on the constitutionality of recruiting and financial aid programs, see Chapter VI of the Diversity Manual.

⁴⁰ See Diversity Manual at 37.

⁴¹ Diversity Manual at 37.