

Affirmative Action—A Legal Primer

Just as the January conference began with an elaboration of the Supreme Court findings in the context of the overall legal environment related to affirmative action, so too does this Guidebook.

Legalese has become an unfortunate reality for higher education administrators struggling to achieve diversity in their human resource development efforts. “Strict scrutiny,” “narrow tailoring,” “compelling state interest,” “Title IX,” “Title VI,” “Title VII,” “equal protection,” “critical mass,” and “race-neutral alternatives” are just a few of the terms that have barged their way into the vocabularies of well-intended program implementers who are trying to navigate their institutions’ “Next Steps” through a risky post-*Michigan*¹ minefield. With much of the complicated discourse on this topic drafted by lawyers for lawyers, the administrators who really need to understand these terms-of-art and who are best equipped to analyze these standards in context are often overlooked. Legal commentators assume that laypersons can glean a full understanding of these terms by reading protracted litanies of summarized legal opinions. As members of the higher education community that we serve, we know that this assumption is often incorrect.

Even more challenging for program implementers in STEM fields is the fact that virtually none of these legal discussions considers the intricacies and particularities of the STEM disciplines, or the grave national consequences that will inevitably result if the United

States fails to act dramatically and affirmatively to fully develop and utilize its diverse citizenry in STEM disciplines.² Consideration of such data, in our view, could significantly change a decision on the sustainability of a particular STEM program. Therefore, we start our analysis with a clear and concise “affirmative action primer” of definitions, statutory and judicial principles, and paradigms with an emphasis on such principles related to the STEM enterprise. Our objective is that STEM program implementers can use this primer, in addition to (not instead of) conferring with expert legal counsel, to gain a more complete understanding of these legal terms. They can use this document along with counsel’s advice as a foundation on which to “stand their ground” as to the centrality—as a matter of law—of diversity in STEM human resources, not only to their institution’s particular mission, but also to the nation.

Federal Equal Opportunity Standards

Title VI, Title VII, Title IX and the A.D.A.

The following six laws constitute the major federal statutory equal protection and non-discrimination standards to which public and private institutions must adhere.

1. Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d

(applies to private institutions that accept federal funding and to public institutions)

“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.”

Equal Protection principles of the U.S. Constitution’s Equal Protection Clause (found in the 14th Amendment) apply through Title VI to private institutions that accept federal financial assistance.³ With the *Grutter* and *Gratz* decisions, both remediation of the present effects of an institution’s own past discrimination (the remedial rationale) and the achievement of student body diversity to create educational benefits for all students and to serve the nation (the diversity rationale) are acceptable rationales for taking race into account in college admissions.

2. Title VII of the Civil Rights Act of 1964, 42 USC 2000e-2

(applies to private nonexempt employers and state and local government employers) and Executive Orders 11246 and 11375 (apply to nonexempt federal government contractors)

It is illegal for an employer “to fail or refuse to hire or to ... discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment” on the basis of “race, color, religion, sex, or national origin.” 42 U.S.C. 2000e-2(a).

Title VII creates statutory standards for employment equity. Title VII has its own standards for affirmative action in hiring, including whether an institution is remedying the present effects of its own past discrimination or whether there is a “manifest imbalance” in the representation of women or minori-

ties in the workforce of the institution as compared with the representation of women or minorities in the available and capable labor pool.⁴ The Supreme Court has not yet decided whether the *Grutter* and *Gratz* diversity rationale will also apply to employment situations, and has not yet relied in the employment context on the principles of Equal Protection that apply under Title VI to educational programs.

3. Title IX of the Education Amendments of 1972

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

Although most well-known for requiring equity in athletics, this law applies broadly to all public undergraduate programs, to all public and private graduate and professional school programs that receive federal financial assistance, and to all private education programs that are open to males and females and receive federal financial assistance. It generally takes an approach to non-discrimination and gender equity in programs that are open to males and females that is similar to the approach to race and national origin equity under Title VI.⁵

Expanded and Improved Title IX Enforcement and Compliance Policies

While women and girls still have further to go to reach full equality in athletics, much progress has been made over the past 30 years since implementation of Title IX. In light of this progress, in 2000 the U.S. Commission on Civil Rights issued a report entitled, *Equal Educational Opportunity and Nondiscrimination for Girls in Advanced Mathematics, Science, and Technology Education: Federal Enforcement of Title IX* recommending that Title IX enforcement authority be used more effectively to ensure that women and girls receive equal treatment and greater participation opportunities in math and science education programs.

Some policymakers and commentators have championed this view,⁶ and in July 2004, the Government Accountability Office issued a report entitled “GENDER ISSUES: Women’s Participation in the Sciences Has Increased, but Agencies Need to Do

More to Ensure Compliance with Title IX.”⁷ This report, requested by Senators Ron Wyden and Barbara Boxer, assesses what federal agencies do to ensure that grant recipients comply with Title IX in STEM fields, what data show about women’s participation in these fields, and what promising practices exist to promote their participation.

The argument for utilizing Title IX enforcement strategies more aggressively to ensure greater participation by women in the sciences is promising, but needs further exploration and ultimately more widespread support. We encourage math and science program implementers to approach their university counsel with the possibility of using the statutory and regulatory authority of Title IX as a justification for developing and expanding gender equity programs in math and science.⁸

4. Americans With Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*

The Americans with Disabilities Act (ADA) was signed into law on July 26, 1990. The ADA’s intent is to make American society more accessible to people with disabilities. It gives civil rights protections to individuals with disabilities. The ADA furthers equal opportunity for individuals with disabilities in public accommodations, employment, transportation, education, transportation, health services, voting, and public services, and communications.

5. Section 504 of the Rehabilitation Act, 29 U.S.C. § 794

“No person with a disability in the United States shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any federal program or activity conducted by the federal government.”

6. Age Discrimination Act, 42 U.S.C. §§ 6101-6107)

“No person in the United States shall, on the basis of age, be excluded from participation, in be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance.”

Equal Protection & Due Process Clauses

The following two clauses from the United States Constitution apply to public institutions and, through Title VI and Title IX, to private institutions that accept federal funding.

1. Equal Protection Clause of the 14th Amendment

“[No state shall] deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

2. Due Process Clause of the 5th Amendment

“[No person shall] be deprived of life, liberty, or property, without due process of law.”

Varying Levels of Judicial Scrutiny Given to Race/Gender Conscious Measures

When a government actor makes a decision that confers benefits or burdens based on a person’s status or membership in a particular group or class, e.g., race, gender, or age, and that decision is challenged, the legality of the decision must be analyzed under one of three levels of judicial scrutiny—strict, intermediate, or weak.

1. Strict Scrutiny⁹

Race-conscious decisions made by the government are generally subject to strict scrutiny to determine if they are constitutional under the Equal Protection Clause of the Constitution. The government must show that the race-conscious decision or program is necessary to achieve a compelling governmental interest (such as achieving the educational benefits of diversity so as to further a university’s educational mission), and that the decision is narrowly tailored to advance that interest.

This standard applies, through Title VI of the 1964 Civil Rights Act, to private institutions that receive federal financial assistance when race-conscious decisions made by these institutions are challenged.

Compelling Interest

The initial inquiry or first “prong” of the Strict Scrutiny test.

To satisfy this “prong” the government (or statutorily covered private institution) must be able to justify

its use of race by showing that 1) its purpose or interest in taking race into account is not based on racial animus or prejudice but serves a legitimate and highly substantial objective and 2) race-conscious decisions are necessary either to accomplish or safeguard the compelling interest.

Examples of interests that have been held to be “compelling” are: the government’s (or covered private party’s) interest in remedying the present effects of its own past discrimination;¹⁰ the government’s interest in national security;¹¹ and the government’s (or covered private party’s) interest in obtaining the educational benefits that flow from a diverse student body.¹²

AAAS and NACME note that in the particular context of science and engineering education, this country’s under-utilization of its African American, Hispanic American and Native American human resources is a compelling problem of critical proportion that will, if ignored, seriously impinge the national and economic security interests of this country.¹³ In this new era where some economies, such as Taiwan, Korea, and Ireland, have successfully enticed their citizens to return after advanced training and research experience in the U.S.,¹⁴ and where it appears that the number of new foreign graduate students enrolling in science and engineering programs in U.S. graduate schools is declining possibly because of Visa difficulties due to post-9/11 terrorism concerns,¹⁵ America’s institutions of higher education can hardly afford to ignore this problem.

Grutter expands the student body diversity rationale by recognizing an educational institution’s right, based on an implied First Amendment right to academic freedom, to establish its own mission and to embrace in its mission both educating its students *and* serving the nation’s need for well-prepared citizens, leaders, and “national and economic security.” Based on colleges’ and universities’ unique role in our democracy, society and economy, and in deference to such institutions’ academic judgment, student body diversity is a compelling interest that justifies narrowly tailored race conscious policies. Student body diversity both allows an institution to best educate all of its students and to serve the nation by contributing to a diverse pool of highly qualified STEM academics, professionals and workers.

To maximize and fully exploit the Supreme Court’s

opinion in *Grutter*, it is critical that institutions articulate their missions to embrace broad student diversity¹⁶ as a means of both educating their students and serving the nation. In the particular context of STEM education, a carefully crafted argument supporting not only the educational benefits of student body diversity, but also the national and economic security benefits of such diversity might even be more compelling. Policymakers should consult their institution’s general counsel’s office to discuss the kind of evidence that must be compiled to strengthen this rationale in the particular context of STEM education.

Narrow Tailoring

Second inquiry or “prong” of the Strict Scrutiny test.

To satisfy this “prong” the government (or covered private party) must look at the means it chooses to accomplish its “compelling” purpose and prove that the means are designed or framed as narrowly as is possible in order to achieve the objective. There are four key narrow tailoring questions:

- A. **Necessity.** Is it *necessary* to consider race in the program? Has the program considered or tried “workable” race-neutral alternatives? In sum, race may be used only to the extent necessary. This means that if it is possible to achieve the compelling purpose with a lesser use of race (i.e., using race as one of many considerations but not as an exclusive criterion), then the lesser use of race should be pursued.
- B. **Flexibility.** Is race considered in a flexible manner? Is it only one factor of many, or is it the predominant factor or the only factor considered?¹⁷
- C. **Burden.** What is the impact of the race-conscious program on non-minorities who will not “benefit” from the consideration of race? (Note that if all applicants are considered under the same broadly defined diversity criteria, including race, then non-minorities have not been unduly burdened by race being one of several criteria).
- D. **Assessment.** Does the program include a built-in mechanism for periodic assessment and refinement? Will the consideration of race and the availability of “workable” race neutral alternatives be regularly reviewed to determine if the use of race is still necessary so that the use of race is time-limited to the period of need?

► *Example of a narrowly tailored solution:* a flexible admissions program that considers each applicant individually, considers all aspects of the individual to assess his or her ability to succeed and to contribute to and benefit from studying at the school, and considers all applicants in relation to all of the many dimensions of diversity that are important for creating educational benefits (including racial, geographic, socio-economic and other diversity), and does not unduly burden non-minority applicants.

► *Example of a solution that is not narrowly designed:* a quota system or the automatic awarding of points on the basis of race.

Race-Neutral Alternatives

(defined separately because this is the “narrow tailoring” question that receives the most attention)

Policies or strategies that enhance diversity (including racial and ethnic diversity) without explicitly depending upon racial considerations. The approaches are allegedly neutral as to race, and therefore would not be subject to strict scrutiny.

► *Examples of Race-Neutral Alternatives:* The Texas 10% Plan, the One Florida/Talented 20% Program, and the California 4% Plan;¹⁸ socio-economic considerations in lieu of race; targeted recruitment, outreach, and financial aid; Advanced Placement Initiatives; community colleges coordination.¹⁹

University program implementers must make a serious good-faith effort to consider whether any workable race-neutral alternative policies exist to achieve the educational benefits of student body diversity before they adopt race-conscious approaches. There is NO REQUIREMENT that the university must actually first try and fail at an alternative if it is obviously unworkable.²⁰

Critical Mass

The Supreme Court in the *Grutter* case spoke approvingly of the law school’s compelling interest in enrolling a “critical mass” of minority students to achieve the educational benefits of student body diversity. However, there is no exact definition of critical mass. We do know that it is *not* a quota. Generally, it is the representation of students from an underrepresented group that a university deems sufficient to realize the educational benefits of a diverse campus

community for all students. This can include consideration of the representation of students necessary in living, working and classroom situations that allows each student to contribute as an individual and to not feel isolated or intimidated or that s/he must speak for an entire class of under-represented students. A “critical mass” cannot be fixed in terms of a set number, range of numbers or percentage of under-represented minority students. Having a “critical mass” will ensure that students from underrepresented groups do not feel isolated or like spokespersons for their race or gender, and do not feel uncomfortable discussing issues freely based on their personal experiences.

A critical consideration for STEM education is to recognize that science and engineering are creative and collaborative fields and that the world is increasingly diverse. In order for students, scientists and engineers to identify a diverse society’s needs and to devise culturally appropriate and effective solutions to meet those needs, they must be able to work productively with people of diverse races and backgrounds. Educational experiences that contribute to these skills occur in many settings, in the classroom or laboratory, in living and working situations. Critical mass is not capable of exact definition and may differ from school to school and field to field and over time. STEM departments vary widely in terms of their diversity, and diversity advancements in a Biology Department at University X will have little or no impact on the isolation that an underrepresented minority student may suffer in the Department of Mechanical Engineering at the same school.

2. Intermediate Scrutiny

Gender-conscious decisions made by government, public institutions or covered private parties, have generally been subject to intermediate scrutiny. Although recent Supreme Court cases have not tested the continued efficacy of this standard, the intermediate scrutiny analysis is somewhat less stringent than the strict scrutiny analysis triggered by race-conscious decisionmaking. The government must show that the law is necessary to achieve an important governmental interest, and that the law is narrowly tailored to that interest. The analysis is similar to the strict scrutiny analysis above but somewhat less stringent.

Three Key Lessons Learned from *Grutter & Gratz*

- ▶ The Supreme Court issued clear, strong, unequivocal language endorsing Justice Powell's opinion in *Bakke*, holding that the promotion of student body diversity is a compelling interest when necessary to achieve a school's educational mission, and can justify the use of race as a "plus" factor in a competitive admissions process where all applicants are "on the same footing" for consideration.
- ▶ A program implementing a flexible, holistic, individualized consideration of each applicant where race is only one of several relevant factors considered is likely to satisfy the "narrowly tailored" definition, whereas a program implementing a rigid, numerical value to each applicant based, even only in part, on race is less likely to be upheld and the automatic awarding of points based only on race is not permissible.
- ▶ A university has discretion, grounded in the First Amendment, in matters of academic judgment and does not have to exhaust every conceivable race-neutral alternative before considering race as one of many factors in order to satisfy the "narrowly tailored" definition, as long as the university engaged in a "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity." A university is not required to actually adopt those "alternatives" if the university deems them inappropriate or unworkable.

3. Weak Scrutiny (Rational Review)

Generally, if the government or a public institution is challenged about decisions that are based on classifications that do not involve race or gender, e.g., giving preference to athletes or legateses, they are required to show only a legitimate state interest (fielding a Division I football team or attracting more alumni donations) and that the law is rationally related to achieving that interest. Only a tiny percentage of laws are struck down when rational review is applied. Under this standard, a law must be arbitrary or capricious and lack any rational relationship to the legitimate ends sought to be achieved to be struck down. Some proponents of targeted recruitment and outreach programs have successfully argued that this is the proper level of review for such *inclusive* strategies to diversify a pool of applicants.

Significant Federal Legal Opinions

The following three legal opinions are instructive to a federal civil rights analysis.

1. *Grutter v. Bollinger*, 539 U.S. 306 (2003) & *Gratz v. Bollinger*, 539 U.S. 244 (2003).

In *Grutter v. Bollinger*, the U.S. Supreme Court held that broadly defined student body diversity is a compelling interest that can justify the use of race in university admissions when the institution determines that such diversity is necessary to achieve its educational mission. Though *Grutter*, indeed, is a landmark case in equal opportunity law, it is important to remember that nothing in *Grutter* requires a university to undertake a race-conscious affirmative action program to increase the diversity of its student body. To the contrary, *Grutter* simply established that such programs are allowed, though not required, when they are necessary and satisfy narrow tailoring. In the absence of a steadfast commitment by the higher education community to the precept of diversity and equal opportunity, *Grutter* will be rendered meaningless.

In *Grutter*, the Court restated its past holdings that all government uses of race are subject to "strict scrutiny," but also stated that a "strict scrutiny" analysis does not invalidate all uses of race. Justice O'Connor wrote that "*context matters*" when reviewing programs that take race into account.²¹ In its consideration of "context," the Court rejected the assertion that "the only governmental use of race that can survive strict scrutiny is remedying past discrimination." *Grutter*, 529 U.S. at 328. *Grutter* over-ruled *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), which had held that the educational benefits of student body diversity were not adequate to justify the use of race in admissions and that only remediation of the present effects of an institution's own past discrimination could justify such use of race. *Hopwood* is no longer good law. The *Grutter* Court also noted, contextually, that numerous *amicus* briefs²² had been filed in support of the University of Michigan by scores of professional associations; universities, colleges, law schools and national educational organizations; retired military leaders; Fortune 500 corporations; more than 14,000 law school students, as well as additional groups and individuals.

Ultimately, the Court deferred to the University of

It's Not Just About Admissions! Post *Grutter* Suggestions for Targeted Programs

- ▶ Avoid race exclusive eligibility requirements for any benefit unless there is strong evidence exclusivity is necessary to achieve diversity or unless the decision to award the benefit does not consider race at all and race exclusive resources merely increase the pool of benefits for all students (e.g., financial aid where need for and amount of aid are determined without regard to race, and race exclusive, fungible dollars are later matched with qualifying individuals who are minorities, freeing other fungible dollars for qualifying students who are non-minorities). Similarly, avoid separate selection tracks. Review OCR's minority scholarship guidance cited, *supra*, in note 14.
- ▶ Ensure flexible, individualized consideration of many attributes of each applicant to any program so that race is only one of several factors being considered.
- ▶ Be careful of explicit numerical benchmarks that may be interpreted as quotas.
- ▶ Research. Research. Research. While you don't need to actually adopt every race-neutral alternative approach to race conscious approaches to diversity when some or all of these alternatives are not workable, you do need to engage in a serious, good faith consideration of whether such alternatives would be workable without changing the character of your institution or foreclosing your academic judgment. Leave a paper trail of this examination.
- ▶ Consider burden! Leave a paper trail on your investigation into the burden your program has on non-minorities. The good news is that in other contexts, the burden may be substantially less than in the admissions context. Remember that if you engage in a holistic assessment of every applicant under all selection criteria (including many different diversity criteria), *Grutter* holds that nonminorities are not burdened by race as a diversity criterion.
- ▶ Evaluate. Evaluate. Evaluate. Carefully investigate the need for the program, and include a projection of a possible ending point. In most STEM fields the need is so critical that the political controversy over your efforts is greatly reduced, thus similarly reducing the threat of serious litigation.

For extremely helpful post-*Michigan* guidance that goes beyond just admissions, refer your university counsel to the College Board publication, Coleman, Arthur and Scott Palmer DIVERSITY IN HIGHER EDUCATION: A Strategic Planning & Policy Manual Regarding Federal Law in Admissions, Financial Aid, and Outreach, available at http://www.collegeboard.com/prod_downloads/highered/ad/diversity_manual_2_ed.pdf

Michigan's good faith educational judgment that diversity is essential to its institutional mission, and that it is, therefore, a compelling state interest. The Court went on to find that the Law School's admissions process is also narrowly tailored to achieve the educational benefits of diversity because of the individualized, whole-file review that is used in which all aspects of an applicant are considered and race is one of the many factors, is considered flexibly and is not given the same weight at all times or for all applicants of a particular race. The Court also held that the Law School's goal of attaining a "critical mass" of underrepresented minority students does not transform its program into a quota.

Notwithstanding the *Grutter* holding, in *Gratz v. Bollinger*, the Court held that the University of Michigan's undergraduate admissions policy of automatically distributing twenty points to students from underrepresented minority groups was not narrowly tailored because it assumes that each member of a racial minority group makes the same contribution to

the university based solely on race and forecloses the exercise of academic judgment on the potential contributions of an applicant based on all of his or her attributes. Therefore, the undergraduate admissions policy, unlike the law school admissions policy in *Grutter*, could not be upheld under the second prong of the strict scrutiny analysis.

For another clear and concise set of recommendations for post-*Grutter* compliance, review and refer your university counsel to "Recommendations: Seven Secrets to Successful Compliance With *Grutter*," on page 43 of a recent report issued by the Mexican American Legal Defense and Education Fund, Americans for a Fair Chance, the Equal Justice Society, and the Society of American Law Teachers.²³

2. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)

Over the past 25 years, Justice Powell's Supreme Court *Bakke* opinion has essentially served as the higher education community's foundation for justifi-

fying its use of race in university admissions when consideration of race is necessary to achieve the student body diversity that generates the educational benefits that achieve the university’s mission and when the approach to consideration of race is “narrowly tailored.” Justice Powell’s opinion also held that it is the educational benefits of student body diversity and not remediation of general societal discrimination that is a compelling interest justifying the use of race as one of many factors considered in admissions. As a legal matter, however, the opinion of the Court was complicated and splintered, as there were actually six different opinions in *Bakke*. On the issue of the state university’s use of race in admissions, some of the *Bakke* Justices would have held that when the government takes race into account not to demean or insult any racial groups, but to remedy past societal racial prejudice, the use of race is permissible. Other Justices would have resolved the debate without determining whether the program at issue was unconstitutional, instead finding it unlawful based on Title VI, the federal civil rights statute. Justice Powell’s opinion, however, was the controlling opinion of the Court on this issue because his opinion supported the admissions program’s use of race on the *narrowest ground*. Still, because of these six complicated opinions, after *Bakke*, lower federal courts and legal commentators engaged in a 25-year protracted debate over the precedential value of Justice Powell’s opinion, and whether its “diversity rationale” really could form a proper legal foundation justifying the use of race in university admissions

Three Key Lessons Learned from *Adarand*

- ▶ Federal affirmative action programs that use race as a basis for decisionmaking would be subjected to a “strict scrutiny” standard of legal review, just like state and local affirmative action programs. Previous Supreme Court cases prescribing a more lenient standard of review for federal programs were overruled.
- ▶ Strict scrutiny is not “fatal in fact.” Seven of the nine Justices recognized that federal affirmative action programs that use race as a basis for decisionmaking can be sustained under certain circumstances.
- ▶ *Adarand* did not determine the constitutionality of any particular federal affirmative action program, including the DOT program at issue in that case. The opinion said very little about the details of application of the strict scrutiny test. Therefore, the Department of Justice opined that *Adarand* made it necessary to evaluate all federal programs that use race or ethnicity as a basis for decisionmaking to determine if they comport with strict scrutiny.

policies. Some lower courts opined that *Bakke* permitted universities seeking a diverse student body to consider race as one of many factors in an admissions policy, other lower courts disagreed.²⁵

Grutter and *Gratz* indisputably ended this legal debate. The majority opinion in *Grutter*, adopted Justice Powell’s opinion in *Bakke* and even expanded it to recognize that a college or university has discretion, based on its First Amendment right to academic

Three Key Lessons Learned from *Bakke*

- ▶ Though a majority of the Justices ruled that the medical school’s affirmative action program would be struck down, Justice Powell’s opinion, along with the partially concurring opinions of Justices Brennan, White, Marshall and Blackmun, recognized that the government may take race into account, even if its use of race may be subjected to “strict scrutiny.”
- ▶ Justice Powell found that that the educational benefits of student body diversity were a compelling governmental interest justifying the use of race as one among many “plus factors” in admissions.
- ▶ Justice Powell’s opinion was adopted, and its diversity rationale was even expanded somewhat by the Supreme Court in *Grutter*. *Grutter* holds that the compelling interest in the educational benefits of student body diversity may encompass educating all of a school’s students and serving the nation’s need for a diverse pipeline of citizens, professionals, and workers. Legal debates over whether Justice Powell’s decision was legally binding are now irrelevant., and the holding of the federal appeals court in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) that the educational benefits of student body diversity are not compelling enough to justify taking race into account in college admissions has been over-ruled and is not good law.

judgment, to define its educational mission to encompass both educating its students and serving the nation and to determine that it has a compelling interest in the educational benefits of student body diversity to achieve that broadly defined mission. The crux of Justice Powell's opinion was that the use of race should be subject to "strict scrutiny," even in the context of an affirmative action program. This means that: (1) there should be a *compelling governmental interest* in using race; and (2) *the program must be necessary—and narrowly tailored to achieve—that interest*. Powell found that the educational benefits of diversity were a compelling governmental interest justifying the use of race as one of many "plus factors" in admissions. Powell said that race can be considered as one of many factors and can influence admissions decisions when the university is trying to achieve broadly defined diversity.

3. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995)

Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) stands for the fact that federal affirmative action efforts that utilize race or ethnicity as a basis for decisionmaking are subject to a strict scrutiny standard of review. Before *Adarand*, the Supreme Court engaged in a more lenient review of congressionally determined federal affirmative action programs, holding them only to the less stringent "intermediate scrutiny" standard of review, which resulted in sustainability of most federal efforts. Six years earlier, in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the Court had already applied "strict scrutiny" to state and local affirmative action programs. *Adarand* simply stands for the proposition that federal programs are no different.

Though *Adarand* received a great deal of publicity upon its announcement as a landmark affirmative action case, it left many questions undecided, most

The *Adarand* "Victory"

Both proponents and opponents of affirmative action policies often overlook the fact that in *Adarand*, the affirmative action program under attack was ultimately upheld, surviving a strict scrutiny analysis by the United States Court of Appeals for the 10th Circuit. Advocates of race-conscious programs should take heed of this lesser known but heartening *Adarand* story as a valuable lesson that persistence, ingenuity and creativity can win the day for affirmative action programs in the end.

Adarand is most often cited for the proposition that "strict scrutiny" applies to federal affirmative action programs much in the same way as it applies to such state and local programs. Essentially, the oft-cited 1995 *Adarand* case has come to symbolize a well-known shift in Supreme Court affirmative action jurisprudence, where an increasingly conservative Court significantly increased the legal obstacles that federal affirmative action programs would have to overcome in order to survive. The Supreme Court, however, did not preclude the federal government from undertaking the affirmative action program at issue; it merely required that the program survive a strict scrutiny analysis if it were to continue.

After the 1995 opinion, the case was sent back to the lower courts. With the Court's new standard in mind, Congress and the Department of Transportation shored up the government's compelling interest argument and creatively revised the program in an effort to help it survive a "narrowly tailored" analysis.

In reauthorizing the program, Congress was careful to demonstrate that the federal government had a "compelling governmental interest" in remedying the effects of past racial discrimination and opening up federal contracting opportunities to members of previously excluded minority groups." Congress did this by presenting very specific evidence through numerous Congressional hearings and Congressional investigations, as well as by compiling voluminous outside studies of statistical and anecdotal evidence. Similarly, the federal government revised the details of the program building in requirements that federal contractors attempt to meet goals in a race-neutral manner before adopting race-conscious measures, that incorporate time limits and checks and regular reassessments of the minority firms participating in the program, and among other things that incorporate additional flexibility including the ability for federal government contractors to seek waivers from participating.

In September 2000, the 10th Circuit court of Appeals ruled that the newly designed program did, in fact, survive strict scrutiny. The United States Supreme Court, when presented with the opportunity to opine further on the *Adarand* controversy, declined to take action, letting the 10th Circuit opinion in *Adarand* stand.

glaringly the constitutionality of the Department of Transportation affirmative action program at issue in the case.²⁶ In her majority opinion, Justice O'Connor said little about the details of how strict scrutiny—specifically the compelling interest and narrowly tailored tests—would be applied in the federal context. Legal analysts, therefore, have assumed that the empirical proof and other evidentiary standards that apply in the state and local context are the same for the federal government.

The other major outcomes of the *Adarand* case were policy-oriented, rather than legal, including the Clinton Administration's post-*Adarand* Memorandum to General Counsels from Walter Dellinger, Assistant Attorney General, dated June 28, 1995. The Memorandum set forth preliminary legal guidance on the implications of the Supreme Court's decision in *Adarand*,²⁷ calling for a complete evaluation of all federal programs that use race or ethnicity as a basis for decisionmaking to determine if they comport with strict scrutiny. Another example is the final Review of Federal Affirmative Action Programs, dated July 19, 1995, by George Stephanopoulos, Senior Adviser to the President for Policy and Strategy and Christopher Edley, Jr., Special Counsel to the President,²⁸ noting that the Administration would continue to support lawful affirmative action measures that are flexible, realistic, subject to reevaluation, and fair.²⁹

These documents are the last pieces of government-wide official advice issued by any Administration on the subject of affirmative action in federal programs.

State-Based Equal Opportunity Standards

► CALIFORNIA

Proposition 209

The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

Federal Loophole

Proposition 209 contains an exception for federal programs. Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state.

California Percentage Plan

Admissions plan known as Eligibility in Local Context (ELC), guaranteeing University of California system admission to the top 4% of California's public and private high school graduates.

► WASHINGTON

I-200

The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

Federal Loophole

I-200 contains a federal programs exception identical to that in Prop. 209. This section does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.

Abandonment possible?

Earlier this year, a bill enjoying widespread bipartisan support was introduced in both houses of the Washington State legislature. The bill (S. 6268 and H. 2700) would allow the state universities to consider diversity consistent with the U.S. Supreme Court rulings in *Grutter* and *Gratz*. The bill would amend I-200.

► FLORIDA

Executive Order 99-281 (“the One Florida Initiative” & Talented 20 plan)

Directed the governor and his executive agencies to dispense with certain practices regarding the use of racial or gender set-asides, preferences or quotas in government employment, contracting and education.

The initiative includes the Talented 20 plan that guarantees state university admission to high school seniors graduating in the top 20% of their respective classes.

► TEXAS

No state law prohibitions Texas 10% Plan

As of this printing, there are no Texas laws prohibiting the state from considering race as a factor in university admissions. Before *Grutter* and *Gratz* were decided, Texas was so prohibited based on the 5th Circuit’s 1996 opinion in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996). *Hopwood* has been *overruled* and is *no longer good law*.³⁰

In 1997, as a response to constraints on its ability to consider race as an admissions factor to state universities under *Hopwood*, the Texas legislature passed H.B. 588, commonly known as the Texas 10% Plan. The plan guarantees admission to any student graduating in the top 10% of their high school class to the public college or university of their choice.³¹

► MICHIGAN

Ballot Initiative

The Michigan Civil Rights Initiative is a coalition of individuals and organizations seeking to commence an anti-affirmative action ballot measure in the State of Michigan that would supercede the *Grutter* and *Gratz* cases on state law grounds and prohibit affirmative action efforts in hiring, public contracting and education. The Executive Director of the initiative is Jennifer Gratz, the plaintiff from the University of Michigan undergraduate case, and such individuals as Ward Connerly and Barbara *Grutter*, the other Michigan plaintiff, are active participants.

As of the printing of this document, the campaign for the 2004 ballot has been halted. Coalition members are reportedly setting their sights on another bout for the 2006 election year.³²

► OTHER STATES

As of this printing no other State has passed a law, constitutional amendment, or implemented an executive order impacting affirmative action at the state level.³³

Colorado had been considering the so-called “Colorado Civil Rights Act,” which sought to ban affirmative action in hiring, public contracting, and admissions to public universities, but the legislation was defeated on March 26, 2004.³⁴

Federal Paradigms—Ongoing Efforts To Encourage Equal Opportunity

In the final section of this primer we summarize ongoing federal affirmative efforts to broaden participation in STEM fields. It is critical that STEM program implementers understand that avenues to increase diversity in these fields still exist, and that these programs can continue as long as they are designed and implemented in a constitutionally permissible manner. The *potential* for new paradigms remains, though such new approaches will necessarily have to employ creative and innovative strategies compliant with the legal principles set forth above. AAAS and NACME maintain that inroads to solving the intractable problem of underrepresentation in STEM fields will only be made by institutionalizing or “mainstreaming” concern for these issues. We therefore encourage more widespread utilization of the broad language contained in the Science and Engineering Equal Opportunities Act, increased federal enforcement of Title VI, Title IX and 504 compliance in STEM fields, and the development of new models like NSF’s “Criterion II” (explained below) by institutions that fund STEM education and human resource development, including federal agencies, private corporations and foundations.

The Science and Engineering Equal Opportunities Act of 1980, 42 U.S.C. §1885, et seq.

(as amended, December 2002) (the “SEEOA”)

This often-overlooked law was the first of its kind with its mission to create equal opportunity in STEM fields. The SEEOA includes strong and broad language about the United States’ interest in promoting the *full use* of human resources in STEM fields that could be relied upon more broadly by proponents of equal opportunity programs in STEM fields. It is important to note that the Congressional findings and statement of policy set forth in the SEEOA is broadly applicable to STEM fields, even though the specific authorization language in the statute refers to the National Science Foundation. NSF relies upon this mandate to authorize its comprehensive science and

engineering education program to increase the participation of underrepresented groups in STEM fields, and to support activities to initiate research at minority-serving institutions. *The SEEOA remains in effect today.* It was amended as recently as one and a half years ago as part of the NSF Authorization Act, P.L. 107-368 where Congress specifically added “persons with disabilities” to its “Congressional statement of findings and declaration of policy” set forth in §1885 of the SEEOA, and also explicitly listed implementing the goals of the SEEOA as a priority area for NSF. The *Grutter* and *Gratz* cases should inform the implementation of the mandates of the SEEOA by universities and other institutions engaging in STEM human resource development, whether or not those institutions receive NSF funding.

The SEEOA

- ▶ The Congress finds that it is in the national interest to promote the full use of human resources in science and engineering and to insure the full development and use of the scientific and engineering talents and skills of men and women, equally, of all ethnic, racial, and economic backgrounds, including persons with disabilities.
- ▶ The Congress declares it is the policy of the United States to encourage men and women, equally, of all ethnic, racial, and economic backgrounds, including persons with disabilities, to acquire skills in science, engineering, and mathematics, to have equal opportunity in education, training, and employment in scientific and engineering fields, and thereby to promote scientific and engineering literacy and the full use of the human resources of the Nation in science and engineering. To this end, the Congress declares that the highest quality science and engineering over the long-term requires substantial support, from currently available research and educational funds, for increased participation in science and engineering by women, minorities, and persons with disabilities. The Congress further declares that the impact on women, minorities, and persons with disabilities which is produced by advances in science and engineering must be included as essential factors in national and international science, engineering, and economic policies.

NSF Criterion II

NSF Criterion II is another model for success. Since 1997, proposals submitted to the National Science Foundation have been evaluated through use of two merit review criteria. The first review criterion relates to the intellectual merit of the proposal, the second relates to the broader impacts of the proposed activity. Historically, most proposers have had more difficulty responding to criterion II than criterion I. Accordingly, as of October 1, 2002, NSF implemented a policy of returning, without review, proposals that do not separately address both merit review criteria within the Project Summary. NSF implemented this change to more clearly articulate the importance of broader impacts to NSF-funded projects.³⁵ NSF implements this policy in an even-handed manner that treats all proposers identically. AAAS and NACME maintain that use of a “Criterion II like” factor by more federal agencies and other institutions funding the STEM enterprise, will lead to collapsing the distinction between research and education, compelling universities and research institutions to examine the impact of their activities on the human resource development needs of the STEM enterprise, and consequently on the economic and national security interests of the nation.

NSF Broader Impacts

The components of the broader impacts criterion as defined by the National Science Board are as follows:

- ▶ How well does the activity advance discovery and understanding while promoting teaching, training and learning?
- ▶ How well does the proposed activity broaden the participation of underrepresented groups (e.g., gender, ethnicity, disability, geographic, etc.)?
- ▶ To what extent will it enhance the infrastructure for research and education, such as facilities, instrumentation, networks and partnerships?
- ▶ Will the results be disseminated broadly to enhance scientific and technological understanding?
- ▶ What may be the benefits of the proposed activity to society?

Equal Employment Opportunity Standards Imposed On Federal Contractors

It is essential that program implementers and their university counsel remember that federal equal employment opportunity standards remain in place. For decades, the federal government has not only banned discrimination by its contractors and subcontractors, but has also required both to take affirmative action steps to ensure that all persons have an equal opportunity for employment, without regard to race, color, religion, sex, national origin, disability or status as a Vietnam era or special disabled veteran. Most all universities are, of course, federal contractors. Therefore, university-wide plans to take steps to ensure equal employment opportunity for all—faculty, administrators, and students—is not only still allowed post-*Grutter*, but it is *required*.

The laws setting forth the federal standards in this regard are: Executive Order 11246, as amended; Section 503 of the Rehabilitation Act of 1973, as amended and the affirmative action provisions of (Section 4212) of the Vietnam Era Veterans’ Readjustment Assistance Act, as amended.

Under E.O. 11246, government contractors with 50 or more employees must include a standard “equal opportunity clause” in each of their contracts exceeding \$50,000. If a contractor is found to have violated E.O. 11246, he may be debarred from future government contracts. Additionally, each of these contractors must develop an Affirmative Action Plan that includes an analysis as to the utilization or underutilization of minorities and women. The actual selection decision, however, is made without regard to race. The Department of Labor (DOL) enforces these affirmative action laws. DOL also sets numerical goals for contractors to use, not as quotas, but to help to measure the effectiveness of affirmative action efforts to prevent discrimination. DOL also gives annual awards to contractors with outstanding affirmative action programs.

Just as in the case of Title VI, Title IX, and §504 compliance, AAAS and NACME strongly recommend increased and more effective monitoring of these equal employment opportunity requirements by the Department of Labor, as well as by STEM funding agencies, particularly as it relates to STEM faculty hiring and student employee assistants.

Modeling Ongoing Federal Programs

Excellent examples exist of federal programs that encourage institutions to broaden the participation of underrepresented groups by inclusive rather than exclusive approaches and by offering incentives for broad institutional reform, rather than by conferring specific benefits or burdens based on a person's status or membership in a particular group or class, e.g., race, gender, or age. NSF's Alliances for Graduate Education and the Professoriate (AGEP) program is a good example. It creates alliances, consisting of two or more doctoral degree granting institutions that agree to create institutional, departmental, and organizational culture changes that will result in significant increases in the recruitment, retention, degree conferral, and STEM career (especially academic) entry of minority students. Strategies are institutionally based, and the program is successful because it catalyzes institutional and departmental change, while operating in an inclusive, rather than exclusive, manner. Other examples of programs encouraging institutional transformation are NSF's ADVANCE program, which supports innovative approaches by institutions to increase the number of women entering and advancing within the professoriate, and NSF's Research in Disabilities Education program, which supports projects from a variety of institutions to develop broadly applicable methods and products for widespread use or commercialization for persons with disabilities in STEM education.

The National Aeronautics and Space Administration's (NASA's) ACCESS (Achieving Competence in Computing, Engineering, and Space Science) is an internship program for students with physical, learning, and other apparent and non-apparent disabilities. Students in STEM majors are placed in research-based positions at sites that provide assistive technology and other accommodations on the job. Successful internships can lead to coop opportunities, graduate study, and full employment. In this way, ACCESS, managed by the AAAS Project on Science, Technology and Disability, is inclusive, rather than exclusive. Similarly, the National Institute of General Medical Sciences (NIGMS) seeks to create programs to further the National Institute of Health's (NIH's) mission to address the complex problems associated with the disease disparity between

minority and nonminority populations in this country. In furthering this mission, NIGMS prudently operates its programs inclusively, supporting applicants who have demonstrated a strong potential to become outstanding contributors to biomedical research and who also have a commitment to remedy the problems of the biomedically underserved. NIGMS encourages applications from individuals who have experienced—and worked to overcome—educational or economic disadvantage, individuals from underrepresented groups, and individuals who have other personal or family circumstances that may complicate their transition to the next stage of their biomedical research career.

Outside of STEM fields, two other programs of note that are meticulously designed to broaden the participation of underrepresented groups within the bounds of constitutional principles are the Small Business Administration's (SBA's) 8(a) Business Development (BD) Program and the Department of Transportation's Disadvantaged Business Enterprise (DBE) program.

Federal agencies in STEM should consider modeling the BD program. The program is a business development program created to help small disadvantaged businesses compete in the American economy and access the federal procurement market. To participate in the program, an applicant must be a small business, must be unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are of good character and citizens of the United States, and must demonstrate potential for success.³⁶

Similarly, federal agencies providing financial assistance to universities in STEM fields should consider the DBE paradigm. The program continues a policy of helping small businesses owned and controlled by socially and economically disadvantaged individuals, including minorities and women, in participating in contracting opportunities created by DOT financial assistance programs. DOT DBE regulations require that all recipients of DOT financial assistance (namely, state and local transportation agencies) set specific goals, rather than quotas, for the participation of DBE firms in their DOT assisted contracts. DOT financial assistance recipients also have the responsibility of certifying the eligibility of DBE firms in these con-

tracts. In order for a firm to be certified as a DBE, it must be a small business owned and controlled by socially and economically disadvantaged individuals.³⁷

The Department of Transportation's DBE program was the subject of the litigation in *Adarand v. Peña*, 515 U.S. 200 (1995). Though previous iterations of the program might not have survived constitutional muster, the program in its current form is alive and well, and continues to be an agent for increasing opportunity for women and minority owned businesses in the transportation industry.

New approaches to broadening participation in STEM will necessarily have to employ creative strategies. These efforts will require collective thought and collaborative relationships among STEM program implementers free to share their ideas and past successes and failures. AAAS and NACME are committed to protecting and maintaining the kinds of open forums where these discussions and modeling activities can occur. The intimidation and fear used by conservative groups purportedly concerned about "equal opportunity" are unproductive and unfortunate tactics that are, in our estimation, threats to STEM human resource development and consequently to the future economic and national security of this country. The stakes are high. If those of us in the STEM education and research community truly believe that diversity is critical to our educational missions, we must commit to making this conviction a reality. Understanding the legal principles set forth in this primer is the first step to standing our ground.

ENDNOTES:

1. See *Grutter v. Bollinger*, 539 U.S. 306 (2003) and *Gratz v. Bollinger*, 539 U.S. 244 (2003).
2. See, e.g., "U.S. Is Losing Its Dominance in the Sciences," *The New York Times*, May 3, 2004, p.1 (discussing the lack of public awareness of this trend and its implications for jobs, industry, national security, and the vigor of the nation's intellectual and cultural life).
3. *Guardians Ass'n v. Civil Service Commission of the City of New York*, 463 U.S. 582 (1983); *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978).
4. See *Johnson v. Railway Express Agency*, 421 U.S. 454, 459 (1975); *United Steelworkers v. Weber*, 443 U.S. 192 (1979) and *Johnson v. Transportation Agency*, 480 U.S. 616 (1987).
5. In February 2003, the Commission on Opportunity in Athletics, an advisory board appointed by Department of Education Secretary Rod Paige, issued a report recommending that the Education Department change the way it implements and enforces Title IX policies (http://www.nacua.org/documents/TitleIX_Report_022703.pdf). Some argued that implementation of these recommendations would weaken Title IX. See *Minority View on the Report of the Commission on Opportunity in Athletics*, available at <http://www.savetitleix.com/minorityreport.pdf>. In July 2003, the Department issued a statement "clarifying" that it was committed to "continuing the progress that Title IX has brought toward true equality of opportunity for male and female student-athletes in America," and that no changes would be made to the current three-pronged test for measuring Title IX compliance in athletics. See <http://www.ncaa.org/news/2003/20030721/active/4015no2.html>
6. See Statement of Senator Ron Wyden, Chair of the Science, Technology and Space Subcommittee of the Commerce Committee of the United State Senate at the October 3, 2002 *Hearing on Title IX and Science*, available at http://commerce.senate.gov/hearings/testimony.cfm?id=836&wit_id=2283. See also Statement of Marcia Greenberger, Co-President, National Women's Law Center at the same Senate Subcommittee Hearing, available at http://commerce.senate.gov/hearings/testimony.cfm?id=836&wit_id=2290.
7. <http://www.gao.gov/new.items/do4639.pdf>
8. The Title IX regulations enforced by the Office for Civil Rights in the U.S. Department of Education at 34 C.F.R. §106.3 (b) explicitly permit colleges and universities to undertake voluntary affirmative efforts to increase the participation of women and girls in math and science programs: "in the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex."
9. Some call it "strict in scrutiny, fatal in fact," referring to the tiny percentage of laws that are upheld when strict scrutiny is applied; however, Justice O'Connor's opinion in *Grutter*, 539 U.S. 306, made it clear that it is possible for race-conscious decision-making by a governmental actor to survive a strict scrutiny analysis.
10. *U.S. v. Paradise*, 480 U.S. 149 (1987) (holding that a public safety agency had engaged in massive racial discrimination and was consistently recalcitrant in implementing orders not to discriminate and requiring a remedial remedy that was race-conscious: the agency had to promote one black state trooper for each white trooper elevated in rank as long as qualified black candidates were available).
11. *Korematsu v. United States*, 323 U.S. 214 (1944) (holding that pressing public necessity can sometimes justify restrictions based on race, and that the government's interest in protecting against espionage and sabotage to its national defense during World War II could justify a law excluding all Japanese Americans, whether disloyal or not, from the West Coast of the United States).
12. *Grutter v. Bollinger*, 539 U.S. 306 (2003).
13. See "America's Failure in Science Education" in *Business Week Online*, March 16, 2004 (arguing that the shortage of U.S. science and technology graduates threatens the U.S. economy, and that Washington's help is badly needed to tackle the problem); see also "Challengers to America's Science Crown" in *Business Week Online*, March 16, 2004 and "Gunning for the U.S. in Technology" in *Business Week Online*, March 16, 2004 (both articles arguing that countries from Israel to India are feeding their R&D capabilities with lavish resources so their economies can reap the resulting benefits, and that America's position as the undisputed leader in technology is under assault from countries worldwide). All articles available at http://www.businessweek.com/technology/tc_special/tc_04usdecline.htm

14. National Science Board, *The Science and Engineering Workforce: Realizing America's Potential*, NSB 03-69, Aug. 14, 2003, p. 12, available at <http://www.nsf.gov/sbe/srs/infbrief/nsfo4326/start.htm>
15. Black, Harvey "Foreign students drop in U.S. Graduate student enrollment in science, engineering peaks, but foreign students buck trend," *The Scientist*, June 30, 2004. See also Thurgood, Lori "Graduate Enrollment in Science and Engineering Fields Reaches New Peak; First-Time Enrollment of Foreign Students Declines," National Science Foundation Science Resources Statistics Info Brief available at <http://www.nsf.gov/sbe/srs/infbrief/nsfo4326/start.htm>
16. An institution that proffers as its compelling interest the "educational benefits of student diversity" and the service to the nation through the enrollment and education of a diverse student body must be careful to define diversity broadly. Diversity may include racial and ethnic diversity but should also include other types of diversity among its students, e.g., geographic, cultural, socio-economic status, special accomplishments and life experiences.
17. *Gratz* and *Grutter* hold in the admissions context that consideration of race must not receive the same weight in relation to every candidate who is a member of a particular race or at all times. Race may "tip the balance" in a particular case, but not in all cases involving minorities. Other factors also must receive significant weight in decisionmaking so that a non-minority with a particular talent or other diversity contribution is capable of "tipping the balance" in another case.
18. "Percentage plans" guarantee that students who graduate at the top of their high school classes will be admitted to state colleges and universities without the need to further compete for these limited spots. Racial diversity is enhanced using this "race-neutral" alternative only because a substantial percent of the high schools in these states are segregated by race, albeit on a *de facto* basis. On the futility of this approach, see Thomas J. Kane, "The Long Road to Race-Blindness," *Science*, vol. 302 (Oct. 24, 2003), and Appendix C.
19. While the Administration has not issued post-*Michigan* legal guidance for the university community, see note 19 *infra*, the Department of Education's Office for Civil Rights (OCR) recently released the second of two publications dealing with race-neutral alternatives. The publication, entitled "Achieving Diversity: Race-Neutral Alternatives in American Education," offers no legal advice, but is intended as a "toolbox" containing an array of race-neutral alternatives to foster "innovative thinking" about alternative ways to achieve diversity. See <http://www.ed.gov/about/offices/list/ocr/raceneutral.html>. Each institution must determine whether these alternatives are "workable" to achieve student body diversity in its setting. A number of race neutral alternatives (e.g., percentage plans and lotteries) are not workable in selective institutions that draw a student body from across the nation and world, and find holistic assessment of the many qualities of each individual to be essential for assembling student bodies that best serve their missions.
 Interestingly, the publication lists "recruitment and outreach and targeted financial aid" as "developmental approaches" designed to diversify student enrollments in a "race-neutral manner" by enriching the pipeline of applicants equipped to meet achievement standards. However, the Supreme Court has not addressed the validity of financial aid or scholarship programs designed to create a diverse student body. The only federal appeals court to address a similar issue *Podberesky v. Kirwan*, 38 F. 3d 147 (4th Cir. 1994), invalidated the racially exclusive Banneker scholarship and mentoring program at the University of Maryland, College Park that had been designed to remedy present effects of past discrimination that existed in the Maryland system. That court held that the university had not presented enough evidence of its own past discrimination, and that the program was not narrowly tailored. This case, however, did not address the issue of the validity of financial aid programs designed to create a diverse student body. Similarly, *Grutter* and *Gratz* are also not on point. While the equal protection principles and standards articulated in these cases would likely inform a decision in contexts beyond admissions, the context of an admissions analysis (including the benefits and burdens of using race) may be very different than in other contexts. Depending on the particularities, some financial aid targeting underrepresented minorities may not implicate equal protection or might survive a strict scrutiny analysis. OCR issued policy guidance to this effect in 1994. That guidance remains in effect today, and presents a comprehensive legal analysis on the applicability of Title VI's nondiscrimination requirement to financial aid that is awarded (at least in part) on the basis of race. See 59 Fed. Reg. 8756 (Feb. 23, 1994) available at <http://www.ed.gov/about/offices/list/ocr/docs/racefa.html>.
 Similarly, the Supreme Court has not addressed recruitment and outreach strategies to increase academic diversity, though several lower courts have addressed such strategies in contexts including broadcasting, law school admissions, housing and employment. Different statutes apply in some of these contexts and may dictate a different result. Recruitment and outreach programs can take many different forms, some of which may confer substantial, tangible benefits on participants. They can also occur at varying stages in the application process (including after the point when a decision is made regarding an applicant who has not yet finalized an acceptance). In most jurisdictions, depending on the particularities of the program, it is likely that the use of some of these strategies to increase racial and ethnic diversity would be upheld, and might not even be subjected to a strict scrutiny analysis. Programs that take race into account but are not exclusively for racial minorities are easier to sustain than race exclusive programs, but even some race exclusive outreach and financial aid may be upheld. Expert legal advice is necessary to assess the sustainability of particular programs and approaches. For an excellent legal analysis of the validity of financial aid, recruitment and outreach strategies, university counsels should consult "Preserving Diversity in Higher Education," Bingham McCutchen, Morrison & Foerster, and Heller Ehrman, et al. http://www.equaljusticesociety.org/compliancemanual/Preserving_Diversity_In_Higher_Education.pdf, pp. 75-99.
20. See also Design Principles in this document that present current research showing most of these so-called race-neutral alternatives to be ineffective.
21. *Grutter*, 539 U.S. at 327. STEM program implementers should consult with their university counsel about full exploitation of the concept of "context matters," particularly in light of the severe underrepresentation that exists in STEM fields and the critical importance of STEM to America's economic and national security. Arguments setting forth the heightened importance of diversity in STEM fields because of America's changing demographics, STEM's vital importance to U.S. economic growth, and U.S. businesses' dependence on university production of a diverse pool of scientists and engineers are eloquently set forth in the U.S. Supreme Court Brief of *Amici Curiae* Massachusetts Institute of Technology, Stanford University, DuPont, IBM, National Academy of Sciences, National Academies of Engineering, and National Action Council for Minorities in Engineering in *Grutter v. Bollinger* and *Gratz v. Bollinger*, pp. 9-20, available at http://supreme.lp.findlaw.com/supreme_court/briefs/02-241/02-241.mer.ami.mit.pdf.
22. See *Grutter*, 539 U.S. at 330-31. An *amicus* brief is a "friend of the Court" brief. It is filed by persons or organizations that are not part of the lawsuit before the Court, but feel that they have legal arguments they want to present to the Court anyway.
23. *Blend It Don't End It: Affirmative Action and the Texas Ten Percent Plan After Grutter and Gratz*, June 24, 2004, available at <http://www.maldef.org/pdf/PostGrutterReport.pdf>.
24. See, e.g., *Smith v. University of Washington Law School*, 233 F.3d 1188 (9th Cir. 2000).
25. See, e.g., *Texas v. Hopwood*, 78 F.3d 932 (5th Cir. 1996).
26. That program was later upheld after the case was sent back to the lower courts and reevaluated under the newly announced proper standard of strict scrutiny. See *Adarand cert. denied*.
27. Memorandum to General Counsels from Walter Dellinger, Assistant Attorney General, dated 6/28/1995, setting forth preliminary legal guidance on the implications of the Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*, 63 U.S.L.W. 4523 (U.S. June 12, 1995), available at <http://clinton2.nara.gov/WH/EOP/OP/html/aa/adarand3.html>.
 Civil rights proponents have been highly critical of the Bush Administration for its failure to offer similar post-*Grutter* advice. See *The Bush Administration V. Affirmative Action: Justice Department Drags Feet On Upholding Ruling*, Citizens' Commission on Civil Rights, 12/2003, available at <http://www.cccr.org/AffirmativeActionReport.pdf>.
28. Review of Federal Affirmative Action Programs by George Stephanopoulos, Senior Adviser to the President for Policy and Strategy and Christopher Edley, Jr., Special Counsel to the President, available at <http://clinton4.nara.gov/textonly/WH/EOP/OP/html/aa/aa-lett.html>
29. See Appendix A of the Review of Federal Affirmative Action Programs for details, available at <http://clinton4.nara.gov/textonly/WH/EOP/OP/html/aa/ap-a.html>.
30. As of May 2004, the University of Texas reportedly announced a return to race-sensitive admissions to the extent allowed under *Grutter* and *Gratz*, while Texas A&M reportedly has no such plans but has undertaken targeted outreach efforts and scholarships. "Reality Check: Texas Top Ten Percent Plan" in *Hispanic Outlook*, May 3, 2004, pp. 23-25. See also note 22, *infra*.

31. Much has been written criticizing and supporting the efficacy of these so-called percentage plans. Each plan, however, is very different with its own intricacies and criteria. For a comprehensive comparative analysis of each plan, see Horn, Catherine L. and Stella M. Flores, *Percentage Plans in College Admissions: A Comparative Analysis of Three States' Experiences*, Report of the Harvard Civil Rights Project, February 2003, available at <http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.pdf>. The debate is most fluid in Texas where post-*Grutter* no laws prohibiting race-conscious policies exist. In late June 2004, affirmative action advocates issued a report to the Texas state legislature urging it to combine the 10% plan with race-conscious policies recognizing the benefits and limitations of the plan which at U.T. Austin has increased minority enrollment, but resulted in students under the plan taking up nearly 70% of its freshman class. *Blend It Don't End It: Affirmative Action and the Texas Ten Percent Plan After Grutter and Gratz*, issued by the Mexican American Legal Defense and Education Fund, Americans for a Fair Chance, the Equal Justice Society, and the Society of American Law Teachers, June 24, 2004, available at <http://www.maldef.org/pdf/PostGrutterReport.pdf>.
32. "UPDATE: Ward Connerly gives up on Michigan ballot initiative for 2004 election!" available at http://www.civilrights.org/issues/affirmative/michigan_update.html (citing the Associated Press and quoting the campaign as saying that it would consider another effort in 2006). See also "Anti-Affirmative Action Vote Halted," *Boston Globe/Associated Press*, May 28, 2004 (citing internal disorganization, discord, and the health problems of Ward Connerly as among the reasons for abandoning the effort).
33. Americans for a Fair Chance's January 2004 report, entitled "Anti-Affirmative Action Threats in the States: 1997-2003," chronicles anti-affirmative action efforts in every state in detail. It is available on their website at www.fairchance.org.
34. "Ward Connerly Defeated on Two Fronts," available at <http://www.civilrights.org/issues/affirmative/details.cfm?id=22050>. See also "Colorado Senate Defeats Affirmative Action Measure," available at http://fairchance.civilrights.org/research_center/details.cfm?id=22048.
35. See NSF Important Notice No. 127, dated July 8, 2002, available at <http://www.nsf.gov/pubs/2002/iin127/imptnot.pdf>.
36. Socially disadvantaged persons are individuals from the following groups: Black Americans, Hispanic Americans, Native Americans (American Indians, Eskimos, Aleuts, and Native Hawaiians), Asian Pacific Americans (persons with origins from Japan, China, the Philippines, Vietnam, Korea, Samoa, Guam, U.S. Trust Territory of the Pacific Islands [Republic of Palau], Commonwealth of the Northern Mariana Islands, Laos, Cambodia [Kampuchea], Taiwan; Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Republic of the Marshall Islands, Federated States of Micronesia, Macao, Hong Kong, Fiji, Tonga, Kiribati, Tuvalu, or Nauru; Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal), and members of other groups designated by the SBA. SBA's regulations regarding this program are promulgated at 13 C.F.R. Part 124.
37. Department of Transportation regulations require its recipients of financial assistance to presume that citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, are socially and economically disadvantaged individuals. DOT requires its funding recipients to require DBE applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged.

