

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Charles C. Ruff to All Staff of the Executive Office of the President re: Request for Documents (2 pages)	12/30/97	P5 8077
002. memo	Charles C. Ruff to All Executive Office of President Staff re: Document Request (2 pages)	12/30/97	P5 8078

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Kendra Brooks (Correspondence)
OA/Box Number: 17898

FOLDER TITLE:

[Reed, Bruce Correspondence]

Kelly Hendren

kh17

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advise between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
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- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

COPY

8077

THE WHITE HOUSE
WASHINGTON

December 30, 1997

MEMORANDUM FOR: ALL STAFF OF THE EXECUTIVE OFFICE OF THE
PRESIDENT

FROM: CHARLES F. C. RUFF
COUNSEL TO THE PRESIDENT

SALLY P. PAXTON
SPECIAL ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: REQUEST FOR DOCUMENTS

We have received Congressional subpoenas for documents from the House Government Reform Committee which relate to the White House Office Database ("WhoDB") and other matters. **Every employee** is responsible for searching all of his or her own White House records for materials (**whether in hard copy, computer or any other form**) to ensure a comprehensive search.

The head of each office must also provide a signed certification that all staff within that office have searched their records and provided copies of any responsive materials in their possession. Additionally, the Counsel's Office has been working with the staff of the Office of Records Management to find responsive material located in storage. If you believe materials that you have sent to Records Management may contain responsive information, please let us know so that we can ensure that all responsive materials are found.

In responding to the following requests, "EOP" includes any person employed by or assigned to any office of the Executive Office of the President, including the White House. "Malone" includes W.P. Malone, Inc. or Percy Malone.

REQUESTS:

1. All materials reflecting involvement or communications by EOP personnel, from January 20, 1993 through the present, regarding any database implemented or discussed, contemplated or planned to be implemented, by or on behalf of Clinton/Gore, the DNC, or any Clinton Presidential campaign entity, for the purpose of maintaining any list of, or information about, supporters or contributors.

COPY

C. Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin.

2. All materials reflecting any communications or meetings relating to any actual or possible political contributions by any of the following tribes or entities, or the effect, if any, of such contributions on DOI policy, including, but not limited to, the decision related to the Hudson casino proposal:

- A. The Minnesota Indian Gaming Commission;
- B. St. Croix Chippewa Indians of Wisconsin;
- C. Oneida Tribe of Indians of Wisconsin;
- D. Ho-Chunk Community; and,
- E. Any other Native Indian tribe, organization, or individual that you know in any way opposed the Hudson casino proposal.

Please provide copies of any responsive documents to **Dimitri Nionakis, 477 OEOB, BY NOON ON JANUARY 8, 1998**. If you have any questions about any requests or if you need additional time to respond to this directive, please call Dimitri at X65814.

Thank you for your assistance.

MARTIN, TANYA
OFFICE OF POLICY DEVELOPMENT
DOMESTIC POLICY COUNCIL
OEOB 218

COPY

8078

THE WHITE HOUSE
WASHINGTON

December 30, 1997

MEMORANDUM FOR: ALL EXECUTIVE OFFICE OF PRESIDENT STAFF

FROM: CHARLES F.C. RUFF
COUNSEL TO THE PRESIDENT

SUBJECT: Document Request

We have received a subpoena for materials related to the Department of Interior's (DOI) decision to deny an application to place a 55 acre parcel of land located in Hudson, Wisconsin, in trust for gaming purposes (hereinafter the "Hudson casino proposal").

In an effort to comply fully with this subpoena, please search your records for all materials (whether in hard copy, computer or other form) responsive to the requests listed below. Every employee is responsible for searching all of his or her own files and records to ensure a comprehensive search.

The head of each office also must provide a signed certification that all employees have searched their files and provided copies of any responsive materials in their possession. Additionally, the Counsel's Office has been working with the staff of the Office of Records Management to find responsive material located in storage. If you believe that you have sent files to Records Management that may contain responsive information, please let us know so that we can ensure that all responsive materials are found.

If you have previously provided to the Counsel's Office, pursuant to an earlier directive, materials that are responsive to this request, you need not provide the same materials again. Please be sure, however, that you have searched your files thoroughly for any documents that are responsive to the specific items in this request.

Requests:

1. All materials reflecting communications (including telephone conversations) or meetings between anyone at DOI or the White House and any lobbyist, including Paul Eckstein, for the following Native Indian Tribes:
 - A. Sokaogon Chippewa Community (Mole Lake Band of Lake Superior Chippewa)
 - B. Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin

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Memorandum for all EOP Staff

December 30, 1997

Page 2

2. All materials reflecting contracts or terms of contracts (including "use agreements"), whether in draft or final, between the EOP and any vendor, the DNC, Clinton/Gore or any other party with respect to the 1993, 1994, 1995 or 1996 White House holiday cards.
3. All materials reflecting any restrictions on the use by either the DNC or Clinton/Gore of information contained in any White House database.
4. All materials relating to PeopleBase. This request includes any documents, whether in draft or in final, which reflect any agreements between either (1) the EOP and Malone, or (2) Clinton/Gore and Malone.
5. All materials which reflect the non-disclosure statement between the EOP and Malone for information contained in PeopleBase.
6. All materials relating to Malone.
7. All materials relating to guidelines for the payment for use of the President or the Vice President's residences for nonofficial purposes.
8. All copies of a Kevin O'Keefe memorandum written on or about May 24, 1994 regarding early supporters.
9. All materials which reflect efforts to respond to or comply with all previous requests for documents or materials related to the WhoDB, including directives sent by Jack Quinn dated August 7, 1996 and September 12, 1996.

Please provide copies of any responsive materials to Sally Paxton, OEOB Room 148, by January 8, 1998. If you anticipate any difficulty in meeting this deadline, or if you have any questions, please call either Sally Paxton at ext. 65079 or Dimitri Nionakis at ext. 65814.

Thank you very much for your cooperation with this request.

MARTIN, TANYA
OFFICE OF POLICY DEVELOPMENT
DOMESTIC POLICY COUNCIL
OEOB 218

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Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. draft	"Affirmative Action Assessment Outline: Postsecondary Admissions and Financial Aid Programs" (30 pages)	03/98	P5
002. draft	"Affirmative Action Assessment Outline: Technical Assistance for Postsecondary Admissions and Financial Aid Programs" (32 pages)	05/01/98	P5

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Kendra Brooks (Subject Files)
OA/Box Number: 17898

FOLDER TITLE:

[Education - Affirmative Action]

Kelly Hendren

kh16

RESTRICTION CODES

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DRAFT

AFFIRMATIVE ACTION ASSESSMENT OUTLINE

Postsecondary Admissions and Financial Aid Programs

March 1998

This version has been approved by the Department of Justice.

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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ASSESSMENT OUTLINE

Contents

INTRODUCTION.....

OVERVIEW

GUIDE

Endnotes.....

WORKSHEETS.....

ADMISSIONS.....

STUDENT FINANCIAL AID.....

ATTACHMENTS.....

Department's Financial Aid Guidance

List of OCR Offices

COPY

Would it make sense to drop a footnote somewhere that many of these same principles may apply to private elementary & secondary school programs in which race is considered?

INTRODUCTION

Under federal law, a college or university may use an affirmative action program that considers race or national origin in admissions or financial aid decisions if the program is properly designed and implemented to meet the institution's compelling need. This Affirmative Action Assessment Outline is designed to help postsecondary institutions that have, or are considering establishing, affirmative action programs assess whether those programs are consistent with Title VI of the Civil Rights Act of 1964 and the Constitution. Institutions that operate affirmative action programs should rigorously review those programs on a regular basis to ensure that they continue to be necessary and that they are being conducted consistent with the applicable legal standards.

As used in this Outline, the term "affirmative action" means the use or consideration of race or national origin as a factor in admissions or in the award of financial aid. Because recruitment and outreach programs designed to increase the number of minorities in an institution's applicant pool typically should not be subject to heightened constitutional scrutiny, this Outline should not be used to assess those types of programs. This Outline also does not address programs undertaken pursuant to a court order.

In 1994, the U.S. Department of Education published guidance under Title VI regarding an institution's consideration of race or national origin in the award of financial aid. See 59 Fed. Reg. 8756 (1994) (Financial Aid Guidance). Institutions should consult that guidance for a specific discussion of affirmative action in financial aid decisions, including an institution's involvement with privately donated race-restrictive funds. The Financial Aid Guidance is attached and can also be found on our internet web site at www.ed.gov.

This Self Assessment Outline consists of an Overview, a legal Guide, and a Worksheet. The Overview highlights the Guide's comprehensive presentation of federal standards applicable to affirmative action in admissions and financial aid. The Worksheet is included to aid institutions in collecting the information necessary to conduct a thorough review of their programs. The Worksheet is designed to help institutions identify and organize information relevant to the legal standards discussed in the Guide, but not every question necessarily will be relevant to each institution. In addition, no single answer or combination of answers will be conclusive as to the validity of any particular program.

There is much uncertainty with respect to the law on affirmative action at this time. New decisions, by the Supreme Court or lower courts, may significantly affect the standards governing the appropriate consideration of race or national origin by educational institutions. An institution's programs may also be affected by state law requirements, such as Proposition 209 in California. We encourage institutions to consult with their counsel, and to contact the Office for Civil Rights ("OCR") at the Department of Education, for technical assistance. A list of OCR offices and staff available to assist you is included in this Outline.

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I agree, but note that some types of "outreach" programs may provide benefits to particular races only & therefore fall under Title VI (e.g., special orientation sessions, mentoring or tutoring programs). Somewhere it may be worth noting that programs other than financial aid may be subject to Title VI requirements.

ASSESSMENT OVERVIEW

Federal legal standards that apply to the consideration of race or national origin in higher education arise from the Constitution and Title VI of the Civil Rights Act of 1964. This summary is intended as a brief overview of the comprehensive legal discussion in the Guide, which must be thoroughly considered in using the Assessment Outline.

I. COVERAGE OF THE OUTLINE

SEE GUIDE

- Public institutions that are part of a state's government are subject to the Fourteenth Amendment of the Constitution. Public and private institutions that receive federal financial assistance from the U.S. Department of Education are subject to Title VI.
- This Assessment Outline applies to admissions and financial aid programs where race, color, or national origin is a factor in decision making. It applies both to programs in which race or national origin is the sole factor in a decision and to those in which race or national origin is one of many factors considered. The Outline does not apply to admissions or financial aid decisions made without regard to race or national origin, including gender-based affirmative action programs.
- The legal standards governing the use of race or national origin in awarding financial aid are generally the same as those applicable to admissions decisions. The Department has published guidance on the use of race or national origin in financial aid programs, 59 Federal Register 8756 (1994) (copy included with this Outline). The Financial Aid Guidance is also available on the Department of Education's internet web site, www.ed.gov.
- Institutions in the Fifth Circuit (Texas, Louisiana, and Mississippi) should consult the Fifth Circuit Standards sections of the Guide and the *Hopwood* decision for the appropriate standards. Institutions in the Fourth Circuit (Maryland, Virginia, West Virginia, and North and South Carolina) should consider the *Podberesky v. Kirwan* decision, as described in the Guide.

COPY

2. CONSIDERATION OF RACE OR NATIONAL ORIGIN IS PERMISSIBLE WHEN THE STRICT SCRUTINY TEST IS SATISFIED

SEE GUIDE,

- Under the Constitution and Title VI of the Civil Rights Act of 1964, it is permissible for colleges and universities to consider race or national origin in making admissions decisions and in awarding financial aid, provided the use of race or national origin satisfies the legal test of "strict scrutiny."
- To satisfy strict scrutiny, the institutional interest underlying an affirmative action measure must be "compelling" and the measure must be "narrowly tailored" to serve that interest.

3. REMEDYING DISCRIMINATION AND ACHIEVING CAMPUS DIVERSITY ARE COMPELLING INTERESTS THAT CAN SUPPORT CONSIDERATION OF RACE OR NATIONAL ORIGIN

SEE GUIDE,

- The compelling interest inquiry centers on "ends" and asks why an institution is classifying individuals on the basis of race or national origin.
- Remedying the effects of past discrimination constitutes a compelling interest that justifies the narrowly tailored use of race or national origin in admissions or financial aid.
- In his landmark opinion in *Bakke*, Justice Powell concluded that a university also may consider race in admissions to attain the educational benefits of diversity where race or national origin is considered as one factor among many.

REMEDIAL PURPOSES

- The Title VI regulations require a recipient of federal funds that has discriminated in violation of Title VI or its regulations to take remedial action to overcome the effects of past discrimination. Where necessary, such remedial action might include race-conscious affirmative action.
- A college that has been found to have discriminated by a court or an administrative agency like the U.S. Department of Education

SEE GUIDE,
PP

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Office for Civil Rights, must take steps to remedy that discrimination. A finding could also be made by a State or local legislative body, as long as the body finding discrimination had a strong basis in evidence identifying discrimination within its jurisdiction for which remedial action is required.

- Absent such formal findings by a court, agency or legislature, a college may take race-conscious remedial action if it has a strong basis in evidence for concluding that the affirmative action is necessary to remedy the effects of its past discrimination and is narrowly tailored to remedy that discrimination.

present

DIVERSITY PURPOSES

SEE GUIDE.

- In *Regents of the University of California v. Bakke*, Justice Powell concluded that achieving the educational benefits of campus diversity is a compelling reason for considering race or national origin in admissions in a narrowly tailored way. According to Justice Powell's opinion, colleges may seek diversity in admissions to fulfill their academic mission through the "robust exchange of ideas" that flows from a diverse student body. The United States ~~supports~~ ^{recognizes} Justice Powell's opinion as a correct statement of the law under the Constitution and Title VI.

- Colleges and universities may use race or national origin to achieve fundamental educational goals through campus diversity. An institution must be able to support its claim that diversity serves its educational objectives.

- For the consideration of race ^{or} ~~and~~ national origin in admissions to be lawful under Justice Powell's rationale, a University's definition of diversity must include characteristics in addition to race or national origin. Such diversity characteristics may include other life experiences, achievements, talents, interests, extracurricular activities, economic disadvantages, geographic background, as well as various others. Not all factors need to be given the same weight, however.

4. USES OF RACE OR NATIONAL ORIGIN MUST BE NARROWLY TAILORED

The narrow tailoring inquiry focuses on "means" and asks how the government is seeking to

COPY

The word "supports" is too weak throughout - either consider Powell's opinion to be the law, or you don't. This word suggests that it is not the law.

meet the objective of the race or national origin-based classification. Whether an institution uses an affirmative action program for remedial purposes or for the attainment of educational benefits of diversity, the use of race or national origin must be narrowly tailored to achieve its purposes.

SEE GUIDE,

- Whether a college's consideration of race or national origin meets the narrow tailoring requirements of Title VI and the Constitution depends upon factors established by federal case law.

CONSIDERATION OF RACE/NATIONAL ORIGIN- NEUTRAL ALTERNATIVES AND THE NEED FOR THE USE OF RACE OR NATIONAL ORIGIN

SEE GUIDE,

- A school's use of race must be necessary and focused as narrowly as possible on the achievement of the school's compelling interest, for example, remedial or diversity objectives.
- Before resorting to race-conscious action, it is important that an institution consider seriously the use of race-neutral alternative approaches (e.g., the use of recruitment or admissions criteria that do not include race). Race may be used as a factor only if the institution concludes that the use of race-neutral alternatives would not effectively bring about the institution's compelling objectives.

MANNER IN WHICH RACE OR NATIONAL ORIGIN IS USED, FLEXIBILITY, AND POOL OF BENEFICIARIES

in admissions

SEE GUIDE,

- Set-asides ^{in admissions} may not be used under Justice Powell's diversity rationale, and may not be used for remedial purposes, unless absolutely essential to remedying discrimination and its effects.
- In the diversity context, admissions programs that rely on separate decision-making procedures that prevent any comparison among applicants of different races and ethnic origins would not meet Justice Powell's test for narrow tailoring set out in *Bakke*. However, Justice Powell, in his *Bakke* opinion, in illustrating a flexible admissions program that would be narrowly tailored, cited the Harvard College admissions program, in which "race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from

COPY

comparison with all other candidates for the available seats." *Regents of the University of California v. Bakke*, 438 U.S. 265, 317 (1978) (Powell, J.)

- The use of classifications based on race or national origin should be flexible. For example, the Supreme Court in *United States v. Paradise*, found that a race-conscious promotion requirement was flexible in operation because it could be waived if no qualified candidates were available. 480 U.S. 149, 177 (1987).

You can't make race an absolute criterion in admissions, only in financial aid.

- Considering race or national origin as one factor among several other admissions criteria, as opposed to using them as an absolute requirement for eligibility, may provide evidence of flexibility.

DURATION AND PERIODIC REVIEW

SEE GUIDE,

- The duration of the use of a racial classification should be no longer than is necessary to its purpose. The classification should be periodically reexamined to determine whether there is a continued need for its use or whether it should be modified based on changed circumstances.
- OCR considers annual reviews the best practice to satisfy this aspect of Title VI's narrow tailoring requirements.

BURDEN ON NON-BENEFICIARIES

SEE GUIDE,

- Affirmative action ^{may} typically imposes some burden or disadvantage on persons who do not belong to the racial or ethnic groups favored by the program's classifications. While some burdens are acceptable, others may be too high. In general, a race-based classification that unsettles legitimate, firmly rooted expectations or imposes the entire burden on particular individuals crosses that line.

For example, if an institution terminated scholarships that had been awarded to particular non-minority students in order to fund a scholarship program for minority students, that might place too much of a burden on the affected non-minority students to be considered narrowly tailored.

COPY

When it comes to diversity, this statement says too much. IF diversity programs are based on educational benefits, then these benefits accrue to all students. Somewhere here when you talk about diversity, I'd make this point (see enclosed article).

- Generally, the less severe and more diffuse the impact on ~~non~~ ^{other} minority students, the more likely a classification based on race or national origin will address this factor satisfactorily. It is not necessary to show that no student's opportunity has been in any way diminished. Rather, the use of race or national origin must not, overall, place an undue burden on students who are not eligible for that consideration.

Be careful here - programs for white students (e.g. at HBCUs) can be legal, at which point the words "minority" & "non-minority" become confusing.

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ASSESSMENT GUIDE

I. WHEN IS AN INSTITUTION COVERED BY THE CONSTITUTION OR TITLE VI?

Both the Constitution and Title VI of the Civil Rights Act of 1964 may apply to an institution's affirmative action programs. The Fourteenth Amendment to the United States Constitution prohibits states from denying any person equal protection of the laws. Because they are components of state government, public colleges and universities are covered by the Fourteenth Amendment.

Title VI provides that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving federal financial assistance.¹ Any public or private institution that receives financial assistance from the federal government is subject to the requirements of Title VI. A public institution that receives federal financial assistance is therefore covered by both the Constitution and Title VI. Title VI covers all of the operations of an institution that receives federal financial assistance, including the institution's involvement in the award of privately donated funds.² Title VI permits affirmative action measures that would satisfy the requirements of the Fourteenth Amendment.³

The Office for Civil Rights at the Department of Education is responsible for enforcing the requirements of Title VI at institutions receiving federal education funds. Institutions subject to Title VI must abide by the provisions of the statute and comply with regulations promulgated by the Office for Civil Rights.⁴

II. WHEN DOES AN ADMISSIONS OR FINANCIAL AID PROGRAM USE A CLASSIFICATION BASED ON RACE OR NATIONAL ORIGIN?

This Guide applies to admissions and financial aid programs that use criteria based on race, color, or national origin as a factor in decision making. It applies both to programs in which race or national origin is the sole factor underlying the institution's decision and to those in which race or national origin is one of many factors considered. This Guide does not apply to admissions decisions or financial aid awards that are based on race-neutral factors. For example, the Guide would not apply to an institution's support for disadvantaged students through admissions or financial aid, as long as the determination that a student is disadvantaged is not based on race or national origin.

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III. COMPLIANCE WITH THE CONSTITUTION AND TITLE VI: STRICT SCRUTINY

The Supreme Court has determined that the Constitution requires that any government program that uses race or national origin as a factor in decision making must satisfy "strict scrutiny".⁵ As explained above, this same standard applies under Title VI to all schools receiving federal funds. The strict scrutiny test is rigorous, but it is important to remember that affirmative action programs are allowed under this standard as long as they meet the two prongs of the test. To satisfy strict scrutiny, the institutional interest underlying an affirmative action measure must be "compelling" and the measure must be "narrowly tailored" to serve that interest.⁶ The compelling interest inquiry centers on "ends" and asks why an institution is classifying individuals on the basis of race or national origin. The narrow tailoring inquiry focuses on "means" and asks how the government is seeking to meet the objective of the race-based classification.

A. THE COMPELLING INTEREST

The Supreme Court has held, in the *Regents of the University of California v. Bakke* decision, that in some instances a college or university may consider race in its admissions process.⁷ The interests that may justify the consideration of race or national origin in higher education can be divided into two broad categories: remedial interests and non-remedial interests. The Supreme Court repeatedly has held that remedying the effects of past discrimination constitutes a compelling interest.⁸ With respect to non-remedial interests, Justice Powell concluded in his landmark opinion in *Bakke* that a university may consider race in its admissions process in order to foster diversity among its student body to further the university's educational objectives.⁹ The United States ~~supports~~ Justice Powell's opinion that achieving the educational benefits of diversity is a compelling interest ^{recognizes} as a correct statement of law under the Constitution and Title VI.

The Court's decisions have not foreclosed the possibility that non-remedial interests other than fostering diversity for educational purposes may also be compelling. However, there are substantial questions as to whether and in what settings such other non-remedial objectives can constitute a compelling interest.

I. REMEDYING THE EFFECTS OF DISCRIMINATION

A. GENERAL STANDARDS

Remedying the identified effects of past discrimination constitutes a compelling interest that can support an institution's use of a classification based on race or national origin. This discrimination could fall into two categories. First, an institution can seek to remedy the

COPY

Remedying the identified effects of past discrimination constitutes a compelling interest that can support an institution's use of a classification based on race or national origin.

effects of its own discrimination. Second, the federal government or a state or local government may seek to remedy the effects of discrimination committed within its jurisdiction, including discrimination committed by private actors, where the government becomes a passive participant in that conduct and thereby helps to perpetuate a system of exclusion.¹⁰

Thus, a ^{government body} ~~public institution~~ may, consistent with its authority, seek to remedy the effects of past discrimination in its educational system, including discrimination by local school systems or by private entities, that it has helped to perpetuate.

In either category, the remedy may be aimed ^{by itself} at ongoing patterns and practices of exclusion or at the lingering effects of prior discriminatory conduct.¹¹ The fact and legacy of general, historical societal discrimination, however, is an insufficient basis for affirmative action. Similarly, amorphous claims of discrimination in education that are not related to an institution's programs are inadequate.¹²

An institution should be able to identify with some precision the discrimination to be remedied. In justifying remedial affirmative action based on the current effects of past discrimination, an institution should be prepared to articulate how any current conditions that limit educational opportunities by race or national origin are related to past discrimination.¹³

It is not necessary for a court to make a judicial finding of discrimination before an institution may undertake remedial measures. But in the absence of a finding of discrimination, the institution must have a "strong basis in evidence" for its conclusion that remedial action is necessary.¹⁴ This evidence should approach what the Supreme Court has called "a prima facie case of a constitutional or statutory violation" of the rights of minorities.¹⁵ For example, significant statistical disparities between the number of minorities admitted to an institution and the percentage of minorities in the pool of qualified applicants that cannot be explained by reference to legitimate admissions criteria might permit an inference of discrimination that would support the use of racial or ethnic criteria as a remedial measure. In making this comparison, a school may consider the pool of qualified students who actually apply for admission, and the larger pool of students in areas from which applications may be drawn who would meet the school's admissions standards. However, mere underrepresentation of minorities compared to the percentage of minorities in the general population is an insufficient predicate for affirmative action.¹⁶

The Title VI regulations require that an institution receiving federal financial assistance that has previously discriminated take action to overcome the effects of that prior discrimination.¹⁷ Thus if a court, a federal agency, or a legislative or administrative body has found that a covered institution has engaged in discrimination, that institution must take steps to remedy that discrimination. The same obligation arises if the institution itself

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When a finding of prior discrimination, whether by a court, an agency, a legislative body, or the institution itself, rests on a strong basis of evidence that the institution discriminated, the institution may use narrowly tailored affirmative action measures to remedy the discrimination.

that remedial action is necessary to correct the effects of past discrimination. When a finding of prior discrimination, whether by a court, an agency, a legislative body, or the institution itself, rests on a strong basis of evidence that the institution discriminated, the institution may use narrowly tailored affirmative action measures to remedy the discrimination.

B. FIFTH CIRCUIT STANDARDS: REMEDIAL OBJECTIVES

This section magnifies Hopwood too much. It should state strongly that:

In *Hopwood v. Texas*, the U.S. Court of Appeals for the Fifth Circuit held that the law school at the University of Texas could not rely on past discrimination by other schools in the Texas state system, including other schools at the University of Texas, as a predicate for considering race in its admissions process.¹⁸ Rather, in the view of the court, the law school's constitutionally valid remedial interests extended no farther than redressing the effects of any prior racial discrimination by the law school itself. "As a result, past discrimination in education, other than at the law school, [could not] justify the present consideration of race in law school admissions."¹⁹ This holding is binding precedent in the Fifth Circuit. Accordingly, postsecondary institutions in Texas, Louisiana, and Mississippi cannot use discrimination by other actors in the state's educational systems as a predicate for considering race or national origin in admissions and financial aid. In addition, one "functionally separate unit" of an institution, such as a medical school, cannot rely on past discrimination by other units in that institution.²⁰ A particular school in those states must have a strong basis in evidence for concluding that there exist present effects from discrimination for which that school itself is responsible. However, if a state or institution of higher education has an obligation to remedy state or institution-wide discrimination, *Hopwood* does not prohibit the appropriate legislative or administrative body, or the governing body of the institution, from using affirmative action to remedy that discrimination in its component schools.²¹

is not a precedent for other circuits, but that Fordice is.

2. NON-REMEDIAL INTERESTS

A. DIVERSITY

In his landmark opinion in *Bakke*, Justice Powell stated that a university may have a compelling interest in considering the race of applicants in its admissions process in order to foster greater diversity among its student body. Such diversity brings a wider range of perspectives to campus, which in turn contributes to a more robust exchange of ideas. This exchange is a central mission of higher education and in keeping with

recognizes
The United States ~~supports~~ Justice Powell's opinion that achieving the educational benefits of diversity is a compelling interest as a correct statement of the law under the Constitution and Title VI.

COPY

Consider adding the recent
Farmer (Nevada-Reno) case
to this footnote.

recognizes
the time-honored value of academic freedom. Moreover, in the view of Justice Powell, the First Amendment protection of academic freedom supports allowing a university to "make its own judgments" regarding education, including the selection of its student body.²² During the nearly two decades since *Bakke* was decided, Justice Powell's opinion has been relied on by both public and private institutions of higher education throughout the United States in crafting their admissions policies. It has also guided lower federal and state courts.²³ The United States ~~supports~~ Justice Powell's opinion that achieving the educational benefits of diversity is a compelling interest as a correct statement of the law under the Constitution and Title VI. The United States has relied on Justice Powell's opinion as a basis for concluding that affirmative action in higher education for purposes of achieving the educational benefits of diversity does not violate Title VI, so long as the affirmative action plan meets the narrow tailoring standards set out in that opinion.

In order for diversity to qualify as a compelling interest, an institution must seek a further objective beyond the mere achievement of diversity itself. The Court has consistently rejected "racial balancing" as a goal of affirmative action, because "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake."²⁴ For example, in *Bakke*, Justice Powell stated that diversity in an institution's student body can serve the further goal of enriching the academic experience, but he found no compelling interest in assuring that the student body had a specified percentage of particular minority groups or reducing the deficit of minorities in the medical profession.²⁵ Accordingly, an institution that uses affirmative action to achieve diversity must have a sound educational objective for its diversity program. A school must be able to support its claim that diversity provides educational benefits and serves the school's educational objectives.

A coalition of educational organizations has gathered social science research and evidence of a consensus view among educators that campus diversity has a measurable positive effect on educational outcomes and that diversity is essential to the missions of colleges and universities.²⁶



B. OTHER NON-REMEDIAL INTERESTS

The Supreme Court has had little occasion to address other non-remedial objectives. In his *Bakke* opinion, Justice Powell assumed that a state could have a compelling interest in "improving the delivery of health-care services to communities currently underserved," but concluded that the university had failed to prove that reserving sixteen percent of the seats in its medical school class for minority students was either needed or geared to promote that goal.²⁷ It is not clear whether a racial classification to promote this interest would ever be considered sufficiently narrowly tailored to survive strict scrutiny.²⁸ Whether other non-remedial interests can be sufficiently compelling to justify the use of classifications based on race or national origin should be considered on a case-by-case basis.

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Somewhere in this guidance, I think the difference between
political classifications needs to be noted. Political classifications
(e.g., recognition of Native American tribes) fall outside of Title VI.

Repetitive, & magnifies Hopwood language too much that can arguably be limited in a number of ways (e.g., as dicta).

C. FIFTH CIRCUIT STANDARDS: NON-REMEDIAL INTERESTS

The United States believes that, as Justice Powell stated in *Bakke*, the need for diversity to achieve a wider range of perspectives on campus constitutes a compelling interest justifying the consideration of race in higher education. In *Hopwood*, the U.S. Court of Appeals for the Fifth Circuit concluded that Justice Powell's opinion was not a controlling precedent and rejected his conclusions about diversity. The *Hopwood* court held that a university's interest in diversity to enrich the academic experience can never justify the use of race as an admissions criterion.²⁹ That ruling is binding in the states of Texas, Louisiana and Mississippi. ~~Accordingly, institutions in those three states cannot use affirmative action to foster diversity among their student body in order to enrich the academic experience.~~

Institutions in the Fifth Circuit should be aware that there is language in *Hopwood* that suggests that remedying past wrongs is the only compelling state interest that can justify classifications based on race.³⁰ However, the only non-remedial interest at issue in the case was the diversity rationale described in Justice Powell's *Bakke* opinion, and it may be argued that the holding of *Hopwood* does not extend to other non-remedial interests that were not before the panel. *Hopwood* itself noted that Justice Scalia has suggested one possible non-remedial compelling interest -- "a social emergency rising to the level of imminent danger to life and limb."³¹ Because the case before it did not present such an interest, the panel expressly declined to decide whether such non-remedial interests could justify the use of race.³² Accordingly, institutions in Texas, Louisiana, and Mississippi may not use affirmative action to foster diversity in order to enrich the academic experience and should consult with their counsel before using classifications based on race or on national origin to further any non-remedial interest other than a *Bakke* diversity interest.

B. NARROW TAILORING

In addition to advancing a compelling goal, any use of race must also be "narrowly tailored." This ensures that race-based affirmative action is the product of careful deliberation, not hasty decision making. It also ensures that such action is truly necessary and is undertaken only when other efficacious but less intrusive means to the end are unavailable.

The determination of whether a particular affirmative action program is narrowly tailored is highly fact-specific. As applied by the courts, the factors that typically determine whether a measure is narrowly tailored are the following: (i) whether the institution considered race-neutral alternatives before resorting to race-conscious action; (ii) the scope and flexibility of the affirmative action program, including whether the racial classification is subject to a waiver; (iii) the manner in which race is used, that is, whether race determines eligibility for a program or whether race is just one factor in the decision making process; (iv)

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the comparison of any numerical targets to the percentage of qualified minorities in the applicant pool; (v) the duration of the program and whether it is subject to periodic review; and (vi) the degree and type of burden imposed on ~~non-minorities~~ ^{other groups} by the program.

Before describing each of the components, two general points about the narrow tailoring test deserve mention. First, although there are some factors that must be satisfied, it is unlikely that an affirmative action program must satisfy every factor. A strong showing with respect to most of the factors may compensate for a weaker showing with respect to others.

Second, all of the factors will not be relevant in every case. The objective of the program may determine the applicability or weight to be given a factor, and factors may play out differently in remedial programs than they will in non-remedial programs.

1. RACE-NEUTRAL ALTERNATIVES

Before resorting to race-conscious action, an institution must seriously evaluate race-neutral alternatives, that is, measures that do not rely on race or national origin as a factor in decision making. For example, the Supreme Court found that a preference for minority-owned businesses was not narrowly tailored in part because the local government did not consider other, race-neutral means to increase minority participation in contracting before adopting race-conscious measures, such as targeted financial assistance for small or new businesses.³³

In the context of higher education, an institution might consider the use of socioeconomic, geographic or other criteria that do not include race or national origin, or increasing efforts to solicit applications from students who have not traditionally applied for admission, including minority students.

The Supreme Court has not specified the extent to which an institution must consider race-neutral measures before resorting to race-conscious action. In cases involving remedial justifications, Justice Powell has suggested that it is not necessary to use the "least restrictive means" where they would not accomplish the desired ends as well,³⁴ and has described the narrow tailoring requirement as ensuring that "[less] restrictive means" are used when they would promote the objectives of a racial classification "about as well."³⁵ The United States believes that an institution need not exhaust race-neutral alternatives, but it must give them serious attention and must use them where efficacious.

2. SCOPE OF PROGRAM, FLEXIBILITY AND WAIVERS

If an affirmative action program's scope exceeds that necessary to achieve the compelling interest underlying the program, the program is not narrowly tailored. A remedial program need not be limited to the specific individuals who suffered the past

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discrimination. But a program undertaken to remedy past discrimination against certain races should not include preferences for other racial groups that did not experience that discrimination. For example, the Supreme Court found that a set-aside program for minority contractors was not narrowly tailored in part because the city's evidence of discrimination, all of which pertained to the treatment of African Americans, did not provide a predicate for the program's preferences for Aleuts, Asian Americans, and Hispanics.³⁶

The use of classifications based on race or national origin should be flexible. For example, the Supreme Court in *United States v. Paradise* found that a race-conscious promotion requirement was flexible in operation because it could be waived if no qualified candidates were available.³⁷

3. MANNER IN WHICH RACE IS USED

An integral part of the narrow tailoring requirement is the manner in which race is used. Flexible programs are more likely to be narrowly tailored than programs with rigid requirements. In this regard, several principles are apparent with respect to admissions.

First, set-asides or quotas may not be used to achieve diversity under Justice Powell's rationale, and may not be used for remedial purposes unless absolutely essential to remedying discrimination and its effects. A good example of a program found to be not narrowly tailored is the medical program the Court invalidated in *Bakke*, which reserved sixteen percent of the positions in the entering class of the medical school for members of certain racial and ethnic groups.³⁸

Second, under Justice Powell's reasoning in *Bakke*, an admissions program that relies on a separate admissions committee or other decision-making procedures that prevents any comparison among applicants of different races and national origins would not be narrowly tailored. An example of this type of impermissible program is the 1992 admissions procedures used at the University of Texas School of Law found unconstitutional by the district court in the *Hopwood* case.³⁹ The University of Texas had two separate admissions tracks and reviewing systems for minority and non-minority students. On the other hand, Justice Powell, in his *Bakke* opinion, in illustrating a flexible admissions program that would be narrowly tailored, cited the Harvard College admissions program, in which "race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats."⁴⁰

Third, where a University considers race or national origin to foster diversity for educational objectives, Justice Powell's opinion in *Bakke* indicates that the program should give consideration to diversity characteristics in addition to race or national origin, such as other life experiences, achievements, talents, interests, extracurricular activities, economic disadvantages, and geographic background.⁴¹ Not all factors or qualities need be given the same weight, however.⁴²

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With respect to financial aid decisions, a program in which race or national origin is the sole or primary factor in determining eligibility -- for example, a scholarship program reserved for minorities -- is less flexible than a scholarship program in which race is one of many factors that determine eligibility for the award, and may be vulnerable to challenge.⁴³ However, a scholarship program reserved for minorities may be distinguished from an admissions quota reserving for minorities a portion of positions in an entering class, in that the burden imposed on non-minority students in the financial aid context (possibly receiving less aid) is less severe than the burden imposed by an admissions program (not being admitted to the institution at all). See 59 Fed. Reg. 8756 (February 23, 1994).

For a detailed discussion of the standards that should be applied to ~~minority~~ ^{race-targeted} scholarship programs, institutions and their counsel should consult the Financial Aid Guidance, 59 Fed. Reg. 8756 (1994).

4. COMPARISON OF NUMERICAL TARGETS TO THE QUALIFIED APPLICANT POOL

When evaluating the use of a numerical goal in a remedial affirmative action program, the Supreme Court has compared the numerical goal to the percentage of minorities in the relevant market. The Court has rejected a city's target of providing thirty percent of its contracts to minority businesses where the target had been selected as roughly halfway between one percent, the percentage of contracts previously awarded to African American businesses, and fifty percent, the percentage of African Americans in the city's population. What was required, the Court stated, was a target that was related to the percentage of African Americans in the pool of qualified contractors, not the percentage in the general population.⁴⁴ Therefore, institutions that use numerical goals and targets for remedial purposes should select a goal that is related to the percentage of minorities in the pool of qualified applicants. A school may consider the pool of qualified students who actually apply for admission, and the larger pool of students in areas from which applications are drawn who would meet the school's admissions standards.

5. DURATION AND PERIODIC REVIEW

A particular affirmative action measure should remain in place only as long as it is needed to achieve the compelling interest that it serves. A race-based classification is therefore more likely to satisfy the narrow tailoring test if it has a definite end date or is subject to meaningful periodic review in order to ascertain the continued need for the measure.⁴⁵ Reexamination of affirmative action programs also allows an institution to fine-tune its classification, which may allow the program to satisfy other factors in the narrow tailoring test. The Office for Civil Rights recommends annual reviews to ensure compliance with this aspect of the narrow tailoring requirements of Title VI.

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6. BURDEN ON NON-MINORITIES

(See note on bottom
of page 6.)

Affirmative action ^{may} typically impose some burden or disadvantage on persons who do not belong to the racial or ethnic groups favored by the program's classifications. While some burdens are acceptable, others may be too high. In general, a race-based classification that "unsettle[s] . . . legitimate, firmly rooted expectation[s]" or imposes the "entire burden . . . on particular individuals" crosses that line.⁴⁶ For example, if an institution terminated scholarships that had been awarded to particular non-minority students in order to fund a scholarship program for minority students, that might place too much of a burden on the affected non-minority students to be considered narrowly tailored. Generally, the less severe and more diffuse the impact on non-minority students, the more likely that a racial or ethnic classification will address this factor satisfactorily.

For a more detailed discussion of narrow tailoring in the context of race-targeted financial aid, see the Financial Aid Guidance, 59 Fed. Reg. 8756 (1994).

IV. CONCLUSION

Under federal law, a college or university may use an affirmative action program that considers race or national origin in admissions or financial aid decisions if the program is properly designed and implemented to meet the institution's compelling need. Any covered institution that uses race or national origin as a basis for decision making should review its program to determine if it comports with the strict scrutiny standard. Appended to this Guide is a nonexhaustive checklist of questions that will aid institutions in collecting the information necessary to conduct a thorough review. Because the questions are just a guide, no single answer or combination of answers is necessarily dispositive as to the validity of any particular program.

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ENDNOTES

1. 42 U.S.C. 2000d (1994).
2. See 42 U.S.C. 2000d-4a(2)(A) (1994).
3. With respect to the kinds of race-conscious measures at issue in this Guide, the restrictions of Title VI and of the Equal Protection Clause are coextensive. See *Regents of the University of California v. Bakke*, 438 U.S. 265, 284-87 (Powell, J.), *id.* at 328-55 (Brennan, J., joined by White, Marshall, and Blackmun, JJ.). For other purposes, however, the requirements of Title VI and its implementing regulations are not completely coextensive with constitutional requirements. See *Guardians Assn. v. Civil Service Comm'n of City of New York*, 463 U.S. 582, 584, 589-93 (White, J.) (1983) (in disparate impact case not involving affirmative action, Title VI can be violated without proof of the discriminatory intent necessary to prove a constitutional violation); *id.* at 623-24 (Marshall, J., concurring); *id.* at 642-45 (Stevenis, J., joined by Brennan and Blackmun, JJ.).
4. Those regulations are located in 34 C.F.R. Part 100 (1997).
5. *Adarand*, 515 U.S. at 235.
6. *Adarand*, 515 U.S. at 200.
7. 438 U.S. 265, 320 (1978) (opinion for the Court for Section V.C.).
8. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498-506 (1989); *Shaw v. Hunt*, 116 S. Ct. 1894, 1902-03 (1996).
9. 438 U.S. 265, 311-15 (1978) (opinion of Powell, J.).
10. See *Croson*, 488 U.S. at 491-93 (plurality opinion); *id.* at 518-19 (Kennedy, J. concurring in part and concurring in the judgment).
11. See *Adarand*, 515 U.S. at 269-70 (Souter, J. dissenting); cf. *Fordice*, 505 U.S. at 727-29 (state must eradicate policies and practices traceable to prior de jure system that continue to foster segregation).
12. See *Croson*, 488 U.S. at 499, 505.
13. See, e.g., *Fordice*, 505 U.S. at 730 n.4.
14. See *Wygant v. Jackson Board of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion).
15. See *Croson*, 488 U.S. at 500.
16. *Id.* at 501-02, 509.
17. 34 C.F.R. 100.3(b)(6)(I).
18. 78 F.3d 932, 951 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996)

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19. *Id.* at 954.
20. *See id.* at 951.
21. *See id.* at 954-55 (citing *Fordice*, 505 U.S. at 731-32).
22. *Bakke*, 438 U.S. at 311-14.
23. *See Davis v. Halpern*, 768 F. Supp. 968, 975-76 (E.D.N.Y. 1991) (suggesting in dicta that a plan satisfying diversity rationale could be constitutional); *DeRonde v. Regents of the Univ. of Calif.*, 28 Cal. 3d 875, 882-87 (1981) (upholding school's plan because it satisfied Justice Powell's diversity rationale and Justice Brennan's remedial rationale in *Bakke*); *McDonald v. Hogness*, 92 Wash. 2d 431, 439-43 (1979) (same).
24. *Bakke*, 438 U.S. at 307 (Powell, J.) (reducing deficit of minorities in medical school and the medical profession); *see Croson*, 488 U.S. at 507; *Johnson v. Transportation Agency*, 480 U.S. 616, 639 (1987).
25. *See id.* at 305, 307, 313. Similarly, in the law enforcement context, diversifying the ranks of officers may at times serve vital public safety and operational needs, thereby enhancing the agency's ability to carry out its functions effectively. *See Barhold v. Rodriguez*, 863 F.2d 233, 238 (2d Cir. 1988); *Talbert v. City of Richmond*, 648 F.2d 925, 931-32 (4th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982); *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671, 695-96 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981); *Baker v. City of St. Petersburg*, 400 F.2d 294, 301 n.10 (5th Cir. 1968); *cf. Wittmer v. Peters*, 87 F.3d 916, 919 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 949 (1997) (upholding preference for a black lieutenant at a boot camp for young offenders based on the finding that the camp would not achieve its rehabilitative mission absent the preference because 70% black inmate population unlikely to accept military regimen with less than a 6% black security staff and no black lieutenants).
26. Brief of *Amici Curiae* American Council On Education, *Et Al.* In Support Of Petitioner at 6, Board of Education of the Township of Piscataway v. Taxman, No. 96-679 (Supreme Court) (On Writ of Certiorari).
27. *Bakke*, 438 U.S. at 310 (Powell, J.)
28. Justice Powell approvingly quoted the state court below, which had noted that there were more precise and reliable ways to identify applicants who were genuinely interested in the medical problems of underserved communities than race, namely, a demonstrated concern for the problem in the past and a declaration that practicing in such a community was an applicant's primary professional goal. *Id.* at 310-11.
29. *See Hopwood*, 78 F.3d at 944, 948.
30. *Id.* at 944, 948.
31. *Id.* at 944 (quoting *Croson*, 488 U.S. at 521 (Scalia, J., concurring in judgment)).
32. *Id.*
33. *Croson*, 488 U.S. at 507.
34. *See Fullilove v. Klutznick*, 448 U.S. 448, 508 (Powell, J., concurring).
35. *Wygant*, 476 U.S. at 280 n.6 (plurality opinion of Powell, J.); *cf. Billish v. City of Chicago*, 989 F.2d 890, 894 (7th Cir.) (en banc) (Posner, J.) (in reviewing affirmative action measures, courts must be "sensitiv[e] to the importance of avoiding racial criteria . . . whenever it is possible to do so, [as] *Croson* requires"), *cert. denied*, 510 U.S. 1081 (1993).

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36. *Croson*, 488 U.S. at 506.

37. 480 U.S. 149, 177 (1987).

38. *Bakke*, 438 U.S. at 275.

39. *Hopwood v. Texas*, 861 F. Supp. 551, 579 (W.D. Tex. 1994), *aff'd in part, rev'd in part*, 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2580 (1996).

40. *Bakke*, 438 U.S. at 317.

41. *Id.* at 315 (Because "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element," a program "focused solely on ethnic diversity would hinder rather than further attainment of genuine diversity.") (Powell, J.)

42. *Id.* at 317-18.

43. In *Podberesky v. Kirwan*, 38 F.3d 147, 153 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995), the U.S. Court of Appeals for the Fourth Circuit sustained a constitutional challenge to a state university scholarship program open only to African American students. *Podberesky* held that the university failed to provide sufficient factual support for a conclusion that its challenged scholarship program was narrowly tailored to the asserted interest in remedying the present effects of past discrimination. Institutions located in the Fourth Circuit, which includes the states of Virginia, Maryland, North and South Carolina, and West Virginia, should review *Podberesky*, as that decision will guide the evaluation of the remedial use of racial classifications in higher education in that circuit.

44. *See Croson*, 488 U.S. at 507.

45. *See Paradise*, 480 U.S. at 178 (plurality opinion); *Sheet Metal Workers*, 478 U.S. at 487 (Powell, J., concurring); *Fullilove*, 448 U.S. at 513 (Powell, J., concurring).

46. *See Johnson*, 480 U.S. at 638; *Sheet Metal Workers*, 478 U.S. at 488 (Powell, J., concurring).

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ASSESSMENT WORKSHEET

About the Worksheet

The Worksheet is a starting point for colleges and universities to use in reviewing their admissions and financial aid programs. The checkpoints are keyed to the legal discussion in the Guide, which must be carefully considered in using the Worksheet.

- Keep in mind that the Worksheet is designed to help institutions identify and organize information relevant to the applicable legal standards, as discussed in the Guide, but not every question necessarily will be relevant to each institution. In addition, no single answer or combination of answers necessarily is dispositive as to the validity of any particular program.
- For the best use of this Worksheet, and the entire Outline, we encourage institutions to consult with their legal counsel, and to contact the Office for Civil Rights ("OCR") at the Department of Education, for assistance. A list of OCR offices and staff available to assist you is included with this Outline.

The consideration of race or national origin in financial aid programs is covered by the same legal standards as admissions although there are some questions that are discrete to each program. The Worksheet covers admissions and financial aid programs separately, with cross-references between the two sections, to avoid repetition when the issues are the same.

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ADMISSIONS WORKSHEET

➡How do the school's programs work?

✓ CHECKPOINT(S) BASELINE INFORMATION

➡GUIDE,
PP.

1. If the institution has decided to consider race and national origin as factors in its admissions process, is the admissions process guided by a written affirmative action plan? How are admissions structured? For public institutions, is the consideration of race mandated or authorized by legislation?
2. What standards guide admissions decisions and how does the admissions process work? How and at what point in the admissions process is each admissions criterion weighted and considered? Is each admissions criterion educationally justifiable and closely related to the institution's mission? How and at what points are race or national origin considered and weighted in admissions? How and at what point(s) are minority students being admitted?

➡Is the consideration of race or national origin supported by a compelling interest?

✓ CHECKPOINT(S) COMPELLING INTEREST

➡GUIDE,
PP.

3. Why does the program consider race or national origin in admissions? Is it intended to remedy discrimination, to foster diversity to achieve an educational objective, or for some other purpose?

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➡ Does the college or university have a duty to remedy discrimination on the basis of race or national origin?

✓ CHECKPOINT(S) REMEDIAL PURPOSES

GUIDE,
FP.

4. Are there facts that show discrimination? Is the program justified solely by reference to general societal discrimination, general assertions of discrimination in education, or a statistical underrepresentation of minorities as compared to their percentage of the general population rather than the relevant pool of qualified applicants? Without more, these are impermissible bases for affirmative action.
5. Has a court, legislative body, or agency made a finding that the institution has discriminated against minorities? Is the institution the subject of a court desegregation order or a legislative or administrative finding of unlawful discrimination? Did the body making the finding have a strong basis in evidence for its conclusion? Does the institution itself have a strong basis in evidence for concluding that it has discriminated? If the institution is public, has a state or local government made findings of discrimination within its jurisdiction, including discrimination by private actors? Are there present effects of any such past discrimination? Was the government, or is the government now, a passive participant in that discrimination so as to perpetuate the exclusion? Did the institution help to perpetuate that discrimination?
6. Identify the racial and ethnic composition (etc. % African American, Hispanic, Asian-American, American Indian, white) of the following groups; i) the institution's student body; ii) the institution's qualified applicants; and iii) the pool of qualified potential applicants from which the institution draws its students, for example, students meeting the school's admission requirements living in the areas served by the institution.
7. Based on the information above, is there underrepresentation at the school of qualified students from particular races or national origins? If so, is the statistical disparity significant?
8. What is the nature of the evidence? Is it statistical or based on written documents? Are statistics based on comparisons to the general minority population, or are they more sophisticated and focused? For example, do they attempt to identify the

Why this finite list of groups? In some situations, not all Asians or Hispanics²³ will be similarly situated.

COPY

number of qualified minorities in the applicant pool, or seek to explain what the number would look like "but for" the exclusionary effects of discrimination? Is there evidence on how discrimination has hampered minority opportunity in education, or is the evidence simply based on generalized claims of societal discrimination? In addition to any statistical or documentary evidence, are there persons who have knowledge or other anecdotal evidence of discrimination?

9. Since the adoption of the program, have additional findings of discrimination been made that could serve to justify the need for the program when it was adopted? If not, can such evidence be assembled now? Is there new evidence that the remedial program is no longer necessary?

→ 10. Apart from any past findings or court orders, is there past discrimination affecting admissions at that institution? Has the institution determined whether the effects of past discrimination continue? If there have not been findings of past discrimination, is there a strong basis in evidence to believe that there may be a current violation or the continuing effects of past discrimination?

→ Is the institution seeking to achieve the educational benefits of diversity?

✓ CHECKPOINT(S) DIVERSITY PURPOSES

→ GUIDE,
PP.

11. Is affirmative action in admissions used to achieve the educational benefits of diversity? What is the institution's definition of diversity? What are the institution's mission statements and how do they relate to its diversity objectives?

12. The institution must articulate how achieving greater diversity would foster an educational goal beyond diversity for diversity's sake. What are the educational benefits of diversity at the institution? What are the bases for the educational benefits the institution identifies?

13. Does diversity include factors other than race and national origin? If so, what factors? Which admissions ~~criterion or groups of~~ criteria are related to the diversity goal? How is each weighted and considered in the admissions process?

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➡ Is the use of race or national origin in remedial or diversity programs narrowly tailored?

✓ CHECKPOINT(S) NEED FOR USE OF RACE OR NATIONAL ORIGIN AND RACE/NATIONAL ORIGIN NEUTRAL ALTERNATIVES

➡ GUIDE,
PP.

14. If race or national origin is considered as a positive factor, has the institution made efforts to achieve its goals in race-neutral ways? If so, what efforts were made and what were the results?

15. If race-neutral measures were not undertaken, why does the institution believe that such efforts would be insufficient to serve its compelling interest without relying on race? What was the nature and extent of the deliberation over any race-neutral alternatives? Was there a judgment regarding the relative effectiveness of race-neutral alternatives and race-conscious measures?

16. Does the college have data to show whether affirmative action is necessary? When did the institution begin implementing its affirmative action program? Does the institution have statistics or other evidence to show the effect of the program on achievement of diversity objectives or remedying the effects of discrimination, e.g., data regarding minority participation levels before and after affirmative action programs began?

✓ CHECKPOINT(S) MANNER RACE OR NATIONAL ORIGIN IS USED, FLEXIBILITY, AND POOL OF BENEFICIARIES

➡ GUIDE,
PP.

17. How does the college assess whether diversity has been achieved? Does the admissions process incorporate numerical goals? By what process were these goals derived? Do all or only some of the schools or programs have goals? If the program is remedial, are the goals related to the percentage of minorities in the pool of qualified applicants, and do the beneficiaries include people in racial or ethnic groups for whom there is insufficient evidence of prior discrimination?

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18. Are admissions decisions made through separate tracks, admissions committees, or eligibility criteria defined on the basis of race or national origin? Does the program establish fixed numerical set-asides? Is race an explicit requirement of eligibility for the program? If there is no such factual requirement, does the program operate that way in practice? Or is race just one of several factors -- a "plus" -- used in decision making? Could the objectives of any program that uses race as a requirement for eligibility be achieved through a more flexible use of race?

✓ CHECKPOINT(S) DURATION AND PERIODIC REVIEW OF THE USES OF RACE OR NATIONAL ORIGIN

⇒GUIDE,
PP.

19. Is the program subject to periodic oversight, and if so, what is the nature of that oversight? Does the periodic review assess whether the form or extent to which race or national origin is considered should be modified in light of the outcomes of the affirmative action program? Has the program ever been adjusted or modified in light of periodic review? What were the results of the most recent review? Even if there was a compelling justification at the time of adoption, that may not be the case today. In that regard, does the program have an end date? Is there evidence of what might result if the racial classification were discontinued?

✓ CHECKPOINT(S) BURDEN ON NON-BENEFICIARIES

⇒GUIDE,
PP.

20. Does the institution periodically assess whether its consideration of race or national origin in admissions places an undue burden on students not eligible for that consideration? What is the nature of the burden imposed on persons who are not included in the racial or ethnic classification established by the program? Does the program displace those persons from existing positions or financial aid awards? What is the nature and extent of the impact on non-beneficiaries in admissions? Does the impact of the program fall upon a particular group or class of students, or is it more diffuse? What is the extent of other opportunities outside of the program? Are persons who are not beneficiaries of the program put at a significant competitive disadvantage as a result of the program?

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STUDENT FINANCIAL AID WORKSHEET

✓ CHECKPOINT(S) INITIAL INFORMATION NEEDS

1. Is the institution's financial aid program guided by a written affirmative action plan? How is the institution's financial aid process structured?
2. Does the institution's financial aid programs include the consideration of race or national origin (as either an exclusive factor or as one among a number of factors)? If so, how? Does the institution fund or administer "race-based scholarships"? If so, what is the justification for each consideration of race or national origin? Are the institution's reasons consistent with the Department's race-targeted scholarship policy?

✓ CHECKPOINT(S) FINANCIAL AID FOR DISADVANTAGED STUDENTS

3. Schools may target financial aid for disadvantaged students, e.g., students from low-income families, or aid based on students' being in the first generation to attend college or family income. Does the institution's definition of "disadvantaged" used for participation in the program include any consideration of race? If not, then the program is not a racial classification subject to strict scrutiny. If yes, the program is subject to strict scrutiny and does not fit within this principle.

✓ CHECKPOINT(S) COMPELLING INTERESTS

4. Why does the program consider race or national origin in financial aid

"Race-based scholarships" or "race-targeted aid" mean, for the purposes of this Guide, any financial aid for which eligibility is limited to persons of a specific racial or ethnic background. Each of the questions in this section on financial aid also are applicable to financial aid programs where race or ethnicity are used only as a plus-factor in deciding awards. This section is based upon the Department's 1994 race-targeted scholarship policy.

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decisions? Is it intended to remedy discrimination, to foster diversity to achieve an educational objective, or for some other purpose? If the use of race is intended to remedy discrimination, see Admissions checkpoints 4-10, above. If it is intended to foster diversity to achieve an educational objective, see Admissions checkpoints 11-13, above.

✓ CHECKPOINT(S) NARROW TAILORING OF REMEDIAL OR DIVERSITY PROGRAMS

Are financial aid decisions that consider race or national origin narrowly tailored to achieve their purpose? See Admissions checkpoints 14-20, above.

Be more specific here in comparing the same types of financial aid - e.g., loans & scholarships are not equivalent.

5. If race-based scholarships are awarded, how many does the institution award annually? How many students at the institution, by race and national origin, receive non-race-based financial aid, annually? What proportion of total financial aid at the institution (institutional, state, local, Federal, private) is earmarked for race-based scholarships? Does a comparison of the amount of race-targeted financial aid provided to students to the total amount of aid provided to students without regard to race or national origin show that the program places an undue burden on other students who are not eligible for race-targeted aid?

✓ CHECKPOINT(S) PRIVATE GIFTS RESTRICTED BY RACE OR NATIONAL ORIGIN

6. Are racial or other criteria attached by the donors to the award of any financial aid funds? If so, can the institution justify the use of race under any of the principles of the OCR financial aid policy guidance?
7. Is any race-targeted aid received by the college's students provided directly to students without involvement by the institution? If so, under the policy guidance, Title VI does not apply. If the college makes privately provided race-targeted aid part of its operations by getting involved in the offering or administration of the aid (e.g., through selection of recipients, distribution of funds), can the college justify the use of the aid under a diversity or remedial rationale?

* Note the additional guidance for HBCUs in the financial aid guidance. See 59 Fed. Reg. at 8758.

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May 1, 1998

MEMORANDUM

To: Dawn Chirwa, Maria Echaveste, Tanya Martin, Robert Shireman, Peter Rundlet, Scott Palmer
From: Eddie Correia

Attached is a draft of the affirmative action self-assessment guide. It has been revised by the Department of Education and Department of Justice to reflect comments by outside groups. The edits are reflected by brackets or other annotations. DOJ has approved this draft with the exception of the footnote, which is noted on the cover page. DOJ is hesitant about making the point in the footnote. Some commenters, for example, the National Women's Law Center, believe the point should be made. Please give me a call after your review. We can then decide if we need to meet on the revisions.

As for release and distribution, ED and DOJ are developing a distribution plan. We will need to meet on those issues.

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AFFIRMATIVE ACTION ASSESSMENT OUTLINE

***[Technical Assistance for] Postsecondary
Admissions and Financial Aid Programs***

May 1998

This version is fully approved by the Department of Justice, with the exception of the reference to gender, p.5 fn 1.

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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ASSESSMENT OUTLINE

Contents

INTRODUCTION.....

OVERVIEW

GUIDE

Endnotes.....

WORKSHEETS.....

ADMISSIONS.....

STUDENT FINANCIAL AID.....

ATTACHMENTS.....

Department's Financial Aid Guidance

List of OCR Offices

COPY

INTRODUCTION

Under federal law, a college or university may use an affirmative action program that considers race or national origin in admissions or financial aid decisions if the program is properly designed and implemented to meet the institution's compelling need. This Affirmative Action Assessment Outline is designed to help postsecondary institutions that have, or are considering establishing, affirmative action programs assess whether those programs are consistent with Title VI of the Civil Rights Act of 1964 and the Constitution. Institutions that operate affirmative action programs should rigorously review those programs on a regular basis to ensure that they continue to be necessary and that they are being conducted consistent with the applicable legal standards.

As used in this Outline, the term "affirmative action" means the use or consideration of race or national origin as a factor in admissions or in the award of financial aid. Because recruitment and outreach programs designed to increase the number of minorities in an institution's applicant pool typically should not be subject to heightened constitutional scrutiny, this Outline should not be used to assess those types of programs. This Outline also does not address programs undertaken pursuant to a court order.

In 1994, the U.S. Department of Education published guidance under Title VI regarding an institution's consideration of race or national origin in the award of financial aid. See 59 Fed. Reg. 8756 (1994) (Financial Aid Guidance). Institutions should consult that guidance for a specific discussion of affirmative action in financial aid decisions, including an institution's involvement with privately donated race-restrictive funds. The Financial Aid Guidance is attached and can also be found on our internet web site at www.ed.gov.

✓ This Self Assessment Outline consists of an **Overview**, a legal **Guide**, and a **Worksheet**. The Overview highlights the Guide's presentation of federal standards applicable to affirmative action in admissions and financial aid, [based on the current state of the law.] The Worksheet is included to aid institutions in collecting the information necessary to conduct a thorough review of their programs. The Worksheet is designed to help institutions identify and organize information relevant to the legal standards discussed in the Guide, but not every question necessarily will be relevant to each institution. In addition, no single answer or combination of answers will be conclusive as to the validity of any particular program.

✓ [The United States endorses achieving campus diversity and remedying discrimination and its effects as beneficial for all students.] There is much uncertainty, however, with respect to the law on affirmative action at this time. While the Guide summarizes current law, new decisions, by the Supreme Court or lower courts, may significantly affect the standards governing the appropriate consideration of race or national origin by educational institutions. An institution's programs may also be affected by state law requirements, such as Proposition

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209 in California. We encourage institutions to consult with their counsel, and to contact the Office for Civil Rights ("OCR") at the Department of Education, for technical assistance. A list of OCR offices and staff available to assist you is included in this Outline.

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ASSESSMENT OVERVIEW

Federal legal standards that apply to the consideration of race or national origin in higher education arise from the Constitution and Title VI of the Civil Rights Act of 1964. This summary is intended as a brief overview of the comprehensive legal discussion in the Guide, which must be thoroughly considered in using the Assessment Outline.

I. COVERAGE OF THE OUTLINE

SEE GUIDE.

- Public institutions that are part of a state's government are subject to the Fourteenth Amendment of the Constitution. Public and private institutions that receive federal financial assistance from the U.S. Department of Education are subject to Title VI.
- This Assessment Outline applies to admissions and financial aid programs where race, color, or national origin is a factor in decision making. It applies both to programs in which race or national origin is the sole factor in a decision and to those in which race or national origin is one of many factors considered. The Outline does not apply to admissions or financial aid decisions made without regard to race or national origin, including gender-based affirmative action programs.¹
- The legal standards governing the use of race or national origin in awarding financial aid are generally the same as those applicable to admissions decisions. The Department has published guidance on the use of race or national origin in financial aid programs, 59 Federal Register 8756 (1994) (copy included with this Outline). The Financial Aid Guidance is also available on the Department of Education's internet web site, www.ed.gov.
- Institutions in the Fifth Circuit (Texas, Louisiana, and Mississippi) should consult the Fifth Circuit Standards sections of the Guide and the *Hopwood* decision for the appropriate standards. Institutions in the Fourth Circuit (Maryland, Virginia, West Virginia, and North and South Carolina) should consider the *Podberesky v. Kirwan* decision, as described in the Guide.

¹ Gender-based classifications are subject to less rigorous standards of scrutiny than classifications based on race or national origin. See *United States v. Virginia*, 518 U.S. 515, 116 S. Ct. 2264, 2275-76 (1996).

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2. CONSIDERATION OF RACE OR NATIONAL ORIGIN IS PERMISSIBLE WHEN THE STRICT SCRUTINY TEST IS SATISFIED

SEE GUIDE.

- Under the Constitution and Title VI of the Civil Rights Act of 1964, it is permissible for colleges and universities to consider race or national origin in making admissions decisions and in awarding financial aid, provided the use of race or national origin satisfies the legal test of "strict scrutiny."
- To satisfy strict scrutiny, the institutional interest underlying an affirmative action measure must be "compelling" and the measure must be "narrowly tailored" to serve that interest.

3. REMEDYING DISCRIMINATION AND ACHIEVING CAMPUS DIVERSITY ARE COMPELLING INTERESTS THAT CAN SUPPORT CONSIDERATION OF RACE OR NATIONAL ORIGIN

SEE GUIDE.



- The compelling interest inquiry centers on "ends" and asks why an institution is classifying individuals on the basis of race or national origin.
- Remedying the ~~present~~ ^{or ongoing} effects of past discrimination constitutes a compelling interest that justifies the narrowly tailored use of race or national origin in admissions or financial aid.
- In his landmark opinion in *Bakke*, Justice Powell concluded that a university also may consider race in admissions to attain the educational benefits of diversity where race or national origin is considered as one factor among many.

REMEDIAL PURPOSES

- The Title VI regulations require a recipient of federal funds that has discriminated in violation of Title VI or its regulations to take remedial action to overcome the effects of past discrimination. Where necessary, such remedial action might include race-conscious affirmative action.
- A college that has been found to have discriminated by a court or an administrative agency like the U.S. Department of Education.

SEE GUIDE,
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Office for Civil Rights, must take steps to remedy that discrimination. A finding could also be made by a State or local legislative body, as long as the body finding discrimination had a strong basis in evidence identifying discrimination within its jurisdiction for which remedial action is required.

- Absent such formal findings by a court, agency or legislature, a college may take race-conscious remedial action if it has a strong basis in evidence for concluding that the affirmative action is necessary to remedy the present effects of its past discrimination and is narrowly tailored to remedy that discrimination.

DIVERSITY PURPOSES

or
ongoing

- In *Regents of the University of California v. Bakke*, Justice Powell concluded that achieving the educational benefits of campus diversity is a compelling reason for considering race or national origin in admissions in a narrowly tailored way. According to Justice Powell's opinion, colleges may seek diversity in admissions to fulfill their academic mission through the "robust exchange of ideas" that flows from a diverse student body. The United States supports Justice Powell's opinion as a correct statement of the law under the Constitution and Title VI. SEE GUIDE,
- Colleges and universities may use race or national origin to achieve fundamental educational goals through campus diversity. An institution must be able to support its claim that diversity serves its educational objectives.
- For the consideration of race or national origin in admissions to be lawful under Justice Powell's rationale, a University's definition of diversity must include characteristics in addition to race or national origin. Such diversity characteristics may include other life experiences, achievements, talents, interests, extracurricular activities, economic disadvantages, geographic background, as well as various others. Not all factors need to be given the same weight, however.

4. USES OF RACE OR NATIONAL ORIGIN MUST BE NARROWLY TAILORED

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The narrow tailoring inquiry focuses on "means" and asks how the government is seeking to meet the objective of the race or national origin-based classification. Whether an institution uses an affirmative action program for remedial purposes or for the attainment of educational benefits of diversity, the use of race or national origin must be narrowly tailored to achieve its purposes.

SEE GUIDE.

- Whether a college's consideration of race or national origin meets the narrow tailoring requirements of Title VI and the Constitution depends upon factors established by federal case law.

CONSIDERATION OF RACE/NATIONAL ORIGIN- NEUTRAL ALTERNATIVES AND THE NEED FOR THE USE OF RACE OR NATIONAL ORIGIN

SEE GUIDE.

- A school's use of race must be necessary and focused as narrowly as possible on the achievement of the school's compelling interest, for example, remedial or diversity objectives.
- Before resorting to race-conscious action, it is important that an institution consider seriously the use of race-neutral alternative approaches (e.g., the use of recruitment or admissions criteria that do not include race). Race may be used as a factor only if the institution concludes that the use of race-neutral alternatives would not effectively bring about the institution's compelling objectives.

MANNER IN WHICH RACE OR NATIONAL ORIGIN IS USED, FLEXIBILITY, AND POOL OF BENEFICIARIES

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SEE GUIDE.

- Set-asides [in admissions] may not be used under Justice Powell's diversity rationale, and may not be used for remedial purposes, unless absolutely essential to remedying discrimination and its effects.
- In the diversity context, admissions programs that rely on separate decision-making procedures that prevent any comparison among applicants of different races and ethnic origins would not meet Justice Powell's test for narrow tailoring set out in *Bakke*. However, Justice Powell, in his *Bakke* opinion, in illustrating a flexible admissions program that would be narrowly tailored, cited the Harvard College admissions program, in which race or

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ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats." *Regents of the University of California v. Bakke*, 438 U.S. 265, 317 (1978) (Powell, J.)

- The use of classifications based on race or national origin should be flexible. For example, the Supreme Court in *United States v. Paradise* found that a race-conscious promotion requirement was flexible in operation because it could be waived if no qualified candidates were available. 480 U.S. 149, 177 (1987).
- Considering race or national origin as one factor among several other admissions criteria, as opposed to using them as an absolute requirement for eligibility, may provide evidence of flexibility.

DURATION AND PERIODIC REVIEW

SEE GUIDE,

- The duration of the use of a racial classification should be no longer than is necessary to its purpose. The classification should be periodically reexamined to determine whether there is a continued need for its use or whether it should be modified based on changed circumstances.
- Although less frequent reviews may be legally supportable, OCR recommends annual reviews as a means that is highly likely to satisfy this aspect of Title VI's narrow tailoring requirements.

BURDEN ON NON-BENEFICIARIES

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SEE GUIDE,

- [If an affirmative action program results in a burden or disadvantage for a person of a particular race or national origin, the courts require the institution to weigh the degree of the disadvantage or burden.] While some burdens may be legally acceptable, others may be too high. In general, a race-based classification that unsettles legitimate, firmly-rooted expectations or imposes the entire burden on particular individuals crosses that line.

For example, if an institution terminated scholarships that had

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been awarded to particular non-minority students in order to fund a scholarship program for minority students, that might place too much of a burden on the affected non-minority students to be considered narrowly tailored.

- Generally, the less severe and more diffuse the impact on [other] students, the more likely a classification based on race or national origin will address this factor satisfactorily. It is not necessary to show that no student's opportunity has been in any way diminished. Rather, the use of race or national origin must not, overall, place an undue burden on students who are not eligible for that consideration.

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ASSESSMENT GUIDE

I. WHEN IS AN INSTITUTION COVERED BY THE CONSTITUTION OR TITLE VI?

Both the Constitution and Title VI of the Civil Rights Act of 1964 may apply to an institution's affirmative action programs. The Fourteenth Amendment to the United States Constitution prohibits states from denying any person equal protection of the laws. Because they are components of state government, public colleges and universities are covered by the Fourteenth Amendment.

Title VI provides that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving federal financial assistance.¹ Any public or private institution that receives financial assistance from the federal government is subject to the requirements of Title VI. A public institution that receives federal financial assistance is therefore covered by both the Constitution and Title VI. Title VI covers all of the operations of an institution that receives federal financial assistance, including the institution's involvement in the award of privately donated funds.² Title VI permits affirmative action measures that would satisfy the requirements of the Fourteenth Amendment.³

The Office for Civil Rights at the Department of Education is responsible for enforcing the requirements of Title VI at institutions receiving federal education funds. Institutions subject to Title VI must abide by the provisions of the statute and comply with regulations promulgated by the Office for Civil Rights.⁴

II. WHEN DOES AN ADMISSIONS OR FINANCIAL AID PROGRAM USE A CLASSIFICATION BASED ON RACE OR NATIONAL ORIGIN?

✓ This Guide applies to admissions and financial aid programs that use criteria based on race, color, or national origin as a factor in decision making. It applies both to programs in which race or national origin is the sole factor underlying the institution's decision and to those in which race or national origin is one of many factors considered. This Guide does not apply to admissions decisions or financial aid awards that are based on race-neutral factors. For example, the Guide would not apply to an institution's support for disadvantaged students through admissions or financial aid, as long as the determination that a student is disadvantaged is not based on race or national origin. [The Guide also does not apply to classifications based on membership in a federally-recognized American Indian tribe, which the Supreme Court has deemed a political classification, not a classification based upon race or national origin.⁵]

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✓ [Particular requirements applying to the impact of the desegregation of public state higher education systems upon historically black colleges or universities are more fully addressed in the Department of Education's Federal Register notice regarding the application of *United States v. Fordice*.⁶]

III. COMPLIANCE WITH THE CONSTITUTION AND TITLE VI: STRICT SCRUTINY

The Supreme Court has determined that the Constitution requires that any government program that uses race or national origin as a factor in decision making must satisfy "strict scrutiny."⁷ As explained above, this same standard applies under Title VI to all schools receiving federal funds. The strict scrutiny test is rigorous, but it is important to remember that affirmative action programs are allowed under this standard as long as they meet the two prongs of the test. To satisfy strict scrutiny, the institutional interest underlying an affirmative action measure must be "compelling" and the measure must be "narrowly tailored" to serve that interest.⁸ The compelling interest inquiry centers on "ends" and asks why an institution is classifying individuals on the basis of race or national origin. The narrow tailoring inquiry focuses on "means" and asks how the government is seeking to meet the objective of the race-based classification.

A. THE COMPELLING INTEREST

The Supreme Court has held, in the *Regents of the University of California v. Bakke* decision, that in some instances a college or university may consider race in its admissions process.⁹ The interests that may justify the consideration of race or national origin in higher education can be divided into two broad categories: remedial interests and non-remedial interests. The Supreme Court repeatedly has held that remedying the effects of past *for ongoing* discrimination constitutes a compelling interest.¹⁰ With respect to non-remedial interests, Justice Powell concluded in his landmark opinion in *Bakke* that a university may consider race in its admissions process in order to foster diversity among its student body to further the university's educational objectives.¹¹ The United States supports Justice Powell's opinion that achieving the educational benefits of diversity is a compelling interest as a correct statement of law under the Constitution and Title VI.

The Court's decisions have not foreclosed the possibility that non-remedial interests other than fostering diversity for educational purposes may also be compelling. However, there are substantial questions as to whether and in what settings such other non-remedial objectives can constitute a compelling interest.

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I. REMEDYING THE EFFECTS OF DISCRIMINATION

A. GENERAL STANDARDS

Remedying the identified effects of past ^{or ongoing} discrimination constitutes a compelling interest that can support an institution's use of a classification based on race or national origin. This discrimination could fall into two categories. First, an institution may seek to remedy the

Remedying the identified effects of past discrimination constitutes a compelling interest that can support an institution's use of a classification based on race or national origin.

effects of its own discrimination. Second, the federal government or a state or local government may seek to remedy the effects of discrimination committed within its jurisdiction, including discrimination committed by private actors, where the government becomes a passive participant in that conduct and thereby helps to perpetuate a system of exclusion.¹²

Thus, a public institution may, consistent with its authority, seek to remedy the effects of past discrimination in its educational system, including discrimination by local school systems or by private entities, that it has helped to perpetuate.

In either category, the remedy may be aimed at ongoing patterns and practices of exclusion or at the lingering effects of prior discriminatory conduct.¹³ The fact and legacy of general, historical societal discrimination, however, is by itself an insufficient basis for affirmative action. Similarly, amorphous claims of discrimination in education that are not related to an institution's programs are inadequate.¹⁴

An institution should be able to identify with some precision the discrimination to be remedied. In justifying remedial affirmative action based on the current effects of past discrimination, an institution should be prepared to articulate how any current conditions that limit educational opportunities by race or national origin are related to past discrimination.¹⁵

It is not necessary for a court to make a judicial finding of discrimination before an institution may undertake remedial measures. But in the absence of a finding of discrimination, the institution must have a "strong basis in evidence" for its conclusion that remedial action is necessary.¹⁶ This evidence should approach what the Supreme Court has called "a prima facie case of a constitutional or statutory violation" of the rights of minorities.¹⁷ For example, significant statistical disparities between the number of minorities admitted to an institution and the percentage of minorities in the pool of qualified applicants that cannot be explained by reference to legitimate admissions criteria might permit an inference of discrimination that would support the use of racial or ethnic criteria as a remedial measure. In making this comparison, a school may consider the pool of qualified students who actually apply for admission, and the larger pool of students in areas from which applications may be drawn who would meet the school's admissions standards. However, mere

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underrepresentation of minorities compared to the percentage of minorities in the general population is an insufficient predicate for affirmative action.¹⁸

When a finding of prior discrimination, whether by a court, an agency, a legislative body, or the institution itself, rests on a strong basis of evidence that the institution discriminated, the institution may use narrowly tailored affirmative action measures to remedy the discrimination.

The Title VI regulations require that an institution receiving federal financial assistance that has previously discriminated take action to overcome the effects of that prior discrimination.¹⁹ Thus if a court, a federal agency, or a legislative or administrative body has found that a covered institution has engaged in discrimination, that institution must take steps to remedy that discrimination. The same obligation arises if the institution itself determines that remedial action is necessary to correct the effects of past discrimination. When a finding of prior discrimination, whether by a court, an agency, a legislative body, or the institution itself, rests on a strong basis of evidence that the institution discriminated, the institution may use narrowly tailored affirmative action measures to remedy the discrimination.

B. FIFTH CIRCUIT STANDARDS: REMEDIAL OBJECTIVES

✓
POINTS FROM EARLIER VERSION MOVED TO FN: 21, 22

In *Hopwood v. Texas*, the U.S. Court of Appeals for the Fifth Circuit recognized that an institution may use race conscious measures in order to remedy the present effects of discrimination for which the institution is responsible, so long as that use is narrowly tailored to meet the compelling remedial purpose.²⁰ The court held that the justifications offered by the law school at the University of Texas were not a sufficient predicate for considering race in its admissions process.²¹ In the view of the court, the law school's constitutionally valid remedial interests extended no farther than redressing the effects of any prior racial discrimination by the law school itself.²² This holding is binding federal precedent in Texas, Louisiana, and Mississippi. However, in accordance with the Supreme Court's controlling decision in *United States v. Fordice*, if a state or institution of higher education has an obligation to remedy state or institution-wide discrimination, *Hopwood* does not prohibit the appropriate legislative or administrative body, or the governing body of the institution, from using affirmative action to remedy that discrimination in its component schools.²³

2. NON-REMEDIAL INTERESTS

A. DIVERSITY

In his landmark opinion in *Bakke*, Justice Powell stated that a university may have a compelling interest in considering the race of applicants in its admissions process in order to foster greater diversity among its student body. Such diversity brings a wider range of

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perspectives to campus, which in turn contributes to a more robust exchange of ideas. This exchange is a central mission of higher education and in keeping with the time-honored value of academic freedom.

Moreover, in the view of Justice Powell, the First Amendment protection of academic freedom supports allowing a university to "make its own judgments" regarding education, including the selection of its student body.²⁴ During the nearly two decades since

The United States supports Justice Powell's opinion that achieving the educational benefits of diversity is a compelling interest as a correct statement of the law under the Constitution and Title VI.

Bakke was decided, Justice Powell's opinion has been relied on by both public and private institutions of higher education throughout the United States in crafting their admissions policies. It has also guided lower federal and state courts.²⁵ The United States supports Justice Powell's opinion that achieving the educational benefits of diversity is a compelling interest as a correct statement of the law under the Constitution and Title VI. The United States has relied on Justice Powell's opinion as a basis for concluding that affirmative action in higher education for purposes of achieving the educational benefits of diversity does not violate Title VI, so long as the affirmative action plan meets the narrow tailoring standards set out in that opinion.

In order for diversity to qualify as a compelling interest, an institution must seek a further objective beyond the mere achievement of diversity itself. The Court has consistently rejected "racial balancing" as a goal of affirmative action, because "[p]referencing members of any one group for no reason other than race or ethnic origin is discrimination for its own sake."²⁶ For example, in *Bakke*, Justice Powell stated that diversity in an institution's student body can serve the further goal of enriching the academic experience, but he found no compelling interest in assuring that the student body had a specified percentage of particular minority groups or reducing the deficit of minorities in the medical profession.²⁷ Accordingly, an institution that uses affirmative action to achieve diversity must have a sound educational objective for its diversity program. A school must be able to support its claim that diversity provides educational benefits and serves the school's educational objectives.

A coalition of educational organizations has gathered social science research and evidence of a consensus view among educators that campus diversity has a measurable positive effect on educational outcomes and that diversity is essential to the missions of colleges and universities.²⁸

B. OTHER NON-REMEDIAL INTERESTS

The Supreme Court has had little occasion to address other non-remedial objectives. In his *Bakke* opinion, Justice Powell assumed that a state could have a compelling interest in "improving the delivery of health-care services to communities currently underserved," but concluded that the university had failed to prove that reserving sixteen percent of the seats in

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its medical school class for minority students was either needed or geared to promote that goal.²⁹ It is not clear whether a racial classification to promote this interest would ever be considered sufficiently narrowly tailored to survive strict scrutiny.³⁰ Whether other non-remedial interests can be sufficiently compelling to justify the use of classifications based on race or national origin should be considered on a case-by-case basis.

C. FIFTH CIRCUIT STANDARDS: NON-REMEDIAL INTERESTS

✓ The United States believes that, as Justice Powell stated in *Bakke*, the need for diversity to achieve a wider range of perspectives on campus constitutes a compelling interest justifying the consideration of race in higher education. In *Hopwood*, the U.S. Court of Appeals for the Fifth Circuit concluded that Justice Powell's opinion was not a controlling precedent and rejected his conclusions about diversity. The *Hopwood* court held that a university's interest in diversity to enrich the academic experience can never justify the use of race as an admissions criterion.³¹ That ruling is binding in the states of Texas, Louisiana and Mississippi. [sentence deleted]

Institutions in the Fifth Circuit should be aware that there is language in *Hopwood* that suggests that remedying past wrongs is the only compelling state interest that can justify classifications based on race.³² However, the only non-remedial interest at issue in the case was the diversity rationale described in Justice Powell's *Bakke* opinion, and it may be argued that the holding of *Hopwood* does not extend to other non-remedial interests that were not before the panel. *Hopwood* itself noted that Justice Scalia has suggested one possible non-remedial compelling interest -- "a social emergency rising to the level of imminent danger to life and limb."³³ Because the case before it did not present such an interest, the panel expressly declined to decide whether such non-remedial interests could justify the use of race.³⁴ Accordingly, institutions in Texas, Louisiana, and Mississippi may not use affirmative action to foster diversity in order to enrich the academic experience and should consult with their counsel before using classifications based on race or on national origin to further any non-remedial interest other than a *Bakke* diversity interest.

B. NARROW TAILORING

In addition to advancing a compelling goal, any use of race must also be "narrowly tailored." This ensures that race-based affirmative action is the product of careful deliberation, not hasty decision making. It also ensures that such action is truly necessary and is undertaken only when other efficacious but less intrusive means to the end are unavailable.

The determination of whether a particular affirmative action program is narrowly tailored is highly fact-specific. As applied by the courts, the factors that typically determine

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✓ whether a measure is narrowly tailored are the following: (i) whether the institution considered race-neutral alternatives before resorting to race-conscious action; (ii) the scope and flexibility of the affirmative action program, including whether the racial classification is subject to a waiver; (iii) the manner in which race is used, that is, whether race determines eligibility for a program or whether race is just one factor in the decision making process; (iv) the comparison of any numerical targets to the percentage of qualified minorities in the applicant pool; (v) the duration of the program and whether it is subject to periodic review; and (vi) the degree and type of burden imposed on [non-beneficiaries] by the program.

Before describing each of the components, two general points about the narrow tailoring test deserve mention. First, although there are some factors that must be satisfied, it is unlikely that an affirmative action program must satisfy every factor. A strong showing with respect to most of the factors may compensate for a weaker showing with respect to others.

Second, all of the factors will not be relevant in every case. The objective of the program may determine the applicability or weight to be given a factor, and factors may play out differently in remedial programs than they will in non-remedial programs.

1. RACE-NEUTRAL ALTERNATIVES

Before resorting to race-conscious action, an institution must seriously evaluate race-neutral alternatives, that is, measures that do not rely on race or national origin as a factor in decision making. For example, the Supreme Court found that a program designed to remedy the effects of discrimination in municipal contracting was not narrowly tailored in part because the local government did not consider other, race-neutral means to increase minority participation in contracting, such as targeted financial assistance for small or new businesses, before adopting race-conscious measures.³⁵

In the context of higher education, an institution might consider the use of socioeconomic, geographic or other criteria that do not include race or national origin, or increasing efforts to solicit applications from students who have not traditionally applied for admission, including minority students.

The Supreme Court has not specified the extent to which an institution must consider race-neutral measures before resorting to race-conscious action. In cases involving remedial justifications, Justice Powell has suggested that it is not necessary to use the "least restrictive means" where they would not accomplish the desired ends as well,³⁶ and has described the narrow tailoring requirement as ensuring that "[less] restrictive means" are used when they would promote the objectives of a racial classification "about as well."³⁷ The United States believes that an institution need not exhaust race-neutral alternatives, but it must give them serious attention and must use them where efficacious.

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2. SCOPE OF PROGRAM, FLEXIBILITY AND WAIVERS

✓ If an affirmative action program's scope exceeds that necessary to achieve the compelling interest underlying the program, the program is not narrowly tailored. A remedial program need not be limited to the specific individuals who suffered the past discrimination. But a program undertaken to remedy past discrimination against certain races should not, [as part of that remedial scheme, provide special treatment] to other racial groups that did not experience that discrimination. For example, the Supreme Court found that a set-aside program for minority contractors was not narrowly tailored in part because the city's evidence of discrimination, all of which pertained to the treatment of African Americans, did not provide a predicate for the program's preferences for Aleuts, Asian Americans, and Hispanics.³⁸

The use of classifications based on race or national origin should be flexible. For example, the Supreme Court in *United States v. Paradise* found that a race-conscious promotion requirement was flexible in operation because it could be waived if no qualified candidates were available.³⁹

3. MANNER IN WHICH RACE IS USED

An integral part of the narrow tailoring requirement is the manner in which race is used. Flexible programs are more likely to be narrowly tailored than programs with rigid requirements. In this regard, several principles are apparent with respect to admissions.

First, set-asides or quotas may not be used to achieve diversity under Justice Powell's rationale, and may not be used for remedial purposes unless absolutely essential to remedying discrimination and its effects. A good example of a program found to be not narrowly tailored is the medical program the Court invalidated in *Bakke*, which reserved sixteen percent of the positions in the entering class of the medical school for members of certain racial and ethnic groups.⁴⁰

Second, under Justice Powell's reasoning in *Bakke*, an admissions program that relies on a separate admissions committee or other decision-making procedures that prevents any comparison among applicants of different races and national origins would not be narrowly tailored. An example of this type of impermissible program is the 1992 admissions procedures used at the University of Texas School of Law found unconstitutional by the district court in the *Hopwood* case.⁴¹ The University of Texas had two separate admissions tracks and reviewing systems for minority and non-minority students. On the other hand, Justice Powell, in his *Bakke* opinion, in illustrating a flexible admissions program that would be narrowly tailored, cited the Harvard College admissions program, in which "race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats."⁴²

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Third, where a University considers race or national origin to foster diversity for educational objectives, Justice Powell's opinion in *Bakke* indicates that the program should give consideration to diversity characteristics in addition to race or national origin, such as other life experiences, achievements, talents, interests, extracurricular activities, economic disadvantages, and geographic background.⁴³ Not all factors or qualities need be given the same weight, however.⁴⁴

With respect to financial aid decisions, a program in which race or national origin is the sole or primary factor in determining eligibility -- for example, a scholarship program reserved for minorities -- is less flexible than a scholarship program in which race is one of many factors that determine eligibility for the award, and may be vulnerable to challenge.⁴⁵ However, a scholarship program reserved for minorities may be distinguished from an admissions quota reserving for minorities a portion of positions in an entering class, in that the burden imposed on non-minority students in the financial aid context (possibly receiving less aid) is less severe than the burden imposed by an admissions program (not being admitted to the institution at all). See 59 Fed. Reg. 8756 (February 23, 1994).

✓ For a detailed discussion of the standards that should be applied to [race-targeted] scholarship programs, institutions and their counsel should consult the Financial Aid Guidance, 59 Fed. Reg. 8756 (1994).

4. COMPARISON OF NUMERICAL TARGETS TO THE QUALIFIED APPLICANT POOL

When evaluating the use of a numerical goal in a remedial affirmative action program, the Supreme Court has compared the numerical goal to the percentage of minorities in the relevant market. The Court has rejected a city's target of providing thirty percent of its contracts to minority businesses where the target had been selected as roughly halfway between one percent, the percentage of contracts previously awarded to African American businesses, and fifty percent, the percentage of African Americans in the city's population. What was required, the Court stated, was a target that was related to the percentage of African Americans in the pool of qualified contractors, not the percentage in the general population.⁴⁶ Therefore, institutions that use numerical goals and targets for remedial purposes should select a goal that is related to the percentage of minorities in the pool of qualified applicants. A school may consider the pool of qualified students who actually apply for admission, and the larger pool of students in areas from which applications are drawn who would meet the school's admissions standards.

5. DURATION AND PERIODIC REVIEW

A particular affirmative action measure should remain in place only as long as it is needed to achieve the compelling interest that it serves. A race-based classification is therefore more likely to satisfy the narrow tailoring test if it has a definite end date or is

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subject to meaningful periodic review in order to ascertain the continued need for the measure.⁴⁷ Reexamination of affirmative action programs also allows an institution to fine-tune its classification, which may allow the program to satisfy other factors in the narrow tailoring test. The Office for Civil Rights recommends annual reviews to ensure compliance with this aspect of the narrow tailoring requirements of Title VI.

6. BURDEN ON NON-MINORITIES

✓ [If an affirmative action program results in a burden or disadvantage for a person of a particular race or national origin, the courts require the institution to weigh the degree of the disadvantage or burden.] While some burdens may be legally acceptable, others may be too high. In general, a race-based classification that "unsettle[s] . . . legitimate, firmly rooted expectation[s]" or imposes the "entire burden . . . on particular individuals" crosses that line.⁴⁸ For example, if an institution terminated scholarships that had been awarded to particular non-minority students in order to fund a scholarship program for minority students, that might place too much of a burden on the affected non-minority students to be considered narrowly tailored. Generally, the less severe and more diffuse the impact on non-minority students, the more likely that a racial or ethnic classification will address this factor satisfactorily.

For a more detailed discussion of narrow tailoring in the context of race-targeted financial aid, see the Financial Aid Guidance, 59 Fed. Reg. 8756 (1994).

IV. CONCLUSION

Under federal law, a college or university may use an affirmative action program that considers race or national origin in admissions or financial aid decisions if the program is properly designed and implemented to meet the institution's compelling need. Any covered institution that uses race or national origin as a basis for decision making should review its program to determine if it comports with the strict scrutiny standard. Appended to this Guide is a nonexhaustive checklist of questions that will aid institutions in collecting the information necessary to conduct a thorough review. Because the questions are just a guide, no single answer or combination of answers is necessarily dispositive as to the validity of any particular program.

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ENDNOTES

1. 42 U.S.C. 2000d (1994).
2. See 42 U.S.C. 2000d-4a(2)(A) (1994).
3. With respect to the kinds of race-conscious measures at issue in this Guide, the restrictions of Title VI and of the Equal Protection Clause are coextensive. See *Regents of the University of California v. Bakke*, 438 U.S. 265, 284-87 (Powell, J.), *id.* at 328-55 (Brennan, J., joined by White, Marshall, and Blackmun, JJ.). For other purposes, however, the requirements of Title VI and its implementing regulations are not completely coextensive with constitutional requirements. See *Guardians Assn. v. Civil Service Comm'n of City of New York*, 463 U.S. 582, 584, 589-93 (White, J.) (1983) (in disparate impact case not involving affirmative action, Title VI can be violated without proof of the discriminatory intent necessary to prove a constitutional violation); *id.* at 623-24 (Marshall, J., concurring); *id.* at 642-45 (Stevens, J., joined by Brennan and Blackmun, JJ.).
4. Those regulations are located in 34 C.F.R. Part 100 (1997).
- ✓ [5. See *Morton v. Mancari*, 417 U.S. 535, 554 n.24 (1974).]
- ✓ [6. 505 U.S. 717 (1992); Notice of Application of Supreme Court Decision, 59 Fed. Reg. 4271-72 (United States Department of Education, January 31, 1994).]
7. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995).
8. *Adarand*, 515 U.S. at 200.
9. 438 U.S. 265, 320 (1978) (opinion for the Court for Section V.C.).
10. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498-506 (1989); *Shaw v. Hunt*, 116 S. Ct. 1894, 1902-03 (1996).
11. 438 U.S. 265, 311-15 (1978) (opinion of Powell, J.).
12. See *Croson*, 488 U.S. at 491-93 (plurality opinion); *id.* at 518-19 (Kennedy, J. concurring in part and concurring in the judgment).
13. See *Adarand*, 515 U.S. at 269-70 (Souter, J. dissenting); cf. *Fordice*, 505 U.S. at 727-29 (state must eradicate policies and practices traceable to prior de jure system that continue to foster segregation).
14. See *Croson*, 488 U.S. at 499, 505.
15. See, e.g., *Fordice*, 505 U.S. at 730 n.4.
16. See *Wygant v. Jackson Board of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion).
17. See *Croson*, 488 U.S. at 500.
18. *Id.* at 501-02, 509.

19. 34 C.F.R. 100.3(b)(6)(I).

20. 78 F.3d 932, 951 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996).

✓ [21. *Id.* The Fifth Circuit rejected the law school's attempted reliance on past discrimination by other schools in the Texas state system, including other schools at the University of Texas.]

✓ [22. *Id.* at 954. In accordance with the Fifth Circuit's rationale postsecondary institutions cannot use discrimination by other actors in the state's educational systems as a predicate for considering race or national origin in admissions and financial aid. In addition, under *Hopwood* one "functionally separate unit" of an institution, such as a medical school, cannot rely on past discrimination by other units in that institution.]

23. *See id.* at 954-55 (citing *Fordice*, 505 U.S. at 731-32).

24. *Bakke*, 438 U.S. at 311-14.

✓ 25. *See Davis v. Halpern*, 768 F. Supp. 968, 975-76 (E.D.N.Y. 1991) (suggesting in dicta that a plan satisfying diversity rationale could be constitutional); *DeRonde v. Regents of the Univ. of Calif.*, 28 Cal. 3d 875, 882-87 (1981) (upholding school's plan because it satisfied Justice Powell's diversity rationale and Justice Brennan's remedial rationale in *Bakke*); *McDonald v. Hogness*, 92 Wash. 2d 431, 439-43 (1979) (same); *Ef. University and Community Coll. Sys. of Nevada v. Farmer*, 113 Nev. 90, 930 P.2d 730, 734-35 (1997), *cert. denied*, ___ U.S. ___, 118 S. Ct. 1186 (1998) (Title VII case relying, in part, upon Justice Powell's diversity rationale in upholding faculty employment decision in which race was a factor).]

26. *Bakke*, 438 U.S. at 307 (Powell, J.) (reducing deficit of minorities in medical school and the medical profession); *see Croson*, 488 U.S. at 507; *Johnson v. Transportation Agency*, 480 U.S. 616, 639 (1987).

27. *See id.* at 305, 307, 313. Similarly, in the law enforcement context, diversifying the ranks of officers may at times serve vital public safety and operational needs, thereby enhancing the agency's ability to carry out its functions effectively. *See Barhold v. Rodriguez*, 863 F.2d 233, 238 (2d Cir. 1988); *Talbert v. City of Richmond*, 648 F.2d 925, 931-32 (4th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982); *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671, 695-96 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981); *Baker v. City of St. Petersburg*, 400 F.2d 294, 301 n.10 (5th Cir. 1968); *cf. Wittmer v. Peters*, 87 F.3d 916, 919 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 949 (1997) (upholding preference for a black lieutenant at a boot camp for young offenders based on the finding that the camp would not achieve its rehabilitative mission absent the preference because 70% black inmate population unlikely to accept military regimen with less than a 6% black security staff and no black lieutenants).

28. Brief of *Amici Curiae* American Council On Education, *Et Al.* In Support Of Petitioner at 6, Board of Education of the Township of Piscataway v. Taxman, No. 96-679 (Supreme Court) (On Writ of Certiorari).

29. *Bakke*, 438 U.S. at 310 (Powell, J.)

30. Justice Powell approvingly quoted the state court below, which had noted that there were more precise and reliable ways to identify applicants who were genuinely interested in the medical problems of underserved communities than race, namely, a demonstrated concern for the problem in the past and a declaration that practicing in such a community was an applicant's primary professional goal. *Id.* at 310-11.

31. *See Hopwood*, 78 F.3d at 944, 948.

32. *Id.* at 944, 948.

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33. *Id.* at 944 (quoting *Croson*, 488 U.S. at 521 (Scalia, J., concurring in judgment)).
34. *Id.*
35. *Croson*, 488 U.S. at 507.
36. See *Fullilove v. Klutznick*, 448 U.S. 448, 508 (Powell, J., concurring).
37. *Wygant*, 476 U.S. at 280 n.6 (plurality opinion of Powell, J.); cf. *Billish v. City of Chicago*, 989 F.2d 890, 894 (7th Cir.) (en banc) (Posner, J.) (in reviewing affirmative action measures, courts must be "sensitiv[e] to the importance of avoiding racial criteria . . . whenever it is possible to do so, [as] *Croson* requires"), *cert. denied*, 510 U.S. 908 (1993).
38. *Croson*, 488 U.S. at 506.
39. 480 U.S. 149, 177 (1987).
40. *Bakke*, 438 U.S. at 275.
41. *Hopwood v. Texas*, 861 F. Supp. 551, 579 (W.D. Tex. 1994), *aff'd in part, rev'd in part*, 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2580 (1996).
42. *Bakke*, 438 U.S. at 317.
43. *Id.* at 315 (Because "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element," a program "focused solely on ethnic diversity would hinder rather than further attainment of genuine diversity.") (Powell, J.)
44. *Id.* at 317-18.
45. In *Podberesky v. Kirwan*, 38 F.3d 147, 153 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995), the U.S. Court of Appeals for the Fourth Circuit sustained a constitutional challenge to a state university scholarship program open only to African American students. *Podberesky* held that the university failed to provide sufficient factual support for a conclusion that its challenged scholarship program was narrowly tailored to the asserted interest in remedying the present effects of past discrimination. Institutions located in the Fourth Circuit, which includes the states of Virginia, Maryland, North and South Carolina, and West Virginia, should review *Podberesky*, as that decision will guide the evaluation of the remedial use of racial classifications in higher education in that circuit.
46. See *Croson*, 488 U.S. at 507.
47. See *Paradise*, 480 U.S. at 178 (plurality opinion); *Sheet Metal Workers*, 478 U.S. at 487 (Powell, J., concurring); *Fullilove*, 448 U.S. at 513 (Powell, J., concurring).
48. *Johnson*, 480 U.S. at 638; *Sheet Metal Workers*, 478 U.S. at 488 (Powell, J., concurring).

ASSESSMENT WORKSHEET

About the Worksheet

The Worksheet is a starting point for colleges and universities to use in reviewing their admissions and financial aid programs. The checkpoints are keyed to the legal discussion in the Guide, which must be carefully considered in using the Worksheet.

- Keep in mind that the Worksheet is designed to help institutions identify and organize information relevant to the applicable legal standards, as discussed in the Guide, but not every question necessarily will be relevant to each institution. In addition, no single answer or combination of answers necessarily is dispositive as to the validity of any particular program.
- For the best use of this Worksheet, and the entire Outline, we encourage institutions to consult with their legal counsel, and to contact the Office for Civil Rights ("OCR") at the Department of Education, for assistance. A list of OCR offices and staff available to assist you is included with this Outline.

The consideration of race or national origin in financial aid programs is covered by the same legal standards as admissions although there are some questions that are discrete to each program. The Worksheet covers admissions and financial aid programs separately, with cross-references between the two sections, to avoid repetition when the issues are the same.

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ADMISSIONS WORKSHEET

➡How do the school's programs work?

✓ CHECKPOINT(S) BASELINE INFORMATION

➡GUIDE,
PP.

1. If the institution has decided to consider race and national origin as factors in its admissions process, is the admissions process guided by a written affirmative action plan? How are admissions structured? For public institutions, is the consideration of race mandated or authorized by legislation?
2. What standards guide admissions decisions and how does the admissions process work? How and at what point in the admissions process is each admissions criterion weighted and considered? Is each admissions criterion educationally justifiable and closely related to the institution's mission? How and at what points are race or national origin considered and weighted in admissions? How and at what point(s) are minority students being admitted?

➡Is the consideration of race or national origin supported by a compelling interest?

✓ CHECKPOINT(S) COMPELLING INTEREST

➡GUIDE,
PP.

3. Why does the program consider race or national origin in admissions? Is it intended to remedy discrimination, to foster diversity to achieve an educational objective, or for some other purpose?

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➡ Does the college or university have a duty to remedy discrimination on the basis of race or national origin?

✓ CHECKPOINT(S) REMEDIAL PURPOSES

➡ GUIDE,
PP.

4. Are there facts that show discrimination? Is the program justified solely by reference to general societal discrimination, general assertions of discrimination in education, or a statistical underrepresentation of minorities as compared to their percentage of the general population rather than the relevant pool of qualified applicants? Without more, these are impermissible bases for affirmative action.
5. Has a court, legislative body, or agency made a finding that the institution has discriminated against minorities? Is the institution the subject of a court desegregation order or a legislative or administrative finding of unlawful discrimination? Did the body making the finding have a strong basis in evidence for its conclusion? Does the institution itself have a strong basis in evidence for concluding that it has discriminated? If the institution is public, has a state or local government made findings of discrimination within its jurisdiction, including discrimination by private actors? Are there present effects of any such past discrimination? Was the government, or is the government now, a passive participant in that discrimination so as to perpetuate the exclusion? Did the institution help to perpetuate that discrimination?
- ✓ 6. Identify the racial and ethnic composition (for example, %African American, Hispanic, Asian-American, American Indian, white, [etc]) of the following groups: I) the institution's student body; ii) the institution's qualified applicants; and iii) the pool of qualified potential applicants from which the institution draws its students, for example, students meeting the school's admission requirements living in the areas served by the institution.
7. Based on the information above, is there underrepresentation at the school of qualified students from particular races or national origins? If so, is the statistical disparity significant?
8. What is the nature of the evidence? Is it statistical or based on written documents? Are statistics based on comparisons to the general minority population, or are they more sophisticated and focused? For example, do they attempt to identify the

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number of qualified minorities in the applicant pool, or seek to explain what the number would look like "but for" the exclusionary effects of discrimination? Is there evidence on how discrimination has hampered minority opportunity in education, or is the evidence simply based on generalized claims of societal discrimination? In addition to any statistical or documentary evidence, are there persons who have knowledge or other anecdotal evidence of discrimination?

9. Since the adoption of the program, have additional findings of discrimination been made that could serve to justify the need for the program when it was adopted? If not, can such evidence be assembled now? Is there new evidence that the remedial program is no longer necessary?
10. Apart from any past findings or court orders, is there past discrimination affecting admissions at that institution? Has the institution determined whether the effects of past discrimination continue? If there have not been findings of past discrimination, is there a strong basis in evidence to believe that there may be a current violation or the continuing effects of past discrimination?

➡ Is the institution seeking to achieve the educational benefits of diversity?

✓ CHECKPOINT(S) DIVERSITY PURPOSES

➡ GUIDE,
PP.

11. Is affirmative action in admissions used to achieve the educational benefits of diversity? What is the institution's definition of diversity? What are the institution's mission statements and how do they relate to its diversity objectives?
12. The institution must articulate how achieving greater diversity would foster an educational goal beyond diversity for diversity's sake. What are the educational benefits of diversity at the institution? What are the bases for the educational benefits the institution identifies?
13. Does diversity include factors other than race and national origin? If so, what factors? Which admissions criteria are related to the diversity goal? How is each weighted and considered in the admissions process?

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➡ Is the use of race or national origin in remedial or diversity programs narrowly tailored?

✓ CHECKPOINT(S) NEED FOR USE OF RACE OR NATIONAL ORIGIN AND RACE/NATIONAL ORIGIN NEUTRAL ALTERNATIVES

➡ GUIDE,
PP.

14. If race or national origin is considered as a positive factor, has the institution made efforts to achieve its goals in race-neutral ways? If so, what efforts were made and what were the results?
15. If race-neutral measures were not undertaken, why does the institution believe that such efforts would be insufficient to serve its compelling interest without relying on race? What was the nature and extent of the deliberation over any race-neutral alternatives? Was there a judgment regarding the relative effectiveness of race-neutral alternatives and race-conscious measures?
16. Does the college have data to show whether affirmative action is necessary? When did the institution begin implementing its affirmative action program? Does the institution have statistics or other evidence to show the effect of the program on achievement of diversity objectives or remedying the effects of discrimination, e.g., data regarding minority participation levels before and after affirmative action programs began?

✓ CHECKPOINT(S) MANNER RACE OR NATIONAL ORIGIN IS USED, FLEXIBILITY, AND POOL OF BENEFICIARIES

➡ GUIDE,
PP.

17. How does the college assess whether diversity has been achieved? Does the admissions process incorporate numerical goals? By what process were these goals derived? Do all or only some of the schools or programs have goals? If the program is remedial, are the goals related to the percentage of minorities in the pool of qualified applicants, and do the beneficiaries include people in racial or ethnic groups for whom there is insufficient evidence of prior discrimination?

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18. Are admissions decisions made through separate tracks, admissions committees, or eligibility criteria defined on the basis of race or national origin? Does the program establish fixed numerical set-asides? Is race an explicit requirement of eligibility for the program? If there is no such factual requirement, does the program operate that way in practice? Or is race just one of several factors -- a "plus" -- used in decision making? Could the objectives of any program that uses race as a requirement for eligibility be achieved through a more flexible use of race?

✓ CHECKPOINT(S) DURATION AND PERIODIC REVIEW OF THE USES OF RACE OR NATIONAL ORIGIN

⇒ GUIDE,
PP.

19. Is the program subject to periodic oversight, and if so, what is the nature of that oversight? Does the periodic review assess whether the form or extent to which race or national origin is considered should be modified in light of the outcomes of the affirmative action program? Has the program ever been adjusted or modified in light of periodic review? What were the results of the most recent review? Even if there was a compelling justification at the time of adoption, that may not be the case today. In that regard, does the program have an end date? Is there evidence of what might result if the racial classification were discontinued?

✓ CHECKPOINT(S) BURDEN ON NON-BENEFICIARIES

⇒ GUIDE,
PP.

20. Does the institution periodically assess whether its consideration of race or national origin in admissions places an undue burden on students not eligible for that consideration? What is the nature of the burden imposed on persons who are not included in the racial or ethnic classification established by the program? Does the program displace those persons from existing positions or financial aid awards? What is the nature and extent of the impact on non-beneficiaries in admissions? Does the impact of the program fall upon a particular group or class of students, or is it more diffuse? What is the extent of other opportunities outside of the program? Are persons who are not beneficiaries of the program put at a significant competitive disadvantage as a result of the program?

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STUDENT FINANCIAL AID WORKSHEET

✓ CHECKPOINT(S) INITIAL INFORMATION NEEDS

1. Is the institution's financial aid program guided by a written affirmative action plan? How is the institution's financial aid process structured?
2. Does the institution's financial aid program include the consideration of race or national origin (as either an exclusive factor or as one among a number of factors)? If so, how? Does the institution fund or administer "race-based scholarships"?² If so, what is the justification for each consideration of race or national origin? Are the institution's reasons consistent with the Department's race-targeted scholarship policy?

✓ CHECKPOINT(S) FINANCIAL AID FOR DISADVANTAGED STUDENTS

3. Schools may target financial aid for disadvantaged students, e.g., students from low-income families, or aid based on students' being in the first generation to attend college or family income. Does the institution's definition of "disadvantaged" used for participation in the program include any consideration of race? If not, then the program is not a racial classification subject to strict scrutiny. If yes, the program is subject to strict scrutiny and does not fit within this principle.

✓ CHECKPOINT(S) COMPELLING INTERESTS

4. Why does the program consider race or national origin in financial aid

² "Rased-based scholarships" or "race-targeted aid" mean, for the purposes of this Outline, any financial aid for which eligibility is limited to persons of a specific racial or ethnic background. Each of the questions in this section on financial aid also are applicable to financial aid programs where race or ethnicity are used only as a plus-factor in deciding awards. This section is based upon the Department's 1994 race-targeted scholarships policy.

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decisions? Is it intended to remedy discrimination, to foster diversity to achieve an educational objective, or for some other purpose? If the use of race is intended to remedy discrimination, see Admissions checkpoints 4-10, above. If it is intended to foster diversity to achieve an educational objective, see Admissions checkpoints 11-13, above.

✓ CHECKPOINT(S) NARROW TAILORING: REMEDIAL/DIVERSITY PROGRAMS

Are financial aid decisions that consider race or national origin narrowly tailored to achieve their purpose? See Admissions checkpoints 14-20, above.

- ✓ 5. If race-based scholarships are awarded, how many does the institution award annually? How many students at the institution, by race and national origin, receive non-race-based financial aid, annually? What proportion of total financial aid at the institution (institutional, state, local, Federal, private) is earmarked for race-based scholarships? [For each type of financial aid (e.g., loans, scholarships),] does a comparison of the amount of race-targeted financial aid provided to students to the total amount of aid provided to students without regard to race or national origin show that the program places an undue burden on other students who are not eligible for race-targeted aid?

✓ CHECKPOINT(S) PRIVATE GIFTS RESTRICTED BY RACE OR NATIONAL ORIGIN

6. Are racial or other criteria attached by the donors to the award of any financial aid funds? If so, can the institution justify the use of race under any of the principles of the OCR financial aid policy guidance?²
7. Is any race-targeted aid received by the college's students provided directly to students without involvement by the institution? If so, under the policy guidance, Title VI does not apply. If the college makes privately provided race-targeted aid part of its operations by getting involved in the offering or administration of the aid (e.g., through selection of recipients, distribution of funds), is the use of the aid justifiable under a diversity or remedial rationale?

✓ ² The financial aid policy guidance also includes a provision permitting historically black colleges and universities (HBCUs) to participate in race-targeted programs established by third parties for African American students if the programs are not limited to students at the HBCUs. If necessary for participation, HBCU's may also use their own funds in those programs. 59 Fed. Reg. at 8763.

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Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Mary Smith to White House re: Whitebead Elementary School (partial) (2 pages)	10/26/99	P6/b(6)
002. note	Blue Ribbon Schools (partial) (1 page)	10/27/99	P6/b(6)
003. memo	Stephen O'Brien to Will Tanner re: Blue Ribbon School Principals (1 page)	10/22/99	P5

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Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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MEMORANDUM

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF EDUCATIONAL
RESEARCH AND IMPROVEMENT
Office of Reform Assistance and Dissemination

TO: Will Tanner
FROM: Stephen O'Brien *Shure* 20 pages
SUBJECT: Blue Ribbon Schools Principals
DATE: October 22, 1999

Please remember that we have never met any of these people. We are only going by the written document.

Here are six schools from which we think the White House might choose the person to introduce the President:

Roanoke Avenue School, NY
Washington Irving, NY

D.T. Cox Elementary, MS (principal is African American woman; Dr. Jerry Rogers who visited the school for us said she is very articulate.)

Eastridge Community, CO

Beaufort Elementary, SC (principal is white woman)

Cannons Elementary, SC (principal is white woman)

Hillcrest Elementary, TX

Kathy and I suggest that you also take the principal(s) to go to the White House from the above group.

Here are our suggestions for the pool for the other people:

Lynn Johnson, Title I Reading Teacher, Abney Elementary, Slidell, LA (504-643-4044)

Kay Bolle, Teacher, Festus Elementary, Festus, MO (214-937-5720)

David Woods, 5th Grade Teacher, Indian Lane Elementary, Media, PA (610-627-7100)

Michael Maffoni, Teacher, Willow Creek Elementary, Englewood, CO (303-773-1765)

Marilyn Wheeler, Superintendent, Coronado, CA (619-522-8915) Also has New American High School in district.

Lynne Rauch, Superintendent, Elk Grove Village, IL (847-301-2150)

Heidi Dziendziel, Parent, Greenfield Elementary, Greenfield, NY (518-893-7402)

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