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Race-Minority Enrollment [1]

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Race - minority enrollment

ONE AMERICA IN THE 21ST CENTURY

The President's Initiative on Race

The New Executive Office Building
Washington, DC 20503
202/395-1010

MEMORANDUM TO HIGHER EDUCATION GROUP

FROM: Scott Palmer

SUBJECT: University of California Admissions Data I

DATE: May 29, 1998

Attached is additional information on the 1998 University of California (UC) admissions data, including a summary of the big picture that emerges from the data and a table that presents the UC admissions *numbers*. (I will shortly provide you with a single table that accurately reports the key *percentages*, which are important for understanding the complete picture. However, I did not want to delay any longer in getting you this preliminary information. Therefore, I have provided the most salient percentages as part of the summary document.) In sum, the data indicate that Proposition 209 and the Board of Regents' decision did not have a dramatic effect on either the application or enrollment decisions of "underrepresented" students (which include American Indian, African American, and Hispanic students), but they did cause significant decreases in the number of underrepresented students admitted to the more-selective UC institutions, most notably Berkeley and Los Angeles.

If you have any questions or concerns, please feel free to contact me at x51047.

Attachments

NOT FOR DISTRIBUTION

Summary:
1998 University of California (UC) Undergraduate Admissions Data

This page summarizes the big picture that emerges from the 1998 UC undergraduate admissions data by examining the application, admission, and enrollment data for "underrepresented" students, which include American Indian, African American, and Hispanic students. In sum, the data indicate that Proposition 209 and the Board of Regents' decision did not have a dramatic effect on either the application or enrollment decisions of underrepresented students, but they did cause significant decreases in the number of underrepresented students admitted to the more-selective UC institutions, most notably Berkeley and Los Angeles.

- Applications: There was a record number of applicants to the UC System in 1998. The number of unduplicated 1998 applicants increased by approximately 8% from 56,177 applicants in 1997 to 60,912 in 1998. This increase was relatively consistent for all racial groups at nearly all UC institutions. This suggests that the concern that underrepresented students would be less likely to apply to UC institutions following Proposition 209 and the Board of Regents' decision did not materialize.

- Admissions: The number of underrepresented students admitted to the UC System as a whole decreased slightly from 1997 to 1998, but there were substantial decreases at the more-selective campuses (Berkeley and Los Angeles), which were offset by modest increases at the less-selective campuses. Admissions data indicate that the main effect of Proposition 209 and the Board of Regents' decision was to shift underrepresented students from the more selective to the less-selective UC institutions.

  These decreases in underrepresented students at select UC institutions are somewhat difficult to see from the raw admissions numbers due to a dramatic increase in the number of 1998 applicants who declined to state their race on their admissions applications. However, the decreases in underrepresented students can be seen by examining the percentage of underrepresented students admitted to UC institutions. Table 1 below shows the percentage of underrepresented students admitted of the total number of students admitted absent those who declined to state their race. If we hypothesize that students of all races are equally likely to decline to state their race, than Table 1 accurately reflects the changes from 1997 to 1998 in the racial composition of the classes admitted. However, evidence suggests that white and Asian-American students are more likely than underrepresented students to decline to state their race. Therefore, Table 1 may underestimate the actual decreases in the percentage of underrepresented students admitted to UC institutions in 1998.

- Enrollment: All UC campuses showed slight increases in the percentage of underrepresented students who accepted their offers of admission for 1998. In other words, the concern that those minority students admitted to UC institutions would choose not to enroll did not materialize. However, because of the decreases in admissions of underrepresented students at the more-selective UC campuses, there are substantial decreases in the actual number of underrepresented students enrolling at those campuses, most notably Berkeley and Los Angeles. Once again, these decreases can be seen most clearly by looking at the percentage of underrepresented students enrolled of the total enrolled absent those who declined to state their race, which is shown in Table 2 below.

Table 1
UC Admissions[1]

Institution	Year	% Underrep. Admitted of Total w/o Decl. to State
UC System	*1998*	*18.1%*
	1997	*18.2%*
Berkeley	1998	12.1%
	1997	23.5%
Davis	1998	16.1%
	1997	17.0%
Irvine	1998	15.8%
	1997	16.1%
Los Angeles	1998	14.5%
	1997	20.7%
Riverside	1998	23.9%
	1997	21.0%
San Diego	1998	11.4%
	1997	15.2%
Santa Barbara	1998	18.5%
	1997	19.8%
Santa Cruz	1998	19.3%
	1997	18.2%

Table 2
UC Enrollment[2]

Institution	Year	% Underrep. Enrolled of Total w/o Decl. to State
UC System	*1998*	*17.7%*
	1997	*18.5%*
Berkeley	1998	12.4%
	1997	23.2%
Davis	1998	16.4%
	1997	15.7%
Irvine	1998	15.5%
	1997	12.6%
Los Angeles	1998	16.5%
	1997	23.3%
Riverside	1998	29.2%
	1997	22.1%
San Diego	1998	12.4%
	1997	14.8%
Santa Barbara	1998	21.9%
	1997	19.0%
Santa Cruz	1998	21.3%
	1997	16.6%

[1] The 1998 percentages reported in Table 1 have since changed slightly due to a final round of admissions offers.

[2] The 1998 percentages reported in Table 2 are based on Statement of Intent to Register responses from admitted students and may change slightly by September.

University of California
Application, Admission and Statement of Intent to Register (SIRs) of New Freshmen
Fall 1998 and Fall 1997

		Am Indian			Afr Am			Chicano			Latino			Underrep Grps			Asian Am			White/ Other			Decl to State			Total		
		Appl	Adm	SIRs	Appl	Adm	SIRs	Appl	Adm	SIRs	Appl	Adm	SIRs	Appl	Adm	SIRs	Appl	Adm	SIRs	Appl	Adm	SIRs	Appl	Adm	SIRs	Appl	Adm	SIRs
BK	F98	175	29	14	1,241	224	98	2,284	459	185	855	176	79	4,555	888	376	10,322	3,080	1,527	9,316	2,849	1,131	5,829	1,483	626	30,022	8,300	3,660
	F97	139	67	24	1,151	547	260	2,033	1,037	411	818	214	81	4,141	1,865	776	10,321	2,894	1,478	9,760	2,884	1,095	2,910	706	280	27,132	8,329	3,629
DV	F98	172	106	39	685	354	104	1,429	978	288	583	363	108	2,869	1,801	539	6,972	4,561	1,364	7,798	5,380	1,375	3,071	1,952	518	20,710	13,694	3,796
	F97	136	117	38	672	504	107	1,274	1,120	260	551	484	148	2,633	2,225	553	7,117	4,463	1,296	8,754	6,116	1,678	992	717	152	19,496	13,521	3,679
IR	F98	104	59	22	602	283	71	1,769	1,026	279	606	345	86	3,081	1,713	458	9,527	5,881	1,792	4,503	3,096	704	2,478	1,487	372	19,589	12,177	3,326
	F97	89	66	9	552	298	55	1,548	1,006	202	569	393	100	2,758	1,763	366	9,184	5,833	1,803	4,646	3,259	737	638	439	105	17,224	11,294	3,011
LA	F98	195	49	15	1,353	304	131	3,028	748	329	1,040	262	129	5,616	1,363	604	11,489	4,251	1,700	10,074	3,480	1,351	5,589	1,727	812	32,768	10,821	4,267
	F97	160	86	40	1,336	518	219	2,636	1,162	452	1,096	356	151	5,228	2,122	862	12,346	4,205	1,544	10,314	3,565	1,291	1,367	765	254	29,255	10,657	3,951
RV	F98	69	54	14	621	372	123	1,718	1,284	405	463	342	95	2,871	2,052	637	5,305	4,296	1,053	2,605	2,185	493	1,161	883	186	11,942	9,416	2,369
	F97	46	33	7	517	342	88	1,290	1,025	263	400	309	74	2,253	1,709	432	5,190	4,296	1,038	2,621	2,191	481	269	226	53	10,333	8,422	2,004
SD	F98	179	68	22	808	226	61	2,099	735	224	732	300	76	3,818	1,329	383	9,709	4,933	1,320	10,344	5,150	1,379	4,165	2,041	518	28,036	13,453	3,600
	F97	160	117	28	692	374	80	1,826	1,187	314	695	271	67	3,373	1,949	489	9,426	5,035	1,310	11,024	5,583	1,510	1,285	771	199	25,108	13,338	3,508
SB	F98	212	112	44	705	374	109	2,241	1,300	436	785	416	137	3,943	2,202	726	4,959	2,780	534	11,139	6,741	2,060	3,678	2,096	555	23,719	13,819	3,875
	F97	193	151	41	623	442	137	2,085	1,647	419	811	633	172	3,712	2,873	769	4,474	3,016	691	11,531	8,264	2,584	973	730	50	20,690	14,883	4,094
SC	F98	125	99	27	407	265	61	1,377	1,019	251	499	374	99	2,408	1,757	438	3,201	2,434	421	5,916	4,846	1,197	2,284	1,804	476	13,809	10,841	2,532
	F97	108	89	20	385	277	52	1,182	957	199	473	374	81	2,148	1,697	352	2,703	1,979	369	6,287	5,196	1,396	667	567	140	11,805	9,439	2,257

NOTES:

(1) Asian Americans include Chinese, East Indian/Pakistani, Filipino, Japanese, Korean, Vietnamese and Other Asians, with the exception of Santa Barbara, which lists East Indian/Pakistani students under White/Others.

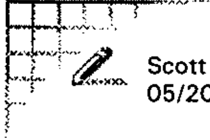
(2) Berkeley and Los Angeles report international counts separately. For the purposes of this report, these counts are included in the decline to state category.

(3) Decline to state include students who did not provide information on their ethnic identity in the admission application.

SOURCE: UC Office of the President, Student Academic Services, Admissions - Management Reports; SIRs - Campus Admissions Offices, May 1998

f98/sirs/flow 5/21/98 11:00am

Race - minority enrollment



Scott R. Palmer
05/20/98 06:25:53 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:
Subject: UC Admissions Numbers

According to figures released today by the University of California System, based on Statement of Intent to Register responses from admitted students, all UC campuses show slight increases in the percentage of underrepresented minority students (i.e., African American, Hispanic, and American Indian students) who accepted their offers of admission for Fall 1998. In other words, the concern that those minority students admitted to UC institutions would choose not to enroll because they would not feel welcome did not materialize.

However, the actual numbers of underrepresented minorities at the most selective UC campuses (e.g., Berkeley and UCLA) show significant declines from last year.

For example, the 1998 freshman class at Berkeley is predicted to include 14 American Indian students (down from 24 in 1997), 98 African American students (down from 260 in 1997), 185 Chicano students (down from 411 in 1997), and 79 Latino students (down from 81 in 1997). Meanwhile, Berkeley is expecting an increase in the number of Asian American freshman in 1998 to 1,527 (up from 1,478 in 1997) and in white students to 1,131 (up from 1,095 in 1997). In sum, the percentage of underrepresented minorities in the freshman class at Berkeley is expected to fall from 21.4% to 10.4%. I will prepare a more complete analysis shortly. Please let me know if you have any immediate questions.

Message Sent To:

Sylvia M. Mathews/WHO/EOP
Judith A. Winston/PIR/EOP
Maria Echaveste/WHO/EOP
Elena Kagan/OPD/EOP
Michael Cohen/OPD/EOP
Tanya E. Martin/OPD/EOP
Julie A. Fernandes/OPD/EOP
Peter Rundlet/WHO/EOP

Race — minority enrollment

DECLINING MINORITY ADMISSIONS IN CALIFORNIA
DRAFT
April 6, 1998

Background: According to figures released by the University of California, minority admissions to most University of California institutions have dropped dramatically this year absent affirmative action. For example, at the Berkeley campus, minority admissions have decreased 57% for black students, 40% for Hispanic students, and 39% for American Indian students from last year's rates. At UCLA, minority admissions have decreased 43% for black students, 33% for Hispanic students, and 43% for American Indian students.

Question: How do you respond to reports that minority admissions to California's universities have dropped dramatically?

Answer: The Administration is extremely concerned about the decline in the numbers of African-American, Hispanic, and Native American students admitted to universities in California as a result of Proposition 209 and the University of California Board of Regents' decision to prohibit the use of properly constructed affirmative action in admissions. Educational opportunity is the touchstone of the American dream and the key to America's continued strength in the 21st century. At a time when our nation is becoming more and more diverse, we must not close the doors of educational opportunity to our students of color. Furthermore, because students learn from each other as well as from their professors, diversity on campus is a vital educational resource that strengthens the educational experience for all our students. For these reasons, every American should be concerned about the developments in California.

Question: How do you respond to those who say that the drops in minority admissions only indicate the extent to which race was being used to admit underqualified minority students?

Answer: I strongly disagree with that analysis. On April 1, the Washington Post reported that the University of California at Berkeley had to reject more than 800 minority applicants who had 4.0 high school grade point averages and SAT scores of 1200 or higher. These minority students are exceptionally qualified for any college or university in the country. Furthermore, we as a nation must realize that diversity and excellence go hand in hand; they are fully compatible and indeed complementary goals. Any educator will tell you that students learn from each other as well in their classes and from their professors-- that's why diversity is important.

Question: What is the administration doing to address this problem?

Answer: We are working on several fronts to address this issue:

- We will continue to strongly support properly constructed affirmative action programs in higher education. For example, we will continue to intervene in litigation in support of appropriate affirmative action programs and to challenge the Hopwood decision.

- We will continue to press higher education officials to maintain and expand diversity, and we will offer assistance to them to do so. For example, we have called on colleges and

universities burdened by new legal restrictions to develop new and creative approaches to achieving diversity, such as aggressively recruiting in secondary schools with high percentages of minority students and forming educational partnerships with such schools.

- Finally, the President has recently announced a dramatic array of education policy actions that will improve educational opportunity and outcomes for all Americans and thereby strengthen the pipeline of students progressing from K-12 education to college. These initiatives include:

  High Hopes --a $140 million investment in the FY 1999 budget -- that promotes partnerships between colleges and middle/junior high schools in low-income communities. These partnerships will provide students with vital support services -- including tutoring, counseling, and mentoring and with information on college options, academic requirements, costs, and financial aid to help students stay on track through high school graduation and college.

  Education Opportunity Zones -- This proposal will devote $1.5 billion over 5 years to help high poverty urban and rural school districts help their students reach high standards, by proving resources to strengthen accountability, better train teachers and principals, and provide students who need it with extra help through after school and summer school programs.

  Small Class with Qualified Teachers -- In order to provide all students with a solid foundation and improve reading in grades 1-3, the Administration is proposing a $12.4 billion initiative over 7 years to help local schools hire 100,000 teachers to provide students with small classes and well-prepared teachers.

  Teacher Preparation and Recruitment -- President Clinton has proposed a $350 million initiative to attract nearly 35,000 outstanding new teachers into high-poverty schools in urban and rural areas over the next five years. In addition, it will upgrade the quality of teacher preparation at institutions of higher education that work in partnership with local schools in inner city and poor rural areas.

  Hispanic Education Action Plan -- The Administration's FY99 budget provides substantial education investments in programs that are targeted to the needs of Hispanic students, including increases in Bilingual Education, funding for Hispanic Serving Institutions, TRIO college preparation programs and migrant education programs.

Question: Is the Office for Civil Rights at the Department of Education investigating admissions policies at higher education institutions?

Answer: The Office for Civil Rights at the Department of Education has received complaints regarding university admissions policies. They will continue to investigate complaints concerning current admissions policies at institutions of higher education to determine if they violate federal civil rights laws by discriminating against minority students. The existence of an investigation does not necessarily indicate that a violation has occurred.

Race - minority enrollment

cc: Judy Winston
Maria Echaveste
Elena Kagan
Minyon Moore
Karen Skelton
Dawn Chirwa
Eddie Correia
Mike Cohen
Mike Wenger
Julie Fernandes
Scott Palmer
Chris Edley

THE WHITE HOUSE

WASHINGTON

February 9, 1998

MEMORANDUM FOR SYLVIA MATHEWS

FROM: **PETER RUNDLET** PR

SUBJECT: **Proposals Related to Higher Education and the Race Initiative**

What follows is a survey of the proposals that I was able to canvass from various individuals and offices that relate to higher education and race in general or the Race Initiative in particular. The only piece missing is an update from Mike Cohen of the DPC on the various proposals and projects he is pursuing in this regard. I was unable to make contact with him directly. I will update this once I speak with him.

As you know, Christopher and Maria have proposed of a four-part conceptual framework with which to approach our higher education agenda items for the Race Initiative:

(1) Campus Dialogue: Activities and events designed to foster cross-racial dialogue and reconciliation on college campuses.

(2) Validators: Identify people who can clearly articulate the value of diversity in higher education to the *broader general public.*

(3) Higher Education Leadership: Encourage higher education leaders to work together and develop a comprehensive strategy to enhance inclusion and diversity *on their campuses.*

(4) Policy Action: Vigorous Administration policy action that includes litigation, public education, race-neutral and race-conscious approaches to enhancing equal opportunity to higher education, inclusiveness, and diversity.

Although I will not attempt here to fit all of the following proposals into this framework, I believe it is helpful as a reference point, and will be useful once we sit down and determine which of the following we want to pursue, and how. The proposals identified thus far include:

Campus Week of Dialogue. Michael Wenger, in partnership with the Association of American Colleges and Universities (AAC&U), the Urban League, and the Department of Education, is leading the effort to organize a week of dialogues on campuses around the country from April 6-9.

Goals: To more fully engage the higher education community in the Race Initiative and to build bridges between college campuses and the communities in which they are located.

Process: AAC&U anticipates receiving a grant from the Ford Foundation to assist it in working with approximately 35 core campuses. In addition, PIR will reach out to hundreds of colleges and universities, including HBCUs (historically black colleges and universities), HSIs (Hispanic serving institutions), and Tribal Colleges.

Specific Events Proposed

- One day designated as National Day of Dialogue on college campuses, including Town Hall meetings on campuses, and discussions on race in classrooms.
- Meetings between campus and community leaders to institutionalize campus-community dialogue.
- Meetings on campus between student leaders from all racial and ethnic groups to discuss how students can work together to address the challenges of race.
- Film showings, cultural festivals, joint community service projects on and around campuses.
- A national Town Hall meeting with either the President or Vice President on the National Day of Dialogue (April 7 or 8), with college students and telecast by C-SPAN or provided by satellite to participating campuses.
- A national meeting of scholars on racial issues to discuss an appropriate research agenda. (Note: this idea is raised separately below; see the concerns raised there.)
- As part of or just prior to this week, a meeting between the President and higher education leaders. (Note: this idea is discussed in great detail, below.)

Next Steps: Pulling all of this off will require an enormous amount of immediate work and coordination. Mike Wenger should nail down what burdens the AAC&U and the Department of Education can bear. Then, a meeting with PIR and WH staff needs to take place to discuss priorities and allocate responsibilities. As noted below, if a meeting with the POTUS is to take place, a date needs to be set aside immediately (since he is scheduled to be out of the country for much of March).

Presidential Meeting with Higher Education Leaders. The President would convene a meeting with higher education leaders both to hear their ideas on the Race Initiative, campus diversity and inclusion, and to issue a call to action to them, as outlined below.

Goals

(1) To encourage the establishment of a formal, coordinated campaign (analogous to the formation of the Lawyers' Committee for Civil Rights due to President Kennedy's call to

action) within the higher education community designed to promote, through words and actions, the values of inclusion and diversity in higher education and to recapture ownership of the public debate over affirmative action in higher education;

(2) To encourage leaders (and their campuses) to participate in the efforts of the PIR, especially the Week of Campus Dialogue;

(3) To solicit the leaders' ideas on creative, legal approaches toward enhancing inclusion and diversity on their campuses; and

(4) To initiate strategy discussions with leaders who will be affected by moves by Congress to curb affirmative action through the education reauthorization and appropriations processes.

Process

Scott Palmer has drafted a detailed proposal on the goals and expected outcomes of such a meeting, much of which is included here. He has been working with Hector Garza at the American Council on Education (ACE), as well as other higher education leaders and associations. Mike Cohen would work with Scott to immediate create a core working group of six to ten college and university presidents that will take responsibility for the overall effort and who will help define the mission and process, as well as identify other leaders who should be a part of the larger campaign. Christopher Edley has identified some likely candidates (the presidents of Harvard, Duke, Penn, and the President of the College Board, Dan Stewart) and we have already established contacts through the creation of the High Hopes Program. The ACE and the Leadership Alliance are also likely to be very helpful. A date for the meeting with the President would have to be reserved immediately, as the meeting should take place before the Campus Week of Dialogue (April 6). Christopher Edley suggested that he would meet with Bob Shrum to coordinate a professional communications strategy for the leaders group.

Potential Outcomes

- A coordinated and ongoing campaign to clearly articulate to the American people the values of inclusion and diversity in higher education and to positively address other tough questions of race in higher education, including the proper role of affirmative action.
- A coordinated research agenda on the educational value of diversity, as well as on methods to increase minority graduation rates and strategies to enhance the "pipeline."
- Creation of short- and long-term strategies to increase minority access to higher education, including both race-neutral and permissible race-conscious strategies.

- The development and promotion of on-campus programs designed to improve minority retention, promote positive racial climates, and create positive cross-racial interactions.

- Creation of partnerships between predominately white and minority-serving institutions.

- Greater participation by the whole higher education community -- college and university presidents, deans, faculty, students, and higher education associations and organizations -- in the President's Initiative on Race, including the Campus Week of Dialogue.

Next Steps: Convene a meeting to determine whether this is a Presidential priority relative to other Race Initiative demands for the President's time. If so, secure a date on the President's schedule for a meeting with higher education leaders. Scott Palmer and Mike Cohen should confer with Christopher Edley and others and call a meeting as soon as possible with the core group of higher education leaders who will agree to take responsibility for coordinating the larger effort. Scott and Mike should convene a meeting with White House and PIR staff to create a strategy to carry this out -- to identify key issues for the meeting and to assign responsibilities for necessary staff work. In addition, Eddie Correia should begin to conceptualize a strategy for engaging Congressional leaders on these issues, as we prepare for battles over the DoEd's reauthorization and appropriations.

More Discrete Higher Education Events and Proposals:

Release of Affirmative Action in Higher Education Guidance Piece. Individuals from the Department of Education, Justice, the Counsel's office, and I have been working to finalize the Department of Education's Guide on Postsecondary Admissions and Financial Aid Affirmative Action programs. The final internal revisions are being made this week and we expect to solicit comments from outside friends before finally releasing it. The purpose of the guidance is to reinforce the continuing vitality of the *Bakke* opinion and to make clear what properly-constructed affirmative action requires in order to provide a greater comfort level to those institutions that may have become unduly cautious in their approaches to creating diversity.

Next Steps: Final drafts have been distributed internally. Comments are due by COB on Friday, February 13. A meeting should be held next week that includes relevant White House staff (Sylvia Mathews, Dawn Chirwa, Rob Weiner, Eddie Correia, Elena Kagan, Maria Echaveste, Judith Winston, Christopher Edley, Minyon Moore, and me), as well as Education and Justice officials, to discuss a roll-out strategy for the Guidance. Although the guidance will not be released in time for admissions offices to restructure their policies for this year, an earlier release may assist some institutions before all of their final admissions decisions are made this spring.

Litigation Strategy. Eddie Correia will begin to meet with counsel representing colleges and universities being sued for their inclusive admissions policies. The purpose of the meetings is twofold: (1) to identify cases in which the United States would participate as *amicus* or intervenor, and (2) to identify creative yet permissible strategies to encourage greater diversity.

Next Steps: Eddie plans to meet with Jane Sherburne, who represents the University of Michigan, soon. Similarly, Maria Echaveste will coordinate with Political Affairs to determine the status of the various state ballot initiatives designed to end affirmative action.

Identification of Race-Neutral/Opportunity-Gap/"Pipeline" Solutions. The Domestic Policy Council, with the assistance of Eddie Correia, Christopher Edley and Scott Palmer, will take the lead on identifying programs designed to increase the percentage of students who attend and complete college. Included in this would be programs designed to prepare students for college and help them pay for it (such as the High Hopes Initiative and Head Start), as well as creative, race-neutral admissions programs (such as aggressive recruitment and outreach and programs like the Texas 10% plan) that will likely increase the number of minorities that attend college.

Next Steps: I understand that Mike Cohen has been working with the Department of Education on producing a document that surveys a variety of inclusive, but race-neutral admissions practices. Pushing this project to a conclusion, vetting the ideas, and then sharing them with the higher education community should be our short-term goal. In any case, the DPC, together with Counsel and PIR, should aim to present a list of potential solutions that the Administration can promote or share with the higher education community.

Research Conference on the Value of Diversity. Some have proposed an academic conference similar to one that the Harvard Civil Rights Project held last spring to discuss current research demonstrating the educational value of diversity. Scott Palmer and Michael Wenger have suggested that such a conference be part of the Campus Week of Dialogue. Others, however, including Christopher Edley, have noted two significant limitations to such a conference: (1) there is little serious social and behavioral science research on the question of the benefits of diversity; and (2) such an event is unlikely to generate much attention. A less ambitious, though useful, goal would be to encourage educational leaders to support serious research in this area.

Next Step: Determine whether such a conference is desirable. Mike Wenger, Chris Edley, Elena Kagan, and Scott Palmer should make a recommendation on this question. If it is not, add to the Leadership agenda, above, the promotion of serious academic research on these issues.

California Minority Scholarship Fund. In order to counter the effects of Prop 209 in California, the Consumer Attorneys of California, together with the San Francisco Bar Association, have proposed to create a private scholarship fund to pay for outreach programs and minority scholarships. The details of the program are not completely clear (e.g., are the scholarships only for students residing in California? for UC schools only or private California schools? for law school only or for other graduate and undergraduate institutions?), but, if properly administered, would be a legal and effective means for increasing minority enrollment in higher education. Eddie Correia has determined that the program can pass Title VI muster, if the funds are completely privately administered. It has also been determined that the Vice President or a Cabinet Member could speak at a fundraising dinner, with some qualification.

Next Steps: Designate someone to work with the California organizers (Karen Skelton has been working with Ray Bourhis to date) to learn more details about the program and the timing. Then appropriate White House and PIR staff need to determine which Administration officials could attend fundraising dinners and to what extent we give White House or PIR imprimatur to the effort. There is no reason to delay with this effort. Finally, this should be recognized as a promising practice.

Meeting with the University of California President Richard Atkinson. We have received a request by Richard Atkinson for a meeting with the President this Friday, February 13. It has been determined that Maria Echaveste, Minyon Moore, Elena Kagan, Eddie Correia, and Karen Skelton should meet with him when he is here. If Chris Edley is in town, he should attend the meeting as well. Chris Edley says that even though Atkinson is in a difficult political situation with the Board of Regents' decision to end affirmative action, he is very much a supporter of the Administration's view on the issue. The purpose of the meeting is to learn more from him about the aggressive outreach program undertaken by UC as well as other insights learned from the recent changes in California.

Next Steps: The above-named individuals should meet with Richard Atkinson this Friday. I understand that Maria is taking the lead in organizing the meeting and coordinating with Atkinson.

The Leadership Alliance. The Leadership Alliance is an academic consortium of 24 colleges and universities, including the nation's most elite colleges and universities and historically black institutions, led by Brown University, that have come together to establish a professional development pipeline that gives minority students and professors access to advanced coursework and laboratories in order to encourage and support their efforts to become scientists, engineers and teachers. Essentially, this group is working to enhance inclusiveness and diversity in graduate school. The Alliance has indicated that it is interested in working with the Administration to jointly pursue this mission.

Next Steps: When we meet, we need to discuss ways in which we can collaborate with the Alliance and other higher education associations to make progress in enhancing inclusiveness and diversity in higher education. Mike Wenger and Scott Palmer should consider the Alliance's offer of help in fashioning outreach and leadership efforts.

Conclusion

We should convene a meeting with relevant White House and PIR staff to sort through the various proposals so that we may quickly act on the priorities. In particular, we will have to act quickly on the Campus Week of Dialogue and the Presidential meeting proposals, as they will require the most work.

Race - minority enrollment

Mike - Did you ever see this?
I'm all in favor of pushing
hard on (3) -- his "[illegible]" --
so we can get our way on
(4). Re (4) -- where's that
ED Dept report on strategies/approaches?
Elena

2/1/98

To: Sylvia Mathews
Peter Rundlet
Andrew Mayock

From: Christopher Edley, Jr.

Re: Higher Education Agenda Items for the Race Initiative

Cc: Maria Echaveste, Minyon Moore, Elena Kagan, Judy Winston, Richard Socarides

I informally asked two friends, prominent in the civil rights community, what they believe to be the Administration's strategy to save affirmative action in higher education. Both said they trust that the President's heart is in the right place, but they believe the basic strategy is to offer lip service, rather than a battle plan. While I don't believe that is a fully accurate or fair characterization, I do share their view that this could well be the Administration that presides over the substantial dismantling of opportunity in selective higher education, substituting speculative long-term pipeline proposals for the concrete achievements of the past 30 years (when we need both). I am among those who views this as a crisis. If I sound hysterical, it is only my effort to be an antidote to the complacency I sense in some quarters.

Following up on last week's Race agenda meeting, here is a quick "brain dump." (Much of what follows is informed by Maria's conceptualization of the problem, but blame me for the parts you don't like.) It seems to me there are roughly four legs to this enterprise, with subparts:

(1) *Campus Dialog:* Outreach to stimulate on-campus dialog and reconciliation activities

(2) *Validators:* Outreach to generate "validators" among higher education leadership (and allied constituencies) for the Race Initiative

(3) *Public Leadership:* Encouraging higher education leaders (and others) to develop and execute plan to convey the importance of inclusion and opportunity the broader public audience, not just their campus communities

(4) *Policy Action:* Vigorous Administration policy action (including litigation and regulatory action) collaboration with educators to preserve and mend affirmative action, rather than end it or acquiesce in judicial and political retrenchment

**

(1) *Campus Dialog:*

Mike Wenger has the lead, piggy-backing ACE and others. There remains the question of what these campus activities are supposed to actually accomplish, apart from people holding hands and singing. So the quality of the materials and guidance, including specific thoughts about follow through, is important. I hope, therefore, that

Wenger & Co. will be pressing the ACE to be creative and ambitious in the content, without the PIR assuming responsibility for it. This was the gist of the guidance Maria gave to Mike in a meeting we had two weeks ago.

The notion of combining coordinated this with an academic conference of some sort is a good one, although time is short and such an event is very unlikely to break through the media haze unless there is a high profile Administration representative there, and the venue is compelling, like the White House (or my think tank at Harvard!). The deeper substantive problem is that the serious social and behavioral science research on the question of the benefits of diversity is quite thin. True enough, it is developing. We had an important conference on the subject here last spring, and a lot of follow up and independent research is being conducted around the country. But I am a little concerned that holding a big conference to simply conclude what is already known – that more research is needed – is not a great investment in the spring time frame. Instead, we can wait for the National Research Council to produce conferences in the summer or fall, or stage our own at a later time.

(2) *Validators:*

I believe PIR also has the lead on this. It is analogous to the outreach activities for the corporate, religious and other communities, intended both to stimulate dialog at the leadership level, and to get input for us. I have nothing to add, except that these validators should prove very important in later stages of the initiative when we should undertake a real campaign to recruit and mobilize leaders who will carry forward the work of the Initiative. That presumably means a group of leaders must invested in the development of what we've been calling the "workplan" for the nation, to be laid out in the President's book.

(3) *Public Leadership:*

This is my obsession, born of several years of trying to understand what is sick about civic discourse on these questions. In a nutshell, higher education leaders are increasingly willing to "own" responsibility for promoting racial progress *on their campuses* – some of them laudably willing to do so despite political risks with their constituents of students, faculty, trustees and even state legislators. But they have not been willing to "own" the problem of correcting public misunderstandings about inclusion, merit, and the mission of higher education.

To get them to stretch beyond their comfort zones, we and they need an *ad hoc* structure for a group of university leaders who agree to take ownership of this public leadership function, and pledge to mobilize the necessary communications, research, and public relations expertise to get the job done. The White House can help generate this structure, by challenging a carefully selected group to step up to their responsibilities: the President cannot lead alone. The analogy is President Kennedy's work with the American Bar Association in 1963, leading to creation of the Lawyer's Committee for Civil Rights Under Law. President Clinton should do the same in

order to help save affirmative action in higher education.

Concretely, we need a meeting penciled in on the President's schedule some time this spring, at which he delivers and a group of educators (and business leaders) accept the challenge of a sustained effort to talk to the American people about the importance of inclusion in higher education, and of mending rather than ending the policies that have helped us open doors these past 30 years. Working backwards from that, we must identify a working group educators to design the appropriate structure and recruit the right set of principals to take up the challenge and meet with the President. Scott Palmer of Judy's staff has started this effort, but we need the POTUS meeting.

I envision the POTUS meeting as the culmination of a half-day of discussions for these leaders among themselves and with Administration and White House staff. We can get their input on the initiative and on Administration policies generally, as well as refine their plans for this challenge. At the end, they would have a meeting with the President and a press stake out.

(4) *Policy Action:*

Admittedly, race-conscious affirmative action is a practical problem only for professional schools and for roughly 20 percent of undergraduate institutions: the other 80 percent are not selective, and therefore the "inclusion" issue concerns the applicant pool and financial aid issues, rather than race-conscious affirmative action. Nevertheless, the legal and political battles on affirmative action are largely on this terrain, and we must be thoroughly engaged.

Litigation: I'm sure that Administration officials believe that everything that is appropriate is being done. From the outside, however, I must tell you that the impression is quite the opposite. On the litigation front, selective institutions feel a great deal of pressure, and DOJ and OCR seem to be entirely too passive. The long-delayed guidance to reinforce the continuing vitality of *Bakke* and to provide helpful "mend it-don't end it" instruction is urgently needed to provide an anchor against the gale force winds of hurricane Bollick, and when the guidance finally issues, it should not be released in the dead of night. Instead, it is an opportunity to explain, defend and teach. This is the President's policy, and he is not ashamed of it.

Other Action: Outside of litigation, there is the question of what admissions and other measures will be explored or encouraged. I hope that, by now, everyone understands that suggestions that institutions simply abandon color-conscious measures and move to class-based measures will fail to produce anyone's desired inclusion of underrepresented minorities because (a) there are more poor white folks than poor colored folks, and (b) poor colored folks are disproportionately *under*represented among those poor applicants with high scores, especially because of unequal K-12 educational opportunities. The most promising college admissions strategies, therefore, are the kind of multi-factored, flexible systems endorsed by Justice Powell

in *Bakke*. Mechanical affirmative action may be administratively convenient, but it is wrong and arguably illegal. The Texas 10 percent plan will likely yield ethnic diversity, but only because of the tragic pattern of segregation and racial identifiability in the secondary schools of that state. It is no solution for the graduate schools. And the jury is still out as to whether the campuses will respond well to a new population of undergraduates whose stellar performance at lousy high schools nevertheless leaves them woefully underprepared.

In short, the President's repeated request that we explore alternatives is no simple undertaking. I don't know what work has been going on in DPC or DoEd, but I'd like someone to tell me where the loop is, and invite me in.

Conclusions

I will write separately about crafting a component for sustained leadership, along the lines I unsuccessfully recommended for the State of the Union. I believe, however, that the campus dialogs in April cannot be a one-shot day, but must instead be structured as one of the building blocks for recruiting and training a cadre of people who will make the challenge of racial healing and progress an ongoing dimension of their civic engagement.

Similarly, mobilizing higher education leaders for the unfamiliar tasks of broad public education – even on *Crossfire!* – is part of a conception of broad-based civic engagement, proceeding from the President's challenge that everyone take some responsibility for building One America.

Finally, I stress the political and practical significance of this. While playing defense on MBE contracting, we must engage on additional battle fronts. One is antidiscrimination law enforcement, and another should be higher education, on both of which we have enormous moral, legal and civic resources upon which to draw.

Returning to my hysterical mode, we must not fiddle while Rome burns. This is not a matter of making the President a dean of admissions. There is serious litigation and other heat on many campuses to cut and trim on affirmative action. The other side is mobilized and emboldened. Let's not wait for the conflagration.

Action items:

(1) Confirm solid content for campus dialogs; confirm number of sites; press plans
(2) Set goals for number, types of validators; set schedule and plan to identify them
(3) Set tentative date for POTUS "challenge" meeting with higher education leaders; identify participants and working group
(4) Finalize legal guidance on affirmative action; formulate rollout strategy; identify litigation and amicus opportunities; anticipate state and congressional legislative developments; develop other policy and research responses

***

Sylvia Mathews THE WHITE HOUSE

TO: Judy Winston
Minyon Moore
Maria Echaveste
Elena Kagan 2F//WW

Race Initiative -
minority enrollment

From: Karen Skelton

This meeting could be an important step in incorporating the PIR into California and public education nationally. Richard Atkinson is a great guy. Please advise.

Karen

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SANTA BARBARA • SANTA CRUZ

OFFICE OF THE PRESIDENT

300 Lakeside Drive
Oakland, California 94612-3550
Phone: (510) 987-9074
Fax: (510) 987-9086
http://www.ucop.edu

January 27, 1998

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

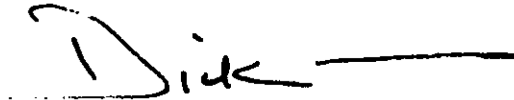
I am writing to request a meeting with you to discuss an issue of great interest to you that is assuming increasing national importance: access to higher education for California high school students following the passage of Proposition 209. We had an opportunity to discuss the challenges confronting the University at the lunch following your commencement address at UC San Diego last June. In particular, I would like to review the University of California's initiatives to provide California's diverse population with access to the University without relying on race, gender, and ethnicity as factors in the admissions process.

This spring the University will admit its first class of undergraduate students under these new admissions criteria. With more than 160,000 students enrolled at the University of California, our ability to achieve diversity will serve as a critical test of this new law and may have far-reaching implications for public higher education nationally. To date we have undertaken an aggressive outreach program to encourage students from diverse backgrounds to continue to seek a UC education. But under this new paradigm, the University must also develop programs to help prepare a greater number of California's children to qualify for admission.

I would like to brief you on the preliminary results from our admission process for next fall's entering class and the new initiatives we have undertaken. It is my desire to engage you in our effort to have the University of California continue to serve the educational needs of all of California's children and to solicit your counsel on how we can establish a model in California that could also serve the needs of the nation.

I will be in Washington on February 13 for other business and would be available to meet with you at that time. I will, of course, make myself available to you at any time that is convenient.

Sincerely,



Richard C. Atkinson
President

cc: Ms. Stephanie Streett
✓Ms. Karen Skelton

Race - minority enrollment

THE WHITE HOUSE

WASHINGTON

February 9, 1998

MEMORANDUM FOR:

SYLVIA MATHEWS
MARIA ECHAVESTE
✓ ELENA KAGAN
JUDY WINSTON

FROM: DAWN CHIRWA AND BILL KINCAID

RE: Review of Draft Self-assessment Guide on Affirmative Action for Institutions of Higher Education.

The attached draft guide has been cleared by the Department of Education and the Department of Justice. The Office for Civil Rights at Education would like to use the document in consultations with individual postsecondary institutions, as well as in regional meetings for institutions which have affirmative action programs. We have been working with ED and DOJ to make the document more user-friendly and to better convey Administration support for properly conducted affirmative action programs. Before proceeding with further constituency vetting, we would like to get internal comments.

We would appreciate it if you could review the document and provide any comments to Dawn (at 6-7963) by COB Friday, February 13. We would be happy to discuss this if necessary.

cc: Mike Cohen
Julie Fernandes
Scott Palmer
Peter Rundlet
Bob Shireman

AFFIRMATIVE ACTION ASSESSMENT OUTLINE

Postsecondary Admissions and Financial Aid Programs

February 1998

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

ASSESSMENT OUTLINE

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INTRODUCTION

Properly designed and conducted affirmative action programs that consider race or national origin in postsecondary admissions and financial aid decisions are permissible under federal law. This guide 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 courts have determined that 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 regarding its evaluation under Title VI of an institution's consideration of race or national origin in the award of financial aid. Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964, 59 Fed. Reg. 8756 (1994) [hereinafter Financial Aid Guidance]. Institutions should consult that guidance for a more 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 included with this Outline and can be found on the Education Department's 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 guidance.

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.

1. COVERAGE OF THE OUTLINE

- 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.

SEE GUIDE,

- 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.

- 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, should consult the Fifth Circuit Standards sections of the Guide and the *Hopwood* decision for the appropriate standards. Institutions in the Fourth Circuit, should consider the *Podberesky v. Kirwan* decision, as described in the Guide.

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 that they satisfy 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 SUPPORTING CONSIDERATION OF RACE OR NATIONAL ORIGIN

- The compelling interest inquiry centers on "ends" and asks why an institution is classifying individuals on the basis of race or national origin.

SEE GUIDE,

- 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 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.

- A college that has been found to have discriminated by a court or an administrative agency like the U.S. Department of Education, 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.

SEE GUIDE,

- 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.

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 Justice Powell's opinion as a correct statement of the law under the Constitution and Title VI.

- Colleges and universities may justify the use of 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 and national origin in admissions to be lawful under a diversity rationale, an institution'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.

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 meet the objective of the race or national origin-based classification. If an institution supports its affirmative action program on remedial purposes or the attainment of diversity, the use of race or national origin must be narrowly tailored to achieve its purposes.

- 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.

SEE GUIDE,

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

- A school's use of race should be necessary and focused as narrowly as possible on the achievement of the school's compelling interest, for example, remedial or diversity objectives.

SEE GUIDE,

- 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).

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

- Set-asides or quotas should not be used unless such measures are absolutely essential to remedying discrimination and its effects. In addition, admissions programs that rely on separate tracks or separate decision-making procedures that prevent a comparison among applicants of different races and ethnic origins are also

SEE GUIDE,

particularly vulnerable to challenge.

- 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.

- Consideration of race or national origin as one factor among several other admissions criteria in some circumstances may be evidence of flexibility.

Duration and Periodic Review

- 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 changing circumstances.

SEE GUIDE,

- OCR considers annual reviews the best practice to satisfy this aspect of Title VI's narrow tailoring requirements.

Burden on Non-Beneficiaries

- Affirmative action necessarily 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.

SEE GUIDE,

> 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 a classification based on race or national origin will address this factor satisfactorily. It is not necessary to show that no student's opportunity to be admitted 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.

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 a part 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.

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 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, in his landmark opinion in *Bakke*, Justice Powell concluded 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 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, but no such interest has been recognized as compelling by the Supreme Court to date. Thus, there are substantial questions as to whether and in what settings such other non-remedial objectives can constitute a compelling interest.

1. 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

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.

discrimination could fall into two categories. First, an institution can seek to remedy the 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 thus helps to perpetuate a system of exclusion.[10]

> 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.[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. Rather, 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 might permit an inference of discrimination that would support the use of racial or ethnic criteria intended to correct those disparities. 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]

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.[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 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

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]

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 the time-honored value of academic freedom. Moreover, in the view of Justice Powell, the First Amendment protection of

> *The United States supports Justice Powell's opinion as a correct statement of the law under the Constitution and Title VI.*

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 been relied on by lower federal and state courts.[23] The United States supports Justice Powell's opinion 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 VII, 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 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.

> For example, in their *Amici Curiae* brief filed in the *Piscataway* case, a coalition of educational organizations, representing a substantial portion of the higher education community, presented to the Supreme Court 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. They stated: "Both kinds of evidence support the conclusion that diversity improves education and advances the goals of imparting knowledge where there was preconception, and fostering mutual regard where there was hostile stereotype."[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 that was narrowly tailored to this interest could 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.

c. Fifth Circuit Standards: Non-Remedial Interests

The United States believes that, as Justice Powell stated in *Bakke,* diversity may constitute a compelling interest justifying the consideration of race in higher education. However, in *Hopwood*, the U.S. Court of Appeals for the Fifth Circuit concluded that Justice Powell's view that diversity is a compelling interest did not represent a majority opinion of the Supreme Court in *Bakke* or in any subsequent decision of the Supreme Court. The *Hopwood* court held that an institution's interest in diversity to enrich the academic experience cannot satisfy strict scrutiny.[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 diversity, 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 did not take a position on Justice Scalia's suggestion. 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 diversity.

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 that less intrusive, efficacious 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) 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 by the program.

Before describing each of the components, two general points about the narrow tailoring test deserve mention. First, 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 should give serious consideration to 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.[32]

> 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. Justice Powell has suggested that in a remedial setting, it is not necessary to use the "least restrictive means" where they would not accomplish the desired ends as well,[33] 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."[34] Accordingly, 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 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 include preferences for other racial groups who 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.[35]

Courts have looked favorably upon plans in which numerical targets are waived if there are not enough qualified minority applicants.[36] In the context of government contracting, for example, Congress permitted officials to waive a national goal of ten percent participation by minority contractors if it was necessary given the unavailability of qualified minority contractors in a particular area, or if a grantee demonstrated that his or her best efforts would not succeed in achieving the target.[37] Waivers such as these ensure that a program is flexible, and are especially important if the program uses a relatively rigid measure such as a quota or set-aside.

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. Thus programs in which certain admissions positions or financial aid awards are open only to members of designated racial or ethnic groups are significantly less likely to satisfy the narrow tailoring requirement than programs that merely consider race or national origin as one of many factors and are open to all races and ethnic groups.

In this regard, two general principles are apparent with respect to admissions. First, set-asides or quotas should not be used in an admissions program unless such measures are absolutely essential to remedying discrimination and its effects. In addition, admissions programs that rely on separate tracks or separate decision-making procedures that prevent a comparison among applicants of different races and ethnic origins are also particularly vulnerable to challenge. Second, where an institution 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.[38]

Two types of racial classifications are especially vulnerable to a challenge on the ground that they are too rigid. First and foremost are affirmative action programs in which certain admissions positions or financial aid awards are open only to members of designated racial or ethnic groups.[39] A good example is the medical admissions program that the court invalidated in *Bakke*, which reserved sixteen percent of the positions in the entering class of the medical school for members of racial and ethnic minority groups.[40]

The second type of classification vulnerable to attack on flexibility grounds is 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. A scholarship program reserved for minorities may be distinguished from an admissions quota reserving a portion of seats in a class for minorities, 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. But a scholarship program open only to minorities is less flexible than a scholarship program in which race is one of many factors that determine eligibility for the award. Under both the admissions set-aside and the minority scholarship program, persons not within the designated categories are ineligible for certain benefits or positions. This is not the case in programs where race or national origin is deemed a plus in evaluating an applicant's file but does not insulate the applicant from comparison with all other candidates for the available benefit.[41]

For a detailed discussion of the standards that should be applied to minority 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 labor market or industry. 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 Richmond'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.[42] Therefore, institutions that use numerical goals and targets therefore 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.[43] Reexamination of affirmative action programs also allows an institution to fine tune its classification or discontinue it if warranted, 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

Affirmative action necessarily 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 "unsettle[s] . . . legitimate, firmly rooted expectation[s]" or imposes the "entire burden . . . on particular individuals" crosses that line.[44] 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

Properly designed and conducted affirmative action programs in institutions of higher education are permissible under the Constitution and Title VI. 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.

ENDNOTES

. 42 U.S.C. 2000d (1994).

. *See* 42 U.S.C. 2000d-4a(2)(A) (1994).

. 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.).

. Those regulations are located in 34 C.F.R. Part. 100 (1997).

. *Adarand*, 515 U.S. at 235.

. *Adarand*, 515 U.S. at 200.

. 438 U.S. 265 (1978).

. *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).

. 438 U.S. 265, 311-15 (1978) (opinion of Powell, J.).

. *See Croson*, 488 U.S. at 491-93 (plurality opinion); id. at 518-19 (Kennedy, J. concurring in part and concurring in the judgment).

. *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).

. *See Croson*, 488 U.S. at 499, 505.

. *See, e.g., Fordice*, 505 U.S. at 730 n.4.

. *See Wygant v. Jackson Board of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion).

. *See Croson*, 488 U.S. at 500.

. *Id.* at 501-02, 509.

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

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

. *Id.* at 954.

. *See id.* at 951.

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

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

23. *See Davis v. Halpern*, 768 F. Supp. 968, 975-76 (E.D.N.Y. 1991); *DeRonde v. Regents of the Univ. Of Calif.*, 28 Cal.3d 575, 625 (1981); *McDonald v. Hogness*, 92 Wash.2d 31 (1979). But see *Hopwood*, 78 F.3d at 942 (concluding that Justice Powell's opinion did not represent the views of the majority of the Court)(see *Fifth Circuit Standards: Non-remedial Interests*, below).

. *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).

. *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).

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

. 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.

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

. *Id.* at 944, 948.

. *Id.* at 944 (quoting *Croson*, 488 U.S. at 521 (Scalia, J., concurring in judgment)).

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

. *See Fullilove v. Klutznick*, 448 U.S. 448, 508 (Powell, J., concurring).

. *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).

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

. *See, e.g., United States v. Paradise*, 480 U.S. 149, 177-78 (1986).

. *See Croson*, 488 U.S. at 508 (discussing *Fullilove*, 448 U.S. at 488 (1980) (plurality opinion)).

. *See Bakke*, 438 U.S. 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.)

39. 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 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 Carolina, and South Carolina, should review *Podberesky*, as that decision will guide the evaluation of the remedial use of racial classifications in higher education in that circuit.

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

. *See Bakke*, 438 U.S. at 315-17; *see also Johnson*, 480 U.S. at 616 (upholding program that did not set aside any positions for women).

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

. *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).

. *See 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.

ADMISSIONS WORKSHEET

➥How do the school's programs work?

✓ CHECKPOINT(S) BASELINE INFORMATION

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?

   ➪GUIDE, PP.

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

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?

   ➪GUIDE, PP.

➡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 (%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 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

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?

⇨GUIDE, PP.

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?

➥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

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?

➩GUIDE, PP.

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

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?

➩GUIDE, PP.

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?

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"?[1] 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 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

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"Rased-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 scholarships policy.

remedy discrimination, see checkpoints 4-10, above. If it is intended to foster diversity to achieve an educational objective, see 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 checkpoints 14-20, above.

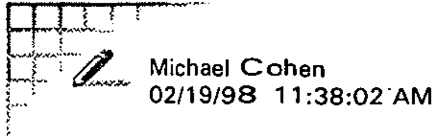
6. If race-based scholarships are awarded, how many does the institution award annually? How many students at the institution, by race and national origin, receive non-race-based financial aid, annually? What proportion of total financial aid at the institution (institutional, state, local, Federal, 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

7. 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 policy financial aid guidance?

8. 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?

~~edu~~ race - minority enrollment


Michael Cohen
02/19/98 11:38:02 AM

Record Type: Record

To: Peter Rundlet/WHO/EOP

cc: Sylvia M. Mathews/WHO/EOP, Elena Kagan/OPD/EOP, Bruce N. Reed/OPD/EOP
Subject: Higher Education and Race Initiative memo

I'm sorry I wasn't able to hook up with you last week before I went to California with Maria and Karen. I have a few updates and reactions to your memo.

1. Presidential meeting with higher education leaders. I will continue to provide some guidance and help to PIR on this. In addition, I will pull Bob Shireman from NEC into the discussions, since he has taken the lead in putting together the High Hopes initiative, including working to secure the support of college presidents and others in the higher education community. Scott Palmer and I met on this yesterday, and will be meeting with Bob today. If we are going to get something to happen in the near future on this, I believe we will need to continue to depend on Scott to play the leading role.

2. Release of Affirmative Action Self-Assessment. Bill Kincaid from my staff has been working closely with Dawn and with the Education Department to finalize this document. Depending upon the internal comments on this document, we believe the next step would be some briefings of key higher education and civil rights groups, prior to distribution. Though it is not entirely clear, your memo appears to contemplate a high-profile release of the Affirmative Action guide for insitutions of higher education. DPC feels strongly that the roll out should be low key.

I might add that the purpose of the document is both to provide comfort to those institutions that have affirmative action plans consistent with Bakke, and to cause those that don't to be less comfortable and to help them make the necessary changes.

3. Identification of Race-Neutral/Opportunty Gap "Pipeline" Solutions. At the request of the DPC, the Education Department is developing two reports. Scott Palmer has also been working very closely with us on this. The first deals with outreach and pipeline programs--most of the examples are those that are also being used in to support the High Hopes initiative. In keeping with our view that the President ought not be "admissions officer in chief", the report does not deal with admissions issues. The second report speaks to the value of diversity in higher education.

Both of these reports are in draft form; neither is as far along as we'd like, and we are continuing to work with ED to get them in shape. The release of the pipeline report in particular ought to be coordination with Sperling/Shireman in NEC and our continuing promotion of High Hopes.

Race-minority enrollment

To Dannykov
Eddie
Correia, Elena
FR: Smalkins
FYI

EYES ONLY

Mike –
FYI.
Elena

SPECIAL ANALYSIS

Affirmative Action and College Admissions

One criticism of affirmative action in higher education admissions is that the policy harms the intended beneficiaries economically by encouraging them to enter colleges where they are unprepared for the competition. A new study finds, to the contrary, that affirmative action in college admissions boosts college graduation rates and earnings of minority students.

The college admissions race. Blacks and Hispanics are about 2 percentage points more likely to be admitted to 4-year colleges than non-Hispanic whites and others with similar high school grades and activities, SAT scores, and family socioeconomic backgrounds. But this admission advantage rises to about 10 percentage points at more selective colleges. Being black or Hispanic is worth as much in the admissions process at elite colleges as having a high school grade point average (GPA) of roughly "A-" rather than "B," or having a (combined) SAT score of 1350 rather than 1000. Blacks and Hispanics have little or no advantage in admissions to less-elite colleges, where 80 percent of students are educated. But elite college admissions are of special interest because of the strong link between college selectivity and earnings.

Grades, graduation rates, and pay. To determine the economic effects on individuals of affirmative action in higher education admissions, one needs to know whether students admitted to elite colleges as a result of affirmative action in admissions would have fared better had they instead attended a less-elite college. Blacks and Hispanics have somewhat lower college GPAs than comparable non-Hispanic white students. However, the study found no differences in college graduation rates or later pay among comparable blacks, Hispanics, and non-Hispanic whites who attend comparable institutions. But graduation rates and earnings are higher for all students who attend elite institutions, regardless of race/ethnicity: Attending a college where the average SAT score is 100 points higher increases the chance that a student will graduate by at least 3 percentage points, and increases the student's subsequent earnings by about 5 to 6 percent. Thus, affirmative action in admissions to elite colleges allows more black and Hispanic students to enjoy the graduation and earnings advantages that elite colleges confer on all their students.

Class- or race-based affirmative action? The number of black and Hispanic students who enroll at an elite college as a result of affirmative action in admissions is small compared with the total number of white and Asian applicants who are denied admission. Thus, it is likely that such programs generate resentment far in excess of their actual aggregate effects, as many white or Asian students who would be denied admission to an elite college even in the absence of affirmative action will erroneously blame affirmative action. Still, those who really are denied admission due to affirmative action—though few in number—will bear some costs. Because the perceived costs of race-based affirmative action in admissions may stir racial animosity, some have suggested replacing race-based programs with class-based

EYES ONLY

programs that are perceived to be fairer. However, the study concludes that class-based programs are a poor substitute for race-based programs. At present, blacks and Hispanics are a small minority of the low-income population whose test scores and high school GPAs are high enough to gain admission to elite colleges. As a result, a change to income-based affirmative action would likely result in a dramatic reduction in minority enrollment at elite colleges.

Race - minority enrollment

Maria Echaveste 12/20/97 02:47:14 PM

Record Type: Record

To: Sylvia M. Mathews/WHO/EOP, Elena Kagan/OPD/EOP

cc: Marjorie Tarmey/WHO/EOP

Subject: Proposal for a California Minority Scholarship Fund

As I make an effort to clean my desk before leaving for the holidays, I owe you a response to this idea proposed by Ray Bourhis for law firms to raise funds for scholarships and outreach programs--i think it's a great idea. As for where we are on the Higher Ed outreach effort--we've received a packet of information from ACE (Eikenberry assigned Hector Garza in his office to work on this--he sent the packet as well to Edley)--I am in the process of reading their proposals andf will get back to you, after talking to Chris and Elena--on the to do list for our first week back.

Race - minority enrollment

12/10/97
Please copy for Maria Elena
Maria Elena lets talk about AA higher ed. where are we please email TI Sarah

TO: SYLVIA MATHEWS
JUDITH WINSTON

CC: CRAIG SMITH
MINYON MOORE

FROM: KAREN SKELTON

DATE: DECEMBER 9, 1997

SUBJECT: CALIFORNIA MINORITY SCHOLARSHIP FUND

Ray Bourhis, a loyal friend of the Administration's in California, has brought to my attention a very good idea which fits squarely within the Race Initiative. Craig Smith supports the idea as part of the Race Initiative, and Minyon suggested I contact you directly.

The proposal is for California law firms to raise funds for scholarships and outreach programs for minority students interested in attending public college. This program is a response to Proposition 209, which places many minority students at a disadvantage in attending public schools of higher education in California, as you know.

The proposal asks that the President, Vice President, or Mrs. Clinton headline a $1,000 per plate dinner in California aimed at leading law firms and corporate donors. This kind of fundraising--focused on building private / public partnerships for the public goal of restoring opportunities for minority students--would publicize an important aspect of race relations. It brings together all kinds of people to help minority students achieve success despite the hardships caused by abolishing affirmative action in California public education.

The Dean of Berkeley's School of Law, Herman Hill Kay, U.C. Chancellor Robert Berdahl, and Regent William Bagley all support this effort. They would organize the law firms willing to donate $1 per billable hour per lawyer to raise scholarship funds.

This idea is unique, simple, and pragmatic. It is also good policy and politics. I look forward to discussing this further at your earliest convenience.

Thank you.

MEMORANDUM

TO: **KAREN SKELTON** **FACSIMILE NO:** **(202) 456-7929**

FROM: **RAY BOURHIS**

DATE: **November 13, 1997**

RE: **Diversity and Outreach Scholarship Fund, Per our Conversation of November 13, 1997**

BACKGROUND

With the passage of Proposition 209 in California, minority applications and admissions to the University of California School of Law (Boalt Hall) and other U.C. law schools have plummeted. According to the Dean of Boalt Hall, Herma Hill Kay, a major problem is the lack of funding for scholarships and outreach programs. After discussing this problem with Dean Kay, U.C. Chancellor Robert Berdahl, Regent William Bagley, and others, I proposed that monies be raised from the legal profession itself. My proposed guideline would be based on contributions by leading law firms of one billable hour per lawyer. On this basis, a firm such as Pillsbury, Madison and Sutro, which has 500 lawyers (and gross revenues in excess of $230 million per year) would contribute approximately $125,000. If a program such as this were to catch on, tens of millions of dollars in scholarship money would be raised in California alone.

PROPOSAL

The President or Vice President would headline two or three (tax deductible) $1,000 per plate dinners in California aimed at leading law firm and corporate donors.

I believe that this idea is solid. Even supporters of Proposition 209 have come out in favor of this concept. Given the current controversy over political fundraising and the exploitation of the issue by some, this could afford an opportunity to demonstrate the importance of fundraising dinners for the advancement of important public purposes. It would also provide the Vice President with an opportunity to take a solid and highly visible position on an issue of great attention and importance in California.

In addition this proposal could form the basis for a national model. In truth, all professional schools need to develop outreach efforts aimed at both the College and High School levels. This program would use private money to fund such an effort, while demonstrating the Administration's strong commitment to embracing diversity in education and the professions.

Withdrawal/Redaction Marker
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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Phone No. (Partial) (1 page)	11/13/1997	P6/b(6)

COLLECTION:

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Domestic Policy Council
Elena Kagan
OA/Box Number: 14365

FOLDER TITLE:

Race - Minority Enrollment [1]

2009-1006-F
ke674

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 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]

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]
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]

If the President or Vice President agree to headline these dinners, that would assure the success of this concept and project.

I have spoken to Dean Kay, Professor Willie Feltcher and Martha Whetstone about this. The President is, of course, very familiar with these individuals. They are all supportive.

I can be reached at (415) 392-4660. My home number is P6/(b)(6) [001]
Thank you.

B O U R H I S & W O L F S O N

Insurance Law and Policyholder Representation

Of Counsel

Robert I. Manousol
Los Angeles

FAX COVER SHEET

DATE:	November 13, 1997
TO:	Karen Shelton
FAX NO:	(202) 456-7929
FIRM/COMPANY:	The White House
FROM:	Ray Bourhis
RE:	Diversity and Outreach Scholarship Fund, Per our Conversation of November 13, 1997
NO. OF PAGES: (INCLUDING COVER SHEET)	3

COMMENTS:

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Race-Minority Enrollment

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF THE SECRETARY

August 18, 1997

MEMORANDUM FOR THE PRESIDENT

FROM: LESLIE T. THORNTON
CHIEF OF STAFF
UNITED STATES DEPARTMENT OF EDUCATION

SUBJECT: MINORITY APPLICATIONS AND ENROLLMENT:
Lessons From California and Texas

I. INTRODUCTION AND BACKGROUND

In July 1995, the California Board of Regents adopted SP-1, a policy prohibiting the use of race, religion, sex, color, ethnicity or national origin as criteria for admissions.[1] In response, officials in California's public colleges and universities have struggled to devise admissions policies and plans that would comply with the Regents' directive *and* produce a racially and ethnically diverse student population.[2]

Similarly, in response to the Fifth Circuit's March 1996 decision in Hopwood v. Texas[3], the Texas system of higher education has also tried to develop guidelines, consistent with Texas Attorney General Dan Morales' formal opinion on the law, to achieve diverse student populations. In addition, this past summer, Governor Bush signed into law a bill requiring automatic admission to Texas' public colleges and universities of all students who graduate in

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[1]Prop. 209, which would expand this ban on race- and gender-based affirmative action to all government activities in the state, is stalled in California courts.

[2]As you know, the fall 1997 classes at UC law schools will have few if any blacks and dramatically fewer Hispanics than last year. Of the nearly 200 blacks who applied to the University of California-San Diego's medical school for the fall semester, ***none of them got in.*** Of the 143 Hispanic students who applied, four were accepted. While some of the numbers at UCLA and the Davis campus are moderately higher, fewer minority students were accepted at UC San Francisco and UC Irvine (one black student of the 171 who applied was accepted compared to four last year), the other two UC system medical schools.

[3]The Fifth Circuit held in sweeping terms that the University of Texas School of Law may not use race as a factor in admissions and dismissed out of hand the use of race to achieve diversity in an academic setting as well as all arguments that the use of race-conscious admissions was necessary to address the present effects of past discrimination. The Supreme Court in July 1996 let stand the ruling. In January 1997, an advisory committee established to study criteria for diversity issues issued its recommendations to the Texas Higher Education Coordinating Board. These guidelines will be in effect for the 1998-99 law school class.

the top ten percent of their high school class (discussed in detail beginning on page 14).

This memorandum summarizes and provides an analysis of available admissions procedures and other efforts in California and Texas public colleges and universities to meet the challenges presented by current mandates. It includes a summary and critique of admissions policies at the UCLA School of Law, Boalt Hall, the undergraduate schools in the UC system, and Texas' higher education system as well as outreach efforts in both states. This memorandum also looks at Texas' ten percent law and speculates on the effectiveness of such a law in other states, including New York and Illinois. Finally, this memorandum makes observations about described policies and plans and offers recommendations both for presidential consideration and for possible presidential action.

II. THE UNIVERSITY OF CALIFORNIA SYSTEM

A. The UCLA School of Law Admissions Report

In the wake of SP-1, the Dean of UCLA's law school formed the "Task Force on Admissions" and charged it to recommend an admissions policy for the school. On April 11, 1996, the Task Force reported to its faculty two admissions proposals and later agreed to adopt Proposal No. 2. Later still however, the faculty agreed to defer for one year permanent implementation of Proposal No. 2 and to use for the class beginning law school in the fall of 1997 a discretionary admissions system using a substantive standard recommended by the Admissions Task Force. The approved substantive standard was to: (I) maximize the diversity of the entering class; (ii) ensure the admission of a substantial majority of those students who would currently qualify for admission under the 60% admission program[4], and (iii) strictly minimize reduction in either the student body's average or median predictive index or both, and any increase in the number of students who can be expected to require academic support.

The "discretionary system" we believe may have been used to select the class entering in the fall of 1997 provided, in relevant part, that the criteria called "Academic Promise and Achievement" would be determined primarily by undergraduate grades, LSAT scores (both of which would continue to be weighted and combined into a "predictive index"), and other scholarly achievements such as graduate study, awards or publications. When assessing these factors, the admissions panel could consider the applicant's entire file including, without

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[4]Under UCLA Law School's 60%/40% admission program, all applicants are evaluated by an index number comprising GPA and LSAT scores. Sixty percent of the entering class is admitted primarily on their index alone. The other forty percent are admitted based on a secondary evaluation using diversity criteria, in addition to index numbers. The Dean of Admissions alone decides who is admitted under the sixty percent category while, under the forty percent category, student representatives from student organizations provide advice and input to the Dean of Admissions and Chair of the Faculty Admissions Committee.

limitation, letters of recommendation, difficulty of course study, and economic, physical or other challenges overcome. Under the heading "Diversity Attributes," the law school could continue to consider many of the attributes mentioned in the Admissions Task Force Report of 1978 and subsequent amendments. Such attributes include socioeconomic background, work experience or career achievement, community or public service, career goals, with particular attention paid to the likelihood of the applicant representing under represented communities, significant hardships overcome, potential for leadership, language ability, unusual life experiences, and any other factors that indicate the applicant may significantly diversify the student body or make a distinctive contribution to the law school or legal profession.

1. UCLA Law School Admissions Task Force Proposal 2

We believe UCLA Law School admissions officials are currently following the approach outlined in the Task Force Proposal No. 2 (for fall 1998 class) but a brief comparison of Proposals No. 1 and 2 may be useful.

Both proposals recommended by the Task Force contemplate that admissions decisions will be heavily influenced by two indices, the predictive index currently used (which combines LSAT and GPA) and a socioeconomic index, which is a presumptive measure of an applicants' socio-economic disadvantage. Proposal No. 1 would use these indices to make most admissions decisions. Proposal No. 2 combines these indices into a single index, and most admissions decisions would be based on this combined index. Under both proposals, the current admissions application would be expanded to request the following socio-economic information from applicants in addition to the information currently requested: (1) principal high school, with address and zip code; (2) principal residential address and zip code while in high school; (3) parental income; (4) father's educational level; (5) mother's educational level; (6) parental assets; (7) elementary school neighborhood and elementary school residence neighborhood. While supplying this information would be optional, any information not provided would be assumed not to reflect socioeconomic disadvantage. Applicants would also be asked under both proposals to provide more information related to diversity attributes other than socio-economic status. The exact questions to be included had not yet been drafted by the Task Force when its report was issued last year and we have no further information.

The Task Force's Proposal No. 2 requires the Admissions Committee to decide on a formula for combining the predictive index and the socio-economic index into a combined index. Most admissions decisions would be based on the combined index. The Task Force anticipated that there would likely be slightly less variation in the academic and diversity profile of each class under this proposal. Despite its heavily objective character, the combined index system would include a subjective evaluation of each applicant's entire file. This evaluation would influence admissions decisions in three ways, two of which are relevant here: (1) up to 10% of each entering class could be composed of "special admits" -- students admitted in the discretion of an admissions subcommittee composed of the Dean of Admission, the Chair of the

Admissions Committee, and a student member of the Admissions Committee. The subcommittee would select these candidates based on factors not adequately captured by the applicants' CPI; and (2) the subcommittee would examine the files of students in the bottom 10% of the admitted class, ranked according to the combined index and an equal number of files just below the combined index "cutoff." The subcommittee could in its discretion alter the ranking of any applicants within this "cut-off" based on the applicants' relative academic promise and socioeconomic disadvantage as well as other non-racial attributes traditionally considered in admissions decisions, including leadership, work experience, writing ability, bilingual ability, hardships overcome, commitment to serve under served communities and any other diversity attributes mentioned in the 1978 report, with the exception of race, ethnicity and national origin.

Like other proposals considered by the Task Force, Proposal No. 2 replaces race as an admissions criterion with measures of socio-economic disadvantage. The Task Force apparently believes this is the best way of retaining some degree of diversity without damaging the academic excellence of the student body. Setting aside 10% of the admitted class for students admitted on the basis of a subjective evaluation of the entire file avoids a common objection to an entirely numerical approach to admissions. Additional flexibility is provided in the discretion granted to the Admissions Committee to alter the ranking of students with the "cut-off band" based on non-racial factors traditionally considered in admissions decisions. The Task Force also believes this approach will reduce the stigma attached to the current admissions system which appears to suggest to some the school has two types of students -- diversity students and non-diversity students.

2. Student Proposal

A student proposal submitted and endorsed by La Raza, APILSA (Asian-Pacific Islander Law Student Association), BLSA, and the Board of the Women's Law Journal was also presented to the UCLA Law School Faculty. Like the two Task Force proposals, the student proposal recommended the school eliminate the 60/40 admissions in favor of a system where all applicants are admitted based on both academic achievement and diversity factors. The students argue that such a unitary system would eliminate the assumptions created by a bifurcated system -- that some students rightfully earned their admission and others did not.

The student proposal recommended a composition of index numbers that incorporates weighted diversity criteria in addition to GPA and LSAT resulting in the formula GPA + LSAT + Diversity assessment = Index number. The student proposal adopted the socioeconomic criteria used in Proposal No. 2 to comprise their diversity assessment in their index number. The proposal would build on the criteria to include a one point preference each for a rural zip code and inner city zip code. It would also expand on the elementary school data.

The student proposal would establish a two-stage review process. The first or primary review would evaluate applicants based on the new index number. Those students with the

highest index numbers would automatically receive an offer of admission. A minimum threshold would be established for those whose index numbers are not high enough to merit automatic admission, under which admission would be denied. The second stage would comprise evaluation of remaining applicants who were neither automatically admitted nor rejected in the first review under a discretionary review based on factors including overcoming adversity and discrimination, community service, work experience, and career goals.

The student proposal would also require the adoption of a public service requirement for graduation and the establishment of a public interest track in admissions. These proposals were made by the Task Force in its "interim" report. The students also supported the hiring of professors prepared to address a multi-cultural pedagogical approach.

B. Boalt Hall

Boalt Hall Law School's admissions procedures, adopted April 22, 1996, group applicants according to the strength of their LSAT and undergraduate grade point average combined in an index number derived from a formula that weighs approximately equally the applicant's LSAT score and GPA. The GPA is adjusted for the age of the degree and the school attended. The adjustment for school attended, which takes into account both the quality of the student body and the grading patterns at the school, is determined by the rank number of the school attended. A school's rank number is the average of the following two percentiles: the average LSAT percentile for all test-takers from the school and the percentile ranking within the test-takers from the school of a student who has a GPA of 3.6. Boalt adopted this procedure for adjusting undergraduate GPA's to eliminate the subjectivity required of a reader in determining the relative strength of an identical GPA from two different institutions.

Though admissions are based primarily on applicants' high LSAT scores and undergraduate grade point average, the Director of Admissions also considers non-numerical criteria in evaluating each applicant. Still, Boalt's primary reliance on the numerical indicators is not only a subject of the UC complaint currently being investigated by the Department of Education's Office for Civil Rights, but the primary criticism of ***New Directions In Diversity: Charting Law School Admissions Policy In A Post-Affirmative Action Era,*** an extremely comprehensive independent legal and pedagogical study written by eight current and one student in the School of Education. This report was released publicly May 9, 1997.

According to this 100-plus page report, the Boalt faculty rejected proposals for alternative admissions policies including consideration of applicants' individual experience of racism and their ability to over come such racial disadvantage and a plan to "admit a range of students whose backgrounds and experience indicated the student body as a whole has an understanding of and commitment to the various needs of all members of society." The Boalt Hall nine argues the school has earnestly sought to comply with SP-1 and Proposition 209, but has not adopted creative ways to maintain broad diversity at Boalt. Advocates argue this is primarily a result of

the school's fear of angering the governor and the governor-appointed regents who control the dollars the state school receives but this argument does not explain why UCLA's Law School -- also subject to state funding -- appears to have gone further to put in their admissions policy characteristics to help improve the racial and ethnic composition of their student bodies.

According to the *New Directions* report, Boalt's primary strategy for seeking diversity while complying with SP-1 has been to place less weight on applicant's LSAT score and undergraduate GPA and invest admissions decision-makers with greater discretion to consider other indices of achievement and intellectual promise. However, this strategy does not include the adoption of clear criteria against which to measure criteria such as socioeconomic status and individual achievement in overcoming disadvantage. Rather, Boalt has adopted a general policy which requires that Boalt seek "a student body with a broad set of interests, backgrounds, life experiences, and perspectives." The policy invests the Director of Admissions and the Admissions Committee with broad discretion in selecting students based on this policy but articulates no goals or mechanism for achieving it.

The *New Directions* report recommends a four step plan to correct the problems attendant with Boalt's current plan: (1) create a character index, a numerical index to measure an applicant's experience of socioeconomic disadvantage, which would be weighted equally with academic factors. Similar to several of the UCLA law school's proposals, the character index would include variables to measure an applicant's individual attributes such as family wealth and parental education as well as neighborhood factors like poverty rates and the educational attainment of an applicant's high school peers; (2) integrate alumni interviews into the admissions process which could capture personal attributes like speaking skills that an exam score or essay cannot; (3) conduct greater outreach to underrepresented communities with tools like the existing Street Law Project which uses mock trials and other participatory projects to expose students to the law who might not otherwise consider careers as lawyers. The report also recommends Boalt Hall fully participate in the efforts of the UC Outreach Task Force planned by the Regents to actively seek out disadvantaged students with academic promise; and (4) eliminate hidden preferences by including race as a measure of experiential diversity.

C. UC Policy On Undergraduate Admissions Post SP-1

Effective for applicants seeking admission for the spring quarter of the 1997-1998 academic year, revised guidelines and procedures were adopted to implement the University of California Policy on Undergraduate Admissions and SP-1. The selection guidelines apply to those students eligible for admission. Up to 6 percent of newly enrolled freshman and 6 percent of newly enrolled advanced standing students can be admitted by exception, as authorized by the Regents.

The eligibility requirements are established by the University in conformance to the specifications outlined in the California Master Plan for Higher Education, which recommends

that the top one-eighth of the State's public high school graduates, as well as those community college transfer students who have successfully completed specified college work, to be eligible for admission to the University of California. The guidelines provide the framework within which campuses must establish specific criteria and procedures for the selection of undergraduate applicants to be admitted when the number of eligible applicants exceeds the places available. Campuses receiving applications in excess of the number required to achieve their enrollment target for a specific term must select students for admission as follows: at least 50 percent but not more than 75 percent of freshman admitted by each campus shall be selected on the basis of nine criteria. The remaining percentage, exclusive of applicants admitted through admission by exception, are selected on the nine criteria plus four more. All campuses are encouraged to base their admissions decisions on a broad variety of factors rather than a restricted number of criteria.

Criteria 1 through 9 -- to select 50 percent to 75 percent of the admitted class -- are designed to asses applicants academic achievement and promise: (1) GPA with 4.0 as maximum; (2) scores on the SAT or ACT and the College Board Scholastic Ass Test II; (3) number, content of and performance in courses completed in academic subjects beyond the minimum specified by the University's eligibility requirements; (4) number of and performance in University approved honors classes, College Board Advanced Placement courses, International Baccalaureate courses, and transferable college courses completed but caution should be exercised not to over-weight these courses; (5) quality of the senior year program; (6) quality of academic performance relative to the educational opportunities available in the applicant's secondary school; (7) outstanding performance in one or more specific academic subjects areas; (8) outstanding work in one or more special projects in any academic field of study; and (9) recent, marked improvement in academic performance as demonstrated by academic grade point average and quality of course work completed in progress, with particular attention being given to the last two years of high school.

The criteria used to select the remaining 50 percent to 25 percent of the admitted class are designed to further assess an applicant's academic promise as well as the potential to contribute to the educational environment and intellectual vitality of the campus. These criteria combined with criteria 1 through 9, **"are devised to meet the goals of excellence and diversity outlined in the 1988 undergraduate admissions policy and in SP-1."** Criteria 10 provides for the consideration of "special talents, achievements, and awards in the particular field such as in the visual and performing arts, in communication, or in athletic endeavors; special skills, such as demonstrated written and oral proficiency in other languages; special interests such as intensive study and exploration of other cultures; or experiences that demonstrate unusual promise for leadership such as significant community service or significant participation in student government; or other significant experiences or achievements that demonstrate the applicant's promise for contributing to the intellectual vitality of a campus." Criteria 11 provides for consideration of "completion of special projects undertaken either in the context of the high school curriculum or in conjunction with special school events, projects or programs co-sponsored by the school, community organizations, postsecondary educational institutions, other

agencies, private firms, that offer significant evidence of an applicant's special efforts and determination or that may indicate special suitability to an academic program on a specific campus." Criteria 12 provides for consideration of "academic accomplishment in light of the applicant's life experiences and special circumstances. These experiences and circumstances may include, but are not limited to, disabilities, low family income, first generation to attend college, need to work, disadvantaged social or educational environment, difficult personal and family situations or circumstances, refugee status, or veteran status." Criteria 13 comprises "location of the applicant's's secondary school and residence. These factors shall be considered order to provide for geographic diversity in the student population and also to account for the wide variety of educational environments existing in California."

The University of California's "Policy On Undergraduate Admissions By Exception" appears to be a further attempt to achieve diversity on its campuses without running afoul of the Regents' mandate. It provides for the admission of up to 6 percent of newly enrolled freshman and up to 6 percent of newly enrolled advanced standing students on each campus. Within the 6 percent designation, up to 4 percent may be drawn from disadvantaged students and up to 2 percent from other students. Disadvantaged students shall be defined as students from low socio-economic backgrounds or students having experienced limited educational opportunities. In evaluating the academic and personal background of candidates for admission by exception, the policy recommends campuses use a combination of the criteria 1 through 13, issued July 1996. Students admitted by exception to the eligibility requirements "must demonstrate a reasonable potential for success at the University." The Admissions by Exception program continues to test alternative methods of selecting students for admission.[5]

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[5]UC's nine campuses are actively looking for other ways to compose student bodies that reflect the state's growing diversity. Each of UC's nine campuses are experimenting with different admissions policies in an effort to achieve diversity. Each will examine a variety of personal circumstances and accomplishments in addition to grades and scores. For example, UC-Davis will offer 60 percent of the 3,700 places in its 1998 freshman class to applicants with the highest grades and tests scores. But in filling the remaining 40 percent, the admissions office will give weight to other factors including extracurricular leadership experience; attendance at a high school that is economically disadvantaged and has a historically low level of UC attendance; residence in the three counties closest to the university; military service; and marked academic improvement in the 11th grade. Still, the new policy calls for consideration only of students who meet UC minimum eligibility requirements; a combined 1,000 on the SAT and a high school grade-point average of 2.82 in designated college preparatory courses. UCLA will give an advantage to applicants from disadvantaged urban and rural neighborhoods. UC Irvine will look at an applicant's entire profile, not just grades and scores, including personal essays and extracurricular activities. UC San Diego will look at "special circumstances and personal challenges" which could include whether an applicant is trying to become the first in his or her family to attend college.

D. Outreach

In both California and Texas, the education, advocacy and political communities all have recognized that the prohibition on the use of race, ethnicity, and national origin as factors in college admissions decisions created a need to focus more heavily on outreach in order to achieve desired diversity. In California, the Regents established the Outreach Task Force in February 1996 to identify ways in which outreach -- "programs to help make prospective students aware of, and prepared for, the educational opportunities of the university" -- could be used to help assure the system remained accessible to students of diverse backgrounds. The Regents' charge to the Task Force was to develop proposals for new directions and increased funding for the Regents to increase "the eligibility rates of those [who are] disadvantage[d] economically or in terms of their social environment." In May 1997, the Task Force issued its four-part plan and released it for public comment, using the Internet as a tool for dissemination. Texas education officials also have developed outreach proposals.

1. UC Outreach Task Force Report

The UC Outreach Task Force Report recommends a four-part plan: (1) school-centered partnerships; (2) academic development; (3) informational outreach; and (4) UC research expertise. ***School-Centered Partnerships*** would comprise the establishment of partnerships with a limited number of school systems in cooperation with local colleges and universities (especially community colleges and California State University) in regions served by UC campuses with the aim of achieving major improvements in student learning outcomes in these partner schools. The partnerships would seek to effect broad scale changes in school culture and practice such that the college preparation and college-going rates of students attending these partner schools improve substantially. An important part of the strategy would involve organizing a consortium of all major educational institutions in a region to invest in school changes at a limited number of sites. ***Academic Development*** would comprise expanding successful current academic development programs to increase the number of students in disadvantaged circumstances who are competitively eligible to attend the University. ***Informational Outreach*** would require aggressive identification and education of families early and throughout the academic process to involve them more deeply in their children's planning and preparation for college and to encourage family support for school improvement. This process would be linked with intensive recruitment of students in disadvantaged circumstances for enrollment at UC, keeping in mind the role of families as key participants and decision makers in the educational process. Finally, ***University of California Research Expertise*** would bring the University's research expertise to bear in a more coordinated way to understand better the root causes of educational disparity within California's educational "pipeline" from K-12 through undergraduate and graduate instruction and to evaluate and assess outreach efforts and monitor and improve program effectiveness.

2. UC Outreach Task Force Minority Report

Certainly, the UC Task Force Outreach Report provides some helpful measures to enhance the system's outreach efforts. Indeed, several of them -- outreach to community colleges and focus on family and community involvement -- embody some of your own initiatives and can probably be supported by the administration. However, critics of the report quite rightly fear that the long-term nature of some of the measures provides no mechanism to address the significant erosion of the racial diversity of UC's undergraduate and graduate student populations *now*. A report issued by a minority group of the Task Force charges that even drafters of the Task Force Report admit their plan will not begin to bear fruit for at least five years.

A *Draft Minority Report Of The University of California Outreach Task Force* was issued for presentation to the Regents July 1997 meeting along with the Task Force Report. While the Minority Report approves of the Task Force's recommendations for school-centered partnerships, enhancements and expansion of academic development programs, and informational outreach, it proposes a plan that focuses on measures they believe will provide short-term results and addresses operational and financial concerns. It includes a recommendation that the Task Force reconvene and consider six specific recommendations of the Minority report including that the Task Force give more consideration to the causes of lower SAT performance among minorities, perception by minority students that UC no longer cares about them, the actual cost of the plan's implementation and the limitations that SP-1 and Prop 209 realistically pose on maintaining diversity at UC.

In addition to the recommendations to the Task Force's report, the Minority Report proposes the following specific plan: (1) call for a new convention of higher education leaders and policy makers to engage in the drafting of a new century plan for K-16 education in California; (2) target minority and poor populations along with the disadvantaged (as defined in the Outreach Task Force Report); (3) recommend stronger accountability, assessment and evaluation of the K-12 system in examining, addressing and remedying the disparities and the preparation of minority students; (4) elaborate on the long range impacts of SP-1 on California economic growth and competitiveness in an increasingly diverse and global market, UC competitiveness and the minority "brain-drain" by private institutions and the loss of funding for UC from California industries committed to a building strong and diverse population; (5) prepare a presentation on available to various constituencies throughout the State of California, including but not limited to parent teacher organizations and children in public schools themselves, involving those most connected with the perception that underrepresented minorities are not wanted at UC; (6) research, plan, and propose intervention with public school students beginning in the third grade. This proposal is based on the Minority group's conclusion that a gateway to eligibility at UC from high school is the ability to take and handle well Algebra in the 9th grade; and (7) take a more systematic approach to harnessing all the available research, teaching and service resources on behalf of public education. While the Minority Report recognizes there are

some problems associated with charter schools, it sees the California Charter School movement as an opportunity for the University to take the lead in systematic K-12 reform.

3. Boalt Hall Nine Report on Outreach

One of the Boalt students' criticisms of the current admissions policy at Boalt Hall is that is fails to focus sufficiently on an outreach plan. At the time the students issued its report on Boalt's admissions policy, the UC Task Force Outreach Report had not been released. However, in anticipation of its release and broad framework, Boalt's nine graduate students recommended that Boalt Hall participate fully in the efforts outlined by the report forming a Bay Area educational consortium in which it and other UC Berkeley programs join together with secondary schools, community based organizations, local businesses, and local political leaders. The group would come together to devise a comprehensive plan for increasing the quality of education provided at Bay Area secondary schools and for giving disadvantaged students the informational resources and support needed to succeed in higher education.

E. State Senate Select Committee On Higher Education Admissions Outreach

On July 31, 1997, California State Senator Teresa P. Hughes wrote to the Department's Office for Civil Rights requesting information "regarding university admissions." The letter also informed the Department that a Senate Select Committee on Higher Education Admissions and Outreach has been established as a direct result of "the recent declines in statewide representation of students for fall enrollment at the university of California." The letter provides that the purpose of the Committee will be to conduct research, hold hearings, assemble the opinions of experts from throughout the state, and develop policy that will restructure admissions and outreach in an effort to provide more equitable enrollment into the university.

F. Models That Work Identified By OCR Through the Spring/Summer Initiatives

The Department's Office for Civil Rights has begun to review and identify models that work or other successful affirmative action programs at colleges and universities nation-wide. The office fully expects to have information on this in a format ready to share by mid-October and presented at ACE's national conference on diversity in higher education.

III. TEXAS

A. Texas Higher Education Coordinating Board,
Advisory Committee on Criteria for Diversity

In May of 1996, in response to the 5th Circuit's decision in Hopwood, Commissioner Ashworth formed a committee to analyze what other criteria might be used, in lieu of the prohibited criteria of race/ethnicity, to reach minority students. He charged the group with

developing guidelines which could be used by colleges and universities and the Coordinating Board in admissions, financial aid, and other activities programs and processes on campuses for the purpose of achieving student body diversity. The group, the **Texas Higher Education Coordinating Board, Advisory Committee on Criteria for Diversity**, presented its progress report in October of 1996. In January of 1997, the committee presented a more substantive report that identified the probable barriers to guaranteeing access and opportunity to higher education for minority students. The committee identified a list of socioeconomic criteria that could be used as an alternative to race and ethnicity in admission, financial aid, etc., and analyzed each of the criterion's impact, i.e., the level of effectiveness in reaching a significant proportion of the minority pool. After analyzing the individual criterion, the committee analyzed what combinations of criteria would produce the result of identifying the largest underserved populations in Texas and concludes in its report a summary of the committee's recommendations.

The recommendations address four major areas: (1) recommendations for the Coordinating Board (mostly - general recommendations regarding adoption of criteria and subsequent actions needed); (2) recommendations for legislative actions (sharing of statewide data, laws formalizing the race-neutral criteria); (3) recommendations for institutions (adopting the criteria, expanding cultural diversity of curriculum and materials, fostering nurturing "welcoming environment", etc.); (4) recommendations for colleges and K-12 Public Schools (access to college prep, elimination of discriminatory tracking, etc.). Importantly, the committee concludes that it is wrong to focus only on admissions and went on to define "access" as "access to receiving degrees." The Committee also argues that retention and graduation must receive as much focus and attention as matriculation.

B. Examination/Criticism of Texas' Race-Neutral Initiatives

A post-report article written by Jorge Chapa (Associate Dean and Director, Graduate Outreach Program, University of Texas at Austin) and Vincent Lazaro (General Counsel, Hispanic Association of Colleges and Universities) entitled ***Hopwood and Beyond: Legal Developments, Legislative Initiatives, and Changing Institutional Affirmative Action Policies in Texas*** examines race neutral initiatives generally and the committee's report specifically. Notably, Chapa and Lazaro argue that after analyzing an extensive list of possible admissions criteria that could compensate for relatively low test scores,[6] the committee basically concluded **no socioeconomic factor serves as an effective substitute for race.** Still, the authors acknowledge that if properly implemented some measures, such as revising programs for graduate student funding and a commitment to eliminating other aspects that may act as barriers to minority success, could make a difference. The authors recommend, among other things, that: at the undergraduate level, the state of Texas set up its **own** system of scholarships that would be portable to any Texas college or university system. This would be similar to the Illinois program that gives such an award to the top ten students from each high school. The authors argue such a

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system would serve to minimize the financial obstacles to higher education faced by many minority students and create an incentive for Texas' best students to finish their education in Texas. At the graduate level, the authors suggest simply to increase the allocation for all fellowships.

Chapa and Lazaro agree with several of the committee recommendations including the call for a "massive overhaul and improvement of elementary and secondary public education in Texas." This suggestion recognizes that "[m]any of the obstacles to diversity in Texas institutions of higher education begin with differential quality and effectiveness of elementary and secondary education in Texas. The authors also agree with what appears to them a strong Committee consensus to minimize the use of standardized tests in admissions decisions generally, and for eliminating standardized test scores as a sole screening factor in particular.

C. Texas' Ten Percent Law: Criticisms and Comparisons

In May of 1997, Texas passed House Bill TX75RHB 588, a comprehensive uniform admission and reporting procedure for the State of Texas. The bill attempts to address the concerns which surfaced after the Hopwood decision and, to that end, provides automatic admission of all students who graduate among the top 10% of their class, and additional automatic admission of students who graduate among the top 25% of their class under specific circumstances outlined in the bill. The bill also provides a list of 18 socioeconomic factors which may be used in admissions decisions, though use of these factors is deemed optional. Some of these factors include whether the applicant has bilingual proficiency, the performance level of the applicant's school as determined by the school accountability criteria used by the Texas Education Agency, the applicant's responsibilities while attending high school; and the catch-all "any other consideration the institution considers necessary to accomplish the institution's stated mission."

1. Criticism of Ten Percent Law

Because a significant portion of the 170,000 students who will graduate from Texas high schools this year will come from schools that are either majority-black or majority-Hispanic, a ten percent law there will virtually guarantee admission slots to many minority students. The most obvious and often-expressed criticism of the ten percent law in Texas, by university officials, is that some students who are in the top 10 percent of their high-school classes will not be prepared to do work in highly competitive campuses because of differences in the quality of education in the state's wealthy and poor districts. Bruce Walker, UT's director of admissions, says the state discontinued a top ten percent rule about five years ago because it guaranteed admission to students who were not academically prepared. Walker is concerned that a law limiting admissions criteria to one academic standard "is going in the opposite direction." At his school, admissions officials are using a broader range of admissions factors including student essays and evidence of leadership skills, two of the 18 optional criteria permitted by the new

Texas law. Walker also said the law might increase minority applications but it won't increase minority enrollment unless the legislature adds at least $25 million annually for student aid for those 16,000 or so applicants who would comprise the top ten percent of Texas' high school students. Walker says if the students can't afford it, they just won't come. Other colleges officials say they do not see how the bill ensures that minority students will be able to afford to attend the universities. In addition, because of Texas' ban on race-based aid, officials say universities will need as much as $60 million in new funds to accommodate minority students who qualify for admission under the new criteria but cannot afford to attend.

There are other practical considerations. Still unanswered are questions like will applicants still need to write essays and if not, how will universities be sure that applicants have adequate writing skills? What would happen if even half of the estimated 16,000 to 18,000 students in the top ten percent of their high school classes wanted to attend the University of Texas' flagship campus at Austin, which enrolls only about 6,000 undergraduate students a year?

In a July 26, 1997 *National Journal* article Rochelle Stanfield also argues that many minority students accepted under a ten percent plan will require substantial remedial programs and other supports to survive in the competitive atmosphere of the very selective public universities. According to Stanfield, civil rights advocates say absent these supports, and better preparation for college, minority students will be afraid to apply.[7]

2. How a Ten Percent Law Might Compare Elsewhere

Clearly, a top ten percent law like Texas' could achieve the result of added diversity in states like Texas where most of the high schools are racially and ethnically rich. In states where high schools have substantially different demographic make-ups, such a plan would likely not produce these results.

John Sexton, Dean of the New York University School of Law and a strong supporter of you and your policies, cautions there are significant variables that would undermine a ten percent rules as a national measure. First, Sexton, warns, a ten percent plan can only apply to state law schools but in states like New York, there may only be one or two schools that are not private. Second, in New York City, where most high schools do not contain large percentages of any minorities, a ten percent rule would not create a larger pool of minorities eligible for college admission. Most suburban schools contain even fewer numbers of minorities.

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[7]On the other hand, the University of Houston does not anticipate any difficulties with the new bill and already has in place its own top-ten percent admission criteria and the law school at UCLA appears to be using a similar plan. In addition, Sonia Hernandez, Chief Advisor to the State Superintendent for Public Instruction in California, and an active member of the UC Task Force Minority Outreach Report, believes a ten-percent law in California could achieve good results.

Dean Sexton is also concerned that a ten percent rule anywhere has the same problems a general reliance on LSAT and GPA does -- it reduces the admissions process to a search for a number. It also does little, he says, for the concern that such measures create an identifiable group of students known as "diversity" students and all the attendant stigmas attached to such groupings. Sexton calls Texas' ten percent law "shortsighted social policy that underestimates the intelligence of the poor."

Stan Ikenberry, president of ACE, shares Dean Sexton's views. Ikenberry's "unstudied opinion" is that a ten percent law is probably an expedient but not very thoughtful response to a very vexing problem because it is too much formula-driven. He is also concerned that admissions policies need more flexibility introduced into them, not less. Ikenberry says that in Chicago, where the public schools are predominantly minority, a top ten percent law would yield a significant number of minority students to the University of Illinois. But in other parts of the state -- particularly "down state" -- such a law would miss a number of qualified minority students. Ikenberry also says that because only 20-25% of colleges and universities across the country really exercise a selective admissions policy, a national ten percent rule would not apply to the 20% of students who go attend private colleges and universities or the 40% to 50% who attend community colleges. Thus, Ikenberry says, a ten percent law is not a good solution from a national or a higher education perspective because it would not apply to a broad enough group and so probably won't get you large enough numbers.

Barry Munitz, Chancellor of the California State University system, agrees. Munitz says a ten percent law is in "no way an exclusively satisfactory solution because it begs the question of preparation and begs the question of whether any numerical number is a satisfactory measure of potential. Still, some form of a ten percent measure has been floating around California. According to Munitz, the CSU board has not adopted the UC equivalent of SP-1 because the system has always worried about "value-added and never believed that just scores and numbers were good indicators. Munitz says CSU will continue to use their "complex set of awarenesses" until and unless the Supreme Court says Prop. 209 overrules Bakke. Finally, even Terry Pell, one of the lawyers who brought Hopwood, says the ten percent law merely substitutes one arbitrary admissions philosophy for another.

IV. OBSERVATIONS AND RECOMMENDATIONS

It is too soon to tell whether either Texas' new guidelines for admissions or it's ten percent law will work to reverse the trend of this fall's incoming law and medical school classes. Moreover, both UCLA and Berkeley law school's new admissions policies -- the only schools for which we have detailed information -- are currently being investigated by the Department's Office for Civil rights on, among other things, a theory of disparate impact. And, we already know that many of the very good ideas outlined in the UC Task Force Outreach Report, Minority Report, and students reports may take up to five years to bear fruit. Still, important lessons can be learned from all of these efforts.

First, the issue of minority application and enrollment declines has clearly brought to the forefront national recognition of some critical issues and has provided an opportunity for you to demonstrate significant leadership not only on the issue of enrollment declines in Texas and California, but on how we should look at higher education as a whole in our increasingly diverse environment. Stan Ikenberry advises that because colleges and universities have much too narrowly defined the merit in terms of LSAT scores and GPA, we have lead *ourselves* down the path that has precipitated claims of reverse discrimination, e.g., that someone with lower scores was admitted over someone who had higher scores because of their race or ethnicity. Ikenberry says if we had moved sooner to get away from this focus we might not now be facing these challenges but believes it is not too late for you to provide important leadership on this issue.

Similarly, Barry Munitz believes you can make a strong appeal, using specific models like CSU's, Neil Rudenstine's (Harvard Law) and John Sexton's (NYU Law), that colleges and universities "should reach into every possible corner for imaginative and proven-effective admissions screening processes" on top of a strong plan for mentoring and preparation. Munitz says the use of traditional measures like the LSAT are useful, of course, but that the "LSAT cannot measure motivation" and that that is what's so bad about SP-1.[8]

Though not constrained by a prohibition on the use of race or ethnicity in admissions decisions, Dean Sexton admissions model contemplates many of the values you have expressed on these issues and represents the type of model Munitz suggests. Further, it's working. The first of Sexton's three-part "Search for Excellence" comprises moving a sufficient number of diverse people into the recruitment pool which means casting a significantly wide net, looking in places you ordinarily would not. For example, Sexton goes into non-elite schools and well as elite schools and HBCU's. He supports a model wherein community colleges would be feeder schools into undergraduate four year colleges. The second part -- selecting students -- treats the admission process not as a ladder but "zone of excellence" that values a multi-factored look at things like advanced study, motivation, character, judgment, maturity, tenacity, communication skills, ability to listen, leadership, capacity to work under pressure, willingness to serve, orientation toward a career for which there is a need, etc. Sexton says the fact that a candidate is

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[8]Jerome Shestack, the new president of the ABA, says the ABA is beginning to study on a model basis issues surrounding the LSAT like the potential unfairness of what happens when one individual can afford to and does take an LSAT preparation course, but another cannot. Shestack says the ABA is looking at finding some sort of base score on the LSAT that would get you through a threshold, after which other factors would be considered. Existing studies on the LSAT already are getting more attention. As a consequence, there appears to be a more widespread recognition that LSAT scores are only a good predictor of first year grades and not a predictor of law school completion or, more importantly, success as a lawyer.

Shestack also says the ABA is also looking at the issue of accreditation based on a presume that schools who meet the standards for accreditation should have a diversity programs.

a member of a disadvantaged group is relevant to many of these factors. The third part of Sexton's model is the recruiting stage. Sexton says his school invests a lot of money in the admissions process but it has clearly been well worth the effort. [9]

Second, some of the approaches being developed and/or discussed in Texas and California are consistent with your own educational initiatives and, therefore, offer mechanisms with which the administration might partner or at least support. For example, the California Master Plan for Higher Education recommends that community college transfer students who have successfully completed specified college work be eligible for admission to the University of California. Sexton, Ikenberry, Munitz all strongly support the greater use of community colleges as feeder schools to address the issue of diversity.[10] One proposal suggested by the UC Outreach Task Force Minority Report calls for the UC system to research, plan, and propose intervention with public school students beginning in the third grade. This proposal -- based on the Minority group's conclusion that a gateway to eligibility at UC from high school is the ability to take and handle well Algebra in the 9th grade. This is consistent with your math initiative. Another proposal which focuses on family involvement in the outreach process is consistent with your established family involvement initiative.

V. CONCLUSION

One suggestion is that you might combine a short-term strategy for addressing the declines in minority enrollment in Texas and California that embraces an effort to look at a broad range of "factors" in admissions, increased outreach, a K-12 mentoring and other improvements strategy with a long-term strategy that would challenge all colleges and universities to fundamentally change the way they measure merit and seek diversity offering, as Munitz suggests, imaginative and proven effective admissions screening programs like CSU's and NYU's. Such an approach could also address important education and race issues which your Race Initiative will likely face including the argument that less than qualified students get admitted to colleges and universities which employ affirmative action measures.

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[9]Munitz, who last evening dined with Rudenstine, says Harvard Law is getting better at advancing a more complex admissions process but that it is enormously expensive for them. Munitz believes you can make a strong appeal for such approaches because schools like NYU and Harvard are finding the effort outweighs the cost in human terms.

[10] Jim Montoya, the Vice Provost for Student Affairs at Stanford and a Mexican-American, says his commitment that Stanford recruit more heavily from community colleges is the project he's most excited about in his new position there and says this is the one shot he would take to get at the issue of minority enrollment and diversity in California's colleges and universities.

Race - Minority Enrollment

POSTSECONDARY INSTITUTION ASSESSMENT GUIDE
Admissions and Financial Aid Programs

INTRODUCTION

This Guide is designed to help postsecondary institutions that have affirmative action programs which consider race or national origin in admissions and financial aid decisions assess whether their programs are consistent with Title VI of the Civil Rights Act of 1964 and the U.S. Constitution. Institutions interested in establishing affirmative action programs are also encouraged to consider this Guide. As used in this Guide, the term "affirmative action" means the use or consideration of race or national origin as a factor in admission or financial aid programs. Recruitment and outreach programs designed to increase the number of minorities in the applicant pool are rarely subject to strict scrutiny review and are not included in this Assessment Guide. Note also that the Hopwood v. State of Texas decision, which applies in the states of Texas, Mississippi and Louisiana, while permitting an institution to consider race or national origin to remedy the effects of its past discrimination, prohibits the use of race or national origin in admissions to achieve the goal of a diverse student body. Thus, the discussion of diversity issues in this Guide would not apply in those states.

The Self Assessment Guide includes Standards, Checkpoints, and Additional Legal Considerations. The Standards are based on federal statutes, case law, and policy. (See the list of legal and policy resources included with this Guide.) The Checkpoints are meant to help institutions identify information relevant to the applicable legal standards. The Additional Legal Consideration sections offer additional pointers for practitioners and campus policy makers. This catalogue of questions is a basic approach to fundamental issues regarding the use of affirmative action in admissions and financial aid. Please note that each Checkpoint in a category will not necessarily be relevant to every institution. In many cases, additional questions may need to be answered that will be specific to an institution's affirmative action plan.

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 impact the standards governing the use of affirmative action in educational institutions. Institutions working with this Guide are encouraged to contact The Office of Civil Rights ("OCR") at the Department of Education for help. The last page of the Guide lists OCR offices and staff available to assist you.

I. General Standards

Classifications based on race or national origin for the purpose of affirmative action are permitted under Title VI to the same extent as under the Constitution. Under Title VI and the Constitution, decisions with race or national origin as a factor are "suspect" and are subject to strict scrutiny. To satisfy strict scrutiny a school's use of race or national origin must be based on a compelling governmental interest and must be narrowly tailored to meet that interest. (Narrow tailoring is discussed later in the Guide.)

The Supreme Court has upheld remedying the effects of discrimination as a compelling governmental interest for the consideration of race or national origin. In the Bakke decision, Justice Powell's controlling opinion found achieving the educational benefits of campus diversity to be a compelling interest.

II. Student Admissions

A. Baseline Information

Standards

Legal issues may arise when a college or university considers race, color or national origin in decisions involving educational programs, such as financial aid or admissions. A thorough understanding of the admissions criteria and process is essential. The questions below cover baseline information for assessing college and university admissions.

Checkpoints

Overview: If the institution has decided to consider race and ethnic origin as factors in its admissions process, is the admissions process guided by a written affirmative action plan? How are admissions structured?

1. 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?

Additional Legal Considerations

To ensure internal consistency, it is recommended that schools that have decided to consider race as a factor in admissions develop a written affirmative action plan.

B. Is Affirmative Action Supported by Compelling Interests?

Standards

As discussed above, under the Constitution and Title VI of the Civil Rights Act of 1964 it is permissible in appropriate circumstances for colleges and universities to consider race in making admissions decisions. They may do so to promote diversity of their student body, consistent with Justice Powell's landmark opinion in Bakke. They may also do so to remedy the continued effects of discrimination by the institution itself or within the state or local educational system as a whole. As noted, however, in Texas, Mississippi and Louisiana, the Hopwood decision limits the justification for affirmative action to remedying the school's own discrimination.

Checkpoint

2. If the institution's student admissions process includes consideration of applicants' race or national origin, what is the educational and legal justification(e.g., to remedy the effects of discrimination or to obtain the educational benefits of a diverse student body)?

Additional Legal Considerations

Caveat: In Bakke, Justice Powell rejected the following interests as insufficient on their face to justify the consideration of race by the UC-Davis medical school: reducing the deficit of disfavored minorities in medical schools and the medical profession, and countering the effects of societal discrimination. Justice Powell also rejected UC-Davis' argument that its affirmative action policy was necessary to increase the number of doctors who practice in medically underserved communities.

1. Remedial Purposes

Standards

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 the past discrimination. A college that has been found to have discriminated by a court or an administrative agency like the U.S. Department of Education, 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.

In addition, colleges are permitted to take remedial action without having to wait for a formal finding by a court, administrative agency, or legislative body. Even absent such formal findings, 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. In justifying remedial affirmative action based on the current effects of past discrimination, schools should be prepared to articulate how current conditions that limit educational opportunities by race or national origin are related to past discrimination for which the school shares responsibility.

Checkpoints

3. Is the institution the subject of a court desegregation order or a legislative or administrative finding of unlawful discrimination?

4. Separate 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?

5. Is there under-representation at the school of qualified students from particular races or national origins? Identify the racial and ethnic composition (%African-American, Hispanic, Asian-American, American Indian, white) of the following groups: a) the institution's student body; b) the institution's qualified applicants; and, c) 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

Additional Legal Considerations

The Supreme Court has described the "strong basis in evidence" standard as approaching the evidence needed to show a prima facie case of discrimination under the constitution or civil rights statutes. In order to satisfy the "strong basis in evidence" standard, a college may, if applicable, rely on evidence of past discrimination such as documentation of specific instances of intentional discrimination for which the institution is responsible. Evidence of a significant disparity between the percentage of minority students in a college's student body and the percentage of qualified minorities in the relevant pool of applicants also supports an inference of discrimination. In addition to the qualified applicant pool, the racial/ethnic composition of the pool of college-bound high school graduates who would be qualified for admission to the institution may also be used to determine whether admission practices have resulted in a significant under-representation of qualified students from particular races or national origins. Colleges should assess the composition of the pool of qualified potential applicants based on the number of students by race and national origin in the areas from which applications may be drawn who may meet the school's admissions standards. Such an approach is analogous to employment discrimination cases where courts have accepted statistical evidence to infer patterns or practices of intentional discrimination against minority job applicants. Colleges can strengthen the predicate for remedial affirmative action by supplementing statistical evidence that qualified students are substantially under-represented in the student body with instances of discrimination on the basis of race or national origin against individuals.

Caveat: Evidence of societal discrimination or other factors that are beyond the school's control that may deter participation of minority students would not likely be accepted by courts as a basis for remedial affirmative action.

Note: Although it rejected diversity as a basis for affirmative action, the Hopwood decision (covering Texas, Louisiana, and Mississippi) permits the use of race or national origin to remedy the effects of discrimination by that school.

2. Diversity Purposes

Standards

Achievement of core educational objectives stated in an institution's mission may constitute a compelling educational interest that justifies the consideration of race or national origin in a narrowly tailored manner.

To qualify as a legal justification for the use of race or national origin, diversity programs must have sound educational objectives. An institution must be able to support its claim that diversity serves educational objectives by demonstrating the educational benefits that diversity produces on campus and/or within the institution's programs.

Checkpoint

6. What are the institution's mission statements and how do they relate to its diversity objectives?

7. What are the educational benefits of diversity at your institution? What is the empirical basis for the educational benefits the institution identifies?

Additional Legal Considerations

A college's written mission is a statement of core educational values that are protected by academic freedom principles. Properly devised diversity principles that clearly serve an institution's mission can be the basis for affirmative action in admissions decisions as recognized in the Bakke decision.

To articulate the educational benefits of diversity, studies or other expert-based information can be helpful. In addition to identifying the educational benefits of diversity, a school should be prepared to explain why the educational advantages claimed for its diversity programs cannot be achieved without the use of race or national origin (see following section on Narrow Tailoring).

Diversity Purposes (continued)

Standards

A college may pursue its diversity interest consistent with the strict scrutiny test by using race or national origin as one of several factors considered in the admissions process.

For the consideration of race and national origin in admissions to be lawful under a diversity rationale, an institution's diversity program must include diversity characteristics in addition to race or national origin. Such characteristics may include other life experiences, achievements, talents, interests, extracurricular activities, economic disadvantages, geographic background, as well as various others. The relative weight granted to each factor in making admissions decisions is properly determined by the college or university: race or national origin may be accorded greater weight than other factors, for example, in a multi-factored diversity program, when diversity objectives related to race or national origin remain unfulfilled while race neutral components of diversity have been achieved.

Checkpoints

8. Is affirmative action in admissions used to achieve the educational benefits of diversity? What is the institution's definition of diversity? Does diversity include factors other than race and ethnicity? 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?

Additional Legal Considerations

Colleges may seek diversity in admissions to fulfill their academic mission through the "robust exchange of ideas" that flows from a diverse student body. Bakke, 438 U.S. at 312-313. Under the Bakke decision, which governs our interpretation of Title VI, achieving the educational benefits of campus diversity is a compelling interest for purposes of the strict scrutiny test. Since Bakke, the Supreme Court has decided a number of affirmative action cases, none of which has invalidated Justice Powell's opinion in Bakke that the promotion of diversity in the higher education setting can be a compelling interest.

Note that according to the Hopwood decision, diversity is not lawful under the Constitution to justify the consideration of race or national origin. Hopwood applies in Mississippi, Louisiana, and Texas and is not legally binding in any other state. Note also that Hopwood upheld the consideration of race or national origin by an institution where necessary to remedy discrimination by that school.

C. Is the use of race in remedial or diversity programs narrowly tailored?

Overview: If the institution supports its affirmative action program on remedial purposes or the attainment of diversity, is the use of race or national origin in admissions narrowly tailored to achieve its purposes?

Standards

The Department of Education will consider factors established by case law in assessing whether a college's consideration of race or national origin meets the narrow tailoring requirements of Title VI and the Constitution. An overriding question is whether the school's use of race is focused as narrowly as possible on the achievement of the school's compelling interest, e.g., remedial or diversity objectives.

First, it is necessary to determine the efficacy of alternative approaches. It is important that consideration has been given to the use of race-neutral alternative approaches (e.g., the use of admissions criteria that do not include race or national origin, or recruitment programs). Race or national origin may be considered in admissions decisions only if a college determines that alternative approaches to the use of race have not been or will not be effective.

Checkpoints

9. 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?

10. If race-neutral measures were not undertaken, why does the institution believe that such efforts would be insufficient to enhance diversity without the plus-factor credit?

11. 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?

Standards

Each college or university has the academic discretion to define those characteristics and qualifications that will produce the educational benefits of diversity. Under Title VI, OCR will defer to a school's reasonable choices in defining diversity. A program that includes a broad, multi-factored definition of diversity, designed to produce articulated educational benefits may measure whether multi-factored diversity has been achieved in determining whether programs are narrowly tailored. Lawful diversity admissions programs, however, should not set aside positions based on race or national origin. Unless essential to remedying discrimination and its effects, such set-asides or quotas are inconsistent with the legal requirement of Bakke that all applicants be able to compete for all vacancies and have their individual merits considered. Rather, race may be used as one factor among many.

Checkpoints

12. 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?

Standards

The duration of the use of a racial classification should be no longer than is necessary to its purpose, and the classification should be periodically reexamined to determine whether there is a continued need for its use. Thus, for example, the use of race or national origin as among multiple factors considered in admissions should continue only while necessary to overcome the effects of past discrimination and achieve a diverse student body. Institutions should periodically assess whether the use of race or national origin to achieve diversity continues to be necessary or whether the admissions system should be modified based on changing circumstances. OCR considers annual reviews the best practice to support this aspect of Title VI's narrow tailoring requirements.

Checkpoint

13. Is the affirmative action program (based on diversity or remedying the effects of discrimination) periodically reviewed and modified? If so, 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?

Standards

The use of the classification 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. Consideration of race or national origin as one factor among several other admissions criteria in some circumstances may also be evidence of flexibility.

The burden on those who are not conferred the benefit of the affirmative action program (generally, non-minority students) must be considered. Lawful diversity programs do not include separate tracks, separate decision-making procedures, or different admissions formulas based on the race or national origin of applicants. It is important that institutions exercise care to avoid separate procedures that are based on race or national origin as such procedures may prevent competition among applicants of all races and national origins. A use of race or national origin may impose such a severe burden on particular individuals that it is too intrusive to be considered narrowly tailored. See Wygant v. Jackson Board of Education,(use of race in imposing layoffs involves severe disruption to lives of identifiable individuals).

Generally, the less severe and more diffuse the impact on non-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 to be admitted 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.

Checkpoint

14. 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?

Additional Legal Considerations

Justice Powell's opinion in Bakke indicated that race or national origin could be used in making admissions decisions to further the compelling interest of a diverse student body even though the effect might be to deny admission to some students who did not receive a competitive "plus" based on race or ethnicity. In cases since Bakke, the Supreme Court has provided additional guidance on the factors to be considered in determining whether affirmative action based on race or national origin is narrowly tailored to its purpose. See, for example, United States v. Paradise, 480 U.S. 149 (1987); Wygant v. Jackson Board of Education, 476 U.S. 267 (1986); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (and cases discussed in the decision).

An institution may rely on evidence of its own prior unsuccessful race-neutral efforts to achieve diversity, projections of the effects of race-neutral options, expert-based conclusions, the experience of other institutions in similar circumstances, or other professionally-supported information in determining whether the school's diversity objectives can be achieved without any consideration of race or national origin in admissions.

III. Financial Aid

Standards

The relevant standards are stated in the Department's published guidance on the use of race or national origin in the provision of financial aid, 59 Federal Register 8756 (1994) (copy included with this Guide). Note that the standards for admissions and financial aid are generally the same.

Additional Legal Considerations

In the Podberesky v. Kirwin decision, the Fourth Circuit, which covers Maryland, Virginia, West Virginia, North Carolina and South Carolina, ruled that the challenged race-targeted scholarships at the University of Maryland did not meet the Supreme Court's strict scrutiny standard. The court did not rule that all race-targeted scholarships are impermissible. Rather, it held that colleges may establish race targeted scholarships to remedy the present effects of prior discrimination, so long as such measures are narrowly tailored to achieve that objective. The court found, however, that the University had not demonstrated the need for remedial action, and that even if such need existed, the University's scholarship program was not narrowly tailored to cure the present effects of the University's previous discrimination. The Podberesky decision, which rests on the nature and weight of the University's factual evidence and the extent to which it met the "narrow tailoring" standard, does not require the Department to modify its policy guidance on remedial race-targeted scholarships. The evidentiary standards set out in the Podberesky decision should be used in applying the Department's guidance in the states of the Fourth Circuit -- Maryland, Virginia, West Virginia, North Carolina and South Carolina.

The following questions are keyed to the financial aid guidance, which should be considered carefully in assessing financial aid programs:

Checkpoints

A. General

Overview: Is the institution's financial aid program guided by a written affirmative action plan? How is the institution's

financial aid process structured?

1. From what sources does the institution obtain its financial aid funds? Are the sources public or private? Inside sources or outside sources? Federal, state or local? What percentage of aid is received from each source?

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"?[1] 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?

Note: The following sections refer to the principles from the Department's policy that are used most often by institutions.

B. Principle 1: 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.

C. Principle 3: Financial Aid to Remedy Past Discrimination

4. What are the racial or national origin groups eligible for race-based aid? What is the nature of the past discrimination against that group? Are there court, legislative, or administrative findings of past discrimination at that institution? If so, are there continuing effects of past discrimination at the institution? If there have not been formal findings of past discrimination, is there a strong basis in evidence to believe that there are current effects of discrimination?

"Race-based scholarships" or "race-targeted aid" mean, for the purposes of this memorandum, 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.

D. Principle 4: Financial Aid to Create Diversity

5. Is affirmative action in financial aid used for purposes of diversity? What is the institution's definition of diversity? Has the institution identified the benefits of diversity?

6. Is special consideration for minority status used as one factor among many factors for scholarship awards in some cases? If many factors are considered, what are the other factors? How are the factors weighted and considered, and why?

E. Narrow Tailoring of Remedial or Diversity Programs

These questions apply to all programs that fall under Principles 3 or 4, remedial or diversity programs.

7. Can the institution show that the use of race or national origin is necessary to achieve its stated purpose? If race is used as an eligibility criterion in awarding scholarships, has the institution made efforts to remedy discrimination or enhance diversity by using race as a plus factor? If race is considered as one factor in awarding scholarships, has the institution made efforts to remedy discrimination or enhance diversity by also using race-neutral means? If so, what race-neutral efforts were made and what were the results of those efforts? If race-neutral means have not been tried, does the institution reasonably believe that race-neutral efforts would be insufficient to meet its diversity goals without race-based scholarships?

8. Is the use of race-based scholarships in the financial aid process periodically reviewed and modified? What standards are used in the review? When was the last such review?

9. 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?

10. Does the institution have statistics or other evidence to show the level of participation of minorities before and after programs to achieve diversity or to remedy discrimination were established? 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?

F. **Principle 5: Private Gifts Restricted by Race or National Origin**

11. 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 policy guidance?

12. 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?

Race - minority enrollment ~~Race Initiative~~ - ~~Affirmative Action~~ ~~Educ~~ DRAFT

Appendix: Questions to Guide Assessment of Affirmative Action in Higher Education

I. Coverage of Constitution and Title VI

- Is the institution public and part of a state government? If so, it is subject to the Fourteenth Amendment. Is the institution a part of the federal government? If so, it is subject to the Fifth Amendment. Does the institution receive federal financial assistance through any of the programs listed in Appendix A of Part 100 of the Office of Civil Rights' regulations? If so, it is subject to Title VI.

- Is the institution located in the Fifth Circuit? If so, the standards governing its affirmative action program are those in *Hopwood v. Texas*, which is discussed in the "Fifth Circuit Standards" sections of this guidance.

II. Race-based Classifications

- Does the institution use race, color, or national origin as a factor in any aspect of admissions or the award of financial aid? If an institution considers disadvantaged status, does the definition of disadvantage include consideration of race or national origin?

- 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?

- 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?

III. Strict Scrutiny

A. Compelling Interest

- What is the objective of the program's consideration of race or national origin? Is it intended to remedy discrimination, to foster diversity to

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achieve an educational objective, or for some other purpose?

1. <u>Remedial Interests</u>

- Factual Predicate. What is the underlying factual predicate of 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.

- 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?

- Identify the racial and ethnic composition (%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.

- Based on the information above, is there underrepresentation at the school of qualified students from particular races or national origins? If so, is there a significant statistical disparity?

- What is the nature of the evidence? Is it statistical or documentary? 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 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? Does the evidence seek to explain the secondary 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, is there testimonial or anecdotal evidence of discrimination?

- 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?

- 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?

2. Diversity Interests

- What are the institution's mission statements and how do they relate to its diversity objectives?

- What are the educational benefits of diversity at your institution? What is the empirical basis for the conclusion that diversity will enhance the educational benefits the institution identifies?

- Is affirmative action in admissions used to achieve the educational benefits of diversity? What is the institution's definition of diversity? The institution must assemble a factual predicate demonstrating that greater diversity would foster some larger societal goal beyond diversity for diversity's sake. 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?

B. Narrow Tailoring

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- Race-neutral alternatives. 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? If race-neutral measures were not undertaken, why does the institution believe that such efforts would be insufficient to serve the compelling goals without the plus-factor credit? 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?

- Duration/Continued Need. Does the institution have data to show whether affirmative action is necessary? When did the institution begin implementing its affirmative action program? 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? Has the end date been moved back? Is the program subject to periodic oversight, and if so, what is the nature of that oversight? Has the program ever been adjusted or modified in light of periodic review? What were the results of the most recent review? Is there evidence of what might result if the racial classification were discontinued? 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?

- Pool of Beneficiaries. How does the college assess whether diversity has been achieved? Does the admissions process incorporate numerical goals? By what process were these goals derived? 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 categories of minorities who may not have been discriminated against?

- Manner in Which Race is Used. 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?

- Burden on Non-Beneficiaries. What is the nature of the burden imposed on persons who are not included in the racial or ethnic classification

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established by the program? Does the program displace those persons from existing positions or financial aid awards? What is the size and dimension of the exclusionary impact in admissions? What is the dollar value of the financial aid awards in question? 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 not eligible for the preference put at a significant competitive disadvantage as a result of the program?

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remedied. The fact and legacy of general, historical societal discrimination is an insufficient basis for affirmative action.[13] Similarly, amorphous claims of discrimination in education that are not related to an institution's programs are inadequate.[14] 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 for which the institution shares responsibility.[15]

It is not necessary for a court to make a judicial finding of discrimination before an institution may undertake remedial measures. Rather, 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 might permit an inference of discrimination that would support the use of racial or ethnic criteria intended to correct those disparities.[18] 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 as compared to the percentage of minorities in the general population is an insufficient predicate for affirmative action.[19]

The Title VI regulations require that, in administering a program in which it has previously discriminated, an institution receiving federal financial assistance take action to overcome the effects of that prior discrimination.[20] 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 in the relevant jurisdiction, the institution may use narrowly tailored affirmative action measures to remedy the discrimination.

b. Fifth Circuit Standards: Remedial Objectives

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.[21] 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.[22] "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."[23] 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

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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.[24] 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 from using affirmative action to remedy that discrimination in its component schools.[25]

2. Non-Remedial Interests

a. Diversity

No majority opinion for the Supreme Court has addressed when a non-remedial objective may constitute a compelling interest that can justify the use of narrowly tailored race-conscious measures.[26] However, in his landmark separate 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 the central mission of higher education and in keeping with the time-honored value in academic freedom.[27] 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.[28]

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 "[preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake."[29] 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,[30] but 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.[31] 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 serves educational objectives by being prepared to demonstrate the educational benefits that diversity produces on campus or within the university's programs.

b. Other Non-Remedial Interests

The Supreme Court has neither approved nor foreclosed the use of affirmative action to serve non-remedial ends, but, as we have already noted, no majority opinion of the Court has found a non-remedial objective compelling.[32] 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

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reserving sixteen percent of the seats in its medical school class for minority students was either needed or geared to promote that goal.[33] It is not clear whether a racial classification that was narrowly tailored to this interest could survive strict scrutiny.[34] 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 Department of Education and the Department of Justice believe that, as Justice Powell stated in *Bakke*, diversity may constitute a compelling interest justifying the consideration of race in higher education. However, in *Hopwood*, the U.S. Court of Appeals for the Fifth Circuit held that an institution's interest in diversity to enrich the academic experience cannot satisfy strict scrutiny.[35] 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.[36] However, the only non-remedial interest at issue in the case was diversity, 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".[37] Because the case before it did not present such an interest, the panel did not take a position on Justice Scalia's suggestion. Institutions in Texas, Louisiana, and Mississippi should consult with their counsel before using classifications based on race or on national origin to further any non-remedial interest, and cannot use affirmative action to foster diversity in order to enrich the academic experience.

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 decisionmaking. It also ensures that such action is truly necessary and that less intrusive, efficacious 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 of the affirmative action program, and whether the use of a waiver or other mechanism facilitates the narrowing of the program's scope; (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 decisionmaking process; (iv) the

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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 by the program.

Before describing each of the components, three general points about the narrow tailoring test deserve mention. First, 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.

Third, the narrow tailoring test should not be viewed in isolation from the compelling interest inquiry. While the two inquiries are distinct, as a practical matter there may be an interplay among the two. For example, in a case involving a set-aside program for minority contractors, the Court stated that the weak evidence of discrimination on which the city of Richmond predicated its remedial program could not justify the adoption of a rigid racial quota.[38] This suggests that if Richmond had opted for a more flexible measure, the Court might have been less demanding in reviewing the evidence of prior discrimination. However, the Court has never explicitly recognized any trade-off between the compelling interest and narrow tailoring tests.

1. Race-Neutral Alternatives

Before resorting to race-conscious action, an institution should give serious consideration to race-neutral alternatives, that is, measures that do not rely on race or national origin as a factor in decisionmaking. For example, the 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.[39] In the context of higher education, an institution might consider the use of socioeconomic 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 Court has not specified the extent to which an institution must consider race-neutral measures before resorting to race-conscious action. Justice Powell has suggested that in a remedial setting, it is not necessary to use the "least restrictive means" where they would not accomplish the desired ends as well,[40] 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".[41] Accordingly, an institution probably 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 program need not be limited to the specific individuals who suffered the past discrimination.[42] But a program undertaken to remedy past discrimination against certain races should not include preferences for other racial groups who 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.[43]

Courts have looked favorably upon plans in which numerical targets are waived if there are not enough qualified minority applicants.[44] In the context of government contracting, for example, Congress permitted officials to waive a national goal of ten percent participation by minority contractors if it was necessary given the availability of qualified minority contractors in a particular area, or if a grantee demonstrated that his or her best efforts would not succeed in achieving the target.[45] Waivers such as these ensure that a program is flexible, and are especially important if the program uses a relatively rigid measure such as a quota or set-aside.

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. Thus programs in which certain spots or financial aid awards are open only to members of designated racial or ethnic groups are significantly less likely to satisfy the narrow tailoring requirement than programs that merely consider race or national origin as one of many factors and are open to all races and ethnic groups.

Two types of racial classifications are most vulnerable to a challenge on the ground that they are too rigid. First and foremost are affirmative action programs in which a specific percentage of positions or financial aid is set aside for minorities. A good example is the medical admissions program that the court invalidated in *Bakke*, which reserved sixteen percent of the slots in the medical school for members of racial and ethnic minority groups.[46]

The second type of classification vulnerable to attack on flexibility grounds is 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. A scholarship program reserved for minorities may be distinguished from an admissions quota reserving a portion of seats in a class for minorities, 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. But a scholarship program open only to minorities is less flexible than a scholarship program in which race is one of many factors that determine eligibility for the award.

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Under both the admissions set-aside and the minority scholarship program, persons not within the designated categories are ineligible for certain benefits or positions. This is not the case in programs where race or national origin is deemed a plus in evaluating an applicant's file but does not insulate the applicant from comparison with all other candidates for the available benefit.[47]

In light of these considerations, two general principles are apparent with respect to admissions. First, set-asides or quotas should not be used in an admissions program unless such measures are absolutely essential to remedying discrimination and its effects.[48] Second, where an institution considers race or national origin to foster diversity for educational objectives, Justice Powell's opinion in *Bakke* indicates that the program should include diversity characteristics in addition to race or national origin, such as other life experiences, achievements, talents, interests, extracurricular activities, economic disadvantages, and geographic background.[49]

For a detailed discussion of the standards that should be applied to minority scholarship programs, institutions and their counsel should consult the Department of Education's published guidance, 59 Federal Register 8756 (1994).

4. Comparison of Numerical Targets to the Qualified Applicant Pool

Where an affirmative action program is justified on remedial grounds, the Court has compared any numerical goal to the percentage of minorities in the relevant labor market or industry. The Court 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 Richmond'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.[50]

Institutions that use numerical goals and targets therefore 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.[51] 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.[52] Reexamination of affirmative action programs also allows an institution to fine tune its classification or discontinue it if warranted, which may allow the program to satisfy other factors in the narrow tailoring test. The Office of 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-Beneficiaries

Affirmative action necessarily 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 "unsettle[s] . . . legitimate, firmly rooted expectations" or imposes the "entire burden . . . on particular individuals" crosses that line.[53] 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.

In this regard, race-targeted financial aid may be less burdensome than race-based admissions policies. Race-targeted aid does not necessarily foreclose a non-minority student from attending a school solely on the basis of his or her race. Moreover, in contrast to the number of admissions slots, the amount of financial aid at an institution may not be fixed. For a more detailed discussion of narrow tailoring in the context of race-targeted financial aid, see the Department of Education's published guidance, 59 Federal Register 8756 (1994).

IV. Conclusion

Any covered institution that uses race or national origin as a basis for decisionmaking should review its program to determine if it comports with the strict scrutiny standard. Appended to this guidance 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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1. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 213-18 (1995).

2. 42 U.S.C. 2000d. Title VI does not apply to programs directly administered by the United States or its agencies. *See Soberal-Perez v. Heckler*, 717 F.2d 36, 38 (2d Cir. 1983), *cert. denied*, 466 U.S. 104 (1984).

3. For a list of federal education financial assistance programs, see 34 C.F.R. Part 100, Appendix A.

4. *See* 42 U.S.C. 2000d-4a(2)(A).

5. *See Regents of the University of California v. Bakke*, 438 U.S. 265, 284-87 (Powell, J.), 325, 328 (plurality opinion).

6. Those regulations are located in 34 C.F.R. Part 100 (1997).

7. *Adarand*, 515 U.S. at 235 (Constitution); *see Bakke*, 432 U.S. at 284-287 (Powell, J.), 325, 328 (plurality opinion). (Title VI does not prohibit affirmative action measures that would be permissible under the Constitution).

8. *Adarand*, 515 U.S. 200.

9. *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).

10. 438 U.S. 265, 311-15 (1978) (Powell, J., concurring in the judgment).

11. *See Croson*, 488 U.S. at 491-93 (plurality opinion); id. at 518-19 (J. Kennedy concurring in part and concurring in the judgment).

12. *See Adarand*, 515 U.S. at 269-70 (Souter, J. dissenting); *Cf. United States v. Fordice*, 505 U.S. 717, 727-29 (1992) (state must eradicate policies and practices traceable to prior de jure system that continue to foster segregation).

13. *See Croson*, 488 U.S. at 499, 505.

14. *See Croson*, 488 U.S. at 499 ("amorphous" claim of past discrimination in an industry can not justify the use of an unyielding quota).

15. *See, e.g., Podberesky v. Kirwan*, 38 F.3d 147, 153 (4th Cir. 1994) [cert denied ..]; *Fordice*, 505 U.S. at 730 n.4.

16. *See Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986) (plurality opinion).

17. *See Croson*, 488 U.S. at 500.

18. *See Croson*, 488 U.S. at 501, 509.

19. *Croson*, 488 U.S. at 501-02.

20. 34 C.F.R. 100.3(b)(6)(I).

21. 78 F.3d 932, 951 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996)

22. 78 F.3d at 951.

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23. 78 F.3d at 954.

24. *See* 78 F.3d at 951.

25. *See* 78 F.3d at 954 (*citing Fordice*, 505 U.S. at 731-32).

26. In *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), the Court applied intermediate scrutiny to a preference for minority-owned broadcasters and held that exposing the nation to diverse perspectives in broadcasting was an important governmental interest. The Court thus did not consider whether the government's interest in seeking diversity in broadcasting was compelling. *Adarand* overruled *Metro Broadcasting* insofar as it held that benign race-based action by the federal government is subject to intermediate scrutiny, but did not address whether diversity in broadcasting can be a compelling, as opposed to important, interest.

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

28. *Bakke*, 438 U.S. at 314.

29. *Bakke*, 438 U.S. at 307 (J. Powell, concurring) (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).

30. *Bakke*, 438 U.S. at 313.

31. *See Bakke*, 438 U.S. at 305,307. 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).

32. See *Adarand*, (Stevens, J. dissenting).

33. *Bakke*, 438 U.S. at 310 (Powell, J. concurring in the judgment)

34. 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.

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

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

37. *See Hopwood*, 78 F.3d at 944 (discussing *Croson*, 488 U.S. at 521 (Scalia, J., concurring in judgment)).

38. *Croson*, 488 U.S. at 496; *see also Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986); *United States v. Paradise*, 480 U.S. 149 (1987).

39. *Croson*, 488 U.S. at 507.

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40. *See Fullilove*, 448 U.S. at 508 (Powell, J., concurring).

41. *Wygant*, 476 U.S. at 280 n.6 (plurality opinion of Justice Powell); *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*, 114 S.Ct. 290 (1993).

42. *See Adarand*, 515 U.S. at 237 (government may respond to the lingering effects of racial discrimination by using narrowly tailored race-based action).

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

44. *See, e.g., Paradise* , 480 U.S. 177-78.

45. *See Croson*, 488 U.S. at 508 (discussing *Fullilove v. Klutznick*, 448 U.S. 448, 488 (1980) (plurality opinion)).

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

47. *See Bakke*, 438 U.S. at 315-17; *see also Johnson*, 480 U.S. at 616 (upholding program that did not set aside any positions for women).

48. *See, e.g., Paradise*, 480 U.S. 149.

49. *See Bakke*, 438 U.S. at 315 (Because "[t]he diversity that furthers a compelling state interests 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., concurring in the judgment)

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

51. *See Fullilove*, 488 U.S. at 513 (Powell, J., concurring).

52. *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).

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

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Race-minority enrollment

Bruce –
From Chris Edley
E.

THOUGHTS ON HIGHER EDUCATION AGENDA

I. Goals:

A. Defend and build support for inclusion and access

B. Defend and build support for the President's "Mend it, don't end it" policy

C. Anticipate escalation of attacks in calendar 1998 in Congress, state politics and the courts

D. Project an aggressive, principled Administration posture on these issues

E. Engage on the plane of values that speak broadly, not just on the plane of policy and legal details

II. Factual background

A. Hopwood, Podberesky, Proposition 209

B. Texas and California dismantling of race and (in CA) gender-conscious affirmative action, with very significant impact

C. Post-Hopwood litigation: suits filed or expected against universities in Washington, Michigan, Georgia, North Carolina, Florida

D. Policy shifts under consideration – reports of policy shifts under consideration, but few concrete examples

III. Public education on "merit" and "inclusion"

A. The message

1. Counteracting public error in equating SAT, etc., test scores with merit

2. Building public understanding that inclusion furthers education mission

3. Building understanding about the national stake in inclusion, for purposes of social and economic strength

B. The messengers

1. Leaders of higher education and testing industry

2. Presidential call for ad hoc task force of key presidents and associations

3. Selected events by POTUS and Administration officials

C. Timing: ASAP – admissions season is now; new litigation and legislative battles looming

IV. Enforcing the law

A. Basic proposition: need for Federal counter-pressure to the Clint Bolick litigation campaign

B. Title VI affirmative enforcement

1. Respond to widespread public criticism of OCR

2. Investigations: Raise policy issues to senior appointee and White House level ASAP; accelerate investigations to reflect growing risk of backsliding on inclusion

3. Policies: Is a swelling disparity a prima facie case, or not? Is there an obligation to explain admissions practices that, through mechanical use of tests or otherwise, have adverse impact? Why not regulation?

4. Litigation (DOJ): Find opportunities to litigate/intervene. Look for impact litigation opportunities. E.g., announced policies in Georgia or California.

C. Defensive litigation

1. Participation as intervenors/amici in defending reverse discrimination suits.

2. SWAT teams of OCR/DOJ investigators to audit universities and offer "mend it don't end it" technical assistance in advance of litigation; easy to key based upon Bolick efforts to recruit plaintiffs

V. Promising practices research and dissemination

A. Mechanism: Secretary's Working Group

1. Produce a report on admissions and financial aid practices that can, consistent with the law, promote excellence through inclusion

2. Invite outsider contributions, thereby stimulating research and consensus-building, in compliance with FACA

3. Report late spring

B. Substantive issues:

1. Race and gender-conscious strategies – models that make sense under Bakke, in light of various institutional missions; premise is that some institutions don't know how to "mend it"

2. Explore strategies that de-emphasize standardized tests biased by class-linked prior educational opportunities – e.g., Texas 10% plan

VI. Legislation and budget initiatives

A. Fatah proposal

B. Anything else?