

PART ONE: GENERAL GUIDELINES

Chapter I Basic Legal and Constitutional Principles

When analyzing the consideration of race in higher education, courts look to the Equal Protection Clause of the Fourteenth Amendment as well as to two federal statutes, Title VI of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. This Chapter describes the basic constitutional and statutory framework appropriate for reviewing race-conscious higher education admissions policies. It examines the two “compelling governmental interests” currently recognized by the Supreme Court in the higher education context: student body diversity and the remediation of past discrimination. It also describes the requirements for a “narrowly tailored” race-conscious admissions policy, paying special attention to the narrow tailoring criteria announced by the Court in *Grutter*.

A. Constitutional and Statutory Framework

The Supreme Court has twice ruled on the consideration of race in university admissions, first in *Regents of the University of California v. Bakke*,² and second in the recent companion cases, *Grutter v. Bollinger* and *Gratz v. Bollinger*. In *Bakke*, the Court scrutinized a medical school admissions program that reserved 16 seats in each entering class for racial minorities. The Court concluded that racial quotas and set-asides like the program in *Bakke* are unconstitutional.³ Justice Powell’s opinion in *Bakke*, however, recognized that diversity is a compelling governmental interest and left the door open to other possible uses of race in admissions. In *Grutter*, the Court reaffirmed Justice Powell’s opinion in *Bakke*.⁴

1. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution provides that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”⁵ Ratified in 1868, three years after the end of the Civil War, the Fourteenth Amendment’s immediate and original purpose was to protect newly freed African Americans from oppressive state action.⁶ Over time, however, the underlying principles of Equal Protection have taken on much broader and far-reaching significance. For example, the Equal Protection Clause has served as the legal foundation for desegregating public schools.⁷

Equal Protection is triggered when the government classifies individuals.⁸ When a law that classifies individuals is challenged under the Equal Protection Clause, a court first evaluates the law’s purpose. Second, the court evaluates the link between the law’s purpose and the classification it makes. Courts analyze Equal Protection cases by applying different levels of scrutiny depending on the type of government classification. The Supreme Court has identified three levels of scrutiny: rational basis, intermediate scrutiny, and strict scrutiny. For classifications based on race or national origin, courts apply strict scrutiny, the highest level of review.⁹ Under a strict scrutiny analysis, “racial classifications are constitutional only if they are **narrowly tailored** to further **compelling governmental interests**.”¹⁰ Race-conscious

admissions programs classify some applicants, in part, based on their minority status, and thus are subject to strict scrutiny.¹¹

Although rigorous, strict scrutiny review does not invalidate all racial classifications. The Supreme Court made clear in *Grutter* that “[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause” and “strict scrutiny must take ‘relevant differences’ into account.”¹² Applying strict scrutiny in both *Grutter* and *Gratz*, the Court held that a higher education admissions policy may consider race if the policy is narrowly tailored to achieve the compelling interest of student body diversity.¹³

2. Title VI and 42 U.S.C. § 1981

In addition to the Equal Protection Clause, two federal laws are relevant to the consideration of race in university admissions: Title VI of the Civil Rights Act of 1964 and 42 U.S.C. § 1981.

Title VI provides that “[n]o 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.”¹⁴ Title VI is relevant to the consideration of race because most universities, including private institutions, receive federal financial assistance.

Section 1981 provides that “[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens. . . .”¹⁵ Section 1981 is relevant to the consideration of race in university admissions because the Supreme Court has held that the provision of educational services constitutes a “contract” for Section 1981 purposes.¹⁶

In practice, it appears that the courts look to the Equal Protection Clause first, and only those admissions policies that violate the Equal Protection Clause will be found to violate either Title VI or Section 1981.¹⁷ For example, the Supreme Court held that the University of Michigan Law School’s policy did not violate Title VI or Section 1981, because the policy did not violate the Equal Protection Clause.¹⁸ As a result, this manual focuses primarily on the requirements imposed by the Equal Protection Clause.

B. Compelling Interests Under Equal Protection

The U.S. Supreme Court has recognized two interests that are sufficiently compelling to justify the use of race in higher education admissions: (1) promoting student body diversity; and (2) remedying the present effects of an institution’s past discrimination.

1. Diversity Is a Compelling Interest

Although the list of interests that are sufficiently compelling to justify race-conscious affirmative action under strict scrutiny is still evolving, the *Grutter* decision clearly states that

“student body diversity is a compelling state interest that can justify the use of race in university admissions.”¹⁹

Prior to the ruling in *Grutter*, *Bakke* was the only U.S. Supreme Court decision to directly address the use of diversity as a compelling interest to justify race-conscious admissions programs. Because Justice Powell’s opinion was not adopted by a majority of the Court, there was a split among the lower courts as to its value as binding precedent. Some lower courts rejected the idea that diversity could ever be a compelling interest.²⁰ Other courts, however, found Justice Powell’s opinion to be controlling law.²¹ The Court’s decision in *Grutter* resolved this split. In *Grutter*, a majority of the Court adopted Justice Powell’s position in *Bakke* holding that diversity is a compelling interest that can be used to justify race-conscious admissions programs.

The Supreme Court has expressly recognized that educational institutions play a key role in society in developing and training future leaders. They are places for the “robust exchange of ideas,” and because of this role, educational institutions have a protected First Amendment interest in the selection of students and faculty. Once an institution has determined that diversity will enhance the educational experience, it has a constitutional basis—the First Amendment—to promote that goal.²² In *Grutter*, the Court stated that academic freedom, though not a specifically enumerated constitutional right, “long has been viewed as a special concern of the First Amendment.”²³ The Court recognized that educational institutions should be allowed a certain amount of discretion and freedom to define and accomplish their educational missions, which may include the goal of attaining a diverse student body.²⁴

The Supreme Court also recognized the “important and laudable” educational benefits of diversity. According to various expert studies and reports cited by the Court, a diverse student body promotes “classroom discussion [that] is livelier, more spirited, and simply more enlightening and interesting.”²⁵ It also promotes “cross-racial understanding,” prevents minorities from feeling “isolated or like spokespersons for their race,”²⁶ and produces a vibrant educational experience that challenges and breaks down racial stereotypes.²⁷

In addition, diversity is beneficial because it “better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.”²⁸ Major American businesses that filed *amici curiae* briefs in the Michigan cases emphasized that “cross-cultural experience and understanding” in higher education plays a “crucial role . . . in preparing students to be the leaders this country needs in business, law, and all other pursuits that affect the public interest.”²⁹ Furthermore, retired officers of the U.S. military made clear that the ROTC programs on college campuses must “train and educate a highly qualified, racially diverse officer corps in a racially diverse setting” in order to allow the military to “fulfill its principle mission to provide national security.”³⁰ A student body that reflects a diversity of races, viewpoints, and perspectives thus creates the type of vibrant educational environment that results in better educated and better prepared individuals who can more effectively contribute to society after graduation.

Diversity is a compelling interest because it provides clearly defined educational benefits. A university should be able to articulate the benefits obtained by having a diverse student body, such as more spirited and more enlightening classroom discussions, or the fact that diversity better prepares students for the workplace.³¹

2. Remediating Past Discrimination Is a Compelling Interest

The remediating of past discrimination is also a compelling interest that may justify race-conscious admissions programs by educational institutions.³² An institution may therefore, in some limited instances, defeat a challenge to its race-conscious programs on this basis.

A public entity can assert remediation as a compelling interest only when its race-conscious affirmative action program was designed either to remedy the public entity's own discriminatory practices or to dismantle a system of discrimination in which the entity has been a "passive participant" or a "joint participant."³³ A public entity may not use race-conscious policies simply to combat "societal discrimination," to provide role models for students, or to benefit "racial groups that . . . may never have suffered."³⁴ To institute a race-conscious policy of any sort based on the remedial justification, the public entity must show that it has a "*strong basis in evidence* for its conclusion that remedial action was necessary."³⁵ If a public entity can meet the requirements of this compelling interest, even quota systems may be permitted.³⁶ For this reason, in the admissions context, colleges and universities with a clearly documented or proven discriminatory past may find the remedial approach a useful supplement to the diversity justification discussed above.

For a fuller discussion of remediation as a compelling interest, see Chapter V.

C. Narrow Tailoring Under Equal Protection

1. Narrow Tailoring When Diversity Is a Compelling Interest

Under a strict scrutiny analysis, when a public entity relies on a racial classification to further a compelling interest, the entity is "constrained in how it may pursue that end: [T]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose."³⁷ While *Bakke*, *Grutter*, and *Gratz* identify certain race-conscious admissions policies that cannot be used because they are not narrowly tailored, the Supreme Court recognized in those cases that there are permissible, narrowly tailored ways to consider race to further the diversity of a student body. As discussed below, the Court in *Grutter* highlighted some options by which race can be considered in admissions policies, but it did not indicate that a narrowly tailored consideration of race is limited to these options.

Under *Grutter*, when educational institutions adopt race-conscious admissions programs to advance student body diversity, those programs must have the following characteristics to be narrowly tailored: (1) Race may be used as a factor in the admissions process, but only in a flexible and nonmechanical manner; (2) educational institutions must

seriously and in good faith consider whether workable race-neutral alternatives exist to achieve educational diversity (or, if a race-conscious program is already in place, reevaluate race-neutral alternatives); (3) the adopted race-conscious admissions programs must not unduly burden nonminority applicants; and (4) the institutions must reevaluate the efficacy of their race-conscious admissions programs periodically and adjust them accordingly if such programs prove unnecessary or if workable race-neutral alternatives become available.

A narrowly tailored race-conscious admissions policy:

1. Takes race into account in a flexible and nonmechanical way;
2. Requires a serious and good faith consideration of whether workable race-neutral alternatives will effectively further diversity;
3. Does not otherwise unduly burden nonminority applicants; and
4. Is periodically reevaluated for its necessity.

a. Race-Conscious Admissions Programs Must Be Flexible and Nonmechanical

When race is used in the admissions process, narrow tailoring requires institutions to review each application individually and evaluate a “wide variety of characteristics besides race and ethnicity” that could contribute to student body diversity. According to *Grutter*, this holistic, individualized review “demands that race be used in a flexible, nonmechanical way.”³⁸

Race-conscious admissions programs must be “flexible enough to consider all pertinent qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.”³⁹ According to *Grutter*, one way to achieve this flexibility is to “consider race or ethnicity only as a ‘plus’ in a particular applicant’s file, without insulat[ing] the individual from comparison with all other candidates for the available seats.”⁴⁰ For example, in *Grutter*, the Court found the University of Michigan Law School’s race-conscious admissions program to be flexible because it also considered a host of nonracial diversity factors, including applicants’ travel experiences, fluency in different languages, overcoming of personal adversity, family hardship, community service, and career histories.⁴¹ Such a race-conscious program “adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions.”⁴²

In addition, race-conscious admissions programs must not be mechanistic so as to insulate or limit an applicant from comparison with other applicants based on his or her race.⁴³

Quotas and point systems that automatically make race a determinative factor in an admissions decision exemplify this rigidity. In *Bakke*, the Supreme Court struck down the University of California, Davis Medical School's system, which reserved 16 out of 100 seats for African American, Native American, Asian American and Latino students solely because of their race. In *Gratz*, the Court struck down the point system of the University of Michigan's College of Literature, Science, and the Arts, which awarded 20 out of 150 points for underrepresented minority status, making race automatically decisive "for virtually every minimally qualified underrepresented minority applicant."⁴⁴ In both *Bakke* and *Gratz*, the admissions programs were deemed not narrowly tailored.⁴⁵

An educational institution, *may*, however, adopt goals or targets for minority applicants.⁴⁶ A goal is "defined by reference to the educational benefits that diversity is designed to produce."⁴⁷ It is not mandatory and fixed like a quota, but rather is discretionary and flexible—"only a good-faith effort . . . to come within a range demarcated by the goal itself."⁴⁸ For instance, Harvard's admissions policy, which was cited with approval by Justice Powell in *Bakke*, set a goal designed to encourage classroom participation and a richness and diversity of perspectives.⁴⁹ The Harvard policy had no set maximum number but determined that "10 or 20 black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds, and experiences of blacks in the United States."⁵⁰ Similarly, the University of Michigan Law School's admissions policy, approved in *Grutter*, aspired for a "critical mass" or "meaningful representation" of minorities, which would "encourage[] underrepresented minority students to participate in the classroom and not feel isolated."⁵¹

A goal must be flexible and designed to reap the educational benefits of a diverse student body.⁵² An institution may keep and consult daily records of the racial and ethnic composition of the admitted class as part of achieving a goal—so long as admissions officers do not give race "any more or less weight based on the information contained in these reports."⁵³ Whether an institution can seek to enroll the same percentage of minority students in the applicant pool is not clear from *Grutter*. The Supreme Court did state, however, that if the institution were to admit the same percentage of minorities year after year, it would indicate that the "critical mass" or goal was not flexible.⁵⁴ Articulating and striving for a numerical goal, target, or critical mass of enrolled minorities from the applicant pool—so long as it operates in a flexible manner—is a viable method by which an educational institution can announce and enact its commitment to diversity without running afoul of the Constitution. Indeed, as the Supreme Court recognized in *Grutter*, "[S]ome attention to numbers,' without more, does not transform a flexible admissions system into a rigid quota."⁵⁵

A narrowly tailored, race-conscious admissions program considers race in a flexible and nonmechanical manner.

Institutions may use race as a “plus” factor and adopt goals, targets, or “critical masses.”

Institutions may not adopt quotas and determinative point systems.

b. Workable Race-Neutral Alternatives Must Be Considered

Narrow tailoring requires educational institutions that are either considering or already have existing race-conscious admissions policies to examine whether workable race-neutral alternatives exist to achieve their diversity interest. What is required is a “serious, good faith consideration of *workable* race-neutral alternatives that will achieve the diversity the university seeks.”⁵⁶ The institutions need not exhaust “*every conceivable* race-neutral alternative.”⁵⁷ For example, the Court in *Grutter* found the University of Michigan Law School’s admissions program to be narrowly tailored even though the law school did not consider lowering its admissions standards for all applicants or instituting a percent plan⁵⁸—policies that some have pointed to as “race-neutral alternatives.”⁵⁹

Nor do educational institutions need “to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups.”⁶⁰ For example, *Grutter* recognized that a lottery system “would effectively sacrifice all other educational values, not to mention every other kind of diversity,” and that lowering admissions standards for all applicants would make the University of Michigan Law School less competitive and “sacrifice a vital component of its educational mission.”⁶¹ Likewise, *Grutter* observed that percent plans—admissions policies that automatically admit a specified percentage of the highest-performing graduates of a high school or college to a public university—are unworkable in many settings, particularly in graduate and professional schools.⁶² Therefore, while narrow tailoring requires educational institutions to consider seriously and in good faith workable, race-neutral options, it does not require institutions to exhaust all possible race-neutral options or to adopt a race-neutral alternative that will harm their academic values or their interest in diversity.

Educational institutions need not use a race-neutral alternative that will harm their educational values or their interest in diversity.

c. Race-Conscious Admissions Programs Must Not Unduly Burden Nonminority Applicants

Narrow tailoring also means that educational institutions implementing race-conscious admissions policies must not unduly harm members of any racial group, particularly those “individuals who are not members of the favored racial and ethnic groups.”⁶³ One way for institutions to ensure that nonminority applicants are not unduly burdened by race-conscious admissions policies is to provide an individualized, flexible, and nonmechanical review of all applications, as achieved by the University of Michigan Law School’s policy.⁶⁴ Race-conscious admissions programs must consider “all pertinent elements of diversity” so that nonminority applicants who may have greater potential to enhance student body diversity can be offered admission over minority applicants.⁶⁵ In other words, when race is considered a “plus” factor in the context of individualized review, as approved by *Grutter*, a nonminority candidate who was rejected “will not have been foreclosed from all consideration for that seat simply because he was not the right color.”⁶⁶ In an individualized, flexible, and nonmechanical review, all of the rejected applicant’s qualifications “would have been weighed fairly and competitively.”⁶⁷

If a race-conscious admissions program provides for an individualized, flexible, and nonmechanical review of all applicants, it will not unduly burden nonminority applicants.

d. Race-Conscious Admissions Programs Should Periodically Be Reevaluated

Finally, narrow tailoring requires that race-conscious admissions programs have a “logical end point” or “reasonable durational limits.”⁶⁸ As *Grutter* recognized, “[t]he requirement that all race-conscious admissions programs have a termination point assures all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself.”⁶⁹ Although the Supreme Court in *Grutter* announced its hope that race-conscious admissions policies will not be necessary in 25 years, it did not establish any set “logical end point.”⁷⁰ *Grutter* did, however, encourage educational institutions to perform periodic reviews of, or include sunset provisions in, their race-conscious admissions programs to ensure that such programs do not become outdated or unnecessarily harmful to nonminorities.⁷¹ Periodically reevaluating the efficacy of race-conscious admissions programs and adjusting them accordingly should ensure that such programs have “reasonable durational limits.”

To ensure that race-conscious admissions programs have a reasonable duration, educational institutions should reevaluate their programs periodically.

Some Salient Points About Considering Race in Admissions Decisions After *Grutter* and *Gratz*

CONSTITUTIONAL:

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

UNCONSTITUTIONAL:

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

2. Narrow Tailoring When Remediating Past Discrimination Is a Compelling Interest

The discussion above is not meant to suggest that quotas, strict point systems, or more heavily weighted uses of race may never be appropriate in the educational context. The diversity rationale for an admissions program, as endorsed by the Supreme Court in *Grutter*, allows an educational institution to make race-conscious admissions decisions without regard to past or ongoing discrimination. Outside the educational realm, quotas have been recognized as a permissible approach when they serve as a remedy for identified past discrimination by certain sectors of society or institutions.⁷² Neither *Grutter* nor *Gratz* directly addressed the contours of narrowly tailored admissions programs that use quotas or separate admission tracks as a remedy for past discrimination.⁷³ In light of the Court's unwillingness to foreclose the use of quotas to remedy past discrimination in the educational context, educational institutions that have had a history of discrimination and can offer a strong basis in evidence for that discrimination may consider exploring stronger uses of race in employing race-conscious admissions policies.

Such a remedial program in the context of higher education might have the following characteristics to be considered narrowly tailored: In defending a remedial admissions program, an institution would most likely bear the high burden of demonstrating the program's necessity. For example, it may need to demonstrate that the institution discriminated against the beneficiary groups, and that such discrimination resulted in the current lack of opportunity.⁷⁴ In that circumstance, the remedial program would most likely apply only to those groups that have actually been victims of discrimination in the institution, and would not likely extend to other minorities who might be victims of societal discrimination but have not actually suffered adverse treatment at a particular school.⁷⁵ In all likelihood, an institution would also need to explore workable race-neutral alternatives before adopting the remedial program,⁷⁶ to periodically evaluate the necessity of the remedial program,⁷⁷ and to avoid unnecessarily harming the rights of nonminority students.⁷⁸ For more discussion on the use of a remedial admissions program, see Chapter V.

Before adopting a remedial admissions program, it is advisable to consult with counsel to determine whether this option can apply to a specific institution.

D. State Statutory Requirements

Some states have passed laws that limit or prohibit the consideration of race in admissions and other contexts. In California and Washington, for example, voters passed initiatives that prohibit discriminating against or granting "preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."⁷⁹ California's Proposition 209

amended the state constitution, while Washington's Initiative 200 enacted a statute into the state code.⁸⁰

The Washington Supreme Court recently interpreted the state's prohibition against preferential treatment on the basis of race and concluded that the act *does not prohibit all race-conscious government action*.⁸¹ The court recognized that diversity resulted in educational benefits and that a "core mission of public education" was to make an "equal, uniform, and enriching educational environment" available to all students.⁸² Therefore, it appears that public educational institutions in Washington *can* employ race-conscious measures so long as the institution does not use race to grant a "preference" in violation of the Washington statute.⁸³

In *Parents Involved in Community Schools v. Seattle School District*, the school district used a racial integration tiebreaker specifically designed to promote racial diversity in assigning students to high schools within the school district.⁸⁴ The Washington Supreme Court held that the tiebreaker did not violate the state's prohibition against preferential treatment on the basis of race, and that the statute did not prohibit all race-conscious government action.⁸⁵ California state courts, however, have found several programs, including outreach policies and school transfer policies to violate California's Proposition 209.⁸⁶

In November 1999, Florida Governor Jeb Bush issued Executive Order 99-281, the "One Florida Initiative," which banned race- and gender-based affirmative action in admissions to Florida's higher education system, as well as in government employment and state contracting.⁸⁷ Governor Bush's executive order was an effort to preempt a ballot initiative like California's Proposition 209 from affecting the outcome of the November 2000 election.⁸⁸ At that time, Governor Bush also established, and Florida's Board of Regents approved, the "Talented Twenty" policy, allowing Florida high school graduates in the top fifth of their class to be admitted to at least one institution in the State University System, though not guaranteeing a space at selective institutions like the University of Florida and Florida State University.⁸⁹ The One Florida Initiative banned race-conscious decision making in admissions, but not in financial aid and outreach.⁹⁰

Public university administrators should be aware of state statutes limiting or prohibiting the consideration of race in their particular state. For further discussion on developing admissions policies when the consideration of race is prohibited, see Chapter IV.