

Chapter VI Recruitment, Financial Aid, Support, and Other Admissions-Related Programs

The Supreme Court has not directly addressed race-conscious affirmative action policies in higher education outside the admissions context. *Grutter* and *Gratz* do, however, have important constitutional implications for financial aid and scholarships, recruitment and outreach programs, preparation and support programs, and faculty hiring. Now that the Court has clearly endorsed the compelling interest in student body diversity, the means of achieving diversity through race-conscious programs outside of admissions should satisfy constitutional requirements as long as those programs comply with the Court's narrow-tailoring criteria.¹⁸²

Lower federal courts have addressed whether race-conscious programs are permissible in a variety of contexts, including law school admissions, employment, contracting, and housing. It is not clear, however, whether many of these decisions would be controlling in cases involving recruitment and outreach programs related to higher education admissions. On the other hand, current federal guidelines fully endorse the use of race in narrowly tailored financial aid and scholarship programs that seek to remedy the present effects of past discrimination or to create a diverse student body, and federal law clearly authorizes race-conscious employment programs designed to cure a manifest imbalance between minorities and non-minorities in an institution's workforce or to remedy past discrimination by that institution.¹⁸³

Race-exclusive programs, such as minority-only scholarships or minority preparation and support programs, already have been contested by anti-affirmative action organizations, and pose an especially difficult set of challenges for institutions seeking to promote diversity or to remedy past discrimination. Although these programs must be examined carefully and in their particular context, institutions should not presume either their legality or their illegality.

This Chapter examines the relevant constitutional and statutory law in three general areas: (1) financial aid and scholarships; (2) recruitment and outreach; and (3) retention, preparation, and support. In particular, the Chapter identifies key issues that an institution should consider in crafting these programs in the aftermath of *Grutter* and *Gratz*.

A. Financial Aid and Scholarship Programs

While the state of the law with regard to race-conscious financial aid and scholarship programs is far from settled, with careful planning and risk assessment, institutions should be able to develop and maintain race-conscious financial aid and scholarship programs that do not run afoul of federal law. To be sure, some states have ended the practice of taking race into account when awarding scholarships and financial aid at their public institutions. And at least one federal court has raised questions about the evidence an institution must put forward to justify a race-exclusive scholarship program designed to remedy past discrimination.

The Supreme Court has not directly addressed race-conscious financial aid and scholarships, but the Court's existing precedents, including *Grutter* and *Gratz*, clearly provide a basis for institutions to craft narrowly tailored race-conscious financial aid policies and scholarship programs. Moreover, current federal guidelines endorse the use of race in narrowly tailored financial aid and scholarship programs.

1. **Race-Conscious or Race-Targeted Financial Aid and Scholarship Decisions Will Be Subject to Strict Scrutiny**

A financial aid or scholarship program that takes into account a student's race—either as an eligibility requirement or as a factor in the awarding process—will trigger strict scrutiny analysis because the program subjects persons to different treatment on the basis of their race.¹⁸⁴ As with all programs subject to strict scrutiny, a financial aid or scholarship program must be narrowly tailored to meet a compelling interest.

This means the program must be narrowly tailored in furtherance of one (or both) of the compelling interests currently recognized by the Supreme Court: (1) to create a diverse student body, or (2) to remedy the present effects of an institution's past discrimination. Whether such a program is narrowly tailored will depend on a number of variables, including the exact role of the applicant's race in the program. For example, does the program rely on race as an eligibility requirement? How flexible is the program? Is race considered a "plus" factor? What are the burdens on nonminority students? Were race-neutral alternatives considered?

It is important to note at the outset that this discussion applies equally to both public institutions and private institutions that receive federal funding. Although private institutions are not "state actors" per se, private institutions that receive federal funding—virtually all institutions—are subject to Title VI of the Civil Rights Act of 1964.¹⁸⁵ In addition, even institutions that are not recipients of federal funding may be bound by federal antidiscrimination statutes such as 42 U.S.C. section 1981, which prohibits racial discrimination in contracts involving educational services.¹⁸⁶

It is also important to note that even awards from **privately** donated sources may be subject to the standards of the Equal Protection Clause. It is not entirely clear whether a program funded completely by private sources will trigger strict scrutiny if an educational institution only administers the funding, but policy guidelines promulgated by the Department of Education suggest that all operations of a college or university must comply with Title VI, even if they involve the administration of private funds.¹⁸⁷ In addition, the Supreme Court has held that purposeful discrimination that violates the Equal Protection Clause will also violate 42 U.S.C. section 1981.¹⁸⁸ If a contract can be formed between private donors and student recipients, then section 1981 might impose a constitutional standard upon even entirely private forms of financial aid.¹⁸⁹

This is not a clearly settled area of law, so institutions soliciting funds from private sources for race-based scholarships or making awards from these private funds should do so in accordance with a narrowly tailored program that is designed to meet a compelling interest: seeking a diverse student body or remedying past discrimination.

Finally, the discussion below pertains to voluntary programs. Action mandated by a court or agency is outside the scope of this manual. While an institution that has previously discriminated against persons because of their race, color, or national origin *must* take affirmative action to overcome the present effects of prior discrimination, these actions are subject to different standards than voluntary programs are.¹⁹⁰ Similarly, while the Department of Education's Office for Civil Rights, the agency responsible for enforcing Title VI, "often has approved race-targeted financial aid programs as part of a Title VI remedial plan to eliminate the vestiges of prior discrimination,"¹⁹¹ this manual does not address these measures. Nor does the manual address measures in which federal courts have required public universities to create race-based scholarships as part of larger desegregation orders.¹⁹²

2. Evidence of Past Discrimination in Remedial Cases: *Podberesky v. Kirwan*

Only one reported federal case directly addresses the constitutionality of race-conscious financial aid and scholarship programs. In *Podberesky v. Kirwan*,¹⁹³ the Fourth Circuit struck down a race-exclusive merit-based scholarship targeting high-achieving African American students at the University of Maryland, ruling that the University's evidence was not sufficient to justify the program.

The University had voluntarily established its Banneker Scholarship program as a means to remedy the lingering effects of the *de jure* segregated educational system that had existed in Maryland. Daniel Podberesky, a Hispanic student, challenged the Banneker program, arguing that it created an impermissible racial classification in violation of the Equal Protection Clause. Podberesky met the academic qualifications and all other requirements of the Banneker scholarship, except that he was not African American. He did not qualify for any of the "race-neutral" merit-based scholarship programs offered by the University.¹⁹⁴

The University of Maryland argued that the Banneker program was constitutionally permissible because it was narrowly tailored to remedy four present effects of past discrimination: (1) the University's poor reputation within the African American community; (2) African Americans' underrepresentation in the student population; (3) low retention and graduation rates among African American students enrolled at the University; and (4) a campus atmosphere perceived as being hostile to African American students.¹⁹⁵ The federal district court agreed with the University, but the Fourth Circuit reversed and held that the Banneker Scholarship program violated both the Equal Protection Clause and Title VI.¹⁹⁶

The Fourth Circuit ruled that the University had failed to present sufficient evidence to prove that its own past discrimination was the cause or source of the alleged present effects.

Therefore, the University lacked a compelling interest to implement the race-based Banneker program. Specifically, the Fourth Circuit ruled that in order for an institution to prove that a racially hostile environment is a present effect of past discrimination, the institution must show that the environment was caused by its own past actions and was not a result of general “societal discrimination.”¹⁹⁷

The Fourth Circuit also ruled that the University’s scholarship program was not narrowly tailored. It found that the University had not convincingly established the composition of its applicant pool and, therefore, the court could not determine whether there was an underrepresentation of African American students or any need for narrowly tailored remedial action. The court also concluded that, even if a need for remedial action existed, the Banneker program was not narrowly tailored because its eligibility criteria included students from outside the state of Maryland, who, in the court’s view, were not the type of students subjected to the University’s past discrimination.¹⁹⁸

It is important to note that the Fourth Circuit did *not* rule that all race-targeted scholarships are impermissible. Nor did the Fourth Circuit make *any* ruling whatsoever as to the constitutionality of scholarship programs designed to promote student body diversity, since the University did not attempt to justify the Banneker program on the basis of a diversity rationale. Indeed, following established Supreme Court precedent, the Fourth Circuit acknowledged that an institution may establish race-targeted scholarships to remedy the present effects of prior discrimination, provided that such measures are narrowly tailored to achieve that objective. The Fourth Circuit simply ruled that the University’s evidence to support the Banneker scholarship was insufficient.¹⁹⁹

3. Current Federal Guidelines Support Race-Conscious and Race-Targeted Financial Aid and Scholarships

Although case law is limited in the area of race-conscious financial aid, the U.S. Department of Education’s 1994 Final Policy Guidance provides support for race-conscious financial aid programs. (See Appendix 5 for the complete Policy Guidance.) The Policy Guidance offers a useful legal analysis of financial aid programs, and states that “a college may use race or national origin as a condition of eligibility in awarding financial aid if this use is narrowly tailored, or in other words, if it is necessary to further its interest in diversity and does not unduly restrict access to financial aid for students who do not meet the race-based eligibility criteria.”²⁰⁰

Although it does not carry the force of law, and may be revised by the Bush Administration in the aftermath of the *Grutter* and *Gratz* decisions, the Policy Guidance is an essential reference for colleges and universities. It is “intended to assist colleges in fashioning legally defensible affirmative action programs to promote the access of minority students to postsecondary education,” and “to help clarify how colleges can use financial aid to promote campus diversity and access of minority students to postsecondary education without violating Federal anti-discrimination laws.”²⁰¹

The Policy Guidance is based on five principles:

- ***Principle 1: For Disadvantaged Students.*** An institution may make awards to “disadvantaged students” without regard to race, even if the awards disproportionately favor minority students. This would include, for example, funds earmarked for students from school districts with high dropout rates or from low-income families or from families in which few or no members have attended college. Programs based on this principle do not trigger strict scrutiny because they do not involve classifications based on race. Moreover, although Title VI regulations prohibit actions that have an effect of discriminating on the basis of race, even if not intentional,²⁰² actions that have a disproportionate effect on students of a particular race are permissible under Title VI if the actions bear a “manifest demonstrable relationship” to the college’s or university’s educational mission.²⁰³ The ability to overcome disadvantage is a permissible, educationally justified, race-neutral consideration in awarding financial aid.
- ***Principle 2: Authorized by Congress.*** A college or university may make awards on the basis of race if they are awarded under a federal statute that authorizes the use of race. Financial aid programs for minority students that are authorized by a specific federal law cannot be considered to violate another federal law, such as Title VI.²⁰⁴
- ***Principle 3: To Remedy Past Discrimination.*** An institution may make awards to remedy discrimination as found by a court or by an administrative agency, such as the Department of Education’s Office for Civil Rights, or based on a finding of past discrimination by a state or local legislative body, as long as the legislature has a strong basis in evidence identifying discrimination within its jurisdiction. A college or university also may make awards on the basis of race as part of affirmative action to remedy the effects of the school’s past discrimination without waiting for a finding to be made, if the school has a strong basis in evidence of its past discrimination to justify the affirmative action. All programs based on this principle must be narrowly tailored to remedy the present effects of the past discrimination.
- ***Principle 4: To Create Diversity.*** An institution may make awards to promote diversity by considering factors other than race, such as geographic origin, diverse experiences, or socioeconomic background. In addition, a college or university may take race into account as one factor, along with other factors, in making awards if necessary to promote diversity. Finally, a school may use race as a condition of eligibility in making awards if such use of race is narrowly tailored to promote diversity.
- ***Principle 5: Private Gifts Restricted by Race.*** All of the operations of a college or university receiving federal financial assistance are covered by Title VI.²⁰⁵

Since an institution's award of privately donated financial aid is within its "operations," the institution must comply with the requirements of Title VI in awarding those funds. Thus, an institution may award privately donated financial aid on the basis of race if it does so to further a compelling interest, consistent with "narrow tailoring" requirements.²⁰⁶

4. Race as a "Plus" Factor in Financial Aid or Scholarship Decisions

A financial aid or scholarship program designed to create a diverse student body that takes several factors into account, including a student's race, would likely survive strict scrutiny if the process parallels admissions procedures approved by the Supreme Court. Examples of this type of program might include:

- a merit-based scholarship, in which a student's race was a "plus" factor in the selection process, or
- a need-based program that gives a "plus" to a student's race—for example, by substituting or reducing the work-study or loan portion of a minority student's aid package and replacing it with a grant.

The Supreme Court's holding in *Grutter*—that creating a diverse student body is a compelling interest justifying the use of race as a "plus" factor in admissions decisions—provides strong support for the use of race as a plus factor in financial aid and scholarship decisions because like admissions, these programs strongly influence the composition of the student body. *Grutter* held that a student's race cannot be the decisive factor in the admissions review and selection process. The examples cited above are consistent with *Grutter* because the decision *whether* to make an award is not made on the basis of the student's race. Even in the need-based example, a student's race is considered in the *kind* of award that is made; the student's race is not the determining factor as to *whether* an award is made at all.

A school should be prepared to show that its plus-factor use of race in individualized financial aid or scholarship decisions helps it achieve a diverse student body. This showing will be important because an opponent might argue that the holding of *Grutter* is limited strictly to the admissions context. An institution must be prepared to show specifically *how* and *why* its financial aid or scholarship program promotes diversity.

In this regard, an institution should gather evidence showing that its race-conscious program helps it to achieve a goal or "critical mass" of minority students. For example, an institution might be able to show through a survey or statistical evidence that the number of minority students that actually enroll would be much lower if race-conscious financial aid or scholarship programs were not employed. Indeed, the Supreme Court accepted the University of Michigan's argument that its mission to maintain a diverse student body could not be achieved "with only token numbers of minority students."²⁰⁷ For the reasons set forth

in Chapter II, a goal or “critical mass” of minority students helps the institution achieve its goal of attaining a diverse student body.

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At the same time, narrow tailoring requires an institution to show that its consideration of a student’s race in making financial aid or scholarship decisions is no greater than is necessary to achieve a diverse student body. An institution must make several showings to meet the requirements of narrow tailoring. As discussed in Chapter I, an institution must: (1) take race into account in a flexible and nonmechanical way; (2) seriously and in good faith consider whether workable race-neutral alternatives will effectively further diversity; (3) not otherwise unduly burden nonminority applicants; and (4) periodically reevaluate the program for its necessity.

One particular “narrow tailoring” challenge against which the institution should be prepared to defend is whether the program unduly burdens nonminorities.²⁰⁸ The more diffuse and less severe the impact on nonminority students, the more likely a race-conscious program will meet this requirement. An institution does not have the burden of proving that no student’s opportunity to receive financial aid has been in any way diminished by the program.²⁰⁹ Nevertheless, the outright elimination of scholarships currently received by nonminority students in order to start a scholarship program for minority students is probably “too intrusive to be considered narrowly tailored.”²¹⁰ A comprehensive program that takes into account many factors, including race, is likely to pass constitutional muster. (See Chapter II).

One way to show that race-targeted scholarships do not burden nonminorities is to gather evidence showing the amount of funding for race-conscious financial aid or scholarships relative to the entire amount of funding for non-race-conscious financial aid or scholarships. While an institution should base this evidence on its own budget and financial statements, a 1994 report by the U.S. General Accounting Office may be useful for thinking about the kinds of evidence to gather.²¹¹ According to the GAO report, although many colleges and universities award minority-targeted scholarships (which the GAO defined as scholarships for which some form of minority status is an eligibility criterion), the total amount of money dedicated to these scholarships is quite small. The GAO report concluded that “many schools” use minority-targeted scholarships “to some extent” but that these scholarships are “a small proportion of all scholarships” available, and that despite their “widespread use,” minority-targeted scholarships account for “a small share of all scholarships and scholarship dollars.”

Specifically, the GAO study found that at the undergraduate level, scholarships (from all funding sources) for which minority status is the *only* requirement for eligibility were rare, accounting for less than 0.25 percent of all scholarship monies. The GAO study further found that scholarships for which minority status is one of several requirements for eligibility represented only about 3 percent of scholarship monies. According to the GAO report, most minority-targeted scholarships use additional criteria, such as financial need or academic merit, for awarding funds.

More recently, a 1995 Report to the President stated that the Department of Education “estimate[d] that only 40 cents of every \$1000 in Federal educational assistance is devoted to [minority] targeted [scholarship] programs [and that] they should be understood as a very minor element of an overall, balanced, opportunity strategy addressing many needy populations and several national purposes.”²¹²

Finally, an institution should be prepared to show that the existence of funds for race-conscious financial aid or scholarships does not necessarily translate into a decrease of funds for nonminority students. Even it does, the burden on third parties may be negligible because, “unlike admissions to a class with a fixed number of places, the amount of financial aid [available in any given year] may increase or decrease based on the functions it is perceived to promote” and for reasons other than the availability or existence of race-conscious programs.²¹³

5. Race-Exclusive Awards

a. Race-Exclusive Awards to Promote Diversity

A narrowly tailored use of *race-exclusive* awards to achieve a diverse student body may survive strict scrutiny, although these programs pose a difficult set of challenges for educational institutions. An example of this type of award is the Banneker Scholarship at issue in *Podberesky*, for which only African American students were eligible. (Recall that the University of Maryland did *not* attempt to justify the Banneker Scholarship on diversity grounds, thus the reasoning of *Podberesky* has no bearing on the analysis below.)

Although *Gratz* creates some uncertainty as to whether race-exclusive financial aid or scholarship programs can survive the “narrowly tailored” prong of strict scrutiny, *Gratz* may be ultimately distinguishable. In *Gratz*, the Supreme Court held that the University of Michigan’s undergraduate admissions system, which automatically awarded 20 points to applicants who were underrepresented minorities, was not narrowly tailored because race was the decisive factor in admission.²¹⁴ Justice O’Connor in her concurrence stated: “This [undergraduate] policy stands in sharp contrast to the law school’s admissions plan, which enables admissions officers to make nuanced judgments with respect to the contributions each applicant is likely to make to the diversity of the incoming class” and “adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions.”²¹⁵

Opponents of race-exclusive policies might invoke *Gratz* to challenge financial aid or scholarship programs as not narrowly tailored, because race is a determinative factor in deciding which students receive these financial aid or scholarships. Opponents might further argue that automatically limiting the applicant pool only to members of a particular race does not allow for a consideration of all factors that will add to diversity. The process, so the argument might go, is nonindividualized, mechanistic, and violates both *Gratz* and *Grutter*.

The narrow-tailoring analysis as applied in *Gratz* may be distinguishable because *Gratz* involved an admissions system, not a financial aid or scholarship program. This is an important distinction that *Grutter* implicitly recognized—strict scrutiny must be applied within the *context* of the program under review. The narrow-tailoring “inquiry must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity. . . .”²¹⁶ The institution must show “that the means chosen ‘fit’ . . . th[e] compelling goal . . . closely.”²¹⁷

The narrow-tailoring analysis in the financial aid or scholarship context should focus on showing that a race-exclusive program is a carefully considered and closely calibrated means to achieve the goal of creating a diverse student body, specifically to achieve a goal or “critical mass” of minority students. Presumably, by the time the institution makes its scholarship and financial aid decisions, the institution has already engaged in the individualized, nonmechanical, “meaningful . . . consider[ation]” of a student and his or her potential to contribute to the diversity of the class, since the institution decides whether to award a particular student financial aid or a scholarship *after* deciding to admit that student.

Indeed, an institution’s efforts to achieve a goal or “critical mass” of minority students do not end after admissions decisions have been made. For example, an institution may find that, although it has sufficient minority applicants to offer admission to a diverse group of applicants, absent the availability of financial aid for minority students, its offers of admission are disproportionately rejected by minority applicants, which makes it impossible for the school to enroll a “critical mass” of minority students and to achieve a diverse student body. As one court has recognized, “[o]ne of the most important determinants for the majority of student enrollment decisions is the receipt of financial aid.”²¹⁸ It is important for institutions to articulate and support this distinction between the admissions and the financial aid/scholarship contexts.

The Department of Education’s 1994 Final Policy Guidance offers other justifications that institutions might consider in supporting race-exclusive financial aid and scholarship programs to achieve a diverse student body. The Policy Guidance recognizes that “it may be necessary to designate a limited amount of aid for students of a particular race or national origin.”²¹⁹ One reason it may be necessary to do so is the failure of an institution to attract a sufficient number of minority applicants who meet the academic requirements of the institution, which may impair an institution’s efforts to enroll a diverse student body, even if a student is given a competitive “plus” in the admissions process on account of race. An institution that is able to achieve a diverse student body in some of its programs using “race-

neutral” financial aid criteria or using race as a “plus” factor nevertheless may find it necessary to use race as a condition of eligibility in awarding limited amounts of financial aid to achieve diversity in some of its other programs, such as particular undergraduate schools or programs.

Limited race-exclusive awards can serve a critical role in achieving a diverse student body in at least three respects: First, the availability of awards for members of a particular race may serve as a recruitment tool, encouraging students to apply in the first place. Second, a race-exclusive program provides a means of encouraging admitted students to enroll. Finally, a race-exclusive program may assist institutions in retaining students until they complete their program of studies.²²⁰

As suggested above, an institution should also gather evidence regarding the scope of its race-exclusive programs to show that these programs involve limited amounts of funds and have little burden on nonminority groups. In addition, institutions should be prepared to document that policies that are less burdensome on nonminority students (including race-neutral policies) are not as efficacious as race-exclusive policies. This documentation might include statistical projections of enrollment or retention based on variations in the types of race-conscious and race-neutral policies that could be employed.

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b. Race-Exclusive Awards to Remedy Past Discrimination

A college or university should be able to implement a race-based financial aid or scholarship program voluntarily if it can establish a strong basis in evidence that affirmative action is necessary to remedy the present effects of past discrimination and show that the program is narrowly tailored. While this is the type of program that the Fourth Circuit struck down in *Podberesky v. Kirwan*, a carefully crafted and well-documented program can survive strict scrutiny. The lesson *Podberesky* teaches is that an institution must justify this type of program with hard evidence causally linking present-day effects of discrimination to either its own past discrimination or “identified discrimination within its jurisdiction.”²²¹ *Podberesky* raises a host of issues that institutions must consider.²²²

As discussed above, while the case law is unsettled with regard to the kinds and amounts of evidence that constitute a “strong basis in evidence,” an institution that is able to gather statistical as well as anecdotal evidence of the present effects of past discrimination will be in a strong position to defend its program. An institution that has or is contemplating a race-exclusive financial aid or scholarship program based on the remedial justification should proactively develop a record to justify the program, including a historical record to establish a

causal connection between past discrimination and its present effects. It is crucial that a college or university develop an *institution-specific* record in order to avoid challenges that it is trying to remedy “societal discrimination.”

An institution could gather evidence to show that its poor reputation among minority students is a present effect of either its own past discrimination or prior discrimination “within its jurisdiction.” Supreme Court precedent in the employment context makes clear that a reputation for having discriminated in the past is a lingering effect of “discriminatory practices and devices which have . . . disadvantage[d] minority citizens.”²²³ Moreover, the effects of such past discrimination can linger even after the institution “formally ceases to engage in discrimination” because “informal mechanisms may obstruct equal” opportunities and access, and the reputation “may discourage minorities from seeking” the opportunities to begin with.²²⁴

A school must also be prepared to show that its poor reputation is *caused* by the past discrimination. In *Podberesky*, the University of Maryland’s admissions officials and recruiters testified that the University’s “past discrimination against African-Americans was strongly interwoven with its reputation.”²²⁵ The Fourth Circuit rejected the University’s argument, however, stating that “mere knowledge of historical fact is not the kind of present effect that can justify a race-exclusive remedy.”²²⁶ Thus, an institution must be prepared to show the link between past discrimination and present effect.

An institution should show that its reputation plays a role in students’ decisions to enroll. The Supreme Court has recognized that a student’s decision whether to attend a particular college or university “is determined not simply by admissions policies, but also many other factors.”²²⁷ If a college or university presents evidence, such as through a survey, that the institution’s reputation is one of these factors and that the institution has a poor reputation among minority students, such evidence will bolster its argument that a poor reputation is one of the effects of past discrimination that it seeks to remedy through the program.

A school should also develop evidence of the continuing effects of past discrimination by pointing to statistical disparities in its student population. The institution must show that the low number of minority students in its student population is a present effect of past discrimination. It is important to consider this statistical evidence carefully. This area is rife with potential problems, since the college admissions process involves so many variables.

The Supreme Court in *Croson* held that “[t]he relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task.”²²⁸ As such, the correct pool is most likely minority students who meet the minimum admission requirements. If the institution can show a statistical disparity between the number of minority students who meet the minimum admission requirements and the number of minority students at the school, the institution may be able to establish an inference that past discrimination accounts for the disparity.²²⁹ It is imperative

that in gathering this evidence, a school demonstrate a causal connection between its past discrimination and current statistical racial disparities in its student population.

Similarly, an institution should gather statistical evidence about retention and graduation rates of minority students as compared with the rates for other racial groups. Non-discriminatory explanations must be ruled out when presenting such evidence. An institution must demonstrate that a causal connection exists between its past discrimination and these lower graduation and retention rates. While any statistical study presented by a college or university should control for non-discriminatory explanations, Supreme Court precedent in *U.S. v. Fordice*²³⁰ makes clear that it is the duty of the court to consider whether the past discrimination is “influencing,” “fostering,” or “contributing to” the disparities. The institution does not have to eliminate every other possibility.

An institution may also collect evidence that its racially hostile climate is an effect of past discrimination. Once again, this type of evidence is not dispositive of whether such a campus climate is traceable to past discrimination. The school must be prepared to make that connection. One court has held that “a university that maintains a climate traceable to segregation with continuing segregative effects must remedy the climate to the extent that such can be done in a practicable and educationally sound manner.”²³¹

In addition to showing that the remedial, race-based financial aid or scholarship program is justified by a strong basis in evidence, the institution will also have to show that the program is narrowly tailored. The same considerations discussed above in Chapters I and II apply here. The institution must show that it considered race-neutral alternatives. The extent, duration, and flexibility of the racial classification must be addressed. The use of the classification should be sufficiently flexible that exceptions can be made if appropriate. For example, racial restrictions on the award of financial aid could be waived if there were no qualified applicants in a particular year. Finally, the burden on nonminority students must be considered.

B. Recruitment and Outreach Programs

Although the Supreme Court has yet to address the constitutionality of race-conscious recruitment and outreach efforts under the Equal Protection Clause, several lower federal courts have addressed the question in a variety of contexts, including law school admissions, employment, contracting, and housing.

Indeed, the last decade has seen a number of decisions by federal courts specifically analyzing race-conscious and race-targeted recruitment and outreach programs. Moreover, many federal courts, while ruling that certain race-based affirmative action measures violate the Equal Protection Clause, have without explicit analysis, pointed approvingly to race-conscious recruitment efforts as permissible forms of affirmative action.²³²

At the state level, executive officers and legislatures have taken a variety of positions with regard to race-conscious recruitment and outreach in the admissions context. Some states, for example, have authorized their public colleges and universities to embrace race-conscious recruitment and outreach efforts, even as they have formally stricken all consideration of an applicant's race in the selection and review process. On the opposite end of the spectrum, public institutions in California must contend with the California Supreme Court's decision holding that outreach to minority business enterprises constitutes "preferential treatment" that is prohibited by the California Constitution, as amended by Proposition 209.²³³

The result is seemingly a hodgepodge of rules. In addition, race-conscious recruitment and outreach efforts come in a wide variety of forms and occur throughout the admissions cycle, both before and after the review and selection process. An institution may be conscious of race, for example, in determining that an admissions officer should visit a particular high school with a high percentage of minority students or by sending a publication about the institution's commitment to diversity only to prospective minority applicants. An institution might also offer minority-only campus visitation programs that serve as recruiting tools to encourage minority students to apply. Recruitment begins in earnest again after acceptance letters have been sent, in an effort to enroll the students who have been admitted. Minority-only "admit" events are commonplace occurrences on campuses throughout the country.

Despite conflicting lower federal court rulings, many race-conscious recruitment and outreach programs have been upheld as constitutional. Some courts have relied on the 1995 Supreme Court decision in *Adarand Constructors, Inc. v. Peña*,²³⁴ to hold that race-conscious recruitment does not entail a "preference" and therefore does not trigger strict scrutiny in the first place. Other courts have adopted the analytical tool developed by the federal district court in *Shuford v. Alabama State Board of Education*²³⁵ that distinguishes between "inclusive" and "exclusive" forms of affirmative action, to hold that recruitment is "inclusive" and therefore does not implicate the Equal Protection Clause. (For more on the distinction between "inclusive" and "exclusive" forms of affirmative action, see Section B.3.)

On the other hand, in the contracting context, where mandated race-conscious recruitment measures amount to granting "preferences" based on race, courts have struck down the measures as equal protection violations. While there is a temptation to read these decisions as cautionary tales, they can be distinguished from recruitment and outreach in the admissions context.

This Section examines these decisions in detail and offers suggestions for crafting race-conscious recruitment and outreach programs that will withstand constitutional inquiry.

1. Overview

The threshold question in analyzing the constitutionality of a race-conscious recruitment or outreach program is whether the program creates classifications that subject persons to unequal treatment on the basis of race. Under *Adarand Constructors, Inc. v. Peña*,

only racial classifications that lead to unequal treatment implicate the Equal Protection Clause and thus trigger strict scrutiny review. Racial classifications that do not lead to unequal treatment do not implicate the Equal Protection Clause and thus do not trigger strict scrutiny review.

The Supreme Court in *Adarand* held that “all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.”²³⁶ More specifically, *Adarand* held—in language later adopted in *Gratz*—that “any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify *any racial classification subjecting that person to unequal treatment* under the strictest judicial scrutiny.”²³⁷ Although *Adarand* did not define the term “racial classification,” the language of *Adarand* makes clear that the precise concern of the Equal Protection Clause is governmental action that “treats people differently because of their race.”²³⁸ The facts of *Adarand* presented the Court with a racial classification that squarely produced differential treatment: *Adarand* invalidated a government program that gave financial bonuses to contractors who utilized minority subcontractors, thus directly enhancing the competitive position of minority-owned firms relative to nonminority-owned firms in bidding for subcontracts.²³⁹

Interpreting *Adarand*, federal courts of appeals such as the Ninth Circuit have held that “[t]he Equal Protection Clause as construed in *Adarand* applies only when the government subjects a ‘person to unequal treatment.’”²⁴⁰ Other courts are generally in agreement with the Ninth Circuit’s interpretation of *Adarand*.²⁴¹

It is important to note, however, that the Supreme Court in *Grutter* contains a statement that opponents may use to argue that *Adarand*’s limiting rule is no longer good law: “Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it.”²⁴² As such, *Grutter* might be interpreted as holding that *all* uses of race implicate the Equal Protection Clause and are subject to strict scrutiny. This interpretation, however, may not be justified. First and most importantly, the statement is not presented as a holding of the Court. Indeed, earlier in the opinion, the Court clearly reaffirmed the holdings of *Adarand* that “all racial classifications imposed by government must be analyzed . . . under strict scrutiny” and that “government may *treat people differently because of their race* only for the most compelling reasons.”²⁴³ Moreover, it is not likely that the Court intended to depart from *Adarand*, because it made no attempt to distinguish *Adarand* or lower courts’ interpretation of *Adarand*. Accordingly, *Grutter* broke no new ground, and *Adarand*’s limitation on the application of strict scrutiny only to *racial classifications that subject persons to unequal treatment*—a limitation affirmed in whole by *Gratz*—should be interpreted as the law of the land.²⁴⁴

While the Supreme Court was not presented with a recruitment or outreach program in *Adarand*, lower courts have considered whether particular race-conscious recruitment and outreach programs create racial classifications that subject persons to unequal treatment.

These decisions are analyzed in the sections below in an attempt to draw out the significant holdings for institutions crafting race-conscious recruitment and outreach programs.²⁴⁵

2. Recent Recruitment and Outreach Cases

a. *Weser v. Glen*

A recent case on recruitment and outreach in the admissions context holds that “[r]acial classifications that serve to broaden a pool of qualified applicants and to encourage equal opportunity, but do not confer a benefit or impose a burden, do not implicate the Equal Protection Clause.”²⁴⁶ In *Weser v. Glen*, the plaintiff challenged his denial of admission to the City University of New York Law School at Queens College. He alleged that the Law School discriminated against him “in accordance with an unconstitutional affirmative action plan,”²⁴⁷ and contended that the Law School “tr[ie]d to select a diverse group of students” through “active recruit[ment].”²⁴⁸ The policy challenged by the plaintiff stated:

We try to select a diverse group of students. Our students must be academically able and genuinely representative of the remarkable diversity of the City the Law School serves. We actively recruit, among others, students who are members of the populations that have traditionally been underserved by the law and underrepresented by the profession.²⁴⁹

The plaintiff argued that the official admissions policy favored minorities and women, subjected white males to different admissions standards, and limited the number of seats available to white males.²⁵⁰

The court rejected the plaintiff’s arguments and found no “implicat[ion of] the Equal Protection Clause.”²⁵¹ Echoing the language of *Adarand*, the court found that the Law School’s admissions policy, on its face, did not classify persons on the basis of race and did not require or encourage the unequal treatment of applicants.²⁵² The court also credited a Law School dean’s testimony that “the Law School student body consists of a diverse group of qualified individuals as a result of the school’s efforts to gather the largest possible applicant pool.”²⁵³

Although the parties disputed whether the Law School’s recruitment and outreach efforts targeted persons of certain races, that issue was not relevant to the court’s holding: “Even if the Law School’s recruiting and outreach efforts were ‘race conscious’ in being directed at broader recruiting of minorities . . . such efforts would not constitute discrimination” because racial classifications that broaden the pool of qualified applicants and encourage equal opportunity, “but do not confer a benefit or impose a burden, do not implicate the Equal Protection Clause.”²⁵⁴

b. *Honadle v. University of Vermont*

In *Honadle v. University of Vermont*,²⁵⁵ a faculty hiring case relied upon by *Weser*, the district court, in ruling on a pre-trial motion, reviewed the validity of the University of Vermont's Minority Faculty Incentive Fund ("MFIF"). The MFIF program had the potential to provide, among other things, financial incentives to individual departments to be used to ensure the successful recruitment of minority faculty.²⁵⁶ The plaintiff, a white woman, alleged that the potential availability of MFIF funds was the racially discriminatory and constitutionally impermissible reason that the University hired "a Chinese-born Asian-American" woman instead of the plaintiff as a department chair.²⁵⁷ The University argued that neither the race of the candidates nor the potential availability of funds under the MFIF component of its affirmative action plan played a role in the actual hiring decision. The University maintained that the MFIF program was not "an inducement to hire" but "merely an inducement to enhance equal opportunity through expanded recruitment."²⁵⁸

After determining that the "threshold question [under *Adarand*] is whether the [MFIF program] created a racial classification," the court rejected the plaintiff's argument and ruled that the MFIF program "do[es] not create a racial classification demanding strict scrutiny."²⁵⁹ "A public university may be racially 'aware' or 'conscious' by . . . encouraging broader recruiting of racial and ethnic minorities without triggering the equal protection clause's strict scrutiny review. These activities do not impose burdens or benefits, nor do they subject individuals to unequal treatment."²⁶⁰

Although the parties disputed both the purpose and the effect of the MFIF program, the court concluded that the program did not "have the purpose of creating an inducement to hire" the Asian American woman instead of the plaintiff. The court noted that the availability of incentive funds was not "a determining factor in hiring decisions,"²⁶¹ the award of incentive funds "[wa]s not automatic upon the hiring of a minority faculty member, but depend[ed] upon availability of funds," and decisions to award funds were often not made "until long after the hiring decision."²⁶² The court noted, however, that if the plaintiff could prove at trial that the MFIF program had the effect of influencing the hiring decision, the program would be subject to strict scrutiny.²⁶³

A key fact of *Honadle* is that the potential to receive funds for race-conscious recruitment played no part in the ultimate hiring decision. *Honadle* can be viewed as another decision in which "[c]ourts have consistently declined to apply strict scrutiny to outreach efforts to minorities which do not accompany actual preferences" in the ultimate decision.²⁶⁴

c. *Raso v. Lago*

In *Raso v. Lago*,²⁶⁵ the First Circuit held that a fair housing marketing plan that involved an advertising outreach strategy targeting minorities could not be categorized as a racial classification that benefited a particular race. The challenged housing marketing plan included broad outreach to minorities to make them aware of housing opportunities. The

outreach was upheld as constitutional because race was a consideration only in the targeted recruitment efforts and did not come into play with regard to the ultimate assignment of housing units.²⁶⁶

3. “Inclusive” vs. “Exclusive” Recruitment Programs

In upholding the constitutionality of the University of Vermont’s race-conscious recruitment program, the *Honadle* court also relied on the “distinction between ‘inclusive’ forms of affirmative action, such as recruitment and other forms of outreach, and ‘exclusive’ forms of affirmative action, such as quotas, set asides and layoffs.”²⁶⁷ This distinction was first set forth in *Shuford v. Alabama State Board of Education*.²⁶⁸

In *Shuford*, the court considered the validity of a consent decree in a race- and sex-discrimination class action involving faculty hiring at postsecondary educational institutions in Alabama. The court first observed that “there exists a wide variety of affirmative action techniques, with different consequences, each of which should be analyzed on its own merits.”²⁶⁹ These differences, according to the court, can be categorized into “inclusive” and “exclusive” forms of affirmative action.

“Inclusive” forms of affirmative action:

have as their purpose ensuring that the pool of candidates is as large as possible. For example, *the primary inclusive form of affirmative action is recruitment*, which generally attempts to expand the applicant pool to include more . . . minorities. Recruitment and other techniques of inclusion do not affect the selection process for hiring or promotion. Rather, inclusive techniques seek to ensure that as many qualified candidates as possible make it to the selection process.²⁷⁰

On the other hand, “exclusive” forms of affirmative action:

usually work . . . to select some candidates rather than others from a pool. Such techniques include setting selection goals for vacancies, requiring selection quotas for vacancies, and displacing workers of a particular . . . race through layoffs. These affirmative action techniques, to varying degrees, have the potential to help minorities . . . actually be selected at the expense of someone else. Of course, selection by necessity requires excluding some people. The concern is discriminatory exclusion that causes harm to third parties, as these examples suggest.²⁷¹

According to the court, “techniques of inclusion do not require the traditional . . . equal protection analysis that courts have used for techniques of exclusion.”²⁷² “At the heart of the distinction”—and the reason why “inclusive” affirmative action does not implicate Equal

Protection or trigger strict scrutiny—“is the recognition that, as the Supreme Court put it [in *United States v. Paradise*]: ‘Qualified white candidates simply have to compete with qualified black candidates.’”²⁷³ An institution’s race-conscious efforts to increase the number of minority candidates in the applicant pool thus will not trigger equal protection analysis because such efforts are an “inclusive” form of affirmative action.

The court approved the use of “procedures designed to . . . increase the number of applicants considered in order to obtain the best candidates,” noting that “[t]he provisions are not aimed at the actual selection process.”²⁷⁴ Race-conscious recruiting efforts “are always neutral with respect to selection if [the efforts] are inclusive.”²⁷⁵ The court was careful to note, however, that efforts to increase the number of minority applicants *would* trigger strict scrutiny if they had the effect of limiting the number of nonminority applicants:

Under some circumstances, however, these affirmative action techniques could act to exclude. This presents an entirely different situation. For instance, if the [defendants] began recruiting at black and women’s colleges and stopped recruiting at [predominantly white] Auburn [University], this would be an instance of exclusion. *In order to be truly inclusive, recruiting must be balanced.*²⁷⁶

Adopting the reasoning in *Shuford*, the Eighth Circuit Court of Appeals in *Duffy v. Wolle*²⁷⁷ ruled that “an employer’s affirmative efforts to recruit minority . . . applicants does not constitute discrimination.” In *Duffy*, a white male plaintiff claimed he was discriminatorily passed over for a promotion in violation of his right to equal protection, in part, because of the employer’s “interest in obtaining a diverse pool of applicants.”²⁷⁸ Although there was no indication in the record that the defendants actually undertook any targeted recruiting, the Eighth Circuit concluded that “[a]n inclusive recruitment effort enables employers to generate the largest pool of qualified applicants [and] helps to ensure that minorities . . . are not discriminatorily excluded.”²⁷⁹

The Eighth Circuit also concluded that efforts to increase the number of minorities in the applicant pool do not impose burdens on the basis of race. “The only harm to white males is that they must compete against a larger pool of qualified applicants. This, of course, is not an appropriate objection [and] does not state a cognizable harm.”²⁸⁰

Thus, as the case law suggests, it is important for an institution to engage in balanced recruitment and outreach, even as it takes special race-conscious measures to recruit and reach out to minorities.

4. Programs That Trigger Strict Scrutiny

The Sixth, Ninth, and D.C. Circuits, as well as several district courts, have held that affirmative action plans that require the solicitation and encourage, if not mandate, the

inclusion of minorities create racial classifications and operate as “preferences” that trigger strict scrutiny.²⁸¹

a. *MD/DC/DE Broadcasters Ass’n v. FCC*

In *MD/DC/DE Broadcasters*, the D.C. Circuit struck down a Federal Communications Commission’s equal employment opportunity rule as an impermissible racial classification because it placed pressure on radio stations to engage in minority recruitment.²⁸² The FCC rule required radio stations either to undertake four approved recruitment activities or to design their own outreach program. If a radio station chose to create its own program, the station was also required to report to the FCC the race of each job applicant and the source by which the applicant was referred to the station. The rule permitted the FCC to investigate the recruitment efforts of stations that it determined had too few minorities in their applicant pool.²⁸³

The D.C. Circuit found that the reporting requirements and potential investigation by the FCC were “a powerful threat” that all but compelled stations to hire minorities, and that the directive advantaged minority applicants because it was the practical equivalent of a rule that obliges employers to comply or to suffer the consequences. The court further concluded that the FCC’s focus on the race of applicants and employees belied its statement that the only goal of the program was to effectuate outreach: “The Commission has designed a rule under which nonminorities are less likely to receive notification of job openings solely because of their race; that the most qualified applicant from among those recruited will presumably get the job does not mean that people are being treated equally—that is, without regard to their race—in the qualifying round.”²⁸⁴

b. *Lutheran Church-Missouri Synod v. FCC*

Similarly, in *Lutheran Church*, the D.C. Circuit invalidated a regulation imposed by the FCC mandating that all radio stations adopt an affirmative action plan that required the stations to, among other things: (1) use minority-specific recruiting sources; (2) evaluate the availability of minorities in the stations’ recruitment area; and (3) analyze their own efforts to recruit, hire, and promote minorities.²⁸⁵

The court noted that if the regulations had merely required stations to implement racially neutral recruiting and hiring programs, the equal protection guarantee would not be implicated, but the court found that the regulations went beyond mere outreach. According to the court, the regulations constituted impermissible racial classifications because they obliged stations to grant some degree of “preference” to minorities in hiring. It also determined that because the scheme was based on the notion that a radio station’s workforce should mirror the racial breakdown of its metropolitan areas, the program “induce[d] an employer to hire with an eye toward meeting a numerical goal.”²⁸⁶

c. *Monterey Mechanical Co. v. Wilson*

In *Monterey Mechanical Co. v. Wilson*,²⁸⁷ the Ninth Circuit struck down an outreach program as an impermissible racial classification. The program required contractors to make good faith efforts to solicit bids from minority business enterprise (“MBE”) subcontractors.²⁸⁸ The program excused certain contractors from the solicitation requirements if they themselves qualified as MBEs and retained a substantial amount of the work for themselves. The Ninth Circuit determined that this element of the affirmative action plan awarded a “preference” to minority businesses because they did not have to comply with the minority solicitation requirements imposed on non-MBEs.²⁸⁹ The Ninth Circuit concluded that the statute “treats people differently” on the basis of race because “[o]nly those firms not minority . . . owned must advertise . . . and only minority . . . owned firms are entitled to receive the bid solicitation.”²⁹⁰

The Ninth Circuit further found that the solicitation requirements, in conjunction with the benefit awarded to minority-owned general contractors, constituted a “racial preference.” The court explained:

The scheme requires distribution of information only to members of designated groups, without any requirement or condition that persons in other groups receive the same information. Thus the statute may be satisfied by distribution of information exclusively to persons in the designated groups. Bidders in the designated groups are relieved, to the extent they keep the required percentages of work, of the obligation to advertise to people in their groups. The outreach the statute requires is not from all equally, or to all equally.²⁹¹

d. *Bowen Eng’g Corp. v. Village of Channahon*

Bowen Engineering Corp. v. Village of Channahon,²⁹² also addressed requirements imposed on contractors’ bids. The defendant village’s bid specifications required that all contractors take affirmative steps to recruit MBEs.²⁹³ The court found that the village’s bid specifications implicated equal protection analysis because they “granted a preference to minority subcontractors who were solicited by bidders and disadvantaged non-minority contractors who were not contacted and, perhaps, never learned of the subcontracting opportunities.”²⁹⁴ The court added that “the mandatory nature of the specifications and the requirement that bidders justify nonuse of low [minority] bidders weigh in favor of [finding an impermissible racial] classification.”²⁹⁵

e. Distinguishing University Recruitment Efforts

It is important to note that the programs found to be impermissible in the above cases are distinguishable from outreach and recruitment efforts in the admissions context in several crucial ways.

First, these cases involved programs mandated by a court or an administrative agency and thus can be distinguished from an educational institution's voluntary use of race-conscious recruitment and outreach efforts. The mandatory nature of the programs imposed a burden in terms of the cost in time and resources to implement the affirmative recruitment.²⁹⁶ This differs when voluntary action is undertaken.

Second, in some cases, the programs actually gave a direct benefit to minorities, thus creating a situation in which persons of different races were subject to different treatment. This type of "benefit" is not applicable to recruitment and outreach in the pre-application admissions setting.

Third, the solicitation programs did not call for "balanced" recruitment, but only for recruitment and outreach to minorities. The Ninth Circuit specifically contrasted the program it found constitutionally impermissible with a hypothetical, constitutionally permissible "non-discriminatory outreach program, requiring that advertisements . . . be distributed in such a manner as to assure that all persons, including . . . minority-owned firms, have a fair opportunity to bid."²⁹⁷ Educational institutions are much more likely to engage in the broad, balanced recruitment described in the Ninth Circuit's hypothetical program.

Fourth, the courts concluded that the mandatory nature of the programs had the effect of pressuring entities to consider the race of applicants and to favor minority applicants in the ultimate decision. This was especially so in the FCC cases decided by the D.C. Circuit, where the requirement was imposed by the regulatory agency with investigatory power over the entities required to undertake the affirmative action. This type of pressure is not present in the admissions context.

5. Lessons for Race-Conscious Recruitment and Outreach

As described above, the relevant case law offers three lessons for institutions implementing race-conscious recruitment and outreach programs. First, an institution's race-conscious recruitment and outreach programs are not likely to trigger strict scrutiny review if the institution engages in *broad* and *balanced* recruiting activities. A school will have a much stronger defense to a challenge to its race-conscious recruitment and outreach if it can demonstrate that it recruits broadly and distributes information widely, to include both targeted minority students and nonminority students.²⁹⁸

Second, an institution should justify its race-conscious recruitment and outreach on the basis of attempting to increase the number of minority candidates in its applicant pool.

Third, to whatever extent possible, an institution should consider separating the functions of outreach and recruitment from the review and selection aspects of the admission process. Case law draws a distinction between programs in which race-conscious recruitment plays a role in the ultimate decision, and programs in which it does not. Where race-conscious recruitment is not accompanied by “racial preferences,” courts have easily found that the Equal Protection Clause is not implicated. At the very least, institutions that use race as a “plus” factor in the selection process in order to achieve a diverse student body should clearly indicate in their policies that their race-conscious recruitment and outreach efforts do not have an impact on or influence their admission decisions.

Thus, recruitment and outreach efforts that take place well in advance of the application process are more easily understood as expanding the applicant pool, and are less likely to trigger strict scrutiny analysis. For example, an admissions officer’s visit to speak with minority students who have not yet applied (*e.g.*, 8th through 11th graders, and first-semester 12th graders) about the virtues of the institution he or she represents and the application process is directly related to increasing the applicant pool and is highly unlikely to trigger equal protection analysis. Similarly, ordering lists from the Educational Testing Service for the purpose of targeting students to encourage them to apply is unlikely to implicate equal protection analysis because the purpose of the policy is to increase the number of minority students in the applicant pool.

Likewise, campus visitation days for minority students, designed to encourage them to apply, should not trigger strict scrutiny analysis. Whether the institution can pay for transportation to and from campus for these prospective applicants without triggering strict scrutiny review is not as clear because providing transportation to a minority student visitation day is seemingly a benefit conferred on the basis on race. An institution might defend against the charge that it is granting “preferential treatment” on the basis of race by demonstrating that it also provides a similar benefit to students outside of the target group—for example, by paying transportation costs for a harpist or an All-American water polo player—but the institution’s actions will likely be subject to strict scrutiny (though that does not render the program necessarily unconstitutional).

Unless the institution pays for the transportation costs of *all* potential applicants who wish to visit the campus, its decision to pay the costs for minority students will subject this type of recruitment effort to strict scrutiny (which, as above, it may survive). The best defense is to argue that the “benefit” received does not result in any “preference” toward the ultimate benefit: admission. The institution must be careful to demonstrate that there is no link between the paid-for visit to campus and a more favorable admission decision.

In the end, a college or university may have to justify this type of recruitment and outreach program under strict scrutiny review. To do so, the institution must show that the payment of transportation to prospective minority students to attend the visitation day is narrowly tailored to further a compelling interest. The diversity rationale, as discussed above, likely will provide justification for such measures.

Gratz and *Grutter* offer guidance on how race-conscious “post-admission” recruitment efforts can survive strict scrutiny. An institution should be prepared to demonstrate that it employs race-conscious measures in an effort to achieve a “critical mass” of minority students to meet its goal of attaining a diverse student body. The institution should gather evidence showing that race-neutral measures will not permit the institution to achieve its goals.

The institution must also show that its race-conscious recruitment does not unduly burden students not targeted by these efforts. In order to make this showing, as in the “pre-admission” timeframe, the institution should be able to point to a broad and balanced program of recruitment of admitted students generally. The balanced recruitment of students will make it clear that the use of race does not burden non-minorities, and that non-minorities have an equal opportunity to learn whether the institution is a good choice for them in the crucial post-admission, pre-enrollment timeframe.

C. Retention, Preparation, and Support Programs

Neither the Supreme Court nor the lower courts have addressed whether race-conscious support, preparation, and retention programs violate the Equal Protection Clause.²⁹⁹ (For examples of these types of programs, see inset and Appendix 4.C.) Despite the absence of case law on this issue, it is likely that a variety of race-conscious support programs will come under attack by opponents of affirmative action in the wake of the *Grutter* and *Gratz* decisions. Justice Scalia’s *Grutter* dissent enumerates possible next targets: “Tempting targets, one would suppose, will be those universities that talk the talk of multiculturalism and racial diversity in the courts but walk the walk of tribalism and racial segregation on their campuses—through minority-only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies.”³⁰⁰

Given the paucity of relevant precedent, colleges and universities should turn to case law in the recruitment context (see Section B, above) in order to determine whether such programs are constitutional.

Some Types of Race-Conscious Support Programs:

- Minority student organizations
- Minority student housing
- Minority student centers
- Minority graduation celebrations
- Priority course registration for minority students
- Minority tutoring programs
- Minority mentoring programs
- Minority “pre-fall” programs
- Minority academic enrichment programs
- Minority summer programs for high school students

1. Race-Conscious Support Programs That Do Not Treat Students Differently Because of Race

As discussed above with respect to outreach and recruitment, whether support programs are subject to strict scrutiny review turns on whether the program creates a racial classification that confers a benefit on a group defined by race.³⁰¹ Although all of the programs listed in the inset above classify by race, most do not appear to confer any exclusive benefits for minority students or impose undue burdens on nonminority students. Just as a visit by an admissions officer to a group of minority high school students likely would not trigger strict scrutiny review, the hosting by a university of one or two receptions for minority students or one minority-only graduation celebration likely would not trigger strict scrutiny review.

2. Race-Conscious Support Programs That Confer a Significant Benefit

University-funded minority-only student organizations and housing opportunities may confer a benefit based upon race and, therefore, must withstand strict scrutiny. As discussed above, institutions may justify such programs on one of two compelling interests: diversity or remediation of past discrimination. Such programs may be justified under the compelling interest in diversity because the existence of these programs on college campuses is an effective tool for recruiting and retaining underrepresented minorities.

These programs may also be justified under the remediation rationale for similar reasons: on campuses where discrimination has been practiced and its present effects are still felt, these programs demonstrate to potential minority students that they are welcome, and will likely attract those to campus who were hesitant to attend because of the history of discrimination at the institution.³⁰² For a discussion of the evidentiary requirements for remedial justifications, please see Chapter V.

3. Race-Conscious Support Programs That Are Not Racially Exclusive

Support programs will likely be more easily defended if they are not racially- exclusive. As in the recruitment and outreach context, courts are more likely to permit support efforts that are inclusive as opposed to exclusive (see Section B.3.). For this reason, a student organization with a particular ethnic theme, which is not racially exclusive and invites all students to be members, but specifically targets its recruitment efforts on members of particular racial groups, likely does not trigger strict scrutiny. Because the organization is open to all students, there is no benefit conferred based on race. Moreover, because the race-conscious recruiting efforts serve only to expand the numbers of students interested in joining the organization, such efforts will likely be permissible. Even if such programs are subject to strict scrutiny, they are more likely to withstand narrow-tailoring analysis if they are not racially exclusive and invite all students to participate.

Institutions that do choose to employ race-exclusive support programs may attempt to justify their programs on the basis of a diversity interest or a remediation interest, or they may

attempt to articulate a related interest, such as providing a special environment for minority students that promotes particular types of interactions or that ultimately leads to improved academic performance and greater retention rates. In order to pass constitutional muster, institutions must be prepared to document the benefits of these race-exclusive programs and to demonstrate their effectiveness relative to “plus-factor” or race-neutral measures. Institutions should also be prepared to document that the programs are being periodically reviewed for their effectiveness and that there are no undue burdens that fall on students who are not able to participate in these programs.