

DISTRIBUTION PLAN

AFFIRMATIVE ACTION ASSESSMENT OUTLINE

INTENDED USE OF THE OUTLINE

The Office for Civil Rights will use the Affirmative Action Assessment Outline to help colleges and universities assess whether their programs (or intended programs) are consistent with Title VI of the Civil Rights Act of 1964 and the Constitution. The Outline is designed to be used as part of technical assistance and not as a do-it-yourself assessment kit. Because of the changing legal landscape and the complexity of these issues, schools should use the Outline in consultation with the Office for Civil Rights. The Outline will be used, primarily, during technical assistance and other direct contact between OCR and colleges and universities. A "Dear Colleague" letter from the Assistant Secretary for Civil Rights outlining the purpose and intended use of the Outline (consistent with this overview) will accompany the distribution of the Outline.

SCOPE OF DISTRIBUTION AND USE

The Outline will be distributed for several purposes initially and then on a continuing basis.

INITIAL DISTRIBUTION

In 1998, OCR will distribute and use the Outline to meet several significant needs.

- Release to Public As a courtesy, OCR will initially share the Outline with stakeholders in the higher education community who assisted in vetting the Outline. Once OCR's public use begins in 1998, the Outline will also be released to those who request it, without requiring a request under the Freedom of Information Act.
- Campus Technical Assistance OCR will complete technical assistance consultations that have been on hold pending completion of the Outline. OCR will use the Outline to present federal standards and to assist institutions in assessing affirmative action programs. Using the Outline, OCR will work with each institution to identify issues and options for achieving educational objectives through means that comply with federal law. These 1998 activities will include:
 - The Florida public higher education system
 - The University of Wisconsin-Madison
 - Salisbury State University
 - Santa Clara University
 - The University of Iowa School of Medicine
 - The University of North Carolina System
 - Maricopa Community Colleges, Arizona

- Technical Assistance Workshops OCR will use the Outline in presentations and will provide in-service to campus teams (e.g., administrators and attorneys involved in affirmative action programs) on the appropriate use of the Outline in conducting assessments. The content of the Outline will be thoroughly explained and distributed to workshop participants who are interested in follow-up activities using the Outline. Regional workshops, co-sponsored by the American Council on Education, have been scheduled for fall, 1998 in Philadelphia (covering seven Mid-Atlantic States) and in Chicago (covering the Midwest). Each workshop is expected to draw between 250-400 participants. Additional workshops are being considered for schools in the South and in the Southwest/Northwest.

ONGOING DISTRIBUTION AND USE

OCR plans to continue the uses of the Outline begun in 1998.

- Campus technical assistance consultations
- Technical assistance workshops and presentations

REVISIONS

OCR will amend the Outline, when legally necessary or as appropriate to meet user needs. When using the Outline during campus technical assistance consultations, especially with the first group of recipients, OCR will elicit feedback on the usefulness of the Outline and suggestions for improvements. Other stakeholders may recommend useful changes. Revisions will be necessary to reflect new court decisions or other changes in federal law. The Department of Education will make substantive changes in the Outline in consultation with the Department of Justice.

UNITED STATES DISTRICT COURT**WESTERN DISTRICT OF WASHINGTON AT SEATTLE****KATURIA E. SMITH, et al.,****Plaintiffs,****V.****THE UNIVERSITY OF WASHINGTON LAW SCHOOL, et al.,****Defendants.****NO. C97-335Z****ORDER**

This matter comes before the Court on the plaintiffs' motion for partial summary judgment (docket no. 217), and defendants' motion for summary judgment on all claims (docket no. 193). The Court, having considered the motions, and all papers filed in support of and in opposition to the motions, hereby **DENIES** the plaintiffs' motion for partial summary judgment and the defendants' motion for summary judgment.

I. Plaintiffs' Motion for Partial Summary Judgment

Plaintiffs move for partial summary judgment on the issue of whether defendants sued in their official capacity violated the Equal Protection Clause of the Fourteenth Amendment

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and 42 U.S.C. sec. 1981, [Fn. 1] and whether the Law School violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000d, et seq. Plaintiffs motion is premised on defendants' admission that they considered race in their admissions decisions for the purpose of achieving educational diversity. Plaintiffs argue that educational diversity is not a compelling state interest that would justify a race-conscious admissions program.

The thrust of plaintiffs' argument is that Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265, 316-19, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), which viewed achievement of "educational diversity" as a compelling state interest, was not the holding of the Court in *Bakke*, and should not be considered the law of the case. This argument was accepted by the Fifth Circuit in *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir.), cert. denied, 518 U.S. 1033, 116 S.Ct. 2581, 135 L.Ed.2d 1095 (1996), which noted that "Justice Powell's argument in *Bakke* garnered only his own vote and has never represented the view of the majority of the Court in *Bakke* or any other case." Plaintiffs argue in the alternative that subsequent Supreme Court authority makes clear that the educational diversity interest will not satisfy strict scrutiny, and that race may be considered only to remedy the present effects of past discrimination by the institution in question.

A. Bakke as Precedent

In Bakke, the Supreme Court considered whether the University of California at Davis Medical School's admissions policy, which had reserved sixteen of 100 seats in the entering class for disadvantaged members of minority races, violated the Equal Protection Clause of the Fourteenth Amendment and Title VI. Although unable to agree on an opinion as to the

Fn. 1 Consistent with the Eleventh Amendment, claims against the defendants sued 'in their official capacity, as opposed to their personal capacity, are limited to prospective claims for declaratory and injunctive relief. By separate Order entered February 10, 1999, the Court dismissed all individual and class claims for injunctive and declaratory relief, with the exception of plaintiff Pyle's claim for an injunction ordering that he be admitted to the Law School. Although the plaintiffs specified that they seek summary judgment against the official capacity defendants, the Court will proceed with this motion because plaintiffs have also asked for partial summary judgment on the Title VI claims against the Law School and because the issues raised in the motion are relevant to other remaining claims.

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major issues, five justices agreed that the California Supreme Court's judgment must be affirmed insofar as it held that the medical school's special admissions program was unlawful and that plaintiff must be admitted. A different five-member majority agreed that the California Supreme Court's judgment must be reversed insofar as it prohibited the defendant from according any consideration to race in its future admissions process.

Justice Stevens and three concurring justices (the Stevens group) concluded that under Title VI race cannot be the basis for excluding anyone from participation in a federally funded program, and therefore the University's special admissions program violated Title VI by excluding Bakke because of his race. The Stevens group did not reach the constitutional question of whether the program violated the Equal Protection Clause because the case could be decided on statutory grounds (Title VI).

Justice Brennan and three concurring justices (the Brennan group) concluded that the admissions program would be legal under both Title VI and the Equal Protection Clause. The Brennan Group, applying an intermediate standard of review, concluded that UC Davis's goal of admitting minority students disadvantaged by the effects of past discrimination was sufficiently -important to justify the use of race-conscious admissions criteria.

Justice Powell, writing for himself, held that racial and ethnic distinctions of any sort are inherently suspect and thus call for a strict scrutiny review. Applying this standard, Justice Powell found that attainment of a diverse student body was a constitutionally permissible goal for an institution of higher learning; however, that state interest was not served by a two-track system with a prescribed number of seats set aside for an identifiable category of applicants. Rather, he endorsed a "Harvard-type" plan, which viewed racial and ethnic diversity as only one element in a range of factors a university may properly consider in attaining the goal of a heterogeneous student body. Because the University of California at Davis used race as the sole diversity factor, its admissions program could -not withstand constitutional scrutiny. Powell's opinion was limited to the question of whether the

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admissions policy was constitutional. He did not specifically address the legality of the program under Title VI because he concluded that Title VI proscribed only those racial classifications that would violate the Equal Protection Clause.

In *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), the Supreme Court instructed that, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds. . .'" (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)). The application of the *Marks* principle to the *Bakke* decision is particularly vexing because in many ways the opinions of the Justices are at odds with each other. Nevertheless, the Court concludes that Justice Powell's opinion represents the narrowest grounds for the Court's judgment under the *Marks* analysis, and therefore should be considered the holding of the Court.

Some courts have assumed that *Marks* requires the lower courts to find a common enominator among the various opinions that would garner the approval of at least five stices. See, eg., *Rappa v. New Castle County* 18 F.3d 1043, 1057 (31" Cir. 1994) (quoting lanned Parenthood v. Southeastern Pa. v. Casey, 947 F.2d 693 (3rd Cir. 199 1), aff'd in part d rev'd in-part, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992)); *King v. Palmer* 50 F.2d 771, 781 (D.C. Cir. 1991), cert. den 505 U.S. 1229, 112 S.Ct. 3054, 120 L.Ed.2d 920 (1992). This Court concludes that *Marks* would be unworkable if it were interpreted in such a manner. [fn. 2] Rather, *Marks* requires a more simplistic analysis. The Court

Fn 2 Plaintiffs also cite lower court cases that have hold that where there is no common enominator *Marks* is inapplicable and the Supreme Court case is given no precedential value. See e.g. *Ass'n of Bituminous Contractors. Inc. v. Apfel* 156 F.3d 1246, 1254-55 (D.C. Cir. 998); *Rappa* 18 F.3d at 1058. But the Supreme Court has often repeated that the precedential alue of cases must be determined in accordance with *Marks*. The plaintiffs cite *Baldasar v. Illinois*, 446 U.S. 222 (1980), as an example of a Supreme Court case that cannot be deciphered Using the *Marks*, analysis, but the Supreme Court has suggested that *Marks* still provides the key o uncovering the meaning of such fragmented opinions. In a subsequent opinion, the Supreme ourt, addressing the confusion of the lower courts as to *Baldasar's* meaning, reiterated the

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should look to which of the opinions concurred in the judgment on the narrowest grounds without regard to whether that position would be accepted by at least five of the other Justices. [fn. 3]

Plaintiffs argue that to the extent any one rationale in *Bakke* can be viewed as the narrowest, it is Justice Brennan's. In almost every way, however, Justice Powell's opinion in *Bakke* is narrower than the Brennan group's opinion. First, the Brennan group would apply only an intermediate standard of review to race-conscious admissions programs, whereas Justice Powell would require strict scrutiny. Second, the Brennan group would find that remedying past societal discrimination is a sufficient justification for

race-based programs, whereas Justice Powell concludes that the interest in remedying past societal discrimination is too broad and amorphous and "would convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination." *Bakke*, 438

fn. 2 (cont.) Marks rule, but noted that rather than "pursue the Marks inquiry to the utmost logical possibility when it has baffled and divided the lower courts that have considered it," the Court would reexamine the issues in *Baldasa* anew. See *Nichols v. United States*, 511 U.S. 738, 746, 114 S.Ct. 1921, 128 L.Ed.2d 745 (1994). This suggests that the Supreme Court expects that the precedential value of any case can be determined by applying the Marks rule.

fn. 3 See *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 764-65, 108 S.Ct. 213 8, 100 L.Ed.2d 771 (1988), in which a majority of the Supreme Court viewed the plurality opinion of Justice Reed (joined by two other Justices) in *Kovacs v. Cooper*, 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 15 74 (1948), as the law of the case, and rejected the dissent's argument that *Kovacs* was not good law because it "was not the Court's view at all, but rather, an opinion for a three-Justice plurality" see *id.* at 785 (dissenting opinion). The majority explained:

The dissent suggests that the *Kovacs* plurality distinction of *Saia* is somehow not good law because four other Justices (three of whom were in dissent) adopted the far broader rationale that *Saia* was actually repudiated. Justice White's interpretation of *Kovacs* does not square with our settled jurisprudence: when no single rationale commands a majority, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds. (citing Marks) Clearly, in *Kovacs* the plurality opinion put forth the narrowest rationale for the Court's judgment.

Id. at 764 n. 9. Thus, the Court has made clear that the opinion that sets forth the narrowest rationale for the Court's judgment is the holding of the Court regardless of whether that position would garner approval of at least five Justices.

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U.S. at 310 (Powell, J.). Thus, the Brennan group rationale would subject race-based admissions programs to less scrutiny and would result in a broader range of race-conscious admissions programs being upheld as constitutional.

The opinion of Justice Powell, which calls for strict scrutiny of racial classifications and permits race to be used in university admissions only to achieve educational diversity, is narrower in scope and application than the Brennan opinion. Thus, under Marks it should be viewed as the holding of the Court.

This Court's decision to follow *Bakke* is consistent with the way *Bakke* has been viewed by almost every court except *Hopwood*. The Ninth Circuit has written approvingly and applied Justice Powell's *Bakke* rationale in *Higgins v. City of Vallejo*, 823 F.2d 351 (9th Cir. 1987), and several other courts have treated Justice Powell's opinion as the holding of the Court. See, eg., *McDonald v. Hogness*, 92 Wash. 2d 431, 439-40, 598 P.2d 707 (1979), cert. denied, 445 U.S. 962, 100 S.Ct. 1650, 64 L.Ed.2d 23 8

(1980); *DeRonde v. Regents of the Univ. of Cal.*, 28 Cal.3d 875, 172 Cal. Rptr. 677, 625 P.2d 220 (1981), cert. denied, 454 U.S. 832, 102 S.Ct. 130, 70 L.Ed.2d 110 (1981); *University & Community College Sys. of Nevada v. Farmer* 113 Nev. 90, 930 P.2d 730 (1997), cert. denied, ___ U.S. ___ 118 S.Ct. 1186, 140 L.Ed.2d 317 (1998). Finally, members of the Supreme Court have continued to refer to Justice Powell's *Bakke* opinion in subsequent affirmative action cases, see *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 218, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995), and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-497, 109 S.Ct. 706, 102 L.Ed.2d 54 (1989), and at least one Justice has suggested that the issue of educational diversity as a compelling interest remains open. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (O'Connor, J., concurring in part and concurring in the judgment) ("[A]lthough its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context

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of higher education, to support the use of racial considerations in furthering that interest.") (citing *Bakke*, 438 U.S. at 311-15).

B. Educational Diversity Considered in Light of Subsequent Supreme Court Authority

Plaintiffs argue that regardless of whether Justice Powell's opinion in *Bakke* is the holding of the Court, subsequent Supreme Court authority has made clear that governmental units may consider race only for remedial purposes. Because the Law School's program is not tailored to remedy past discrimination, but rather designed to foster diversity, plaintiffs argue that it is unconstitutional. [fn. 4]

The Supreme Court has held since *Bakke* that if certain conditions are met a state may consider race to remedy the effects of past discrimination. See *Shaw v. Hunt*, 517 U.S. 899, 908, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996). The issue presented by plaintiffs' motion for partial summary judgment, however, is whether post-*Bakke* Supreme Court cases have clarified that race may be considered only for remedial purposes.

In Part III-A of Justice O'Connor's plurality opinion in *Croson*, joined only by Justices Rehnquist, White and Kennedy, Justice O'Connor writes:

Classifications based on race carry a danger of stigmatic harm. **Unless they are strictly reserved for remedial settings** they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.

Croson, 488 U.S. at 493 (emphasis added). Plaintiffs argue that this statement makes clear that non-remedial race-conscious programs are unconstitutional. Plaintiffs argue further that Justice O'Connor's statement is the holding of the Court because Justice Scalia stated in his concurring opinion that he agreed with much of Justice O'Connor's opinion.

Plaintiffs have misinterpreted the scope of Justice O'Connor's statement concerning remedial race-conscious programs. The issue of whether race could be considered for any purpose other than remediation was not before the Court, and Justice O'Connor never

fn. 4 The Law School does not contend that its admissions policy was adopted to remedy the effects of past discrimination.

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explicitly stated that remediation is the only compelling state interest that would justify raceconscious government action. Rather, this statement was merely one part of her lengthy explanation of why the Court needs to apply strict scrutiny review to all racial classifications. [fn 5] To interpret this statement as creating a bright-line rule regarding remedial and non-remedial race-conscious programs is simply to read too much into Justice O'Connor's statement. In addition, while Justice Scalia did agreed with much of Justice O'Connor's opinion, particularly her conclusion that strict scrutiny must be applied to all racial classifications, he **disagreed** with Justice O'Connor's "**dictum**" suggesting that despite the Fourteenth Amendment, state and local governments may in some circumstances discriminate on the basis of race in order (in a broad sense) 'to ameliorate the effects of past discrimination.'" Id. at 520 (emphasis added). Justice Scalia would not support the use of race for any purpose except to declassify racially classified state systems. Thus, he did not endorse Justice O'Connor's view that states may adopt race-conscious programs to remedy the effects of past discrimination.

The Supreme Court has never held that educational diversity cannot be a compelling state interest. In the absence of such a holding, this Court will follow Justice Powell's opinion in Bakke that educational diversity "is a constitutionally permissible goal for an institution of higher education." Bakke, 439 U.S. at 311-12. This Court declines to hold that recent cases, by implication, have overruled earlier Supreme Court precedent. Rather, this Court must follow the case which directly controls the issue, and leave to the Supreme Court the prerogative of overruling its own decisions. See Rodriguez dc Quijas v. Shearson/American Express Inc., 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989); Agostini v. Felton, 521 U.S. 203, 117 S.Ct. 1997, 2017, 138 L.Ed-2d 391 (1997).

fn. 5 The Court notes that Justice O'Connor cited Justice Powell's opinion in Bakke as support for this principle. Justice Powell stated in Bakke that "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth." Bakke 438 U.S. at 298.

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While the Court concludes that Justice Powell's opinion in remains good law, it nevertheless must be considered together with all subsequent Supreme Court cases dealing with racial preferences. In these cases, the Supreme Court has subjected race-conscious , programs of all sorts to the most exacting scrutiny possible. The Supreme Court's decisions in Croson and Adaran make plain that a majority of the Justices are highly skeptical of racial preferences and believe that the Constitution imposes a heavy burden of justification on their use. Thus, while educational diversity may be a compelling interest, the defendants's program must be subjected to rigorous scrutiny to determine whether it was narrowly tailored to achieve genuine educational diversity.

II. Defendants' Motion for Summary Judgment

The Court denies the defendants' motion for summary judgment because questions of fact exist concerning whether the defendants followed a Harvard-type plan in making their admissions decisions. Until the Court hears the evidence concerning how the admissions decisions as to the three named plaintiffs were actually made by the defendants, the Court cannot determine whether there has been a constitutional violation. For the same reasons, the Court cannot determine at this time whether there was intentional discrimination under Title VI or whether the individual defendants are entitled to qualified immunity. III.

Conclusion

The Court DENIES plaintiffs' motion for partial summary judgment and defendants' motion for summary judgment.

IT IS SO ORDERED.

DATED this 12th day of February, 1999.

THOMAS S. ZILLY UNITED STATES DISTRICT JUDGE

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COMMENTS ON THE PROPOSED AFFIRMATIVE ACTION ASSESSMENT OUTLINE

This memo addresses a key problem with the March 1998 draft of the Affirmative Action Assessment Outline (AAAO) proposed by the U.S. Department of Education Office for Civil Rights. The AAAO signals a major departure from the United States' long-held position -- based on Justice Powell's opinion in Regents of the University of California v. Bakke, 438 U.S. 265 (1978) -- that a Harvard-style affirmative action program designed to achieve educational diversity is permissible under Title VI and the Constitution. Whether this shift in policy is intended or not, the proposed AAAO would effectively undermine the vitality of Bakke and the security that institutions of higher education have developed in relying on it. It is essential that the AAAO be revised in order for the United States to maintain its consistent support for Bakke and affirmative action in higher education.

I. IT IS IMPERATIVE THAT THE UNITED STATES CONTINUE TO SUPPORT JUSTICE POWELL'S OPINION IN BAKKE.

OCR should reaffirm its adherence to Justice Powell's opinion in Bakke for two reasons. First, colleges and universities are best able to fulfill their educational missions when they are free to consider race as one of many factors in selecting their student bodies. OCR has repeatedly endorsed this policy position and has encouraged institutions to adopt affirmative action programs consistent with Bakke. See OCR Policy Guidance, 59 Fed. Reg. 8756 (1994); OCR Notice of Proposed Policy Guidance, 56 Fed. Reg. 64548 (1991); OCR Policy Interpretation, 44 Fed. Reg. 58509 (1979).

Second, while Justice Powell's opinion in Bakke did not command a majority, the opinion has acquired substantial precedential weight by virtue of the reliance that the United States and institutions of higher education have placed on it over the past two decades. In addition to the policy directives cited above, OCR has issued a number of letter rulings invoking Justice Powell's opinion in Bakke as the controlling legal standard for evaluating diversity-based affirmative action and affirming that "[c]olleges and universities have a First Amendment right to seek diversity in admissions to fulfill their academic mission through the 'robust exchanges of ideas.'" University of Cal. at Berkeley, OCR Letter Ruling, Case No. 09-89-2099 (Mar. 1, 1996) (applying Bakke's standards to find the university's race-conscious undergraduate admission program lawful under Title VI); see also University of Cal. at San Diego, OCR Letter Ruling, Case No. 09-92-2002 (Mar. 21, 1994) (same).

In addition, the United States has endorsed Justice Powell's views on diversity in recent affirmative action cases. See Brief for the United States as Amicus Curiae at 12-16, Texas v. Hopwood, 116 S. Ct. 2581 (1996) (relying on Bakke to establish "the [University of Texas] Law School's compelling educational interest in maintaining a *racially* diverse student body" (emphasis in original)); Brief of the United States as Amicus Curiae at 22, Board of Educ. of Township of Piscataway v. Taxman, 117 S. Ct. 2506 (1997) (arguing that

a diverse faculty, "[l]ike a diverse student body," can promote compelling educational interests).

Supreme Court opinions have treated Justice Powell's opinion as correctly decided. In Wygant v. Jackson Board of Educ., 476 U.S. 267 (1986), Justice O'Connor expressed her approval of Justice Powell's view that fostering racial and ethnic diversity in higher education is a compelling interest. *Id.* at 286 (O'Connor, J. concurring). In Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 568 (1990), a majority of the Court agreed with Justice Powell's conclusion that creating a diverse student body to contribute to a robust exchange of ideas is a constitutionally permissible goal. *Id.* at 568.¹ Decisions of various lower courts have also reinforced Justice Powell's opinion as stable precedent. See Wessman v. Boston Sch. Comm., 1998 WL 271218 at *9 (D. Mass. May 28, 1998); Davis v. Halpern, 768 F. Supp. 968, 975 (E.D.N.Y. 1991); DeRonde v. Regents of Univ. of Cal., 625 P.2d 220, 225 (Cal.), *cert. denied*, 454 U.S. 832 (1981); McDonald v. Hogness, 598 P.2d 707, 713 (Wash. 1979), *cert. denied*, 445 U.S. 962 (1980).

In short, over the past 20 years, Justice Powell's opinion in Bakke has come to bear a "promise of constancy." Cf. Planned Parenthood v. Casey, 505 U.S. 833, 868 (1992) ("The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and the understanding of the issue has not changed so fundamentally as to render the commitment obsolete."). Formal equivocation by the United States on the continuing vitality of Bakke would disturb this promise, encourage courts to question the weight and stability of Justice Powell's opinion as precedent, as was done in Hopwood v. Texas, 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2580 (1996),² and undermine legal arguments based on reliance when the issue again reaches the Supreme Court as anticipated.

II. THE PROPOSED AAAO UNDERMINES JUSTICE POWELL'S DESCRIPTION OF DIVERSITY-BASED AFFIRMATIVE ACTION PROGRAMS THAT ARE PERMISSIBLE EVEN UNDER STRICT SCRUTINY.

Applying strict scrutiny to the admissions program at the University of California at Davis Medical School, Justice Powell concluded in Bakke that educational diversity is a

¹ In Adarand Constructors, Inc. v. Pena, 132 L.Ed.2d 158 (1995), the Court overruled aspects of Metro Broadcasting relating to the level of scrutiny applied to race-conscious programs, but the question whether fostering diversity is a sufficient interest to pass constitutional muster was not presented in the case. See Adarand, 132 L.Ed.2d at 210 (Stevens, J. dissenting).

² We understand and accept the Department's position that Hopwood controls this issue in the Fifth Circuit.

constitutionally compelling interest "that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." Bakke, 438 U.S. at 320. While purporting to uphold this conclusion as "a correct statement of law under the Constitution and Title VI," AAAO at 9, the proposed AAAO actually signals an unwarranted departure from Justice Powell's analysis and conclusions under both the compelling interest and narrow tailoring prongs of strict scrutiny.

A. Compelling Interest

Justice Powell determined that the "attainment of a diverse student body ... clearly is a constitutionally permissible goal for an institution of higher education." Id. at 311-12. This determination rested squarely on the First Amendment interest Justice Powell described as "[t]he freedom of a university to make its own judgments as to education." Id. at 312. It did *not* rest on empirical proof that a racially diverse student body actually leads to better educational outcomes. In other words, Justice Powell found that the decision of an educational institution to foster student diversity because of perceived educational benefits is deserving of significant protection under the First Amendment and constitutes a compelling interest as a matter of law, not at a matter of fact.

The Supreme Court in Metro Broadcasting, Inc. v. FCC acknowledged that Justice Powell in Bakke did not find a compelling interest in educational diversity based on an "assurance . . . that minority students would interact with nonminority students or that the particular minority students admitted would have typical or distinct 'minority' viewpoints." 497 U.S. 547, 580 (1990). Indeed, the Court quoted Justice Powell's observation that "[i]n the nature of things, it is hard to know how, and when, and even if, this informal 'learning through diversity' actually occurs." " Bakke, 438 U.S. at 313 n.48 (citation omitted), quoted in Metro Broadcasting, 497 U.S. at 580. Nevertheless, the Metro Broadcasting Court agreed with Justice Powell's conclusion that "a 'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated." Id. at 568 (citing Bakke).

Moreover, Justice Powell reached this conclusion after balancing the Fourteenth Amendment concern with equal protection with the "countervailing constitutional interest" under the First Amendment in academic freedom. Bakke, 438 U.S. at 313. Justice Powell recognized that academic freedom "long has been viewed as a special concern of the First Amendment," and it encompasses the freedom of a university "to determine for itself on academic grounds . . . who may be admitted to study." Id. at 312 (citation omitted). His opinion made clear that at the first stage of strict scrutiny analysis, the rejected applicant's

Fourteenth Amendment rights do not negate or outweigh the university's "right to select those students who will contribute the most to the 'robust exchange of ideas.'" Id. at 313.³

Citing Justice Powell's opinion in Bakke, a unanimous Supreme Court in Regents of the University of Michigan v. Ewing affirmed that "discretion to determine, on academic grounds, who may be admitted to study" is an element of a university's First Amendment academic freedom. See 474 U.S. 214, 226 n.12 (1985). The proposed AAAO runs counter to the Supreme Court's observation that academic judgments are "not readily adapted to the procedural tools of judicial or administrative decision-making." Board of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 90 (1978). Indeed, in cases subsequent to Bakke, the Court has shown great deference to academic decision-making processes. See Ewing, 474 U.S. at 225 (explaining that judges should not override an academic decision "unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment"); see also University of Pa. v. EEOC, 493 U.S. 182, 199 (1990) (noting that judges " 'should show great respect for the faculty's professional judgment' ") (quoting Ewing, 474 U.S. at 225).

The proposed AAAO would reopen the balancing of legal interests already done by Justice Powell in Bakke. The AAAO states that "[a] school must be able to support its claim that diversity provides educational benefits and serves the school's educational objectives." AAAO at 12. In addition, the Assessment Worksheet indicates that the following questions are relevant to "applicable legal standards": "What are the educational benefits of diversity at the institution? What are the bases for the educational benefits the institution identifies?" Id. at 21, 24.

From these passages in the AAAO, a college or university could justifiably conclude that it must satisfy an evidentiary burden in order to establish its educational interest in

³ It might be argued that this reading of Justice Powell's opinion in Bakke would authorize an institution to pursue not only a racially integrative but also a racially segregative admissions policy on educational grounds. After all, if the balance between First and Fourteenth Amendment concerns tips in favor of academic freedom, then how can educationally beneficial integration be distinguished from educationally beneficial segregation? This argument, however, is unavailing because the balance between academic freedom and equal protection interests tips strongly in favor of the latter when publicly sanctioned racial segregation is at issue. Indeed, Brown v. Board of Education, 347 U.S. 483 (1954), and its progeny, including United States & Ayers v. Fordice, 505 U.S. 717 (1992), conclusively establish that public schools may not sacrifice the Fourteenth Amendment rights of minority students for the sake of maintaining a racially segregated educational environment. In Bob Jones University v. United States, 461 U.S. 574 (1983), the Court ruled that a compelling governmental interest in eliminating racial discrimination in education outweighed the First Amendment interest of religious schools in excluding black students.

attaining a racially diverse student body. However, Justice Powell's opinion did not require courts to determine on a case-by-case basis the proper weight to assign to a university's interest in academic freedom where diversity-based affirmative action is at issue. Instead, it concluded that a university's First Amendment interest in selecting its student body satisfies the Fourteenth Amendment compelling interest requirement *as a matter of law*.

This part of Justice Powell's opinion stands in clear contrast to his analysis of the Medical School's interest in improving the delivery of health care to underserved communities. There, he found the interest not compelling because of a "failure of proof." Bakke, 438 U.S. at 310. In other words, the school offered " 'no empirical data to demonstrate that any one race is more selflessly socially oriented or by contrast that another is more selfishly acquisitive.' " Id. at 311 (quoting the lower court decision). This suggests that Justice Powell's failure to require such empirical data when examining the school's stated interest in educational diversity was a deliberate doctrinal choice in reliance on the recognized First Amendment interests of colleges and universities in selecting their student bodies -- one that the proposed AAAO would undo. By endorsing a factual predicate requirement for the compelling interest analysis in the educational context, the AAAO significantly undercuts Justice Powell's conclusion in Bakke that the university's interest was compelling as a matter of law.

The AAAO does not provide any guidance on the type of evidence an institution must supply in order to substantiate its stated interest in educational diversity. Does compliance with federal law require social science data? Or is expert testimony adequate? Must the evidence be institution-specific? Or is national or other aggregate data sufficiently probative? The United States has acknowledged that "[i]n higher education, the link between the diversity of the student body and the diversity of viewpoints on campus does not readily lend itself to empirical proof," Office of Legal Counsel Memorandum to General Counsels, Re: Adarand, at 18 (June 28, 1995), and that "Justice Powell did not require any such evidence in Bakke." Id. Given the lack of prior experience (under Bakke) in characterizing and measuring the educational impacts of diversity, the apparent imposition of a vague evidentiary requirement will simply heighten anxiety within the higher education community without helping universities in their efforts to comply with the law.

The proposed AAAO would undermine Justice Powell's opinion in Bakke and distance the United States from its longstanding support of that opinion and of affirmative action in higher education. The AAAO should be revised to eliminate this serious problem.

B. Narrow Tailoring

Justice Powell invalidated the Medical School's admissions program in Bakke under the narrow-tailoring prong of strict scrutiny. In doing so, he set forth two key principles for designing a permissible race-conscious admissions program. First, educational diversity

must encompass both racial and non-racial elements of diversity. Thus, a university may use race or ethnicity only as one among many "plus" factors in the selection process. See Bakke, 438 U.S. at 316-17. Second, the admissions process must "treat[] each applicant as an individual." Id. at 318. Every applicant, whether minority or non-minority, must have the opportunity to compete for every seat in the class. See id. at 317, 320.

Importantly, Justice Powell determined that when an admissions program satisfies these requirements, "no . . . facial infirmity exists." Id. at 318. That is, a "plus"-factor admissions program is "facially nondiscriminatory," and "a court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system." Id. Indeed, Justice Powell made clear that a Harvard-style affirmative action plan would satisfy the narrow-tailoring prong of strict scrutiny.

In contrast, the proposed AAAO sets forth an elaborate regimen of narrow-tailoring factors never suggested by Justice Powell's opinion in Bakke. See AAAO at 13-17, 25-26. For example, the AAAO suggests that before using race as one of many admissions factors, an institution must be able to show that race-neutral alternatives are insufficient to further its educational goals. See id. at 25. In addition, the AAAO asks institutions to explain how they will "assess whether diversity has been achieved," id., and it recommends that schools conduct annual reviews to determine whether a particular affirmative action policy is still needed to further a compelling interest, id. at 16.⁴

These factors are derived not from Bakke but from cases involving remedial affirmative action in the contexts of employment and contracting. The AAAO nowhere explains why it is appropriate to apply the same factors to the narrow-tailoring analysis of diversity-based affirmative action in higher education.

The AAAO's observations that "it is unlikely that an affirmative action program must satisfy every factor" and that "all of the factors will not be relevant in every case," id. at 14, serve only to magnify the confusion. Since "[t]he determination of whether a particular affirmative action program is narrowly tailored is highly fact-specific," id. at 13, this guidance again encourages uncircumscribed judicial and administrative review of the university's judgment that a diverse student body enhances the quality of its educational program. It should be sufficient to require a university to establish, based on its judgment that a diverse student body enhances learning, that its admissions process is one narrowly tailored to produce a truly diverse student body as Justice Powell described in Bakke. Of course, under Bakke, a Harvard-style plan would satisfy that inquiry.

⁴ These questions would seem to repeat the error pointed out in Section I, by assuming that an institution has to prove the educational benefits of a diverse student body.

The proposed AAAO should be revised to make clear that OCR continues to adhere to Justice Powell's narrow tailoring analysis in Bakke. Under that analysis, a university's good-faith implementation of a Harvard-style affirmative action program, "where race or ethnic background is simply one element -- to be weighed fairly against other elements -- in the selection process," Bakke, 438 U.S. at 318, suffers no facial infirmity under the Fourteenth Amendment and, in the absence of proof of discriminatory intent, amounts to a "properly devised admissions program" under both Title VI and the Constitution, id. at 320.

Indeed, OCR's 1994 Policy Guidance on financial aid, which the AAAO purports not to overrule, states, "[t]he Department will presume that a college's use of race or national origin as a plus factor, with other factors, is narrowly tailored to further the compelling governmental interest in diversity, as long as the college periodically reexamines whether its use of race or national origin as a plus factor continues to be necessary to achieve a diverse student body." 59 Fed. Reg. 8756, n. 10.

6/10/98 LDF



AFFIRMATIVE ACTION ASSESSMENT OUTLINE

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

May 1998

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

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

ASSESSMENT OUTLINE

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INTRODUCTION

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

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

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

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

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

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

ASSESSMENT OVERVIEW

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

I. COVERAGE OF THE OUTLINE

SEE GUIDE.

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

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

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

SEE GUIDE,

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

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

SEE GUIDE,

or ongoing

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

REMEDIAL PURPOSES

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

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

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

or
ongoing

DIVERSITY PURPOSES

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

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

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

SEE GUIDE,

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

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

SEE GUIDE,

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

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

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SEE GUIDE,

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

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

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

DURATION AND PERIODIC REVIEW

SEE GUIDE.

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

BURDEN ON NON-BENEFICIARIES

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SEE GUIDE.

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

For example, if an institution terminated scholarships that had

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

✓

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

ASSESSMENT GUIDE

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

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

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

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

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

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

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

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

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

A. THE COMPELLING INTEREST

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

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

I. REMEDYING THE EFFECTS OF DISCRIMINATION

A. GENERAL STANDARDS

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

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

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

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

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

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

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

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

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

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

B. FIFTH CIRCUIT STANDARDS: REMEDIAL OBJECTIVES

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POINTS FROM EARLIER VERSION MOVED TO FN: 21, 22

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

2. NON-REMEDIAL INTERESTS

A. DIVERSITY

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

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

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

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

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

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

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

B. OTHER NON-REMEDIAL INTERESTS

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

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

C. FIFTH CIRCUIT STANDARDS: NON-REMEDIAL INTERESTS

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

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

B. NARROW TAILORING

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

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

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

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

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

I. RACE-NEUTRAL ALTERNATIVES

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

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

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

2. SCOPE OF PROGRAM, FLEXIBILITY AND WAIVERS

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

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

3. MANNER IN WHICH RACE IS USED

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

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

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

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

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

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

4. COMPARISON OF NUMERICAL TARGETS TO THE QUALIFIED APPLICANT POOL

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

5. DURATION AND PERIODIC REVIEW

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

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

6. BURDEN ON NON-MINORITIES

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

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

IV. CONCLUSION

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

ENDNOTES

1. 42 U.S.C. 2000d (1994).

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

3. With respect to the kinds of race-conscious measures at issue in this Guide, the restrictions of Title VI and of the Equal Protection Clause are coextensive. *See Regents of the University of California v. Bakke*, 438 U.S. 265, 284-87 (Powell, J.), *id.* at 328-55 (Brennan, J., joined by White, Marshall, and Blackmun, JJ.). For other purposes, however, the requirements of Title VI and its implementing regulations are not completely coextensive with constitutional requirements. *See Guardians Assn. v. Civil Service Comm'n of City of New York*, 463 U.S. 582, 584, 589-93 (White, J.) (1983) (in disparate impact case not involving affirmative action, Title VI can be violated without proof of the discriminatory intent necessary to prove a constitutional violation); *id.* at 623-24 (Marshall, J., concurring); *id.* at 642-45 (Stevens, J., joined by Brennan and Blackmun, JJ.).

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

✓ [5. *See Morton v. Mancari*, 417 U.S. 535, 554 n.24 (1974).]

✓ [6. 505 U.S. 717 (1992); Notice of Application of Supreme Court Decision, 59 Fed. Reg. 4271-72 (United States Department of Education, January 31, 1994).]

7. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995).

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

9. 438 U.S. 265, 320 (1978) (opinion for the Court for Section V.C.).

10. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498-506 (1989); *Shaw v. Hunt*, 116 S. Ct. 1894, 1902-03 (1996).

11. 438 U.S. 265, 311-15 (1978) (opinion of Powell, J.).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

32. *Id.* at 944, 948.

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

ASSESSMENT WORKSHEET

About the Worksheet

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

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

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

ADMISSIONS WORKSHEET

➡How do the school's programs work?

✓ CHECKPOINT(S) BASELINE INFORMATION

➡GUIDE,
PP.

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

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

✓ CHECKPOINT(S) COMPELLING INTEREST

➡GUIDE,
PP.

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

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

✓ CHECKPOINT(S) REMEDIAL PURPOSES

➡ GUIDE,
PP.

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

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

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

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

✓ CHECKPOINT(S) DIVERSITY PURPOSES

➡ GUIDE,
PP.

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

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

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

➡ GUIDE,
PP.

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

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

➡ GUIDE,
PP.

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

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

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

⇒GUIDE,
PP.

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

✓ CHECKPOINT(S) BURDEN ON NON-BENEFICIARIES

⇒GUIDE,
PP.

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

STUDENT FINANCIAL AID WORKSHEET

✓ CHECKPOINT(S) INITIAL INFORMATION NEEDS

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

✓ CHECKPOINT(S) FINANCIAL AID FOR DISADVANTAGED STUDENTS

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

✓ CHECKPOINT(S) COMPELLING INTERESTS

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

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

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

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

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

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

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

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

✓

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