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Law, Policy, and Strategies for Affirmative Action Admissions in Higher Education

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LAW, POLICY, AND STRATEGIES FOR AFFIRMATIVE ACTION ADMISSIONS IN HIGHER EDUCATION

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This essay is based on a presentation made to the American Association of Educational Research and is designed to be accessible to non-law-trained staff in admissions offices throughout a university. It seeks to present the basic legal standards governing admissions and the policy choices that admissions committees must confront regarding diversity. It recommends admissions criteria that value diversity, while a companion essay urges renewed commitment to programs designed to increase the flow of diverse students through the kindergarten to high school (K-12) and college pipeline to higher education.[1]

I. BASIC LEGAL STRUCTURES

A. *Constitutional and Statutory Sources of Legal Duties*

As applied by the courts, the Equal Protection Clause of the Fourteenth Amendment[2] forbids a state school from treating students

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1. See the companion piece in this issue, Charles R. Calleros, *Patching Leaks in the Diversity Pipeline to Law School and the Bar*, 43 CAL. W. L. REV. 131 (2006). One scholar has sought to link these two topics by proposing that law schools set aside a certain number of seats in law school for students who are highly qualified to, and who commit to, mentor disadvantaged students in the K-12 grades. Mark Nadel, *Retargeting Affirmative Action: A Program to Serve Those Most Harmed by Past Racism and Avoid Intractable Problems Triggered by Per Se Racial Preferences*, 80 ST. JOHN'S L. REV. 323, 338-43 (2006).

2. The Equal Protection Clause is concise and general, thus inviting judicial

differently on the basis of race unless the school's policy is narrowly tailored to serve a compelling state interest.[3] This "strict scrutiny" of state-sponsored racial classifications enables the courts to engage in a searching inquiry to determine whether a racial classification is benign or is the product of illegitimate racial motivations.[4]

Similar standards apply to private schools. For example, Title VI of the Civil Rights Act of 1964 forbids racial discrimination by schools, public or private, that receive federal aid.[5] Additionally, 42 U.S.C. § 1981 forbids racial discrimination in contracting, including the formation and performance of contracts between students and schools, public or private.[6] If an admissions process satisfies the Equal Protection Clause, it will also satisfy the requirements of Title VI and of § 1981.[7]

Some state laws impose separate restrictions on the use of race in admissions.[8] If those state restrictions are themselves constitutional,

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interpretation to shape its contours to concrete disputes: "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

3. Grutter v. Bollinger, 539 U.S. 306, 326-27 (2003).

4. *Id.* at 326, 333 (citing Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)).

5. Exec. Order No. 13160, 65 Fed. Reg. 39,775 (June 23, 2000). This statute is codified at 42 U.S.C. § 2000d, which provides: "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." 42 U.S.C. § 2000d (2000).

6. BINGHAM MCCUTCHEN ET AL., PRESERVING DIVERSITY IN HIGHER EDUCATION: A MANUAL ON ADMISSIONS POLICIES AND PROCEDURES AFTER THE UNIVERSITY OF MICHIGAN DECISIONS 4 (2004), *available at* http://www.equaljusticesociety.org/compliancemanual/Preserving_Diversity_In_Higher_Education.pdf. Relevant to this essay are provisions within the first and final subsections of § 1981. "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . ." 42 U.S.C. § 1981(a) (2000). "The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law." § 1981(c).

7. *Grutter*, 539 U.S. at 343.

8. *See id.* at 342 (referring to "[u]niversities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law"); MCCUTCHEN ET AL, *supra* note 6, at 12-13 (describing the initiatives passed in California and Washington that prohibit discriminating against or granting "'preferential treatment to, any individual or group on the basis of race, sex, color,

they may restrict the consideration of ethnic diversity in admissions decisions to a greater degree than does federal law. In states in which affirmative action is effectively prohibited, policies that seek to achieve various forms of diversity through race-neutral admissions standards may be attractive.[9]

B. *Major Supreme Court Decisions Analyzing Federal Law*

1. Regents of University of California v. Bakke

In *Bakke*, Justice Powell provided the fifth vote needed to strike down a University of California medical school's racial set-aside program, which reserved 16 out of 100 seats in the entering class for members of racial minority groups, amounting to an impermissible quota system.[10] But Justice Powell also provided the fifth vote (this time joining a different set of four fellow Justices) to reverse an injunction against all use of race in admissions.[11] He spoke of a university's academic freedom, grounded in the First Amendment, to define its educational mission, to decide which students to admit, and to use race in a flexible fashion, as one of many factors, in determining which mix of students will best fulfill the school's mission.[12] Because none of the opinions of the Justices commanded a five-vote majority, the precedential force of *Bakke* remained in doubt.

2. Hopwood v. Texas

In two stages of litigation in *Hopwood*, the Fifth Circuit Court of Appeals declined to follow Powell's opinion in *Bakke*, reasoning that his opinion did not represent a binding holding of the Court.[13] The

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ethnicity, or national origin in the operation of public employment, public education, or public contracting'" (quoting CAL. CONST. art. 1, § 31(a) (West 2003); WASH. REV. CODE ANN. § 49.60.400(1) (West 2003)); Scott Jaschik, *Michigan Votes Down Affirmative Action*, INSIDE HIGHER EDUC., Nov. 8, 2006, http://insidehighered.com/news/2006/ 11/08/michigan (reporting on voter approval of a state initiative that bans affirmative action by state institutions in Michigan).

9. *See* discussion *infra* Part II.C.

10. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 271 (1978).

11. *Id.* at 272.

12. *Id.* at 269-324.

13. Hopwood v. Texas (*Hopwood II*), 78 F.3d 932, 944 (5th Cir. 1996).

Hopwood II court determined that intervening Supreme Court decisions had undercut support for Powell's position, and it decided that diversity is not a compelling state interest justifying the use of race in admissions.[14]

In *Smith v. University of Washington Law School*, however, the Ninth Circuit Court of Appeals disagreed with the *Hopwood* decisions and applied Powell's reasoning in *Bakke*.[15] The disagreement among lower courts, typified by these two appellate courts, set the stage for further Supreme Court analysis.

3. Grutter v. Bollinger[16] *and* Gratz v. Bollinger[17]

In these two companion cases, the United States Supreme Court revisited the question of affirmative action in higher education admissions for the first time since *Bakke*.[18]

In a five-to-four decision, the *Grutter* Court embraced Justice Powell's opinion in *Bakke*, finding that a state school could have a compelling interest in using race as a factor in admitting a diverse student body as part of an educational mission to improve all students' educations.[19] Such diversity would help students with varying

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Referred to by the court of appeals as *Hopwood II*, this case dealt with the merits of the arguments, whereas the first appeal, *Hopwood I*, addressed only a procedural issue that was raised during the first trial. Hopwood v. Texas (*Hopwood III*), 236 F.3d 256, 260-61 (5th Cir. 2000) (citing Hopwood v. Texas (*Hopwood I*), 21 F.3d 603 (5th Cir. 1994)). In *Hopwood III*, the appeal after a second trial on remand from *Hopwood II*, the court refused to reconsider its previous interpretation of the law. *Hopwood III*, 236 F.3d at 261.

14. *Hopwood II*, 78 F.3d at 944-45.

15. Smith v. Univ. of Washington Law Sch., 233 F.2d 1188, 1196-1201 (9th Cir. 2000).

16. Grutter v. Bollinger, 539 U.S. 306 (2003). For a recently published series of articles analyzing and critiquing various facets of *Grutter*, see Symposium, *Meeting the Challenge of Grutter—Affirmative Action in Twenty-Five Years*, 67 OHIO ST. L.J. 1 (2006).

17. Gratz v. Bollinger, 539 U.S. 244 (2003).

18. The Supreme Court has recently accepted a case for review where a federal court of appeals applied the rules of *Gratz* and *Grutter* to a racial diversity program at the high school level, with a few adjustments to adapt the tests to secondary education. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1172-92 (9th Cir. 2005) (en banc), *cert. granted*, 126 S. Ct. 2351 (2006).

19. *Grutter*, 539 U.S. at 310, 325-28.

backgrounds and perspectives learn from one another, help them overcome stereotypes that they might hold about members of other races, and help them prepare for work and leadership in a multi-ethnic, pluralistic society.[20] Moreover, in *Grutter*, the Court found that the admissions process of the University of Michigan Law School was narrowly tailored to meet this goal—thus passing constitutional strict scrutiny—because:

- The process used race flexibly as only one of several factors relevant to admissions.[21]
- All applicants competed with one another and were given broad-based, individualized review.[22]
- Although the process accorded special significance to race as a factor in diversity, race was not so dominant that it was routinely determinative.[23]
- The process gave weight to factors other than race that would contribute to diversity, allowing non-minority applicants to demonstrate that they could further the school's mission to attain a diverse class.[24]

In contrast, in *Gratz*, the undergraduate admissions process at the University of Michigan failed the strict judicial scrutiny of its treatment of race because it more mechanically added 20 points (out of a maximum total of 150 points) to applicants with certain racial backgrounds, without providing an individualized review of all the qualities of each applicant that might further diversity or other relevant objectives.[25] Such a process was not narrowly tailored to further the compelling state interest in admitting a diverse student body.[26]

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20. *Id.* at 329-32. *But see* Larry Alexander & Maimon Schwarzschild, *Grutter or Otherwise: Racial Preferences and Higher Education*, 21 CONST. COMMENT. 3, 3-5 (2004) (critiquing *Grutter*'s compelling interest analysis and arguing that *Grutter* permits schools to employ thinly veiled racial goals for racial representation, rather than seeking diversity that will truly enhance the educational atmosphere and discourse).

21. *Grutter*, 539 U.S. at 336-37.

22. *Id.* at 337.

23. *Id.* at 338.

24. *Id.*

25. Gratz v. Bollinger, 539 U.S. 244, 255, 270-74 (2003).

26. *Id.* at 275.

II. RECOMMENDED APPROACH

An academic unit should define the goals that make up its educational mission and should then adopt admissions criteria compatible with those goals. Section A below presents arguments in favor of racial diversity as one component of a comprehensive set of admissions criteria, as a means of furthering the educational goals of preparing students for leadership in a demographically diverse society, and as a means of enhancing the educational experience for all students. Section B discusses the legal requirements for such race-conscious admissions criteria, and section C discusses alternative means of achieving diversity when a unit is forbidden by state law from using race-conscious admissions criteria or has rejected such criteria as a policy choice.

A. *Define a University's Educational Mission and Its Goals in Admissions*

1. *Identify the Pool of Qualities that are Potentially Meritorious Admissions Criteria*

Educational missions and consequent goals for admission may vary somewhat from school to school. For example, one institution might place greater weight than other institutions on the goal of producing graduates with top intellectual credentials who can compete for spaces in top graduate schools or for faculty positions; another might emphasize skills of critical thinking, to prepare students for a broad range of professional endeavors and for democratic self-governance and other responsibilities of citizenship; another might place substantial weight on, among other things, producing future leaders in business and political office, capable of leading in a diverse society; yet another might place greater emphasis than others on enlightened service to the community in the pursuit of social justice.

Legal philosopher Ronald Dworkin advanced the following argument to support his contention that the first of these illustrative statements of educational mission—producing graduates with top intellectual credentials—is not the only rational choice:

> Places in selective universities are not merit badges or prizes for some innate talent or for past performance or industry: they are

> opportunities that are properly offered to those who show the most promise of future contribution to goals the university rightfully seeks to advance. These goals can be, and historically have been, social as well as more narrowly academic.[27]

Once a school has defined its educational mission, it can identify the qualities in its student body that might best further that mission. Consider, for example, the following illustrative list of qualities in admitted students that an admissions program might value, depending on the school's educational mission:

(1) Ability to perform well on tests, measured by high scores on entrance examinations, as an indicator of ability to succeed in academic studies and to perform well on graduate admissions tests or professional licensing examinations.
(2) Ability to succeed in challenging academic endeavors, as indicated by high grade point averages in previous demanding academic studies.
(3) Leadership skills, as evidenced by academic and extracurricular activities requiring leadership, as a predictor of ability and likelihood to assume leadership positions with student organizations in school and with civic or business organizations after graduation.
(4) Experiences, perspectives, academic background, values, and qualities of personal identity (including race) that will help diversify the class, so that all students can learn from one another, can question stereotypes about others that they may hold, and can better prepare themselves for work and citizenship in a pluralistic society.
(5) Professional or other practical experience that brings acquired knowledge or insight regarding subject matter that is germane to academic study, indicating both the potential for success in that study and the ability to share that knowledge and insight with other students.
(6) Ability to think critically, as evidenced by performance in courses requiring critical analysis.

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27. Ronald Dworkin, *The Court and the University*, 72 U. CIN. L. REV. 883, 887 (2004).

(7) Honesty, integrity, and adherence to ethical ideals, as revealed in previous activities or in letters of recommendation from mentors with appropriate insights.
(8) Strong work ethic and ability to succeed or persevere in challenging environments, as evidenced by past instances of overcoming personal hardships or societal obstacles.
(9) Creativity, as evidenced by previous inventions or compositions, or by letters of recommendation from mentors with appropriate insights.
(10) Intellectual curiosity, revealed, for example, by a pattern of asking challenging or intellectually stimulating questions in an academic setting.
(11) Collegiality, including the ability to work cooperatively with others both within the school and in post-graduate placements, as evidenced by previous cooperative activities or letters of recommendation from mentors with appropriate insights.
(12) Competitive zeal, suggesting an ability to succeed in highly competitive and demanding academic, business, and governmental environments, as evidenced by previous activities or letters of recommendation from mentors with appropriate insights.
(13) Dedication to community service and the attainment of a just society.
(14) Devotion to religious ideals, as evidenced by previous activities or letters of recommendation from mentors with appropriate insights.

This list is characterized as "illustrative" because it serves merely as a sample of the kinds of qualities that an educational institution might identify as potentially meritorious criteria for admissions. Each institution should generate an expansive list of such qualities and then should engage in a process of deliberation to determine which qualities merit consideration in the admissions process, taking into account the educational mission of the school.

2. *Determine which Qualities Merit Consideration in Admissions*

After generating an expansive list of potentially meritorious admissions criteria, an educational institution should determine which criteria, perhaps with appropriate weighting, best reflect the school's

educational mission. Some criteria, such as religious devotion, may be appropriate for some kinds of schools, such as private sectarian schools, but inappropriate or of limited applicability for others, such as state schools.[28] Some criteria may partially overlap; for example, test-taking skills, intelligence, and acquired knowledge likely will contribute to success both in entrance examinations and grade point averages in prior academic study. Other criteria listed above may be inconsistent with one another, at least in certain contexts or applications. For example, can a school seek to admit students who are both collegial and filled with competitive zeal, or are these qualities incompatible? If these qualities are not easily found in the same applicant, admissions personnel must determine which quality is most consistent with the school's educational mission. They might also query whether the mission of the school would be advanced by admitting a student body that is diverse with respect to these two qualities, or whether diversity in that respect is counterproductive.

In weighing potential admissions criteria against the school's educational mission, some educational institutions might choose to focus nearly exclusively on the first two qualities listed above (grades and entrance examinations), on the ground that admissions should be based entirely, or almost entirely, on "excellence" or "merit." But any of the qualities listed, and others not listed, can be indicators of "merit," depending on a school's educational mission. Most would agree that a useful standard for merit would take into consideration a great number of the qualities listed above. Even Laurence Thomas, an opponent of race-conscious affirmative action in admissions, argues that test scores, although "very powerful indicators," are "not the sole indicators of a person's intellectual wherewithal."[29] Instead, Thomas suggests that "[t]he ways of excellence are boundless, notwithstanding some common and useful indicators."[30]

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28. Public schools, as government institutions, are covered by the First Amendment's restriction on the government's endorsement of religion. The Establishment Clause of the First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

29. Laurence Thomas, *Equality and the Mantra of Diversity*, 72 U. CIN. L. REV. 931, 938 (2004).

30. *Id.* at 954.

Thomas argues in favor of admissions criteria that value "idiosyncratic excellence," which he defines as "[e]xcellence that is not indicated by the typical vectors,"[31] such as proficiency in foreign languages or authorship of remarkable novels.[32] Although he believes that employing admissions criteria beyond grades and entrance examinations benefits minority applicants, he would not consciously link the criterion of idiosyncratic excellence to ethnicity because he rejects the notion that "diversity in and of itself counts as an excellence."[33]

Many schools, however, have adopted admissions criteria that more directly value diversity in personal characteristics among applicants. According to a survey in 2003, 74% of the 451 colleges and universities surveyed included a commitment to racial diversity in their mission statements, and 64% of those mission statements valued other facets of diversity as well.[34]

This interest in diversity is justified on the reasoning that a diverse student body is likely to learn valuable lessons from one another, to spark productive debate and critical examination of one's own ideas and those of others, and to prepare students for diverse peers, clients, and ideas in our multi-ethnic, multi-cultural, and otherwise pluralistic society.[35] Moreover, race, as a quality of "personal identity," can be an important component of such diversity: "Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters."[36]

One study, for example, showed that white students engaged in higher levels of complex thought when placed in discussion groups with minority students or with other students who tended to add to the

31. *Id.*

32. *Id.* at 938.

33. *Id.* at 955.

34. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., ACHIEVING DIVERSITY: RACE-NEUTRAL ALTERNATIVES IN AMERICAN EDUCATION 4 (2004) [hereinafter ACHIEVING DIVERSITY], *available at* http://www.ed.gov/about/offices/list/ocr/edlite-raceneutralreport2.html.

35. *See* Grutter v. Bollinger, 539 U.S. 306, 330-32 (2003).

36. *Id.* at 333.

diversity of opinions expressed in the groups.[37] Another recent study found that Hispanic and African-American students achieved higher graduation rates when admitted to relatively selective institutions of higher education, even when such admission placed them in competition with white students with better academic preparation.[38]

The benefits of a racially diverse student body do not end at the classroom door. Our institutions of higher education must prepare all students to live and work effectively in a racially diverse society.[39] Effective participation in the workplace and in the process of democratic self-governance in such a society will come more easily to graduates who have been exposed in college and graduate school to a variety of personal identities and perspectives in the student body.

Some schools may be restricted by state law from taking race into account in their admissions decisions.[40] Others may decide as a matter of principle or policy to achieve diversity of various kinds without taking race or other personal identity into account.[41] For

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37. Anthony Lising Antonio et al., *Effects of Racial Diversity on Complex Thinking in College Students*, 15 PSYCHOL. SCI. 507, 508-09 (2004); *see also Grutter*, 539 U.S. at 330 (citing the following books for evidence that a diverse student body can enhance the educational program for all students: COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN COLLEGES AND UNIVERSITIES (Mitchell J. Chang, Daria Witt, James Jones & Kenji Hakuta eds., 2003); DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION (Gary Orfield & Michal Kurlaender eds., 2001); WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER (1998)).

38. David Glenn, *Minority Students Fare Better at Selective Colleges, Researchers Say*, CHRON. HIGHER EDUC. (Wash., D.C.), Sept. 3, 2004, at A41 (reporting on the presentation of an unpublished study conducted by Sigal Alon and Marta Tienda).

39. *See generally* Charles R. Calleros, *Training a Diverse Student Body for a Multicultural Society*, 8 LA RAZA L.J. 140 (1995) (discussing the benefits of using teaching materials and raising issues relating to diversity and taking advantage of the varying perspectives and experiences of a diverse student body in law school).

40. *See supra* note 8 and accompanying text.

41. *See* Alexander & Schwarzschild, *supra* note 20, at 5-12 (arguing that race conscious admissions programs are bad policy because, among other things, it is difficult and pernicious to identify people by race and because such programs dilute other academic criteria and channel minority students to elite schools for which they are inadequately prepared); Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004) (arguing that affirmative action in law schools channels African-American students to more elite schools, where they struggle academically, with negative consequences on bar

schools that are not restricted by state law, however, and that wish to take race into account in admissions, the next section discusses race conscious approaches that are consistent with recent Supreme Court case law.

B. *Permissible Uses of Race to Achieve Admissions Goals under Federal Law*

1. *Remedy Past Discrimination or Achieve Numerical Parity*

To an even greater degree than is permitted when a school seeks diversity in its educational program, a school may adopt a race-conscious admissions program to remedy past racial discrimination on the part of that school.[42] Even Justice Powell's opinion in *Bakke*, however, would find constitutional fault with race-conscious admissions, if the school justified it solely to remedy general societal discrimination at the expense of innocent parties or to achieve a just balance of minorities in the school or a profession, absent previous discrimination by the school itself.[43]

2. *Diversify the Professions and Other Leadership Positions*

The Supreme Court's opinion in *Grutter* contains hints that the Court might approve an affirmative action program solely on the basis

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exams, thus causing more harm than good for these students).

42. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 300-02 (1978) (citing to school desegregation and employment discrimination cases, where courts have fashioned and upheld racial preferences to rectify past constitutional or statutory violations); MCCUTCHEN ET AL, *supra* note 6, at 6.

43. *Bakke*, 438 U.S. at 307-10. The Supreme Court confirmed this point in subsequent decisions. Grutter v. Bollinger, 539 U.S. 306, 329-30 (2003) (stating that it would be "patently unconstitutional" for state schools to admit students on the basis of their race for the purpose of producing ethnic percentages in the student body that mirrored those of the general population); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 477, 499 (1989) (rejecting discrimination and the allegedly resulting racial imbalances in firms within the construction industry as a justification for a requirement that all city contractors adhere to a 30% quota in hiring minority subcontractors); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 282-84 (1988) (rejecting use of racial preferences to remedy general societal discrimination).

of a school's goal to benefit society as a whole in a manner similar to the way that diversity can benefit a school's educational program:

> High-ranking retired officers and civilian military leaders assert that a highly qualified, racially diverse officer corps is essential to national security. Moreover, because universities, and in particular, law schools, represent the training ground for a large number of the Nation's leaders, the path to leadership must be visibly open to talented and qualified individuals of every race and ethnicity. Thus, the Law School has a compelling interest in attaining a diverse student body.[44]

This passage arguably supports a college's efforts to diversify its student body if implemented not for the unconstitutional purpose of remedying the past societal discrimination of others, or of achieving a particular percentage of professionals or leaders proportionate to racial representation in the population, but for the purpose of providing generally for more effective leadership in a diverse, pluralistic society.[45]

This potential justification, however, is a close cousin to the unconstitutional goals discussed previously. The *Grutter* Court arguably mentioned it only in passing, choosing to emphasize instead the college's compelling interest in diversifying its student body for the educational benefits that such diversity brings to all students,[46] the sole justification advanced by the college.[47] Until the Supreme Court speaks more clearly to this issue, it thus remains controversial whether affirmative action in admissions can be justified by a desire to benefit

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44. *Grutter*, 539 U.S. at 308. *See also* Steven R. Smith, Chairman, Council of Am. Bar Ass'n Section of Legal Educ. & Admissions to the Bar, Opening Statement of Dean Steven R. Smith before the United States Civil Rights Commission 2 (June 16, 2006), http://www.abanet.org/legaled/calendar/news/deansmithstatementcivil rightscomm.pdf ("[D]iversity is essential for the preservation of democracy in our country and for our nation's continued ability to compete and lead effectively in world economic and political spheres.").

45. *See* Dworkin, *supra* note 27, at 892 (stating that the University of Michigan's purpose in implementing an affirmative action program was not political in nature but was to train students to "participate effectively" in all aspects of community life).

46. *See* discussion *supra* Part I.B.3.

47. *See Grutter*, 539 U.S. at 328.

society with racially diverse graduates.[48] As explained in the next section, a school can more safely justify a race-conscious admissions program on the ground that the resulting exchange of perspectives and experiences would better prepare all students for work and life in a racially diverse society.

3. *Further a School's Educational Mission*

The Supreme Court has recognized that a school may have a compelling educational interest in achieving diversity in its student body because of the educational benefits that diversity brings to the entire student body.[49] Absent a contrary showing, the courts will presume the good faith of a school's statement of its educational mission and will defer to the school's educational judgment.[50] To help guard against the possibility of an illegitimate motive as the real moving force behind a stated mission, however, the school's admissions policy must be narrowly tailored to satisfy the compelling interest.[51]

Narrow tailoring requires that the academic unit first consider in good faith whether workable race-neutral admissions policies could achieve the school's educational goals, rendering race-conscious policies unnecessary.[52] If a race-conscious admissions program is deemed in good faith to be necessary to achieve the school's educational goals, the program must use race as only one of several factors that would help the school identify well qualified students that would bring facets of diversity to the educational program.[53] Moreover, the program must not insulate any racial class of applicants from competition with all other applicants,[54] and it must not unduly

48. *See* Dworkin, *supra* note 27, at 893 (admitting that "it is widely accepted that the Court limited the justification of affirmative action to educational benefits narrowly construed").

49. *Grutter*, 539 U.S. at 329-33.

50. *Id.* at 328-29.

51. *Id.* at 333.

52. *Id.* at 339-40. Narrow tailoring, however, "does not require exhaustion of every conceivable race-neutral alternative." *Id.* at 339.

53. *Id.* at 338-39.

54. *Id.* at 334.

burden applicants who are not the beneficiaries of the race-conscious elements of the admissions program.[55]

For example, a defensible race-conscious admissions program would recognize *not only that* including significant numbers of students from underrepresented races will likely increase the diversity of experiences and perspectives represented in the class, because one's race still affects how one experiences life in our society, *but also that* some backgrounds and experiences unrelated to race will also allow a student to bring underrepresented perspectives to the school, allowing an applicant of the majority race to establish that he or she would enhance diversity in the broadest sense.[56] Moreover, to avoid giving weight to race in an overly mechanical fashion, the admissions process should provide individualized evaluation of each application, allowing the reader to flexibly weigh all factors in comparing applicants to one another.[57] Such evaluation may require a significant increase in human resources devoted to undergraduate admissions, but the difficulty of administering individualized evaluation is not a defense to a legal challenge to the admissions process.[58]

The requirements outlined above would exclude inflexible and mechanical uses of race akin to racial quotas, such as the set-aside in *Bakke* and the point system in *Gratz*.[59] A school, however, is permitted to set general goals that do not specify numbers or percentages, such as a general goal of achieving a "critical mass" in a minority group to help its members avoid isolation, to encourage them to speak out in class, and to combat stereotypes by demonstrating to others that members of minority groups do not hold to a single, monolithic set of views.[60]

Finally, the majority opinion in *Grutter* stated that race-conscious programs should not continue in perpetuity but should terminate after the need for affirmative action has subsided.[61] The Court was

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55. *Id.* at 341.

56. *See id.* at 337-39 (finding that the University of Michigan Law School's admissions policies seriously weighed a number of diversity factors other than race).

57. *Id.* at 336-39.

58. Gratz v. Bollinger, 539 U.S. 244, 275 (2003).

59. *See* discussion *supra* Parts I.B.1, I.B.3.

60. *Grutter*, 539 U.S. at 329-30.

61. *Id.* at 342-43.

surprisingly specific in this regard, expressing the hope that the need for race-based affirmative action will be unnecessary (and thus presumably impermissible) within twenty-five years.[62]

C. *Race-Neutral Means for Achieving Diversity*

Some educational institutions may reject race-conscious admissions programs on principle;[63] others may be precluded by state law from adopting such programs.[64] In either case, the educational institution may nonetheless wish to diversify its student body in ways that do not relate directly to race and thus may not trigger the strict scrutiny that would be applied to racial classifications.

1. *Developmental Approaches*

A report of the Department of Education, released March 29, 2004, identifies two approaches to race-neutral means of achieving diversity in academia: developmental approaches and admissions approaches.[65] Race-neutral developmental approaches could encompass any race-neutral measures designed to increase the number and quality of diverse applicants who make their way into the application pipeline.[66] These might include governmental measures to improve K-12 education, especially in schools or districts that have fallen behind in academic success, as well as private or governmental outreach measures to encourage a broad spectrum of students to aspire to higher education and to apply for admission.[67]

Such outreach measures could generally target students not already entering the pipeline, who might be encouraged or enabled to do so if they received guidance, inspiration, or tutoring. If racial minorities are underrepresented in that pipeline, even race-neutral

62. *Id.* at 343.

63. *See supra* note 41 and accompanying text.

64. *See supra* note 8 and accompanying text.

65. ACHIEVING DIVERSITY, *supra* note 34, at 5.

66. *Id.*

67. *Id.* at 6-7; *see also* Alexander & Schwarzschild, *supra note* 20, at 12-13 (arguing for improvement in K-12 education and for promotion of academically supportive home environments, rather than racial or ethnic preferences in higher education).

outreach measures could help improve the racial balance of the applicant pool, thus allowing admissions officers an opportunity to evaluate applications from a pool that is more diverse, racially and otherwise.

Even if schools more consciously target minority groups with their outreach efforts, race-conscious efforts to enhance diversity in the applicant pool likely will be subject to less searching review than race-conscious decisions that result in actual admission. Moreover, developmental programs are an important supplement to race-conscious admissions programs as well as a means of furthering race-neutral admissions.[68]

2. *Admissions Approaches*

Race-neutral admissions approaches include lotteries or, more commonly, admissions criteria that give weight to qualities other than race but that (1) increase admissions for members of deserving groups other than racially-defined groups, or (2) incidentally increase admissions for racial minorities, or (3) both.[69] For example, the "idiosyncratic excellence" approach espoused by Laurence Thomas[70] would be a race-neutral approach to admissions that seeks to diversify a student body in ways not directly related to race, although it might incidentally benefit minority applicants. Any admissions program that looks for indicators of intelligence, creativity, and accomplishment beyond entrance examination scores and grade point averages is employing an approach of this type.

Of course, if an admissions policy is designed solely to increase minority admissions, under the guise of benefiting a group that is defined in racially-neutral terms, then it benefits minority applicants more than incidentally, and it is not race-neutral. For example, a policy that favored applicants from "District 2" might seem racially neutral on its face; however, if the population of District 2 is almost entirely non-white, and if the purpose of favoring applicants from District 2 is to increase minority admissions, then the policy is not really race-neutral, and it should be subjected to the strict scrutiny

68. Calleros, *supra* note 1.

69. *See* ACHIEVING DIVERSITY, *supra* note 34, at 32-42.

70. *See* Thomas, *supra* note 29, at 954-55.

normally applied to race-conscious admissions policies. In that case, the school would do better to drop the façade and adopt a more explicit race-conscious admissions program that meets the standards discussed previously in Part II, section B above.

Support is increasing for another race-neutral admissions approach: one that gives weight to low-income applicants.[71] Such a preference is not just a pretext for a racial preference if it genuinely aims to correct underrepresentation in higher education among the economically disadvantaged, regardless of their race. Nonetheless, it may incidentally benefit racial minorities, and perhaps the most deserving ones, to the extent that minority groups are disproportionately represented in the low-income populations from which the school draws applicants. So long as this benefit to minorities is incidental to a genuine effort to provide greater opportunities to low-income applicants, such a policy should not trigger the strict scrutiny review that applies to race-conscious policies, even if the motivation for the policy is to correct a societal injustice.

Low-income students, moreover, may bring experiences and perspectives that otherwise would be underrepresented in the student body, enhancing the education for all students. Still, such a policy normally will not result in the same level of racial diversity as would be produced by a race-conscious program,[72] and the school may conclude that the educational benefits of diversity brought by low-income students are not as great as those produced by an arguably richer mix of perspectives brought by a larger critical mass of minority students admitted pursuant to race-conscious policies.

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71. ACHIEVING DIVERSITY, *supra* note 34, at 32-37; Peter Schmidt, *Noted Higher-Education Researcher Urges Admissions Preference for the Poor*, CHRON. OF HIGHER EDUC. (Wash., D.C.), Apr. 16, 2004, at A26 (reporting statement of William G. Bowen).

72. *Schmidt*, *supra* note 71 (replacing minority preferences with ones for applicants for the poorest fourth of society would cause minority enrollments at nineteen studied colleges to drop from 13.4% to 7.1%). *But cf.* Peter Schmidt, *Educational Testing Service Accused of Suppressing Research on an Alternative to Affirmative Action*, CHRON. OF HIGHER EDUC. (Wash., D.C.), Nov. 2, 2006, at A1 (describing unpublished research that might have shown that racial diversity could be achieved by using a criterion that combined low income with evidence that the applicant had overcome adversity and thus was a "striver" whose abilities might be understated by SAT scores).

Finally, some states have adopted the potentially race-neutral approach of giving preferences in admission to applicants who have graduated within a certain percentage of the top graduates of their high school senior classes.[73] This approach enhances opportunities for applicants who graduate from high schools that are less competitive than others and thus would not otherwise be productive "feeder" schools for college.

If the preference is limited to particular high schools, however, it may be deemed a surrogate for benefiting certain groups of students who attend those high schools in disproportionate numbers. If the effect and purpose were to benefit low-income students, for example, the policy probably would not trigger strict scrutiny. If its effect and purpose, however, were to benefit minority students who disproportionately attend such schools, then it ought to be viewed as a race-conscious program that triggers strict scrutiny.[74] Such a plan might well fail to withstand such scrutiny, because its mechanical, numerical preferences do not allow for flexible, individualized evaluation of each applicant to determine whether they would add diversity to the educational program. If racial diversity is the school's aim, it probably would accomplish that goal more effectively by employing transparently race-conscious admissions programs that meet the criteria stated in *Gratz* and *Grutter*.[75]

D. *Summary of Recommended Approach*

The carefully limited race-conscious approach approved in *Grutter* is not only legally permissible under federal law, it furthers sound, widely accepted educational policies.[76] Admitting students

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73. ACHIEVING DIVERSITY, *supra* note 34, at 39-41 (describing the "percentage plans" in place in Texas, Florida, and California). *See also* Grutter v. Bollinger, 539 U.S. 306, 340 (2003) (questioning how the percentage plans adopted by Texas, Florida, and California undergraduate schools would "work for graduate and professional schools").

74. *See* Dworkin, *supra* note 27, at 889.

75. *See id.* at 890 (finding that the percentage high school plans do a poor job of achieving racial diversity in higher education and of selecting the best minority applicants).

76. *See* Smith, *supra* note 44, at 1 ("The commitment to law school diversity represents a broad consensus expressed in legal education, and higher education generally, regarding the educational value of diversity in the classroom."). The

almost entirely on the basis of their abilities to perform well on written examinations will further a school's educational mission only if its educational goals are defined too narrowly to maximize the potential benefits to students. Schools will make a more lasting contribution to their students if they adopt criteria that place some value on a variety of positive skills and qualities, including such attributes as raw intellectual strength, enthusiasm for academic pursuits, ability to work hard and overcome adversity, leadership skills, and experiences that are likely to expose all students to a variety of perspectives and arguments.[77]

A race-conscious admissions program furthers the goal of exposing all students to a diversity of perspectives.[78] The permission and encouragement granted by *Grutter*, however, should not be viewed as a green light for a lazy admissions process that hastily assumes that a candidate will add meaningful diversity solely based on the candidate's race.

Grutter's requirement of individualized assessment of applications[79] should be viewed as an opportunity to truly appreciate and realize the benefits of diversity rather than as an empty procedural hurdle. In many cases, a candidate's racial background will have contributed to the way in which he or she has experienced life in our society. It may have provided the candidate with unusual opportunities for leadership, or imposed needs to overcome adversity, or otherwise exposed the candidate to experiences and perspectives

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American Bar Association's latest standards for accrediting law schools call for schools to "demonstrate by concrete action . . . a commitment to having a student body that is diverse with respect to gender, race, and ethnicity." 2006-07 AM. BAR ASS'N STANDARDS FOR APPROVAL OF LAW SCH., Standard 212(a), (2006), *available at* http://www.abanet.org/legaled/standards/20062007StandardsWebContent/B.Chapter%202_20061005150039.pdf. The ABA's interpretation of this standard allows flexibility in determining what concrete steps a school must take. *See id.*, Interpretation 212-2, 212-3 at 16. However, this interpretation also expressly cites to *Grutter*'s authorization of race-conscious admissions programs while stating a law school's obligation to "take concrete actions to enroll a diverse student body" that permits students to realize the benefits of different perspectives and identities. *Id.*, Interpretation 212-2.

77. *See supra* Part II.A.

78. *See supra* notes 35-37 and accompanying text.

79. Grutter v. Bollinger, 539 U.S. 306, 337 (2003).

outside the mainstream of our society. An admissions officer should look for these and other indicia of merit rather than simply assume that a candidate of a particular race will automatically bring desired qualities to the student body and to society.

To maximize the number of diverse applicants who bring such qualities, every institution of higher education should participate actively in diversity pipeline programs in K-12 education.[80] Such programs can provide support, inspiration, and mentoring to those students in K-12 education who have the potential to take a leadership role in our pluralistic society but who might not aspire to higher education without some assistance and encouragement. A school that is barred by local law from adopting race-conscious admissions criteria[81] should feel a special responsibility to participate in such pipeline programs.[82] Even those schools that take advantage of the admissions approach approved by *Grutter*, however, should participate in K-12 enrichment programs, focusing on communities underrepresented in higher education, to ensure a rich pool of diverse applicants to college and graduate schools.

III. CONCLUSION

Race-conscious admissions can enhance the educational program for all students by exposing them to diverse perspectives and experiences and preparing them for work and citizenry in a diverse society. Federal law will permit schools to use race as one of several factors to attain a qualified and well-rounded student body if the race-conscious program is narrowly tailored to achieve a compelling purpose. The procedures recommended in this article should help a school achieve diversity in a manner that advances its educational mission without offending federal law. If combined with developmental programs designed to increase the flow of well-qualified and diverse applicants through the educational pipeline to higher education, a flexible admissions approach can help to enhance educational benefits to all admitted students.

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80. *See, e.g.*, Calleros, *supra* note 1.
81. *See supra* note 8 and accompanying text.
82. *See, e.g.*, *supra* Part II.C.1.