

# “SERIOUS CONSIDERATION” OF RACE-NEUTRAL ALTERNATIVES IN HIGHER EDUCATION

*George La Noue<sup>+</sup> & Kenneth L. Marcus<sup>++</sup>*

I. INTRODUCTION .....	992
II. THE DEVELOPMENT OF THE RACE-NEUTRAL ALTERNATIVES REQUIREMENT .....	995
<i>A. Wygant v. Jackson Board of Education</i> .....	995
<i>B. Refinement of the Narrow-Tailoring Doctrine in Justice O’Connor’s Jurisprudence</i> .....	997
1. <i>City of Richmond v. J.A. Croson Co.</i> .....	997
2. <i>Adarand Constructors, Inc. v. Pena</i> .....	999
3. <i>Grutter v. Bollinger</i> .....	1000
<i>C. Developments Since Justice O’Connor’s Retirement</i> .....	1003
III. EXTRA-JUDICIAL SOURCES OF GUIDANCE .....	1004
<i>A. Clinton Administration Guidance</i> .....	1004
<i>B. Bush Administration Guidance</i> .....	1005
<i>C. Guidance from the U.S. Commission on Civil Rights</i> .....	1006
<i>D. Non-Governmental Guidance</i> .....	1008
IV. SETTING MEASURABLE GOALS AND STANDARDS FOR CONSIDERATION OF RACE-NEUTRAL ALTERNATIVES .....	1010
<i>A. Race-Conscious Ends</i> .....	1010
1. <i>Race-Conscious Ends and Strict Scrutiny</i> .....	1010
2. <i>Race-Conscious Ends and Narrow Tailoring</i> .....	1013
3. <i>Race-Conscious Ends and Multi-Factored Diversity</i> .....	1015
<i>B. Race-Neutral Ends</i> .....	1016
<i>C. Direct Measures</i> .....	1019
V. PROGRAM EVALUATION STANDARDS FOR SERIOUS CONSIDERATION OF RACE-NEUTRAL ALTERNATIVES .....	1021
<i>A. Program Evaluations in Higher Education</i> .....	1024

---

<sup>+</sup> Professor of Political Science and Public Policy, University of Maryland Baltimore County, B.A. Hanover College; M.A. and Ph.D., Yale University, 1961 and 1966. He has been a trial expert for the U.S. Equal Employment Opportunity Commission and the U.S. Department of Labor, and a consultant to the U.S. Department of Education’s Office of Civil Rights and the U.S. Commission on Civil Rights. He appreciates insights into the evaluation process provided by Marvin Mandell and David Marcotte, colleagues in the UMBC Department of Public Policy.

<sup>++</sup> Lillie and Nathan Ackerman Visiting Professor of Equality and Justice in America, Baruch College School of Public Administration, The City University of New York. Mr. Marcus previously served as Staff Director at the U.S. Commission on Civil Rights (2004–2008) and was delegated the authority of Assistant Secretary of Education for Civil Rights (2003–2004). He gratefully acknowledges conversations with many colleagues which strengthened this research, including Susan Bower, Roger Clegg, Arthur Coleman, Peter Schmidt, and Sheldon Steinbach, as well as able research assistance by Amita Dahiya.

<i>B. Higher Education's Failure to Engage in Visible Race-Neutral Program Examinations</i> .....	1026
<i>C. Race-Neutral Contracting Requirements and Procedures</i> .....	1026
<i>D. Applying the Techniques of Program Evaluations to Achieving Diversity in Higher Education</i> .....	1029
1. <i>Defining Diversity</i> .....	1029
2. <i>Problems of Group Selection</i> .....	1030
3. <i>Measuring the Attainment of Diversity</i> .....	1032
<i>E. Reviewing the Use of Race</i> .....	1036
<i>F. The Process of Seriously Considering Race-Neutral Alternatives</i> .....	1039
VI. CONCLUSION.....	1040

## I. INTRODUCTION

What does it mean for a university to “seriously consider” race-neutral alternatives? Does it require, for instance, on-the-record review,<sup>1</sup> documentation of underlying facts,<sup>2</sup> or demonstration of an empirical basis<sup>3</sup> for a decision?<sup>4</sup> Justice Sandra Day O’Connor’s affirmative action jurisprudence requires post-secondary institutions to address these questions, yet does little to answer them. By requiring universities to conduct “serious, good-faith consideration of workable race-neutral alternatives”<sup>5</sup> before engaging in non-remedial race-conscious activities—but without specifying the requisite nature and scope of this “consideration”—Justice O’Connor has left many institutions to wonder what is needed to satisfy the Court.

---

1. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1*, 377 F.3d 949, 973–76 (9th Cir. 2004) (noting that a race-neutral proposal submitted to the board was “never formally discussed at the board meeting”), *aff’d* 426 F.3d 1162 (9th Cir. 2005), *rev’d and remanded by* 127 S. Ct. 2738 (2007).

2. ARTHUR L. COLEMAN & SCOTT R. PALMER, *COLL. BD., ADMISSIONS AND DIVERSITY AFTER MICHIGAN: THE NEXT GENERATION OF LEGAL AND POLICY ISSUES* 53 (2006) (recommending that higher education institutions adopt the practice of documenting and recording “[t]he entire array of race-neutral practices pursued by the institution”).

3. See U.S. COMM’N ON CIVIL RIGHTS, *FEDERAL PROCUREMENT AFTER ADARAND* xi (2005), available at [http://www.usccr.gov/pubs/080505\\_fedproccadarand.pdf](http://www.usccr.gov/pubs/080505_fedproccadarand.pdf).

4. These practices were discussed in a Bush Administration report that was briefly posted on the website of the U.S. Department of Education but not formally published or distributed. It is referenced in the Civil Rights Commission’s *Federal Procurement After Adarand*, which is still accessible. OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., *INCLUSIVE CAMPUSES: DIVERSITY STRATEGIES FOR PRIVATE COLLEGES, REPORT NO.3, RACE-NEUTRAL ALTERNATIVE SERIES 11–12* (2005) [hereinafter *INCLUSIVE CAMPUSES*], as summarized in U.S. COMM’N ON CIVIL RIGHTS, *supra* note 3, at xi, 18, 21, 23–24, 74, 84.

5. *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

Surprisingly little analysis has been given to this central element of narrow tailoring,<sup>6</sup> which Justice O'Connor developed in *City of Richmond v. J.A. Croson Co.*<sup>7</sup> and *Adarand Constructors, Inc. v. Peña*,<sup>8</sup> before applying it to universities in *Gratz v. Bollinger*<sup>9</sup> and *Grutter v. Bollinger*.<sup>10</sup> As Justice O'Connor noted, numerous universities are experimenting with a "wide variety of alternative approaches" to using race-conscious admissions.<sup>11</sup> Commentators have explored various approaches, including class-rank plans, socioeconomic preferences, and lottery assignment plans.<sup>12</sup> What courts and commentators have largely failed to explore, however, is the basic methodological question: What, specifically, does it *mean* to give serious consideration to these alternatives?

Justice O'Connor's decisions only complicate the question by dictating the requirement in strong terms but applying it so liberally as to sanction even perfunctory performance. While Justice O'Connor's *Grutter* opinion "does not require exhaustion of every conceivable race-neutral alternative," it does require "serious, good faith consideration of workable race-neutral alternatives."<sup>13</sup> At the same time, the Court approved the University of Michigan Law School's race-conscious admission system, which was predicated on weak or nonexistent consideration of race-neutral alternatives.<sup>14</sup> The inconsistency arises from the Court's failure to provide clear standards to guide judicial decision-making and institutional compliance. In other words, the same doctrinal vagueness that has prevented the Court from rendering its decision in clear and consistent terms may also impede universities from complying with the law. Until the Court finally provides standards to guide

---

6. On the paucity of earlier analysis, see ARTHUR L. COLEMAN ET AL., COLL. BD., RACE-NEUTRAL IN HIGHER EDUCATION: FROM THEORY TO ACTION 3 (2008) [hereinafter COLEMAN ET AL., RACE-NEUTRAL IN HIGHER EDUCATION] (commenting that "few topics have generated as much heat and as little light as 'race-neutral alternatives'" and observing that "critical legal and policy issues . . . have been missing in action"), and Michael E. Rosman, *Race-Conscious Admissions in Academia and Race-Neutral Alternatives*, 1 NEXUS 66, 70 (1996) ("[T]he Courts have not explained in great detail the extent to which a state actor must consider or employ race-neutral alternatives.").

7. 488 U.S. 469, 506–07 (1989).

8. 515 U.S. 200, 235 (1995).

9. 539 U.S. 244, 266 (2003).

10. 539 U.S. at 326–27, 342.

11. *Id.* at 342.

12. See OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., ACHIEVING DIVERSITY: RACE-NEUTRAL ALTERNATIVES IN AMERICAN EDUCATION (2004), <http://www.ed.gov/about/offices/list/ocr/edlite-raceneutralreport2.html> [hereinafter ACHIEVING DIVERSITY]; see also COLEMAN & PALMER, *supra* note 2, at 50–53 (discussing socioeconomic status and lottery systems and attendant case law).

13. *Grutter*, 539 U.S. at 339.

14. On the Law School's failure to consider such alternatives, see *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 853 (E.D. Mich. 2001), for the district court's description of the University of Michigan Law School's review system.

future consideration, the result can only be legal uncertainty, compliance failures, and increased litigation.

Universities, in the meantime, have received little or no judicial guidance as to the requirements for race-neutral alternatives, and, as a result, appear to be floundering. Some institutions may be rigorously evaluating race-neutral alternatives as part of their ongoing programmatic review. If so, they are not providing any degree of public transparency.<sup>15</sup> Perhaps this is due to concerns that disclosure would increase their risk of litigation or federal administrative investigation, exacerbate political divisions within the institution, or place the institution in an unflattering public light. Others, however, are apparently not complying with the “serious consideration” requirement at all.<sup>16</sup>

Academia’s failure to comply with this constitutional mandate may be understandable, because even cabinet-level federal agencies have been similarly remiss. The federal government’s noncompliance with the “serious consideration” requirement was the subject of a 2005 report by the U.S. Commission on Civil Rights.<sup>17</sup> This agency noncompliance, however, is particularly ironic in light of longstanding Justice Department guidance,<sup>18</sup> as well as more recent guidance from the U.S. Commission on Civil Rights and the U.S. Department of Education.<sup>19</sup> These standards have been disregarded by many federal agencies in part because the courts have not explicitly held them to any specific standards of serious consideration.

This issue should not, however, be as difficult for universities or the courts as it appears to be. Educational administrators are generally familiar with what it means to seriously evaluate educational programs. Educational program

---

15. In several states, public universities have been precluded from employing racial preferences. See CAL. CONST. art. 1, § 31 (result of California referendum); *Hopwood v. Texas*, 78 F.3d 932, 934–36 (5th Cir. 1996) (holding University of Texas Law School’s race-based admission program unconstitutional); Fla. Exec. Order No. 99-281 (Nov. 9, 1999) (gubernatorial policy). These universities have not only seriously considered, but also implemented, race-neutral diversity measures. See Curt A. Levey, *Troubled Waters Ahead for Race-Based Admissions*, 9 TEX. REV. L. & POL. 63, 96–97 (2004). What is less clear is the extent to which all other federally financed public and private post-secondary institutions are seriously considering race-neutrality before resorting to, or continuing with, the use of race as a factor in admissions, financial aid, or other benefits. Some prominent higher education attorneys have maintained in conversations with the authors that their clients are rigorously evaluating the feasibility of race-neutral programming but that these institutions prefer to avoid public disclosure of their evaluative activities.

16. See Rachel Moran, *Of Doubt and Diversity: The Future of Affirmative Action in Higher Education*, 67 OHIO ST. L.J. 201, 231 (2006) (noting that “[d]espite federal efforts to promote [race-neutral] alternatives, colleges have not paid as much attention to this [legal requirement]”).

17. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 3, at iii.

18. Legal Guidance on the Implications of the Supreme Court’s Decision in *Adarand Constructors, Inc. v. Peña*, 19 Op. Off. Legal Counsel 171 (1995) [hereinafter DOJ Guidance Memorandum].

19. See U.S. COMM’N ON CIVIL RIGHTS, *supra* note 3, at xi (stating that the U.S. Department of Education recommends six standardized practices to determine if a program is race-neutral).

evaluation is a well-developed field with established methodologies and standards. This Article argues that basic principles of program evaluation provide clear standards and criteria for serious program consideration, and that application of these methodologies is mandated by the Court's decisions. Part II describes the manner in which Justice O'Connor constitutionalized program evaluation standards for diversity initiatives. Part III assesses extra-judicial guidance about this requirement, including regulatory guidance by federal administrative agencies, demonstrating that detailed standards are now available to guide the serious consideration of race-neutral programs. Part IV examines the way in which race-neutral alternatives may be measured and argues that the Court's recent jurisprudence permits the use of race-conscious measures to evaluate race-neutral programs, but that these measures must be connected to multi-factored diversity indicia. Part V assesses the program evaluation literature to examine the requirements of "serious" evaluation under contemporary professional and academic standards. As litigation will increasingly focus on narrow tailoring, administrators' failure to apply proper program analysis to race-neutral alternatives could jeopardize many diversity programs. Moreover, the absence of requisite program analysis of race-neutral alternatives will lead to uncertainty, confusion, and disregard for the law. Thus, this Article supplies a framework for identifying meaningful program evaluation standards that can enable universities to comply with the requirements set forth in Justice O'Connor's affirmative action jurisprudence.

## II. THE DEVELOPMENT OF THE RACE-NEUTRAL ALTERNATIVES REQUIREMENT

The idea that narrow tailoring requires a serious consideration of race-neutral alternatives emerges out of Justice Lewis Powell's plurality opinion in *Wygant v. Jackson Board of Education*.<sup>20</sup> Relying as much upon scholarly literature as upon the Court's precedents, Justice Powell asserted that in affirmative action cases, courts should intensely scrutinize the means with which government agencies pursue race-conscious goals to ensure that less intrusive means are not available.<sup>21</sup> Justice O'Connor amplified this standard by requiring that government agencies *themselves* seriously consider race-neutral alternatives before resorting to race-conscious measures.<sup>22</sup>

### A. *Wygant v. Jackson Board of Education*

The *Wygant* Court held, in a fractured set of opinions, that the Equal Protection Clause of the Fourteenth Amendment prohibits a school board from extending race-preferential protection against layoffs to some of its employees based on their race or national origin when less intrusive options, such as

---

20. See 476 U.S. 267, 280 n.6 & n.7 (1986) (opinion of Powell, J.) (plurality opinion).

21. *Id.* at n.6.

22. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989).

hiring goals, are available.<sup>23</sup> As Justice Powell observed, the Court had previously required judicial evaluation to ensure that programs employing racial or ethnic criteria to accomplish race-conscious purposes are narrowly tailored to achieve their legitimate goals.<sup>24</sup>

Justice Powell added a significant element to the requirement, noting that the term “narrowly tailored” had acquired an additional, secondary meaning in the academic literature.<sup>25</sup> Specifically, Justice Powell imported from a few scholarly articles a new legal standard that “require[s] consideration of whether lawful alternative and less restrictive means could have been used.”<sup>26</sup> In particular, he cited with approval Professor Kent Greenawalt’s assertion that “[courts] should give particularly intense scrutiny to whether a nonracial approach or a more narrowly-tailored racial classification could promote the substantial interest about as well and at tolerable administrative expense.”<sup>27</sup> Justice Powell emphasized that the Court’s focus is on the means by which the government pursues even goals of great importance.<sup>28</sup> Justice Powell again relied on commentators to support his notion that “no matter what the weight of the asserted governmental purpose,” the means must be narrowly tailored.<sup>29</sup> Justice Powell observed that these scholars had contended that courts should scrutinize not only the ends but the means by which race-conscious government programs are advanced.<sup>30</sup> Indeed, in the case of legislation, “judicial scrutiny of legislative means [may be] more appropriate than [scrutiny] of the legislative purpose.”<sup>31</sup>

---

23. *Wygant*, 476 U.S. at 283–84 (opinion of Powell, J.) (plurality opinion). Interestingly, it was Justice Thurgood Marshall, in dissent, who suggested that the layoffs could have been handled through a lottery system. *Id.* at 310 (Marshall, J., dissenting). Justice Marshall dispensed with this alternative, however, on the ground that it would have disrupted the school’s seniority hierarchy. *Id.*

24. *Id.* at 279–80 (opinion of Powell, J.) (plurality opinion).

25. *Id.* at 280 n.6.

26. *Id.*

27. *Id.* (alteration in original) (quoting Kent Greenawalt, *Judicial Scrutiny of “Benign” Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 578–79 (1975)).

28. *See id.* at 280.

29. *Id.* at 280 n.7.

30. *Id.* (citing John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 727 n.26 (1974); Greenawalt, *supra* note 27, at 565).

31. *Id.* (citing Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection*, 86 HARV. L. REV. 1, 20–21 (1972)).

*B. Refinement of the Narrow-Tailoring Doctrine in  
Justice O'Connor's Jurisprudence*

*I. City of Richmond v. J.A. Croson Co.*

The Supreme Court held for the first time in *City of Richmond v. J.A. Croson Co.* that race-preferential affirmative action measures are subject to strict scrutiny.<sup>32</sup> In that case, the Court considered a constitutional challenge to a Richmond, Virginia, ordinance that required the city's prime contractors to subcontract at least thirty percent of the value of the contracts to minority-owned businesses.<sup>33</sup> Writing for the Court, Justice O'Connor held that Richmond's contracting scheme had violated the Fourteenth Amendment's guarantee of equal protection because the means were not narrowly tailored to remedy prior discrimination.<sup>34</sup> With palpable exasperation, Justice O'Connor commented that "it is almost impossible to assess whether the Richmond Plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way."<sup>35</sup> Justice O'Connor continued further, finding that the city failed to establish a pressing need to implement race-based hiring procedures.<sup>36</sup> "In this regard," the city failed to give any consideration to race-neutral means of achieving its goals.<sup>37</sup> Justice O'Connor relied on *United States v. Paradise* for the proposition that "[i]n determining whether race-conscious remedies are appropriate, we look to several factors, including the efficacy of alternative remedies."<sup>38</sup> Unlike *Paradise*, however, Justice O'Connor imposed the requirement of considering race-neutral alternatives on the government agency in *Croson*, rather than merely placing that burden on the courts.<sup>39</sup> In other words, an agency's failure to consider any race-neutral

---

32. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–94 (1989).

33. *Id.* at 477.

34. *Id.* at 507–08.

35. *Id.* at 507.

36. *Id.* at 510 (citing *Wygant*, 476 U.S. at 277).

37. *Id.* The term "in this regard" is important because it clarifies that the goal for race-neutral alternatives in the government procurement context must be to remedy prior discrimination.

38. *Id.* at 507 (quoting *United States v. Paradise*, 480 U.S. 149, 171 (1987)). *Paradise* is notable for Justice O'Connor's strong dissent, which castigates the district court for imposing a racial "promotion quota *without consideration of any of the available alternatives.*" *Paradise*, 480 U.S. at 200 (O'Connor, J., dissenting). Justice William Brennan, writing for the plurality, responded that these alternatives had not been provided to the district court. *Id.* at 177 n.28 (opinion of Brennan, J.) (plurality opinion). Justice O'Connor concluded, however, that without exploring the available alternatives, no court could conclude that a racial quota was necessary. *Id.* at 200 (O'Connor, J., dissenting).

39. See *Croson*, 488 U.S. at 507 ("There is no evidence in this record that the *Richmond City Council* has considered any alternatives to a race-based quota." (emphasis added)).

alternative became an independent basis for invalidating race-conscious governmental action under the strict scrutiny analysis.<sup>40</sup>

Justice O'Connor found no evidence that Richmond considered any alternatives to its plan, which she considered to be a race-based quota.<sup>41</sup> In the Court's discussion of the consideration of race-neutral means, Justice O'Connor proffered that the city might have increased minority contracting participation (that is, overcoming the absence of sufficient capital and inability to meet bonding requirements) by establishing a race-neutral financing program for small firms.<sup>42</sup> Writing separately, Justice Scalia suggested that a preference for small or new businesses could also have satisfied Richmond's legitimate interest in enabling those previously excluded by discrimination to compete in the field.<sup>43</sup>

Although Justice O'Connor did not describe the full extent of the requisite consideration of race-neutral alternatives, her opinion reflects an insistence that public agencies' affirmative action program analysis must include serious research. In other words, rigorously evaluating race-neutral alternatives is not merely a matter of prudent public administration, but a requirement of the Equal Protection Clause. Most significantly, Justice O'Connor firmly rejected Richmond's attempt to predicate its program on a national congressional report, insisting that "[i]f all a state or local government need do is find a congressional report . . . to enact [a race-conscious policy], the constraints of the Equal Protection Clause will, in effect, have been rendered a nullity."<sup>44</sup> Moreover, in her discussion of the requisite factual predicate that government agencies must make in order to justify racial preferences on the basis of prior discrimination, Justice O'Connor detailed at length the nature of "particularized findings" required.<sup>45</sup> Beyond criticizing Richmond's evidence

---

40. *Accord Metro Broad., Inc. v. FCC*, 497 U.S. 547, 624 (1990) (O'Connor, J., dissenting) (arguing that the FCC "never attempted to assess what alternatives to racial classifications might prove effective" before implementing a program that provided racial and ethnic preferences in proceedings for new licenses and transfers of existing licenses). Interestingly, the FCC had formally solicited comments about whether effective race-neutral measures might achieve its goals. *Id.* at 624–25. This process had, however, been halted as a result of a congressional appropriations measure. *Id.* at 625. For this reason, Justice O'Connor concluded that the FCC "never determined that it ha[d] any need to resort to racial classifications," when race-neutral alternatives were, in fact, available. *Id.*

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

42. *Id.*

43. *Id.* at 526 (Scalia, J., concurring in the judgment).

44. *Id.* at 504 (majority opinion).

45. In addition, Justice O'Connor defined the problem that state and local governments had to solve before they could use race as a factor in awarding contracts. In particular, Justice O'Connor limited the use of race in contracting to remedying discrimination and required courts to make "particularized findings" identifying that discrimination. *Id.* at 497–98 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (opinion of O'Connor, J.)). She declared:

Proper findings in this regard are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects. Such findings also serve to

and thus establishing an evidentiary threshold for race-based contracting programs, Justice O'Connor suggested the kind of empirical data that could help establish an inference of discrimination.<sup>46</sup> In this way, Justice O'Connor took a step toward formalizing the use of program evaluations by government and reviewing courts.

Justice O'Connor stated that government agencies need to examine situations:

Where there is a *significant* statistical disparity between the number of *qualified* minority contractors *willing and able to perform a particular service* and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion *could arise*.<sup>47</sup>

The decision does not discuss in detail the kind of program analysis to satisfy the race-neutral alternatives required in *Croson*, for the simple reason that Richmond failed to consider any alternatives at all.

## 2. Adarand Constructors, Inc. v. Pena

*Adarand* involved a constitutional challenge to a Department of Transportation program that compensated recipients of prime government contracts who hired subcontractors certified as a small business "controlled by socially and economically disadvantaged individuals."<sup>48</sup> The regulations implementing the contracting preference provided a presumption that minority groups qualify as "socially disadvantaged."<sup>49</sup> Justice O'Connor wrote for the Court, which held by a five-to-four majority that strict scrutiny is now the standard of constitutional review for federal programs that use racial or ethnic

---

assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself.

*Id.* at 510. As a result of this passage in *Croson*, a new disparity study industry evolved, and produced about two hundred state and local contracting studies. Whereas these studies generally find some types of disparities, they do not always support the use of race-conscious remedies. Measuring the relative availability and capacity of Minority and Women's Business Enterprise-Disadvantaged Business Enterprise (MWBE-DBE) and non-MWBE-DBE firms is still a controversial activity. Nevertheless, Justice O'Connor's *Croson* opinion set a clear framework for the tasks that need to be performed before race can be used in state and local public contracting. For a discussion of the problems in implementing the O'Connor formula, see generally George R. La Noue, *Who Counts?: Determining the Availability of Minority Businesses for Public Contracting After Croson*, 21 HARV. J.L. & PUB. POL'Y 793 (1998).

46. *Croson*, 488 U.S. at 509-10.

47. *Id.* at 509 (emphases added).

48. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 205-07 (1995) (internal quotation marks omitted).

49. *Id.* at 207.

classifications in governmental decision-making.<sup>50</sup> Noting that the Fourteenth Amendment “protects *persons*, not *groups*,” the Court held “that all governmental action based on race—a *group* classification long recognized ‘as in most circumstances irrelevant and therefore prohibited’—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed.”<sup>51</sup> The Court concluded that “government may treat people differently because of their race only for the most compelling reasons,”<sup>52</sup> and “that such government classifications must be judicially subjected to strict scrutiny, including the requirements of narrow tailoring.”<sup>53</sup>

As in *Croson*, Justice O’Connor’s opinion looked to the defendant’s consideration of the viability of race-neutral policies as one of the key factors of the narrow tailoring test. Accordingly, Justice O’Connor directed the district court on remand to “address the question of narrow tailoring in terms of our strict scrutiny cases, by asking, for example, whether there was ‘any consideration of the use of race-neutral means to increase minority business participation’ in government contracting.”<sup>54</sup>

### 3. Grutter v. Bollinger

For the first time since *Bakke*,<sup>55</sup> the Court applied its affirmative action jurisprudence to higher education in *Grutter*, the University of Michigan Law School affirmative action case.<sup>56</sup> Writing once again for a divided Court, Justice O’Connor found that the Law School’s admissions plan met the requirements of narrow tailoring, including the requisite serious consideration of race-neutral alternatives.<sup>57</sup> In this respect, Justice O’Connor rejected the plaintiffs’ argument<sup>58</sup> that the Law School’s plan was not narrowly tailored

---

50. *Id.* at 227. Technically, Justice O’Connor’s opinion was the opinion of the Court only to the extent that it was not inconsistent with Justice Scalia’s concurrence, which did not differ from Justice O’Connor’s opinion in the present context.

51. *Id.* at 227 (citation omitted) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

52. *Id.*

53. *Id.*

54. *Id.* at 237–38.

55. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

56. *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003).

57. *See id.* (“The Law School has determined, based on its experience and expertise, that a ‘critical mass’ of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body.”).

58. Justice O’Connor’s opinion also reversed the district court’s ruling that, regardless of whether race-neutral methods would in fact have achieved Michigan’s goals, “the law school’s failure to consider them . . . prior to implementing an explicitly race-conscious system militates against a finding of narrow tailoring.” *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 853 (E.D. Mich. 2001).

because it failed to consider all available race-neutral alternatives.<sup>59</sup> Rather, Justice O'Connor held that the Law School met the standard for serious consideration of race-neutral alternatives, which she set forth in the clearest judicial formulation to date:

Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups. Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.<sup>60</sup>

In other words, universities must rigorously evaluate appropriate race-neutral policies to determine the extent to which they support the institution's specific diversity goals.<sup>61</sup>

Applying this stringent standard, Justice O'Connor nevertheless agreed with the court of appeals that the Law School's consideration of race-neutral alternatives was sufficient.<sup>62</sup> Given the limited extent of the Law School's consideration, the Court was able to reach this result only by relying upon Michigan's good faith.<sup>63</sup> Instead of assessing the University's actual evaluation of race-neutral alternatives, the Court merely rejected the

---

59. *Grutter*, 539 U.S. at 339.

60. *Id.* (citation omitted).

61. See COLEMAN ET AL., RACE-NEUTRAL IN HIGHER EDUCATION, *supra* note 6, at 5 (discussing that some race-neutral policies will be subject to strict scrutiny if the policy has some racial intent and effect).

62. *Grutter*, 539 U.S. at 339–40. Interestingly, the court of appeals reasoned that courts “are ill-equipped to ascertain which race-neutral alternatives merit which degree of consideration.” *Grutter v. Bollinger*, 288 F.3d 732, 751 (6th Cir. 2002). Arguably, Justice O'Connor attempts to conduct precisely this form of evaluation, doing so in a manner that wholly failed to comply with professional standards for educational evaluation, without assessing, in any meaningful sense, the nature of Michigan's evaluative process, choosing instead to assess the workability of alternatives suggested by the district court and the Solicitor General's brief. See *Grutter*, 539 U.S. at 340. A kinder alternative explanation is that Justice O'Connor was tacitly pursuing the first step in a dyadic process. In the first step, one uses a relatively rudimentary analysis to determine which race-neutral alternatives are “workable.” In the second step, one uses “serious consideration”—which is to say, appropriate educational evaluation—to determine which workable alternatives can meet the institution's compelling interest.

63. See *id.* at 339–41, 343 (“We take the Law School at its word . . .”). Michigan argued that racial preferences were necessary because race-neutral alternatives are unworkable. First, Michigan argued that percentage plans are based on racial segregation in public schools, eliminate individualized review, and are inconsistent with the flagship public university's stature as a national institution. Brief for Respondents at 44–47, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516). Second, Michigan asserted that percentage plans are not race-neutral, but instead represent efforts to circumvent legal prohibitions on the use of racial preferences in some states. *Id.* at 44. Third, Michigan argued that a percentage plan could not yield sufficient student racial diversity because of the demographic characteristics of Michigan's public high schools. *Id.* at 48–49.

alternatives suggested by the district court (that is, employing a lottery method or de-emphasizing objective academic credentials) because they would have forced Michigan to compromise core values such as “academic quality.”<sup>64</sup> Similarly, the Court rejected the “percentage plans” recommended by the Solicitor General on two grounds: it was not clear to the Court how such plans would apply to graduate and professional schools<sup>65</sup> and “even assuming such plans are race-neutral, they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university.”<sup>66</sup> The Court stated that “[w]e are satisfied that the Law School adequately considered race-neutral alternatives currently capable of producing a critical mass without forcing the Law School to abandon the academic selectivity that is the cornerstone of its educational mission.”<sup>67</sup> In short, the Court decided to “take the Law School at its word that it would ‘like nothing better than to find a race-neutral admissions formula.’”<sup>68</sup>

To justify this leniency, the Court indicated that the First Amendment affords the University a certain degree of “educational autonomy” in determining how best to accomplish its mission of achieving diversity.<sup>69</sup> This reasoning is questionable on two grounds. First, as Justice Clarence Thomas argued in his separate opinion, it does not appear that the Court’s First Amendment jurisprudence supports the degree of deference that the *Grutter* opinion extended to the Law School.<sup>70</sup> Indeed, as Justice Thomas points out, the Court’s strict scrutiny analysis does not entitle academic institutions to any deference.<sup>71</sup> Second, the Court’s recent Fourteenth Amendment jurisprudence, including its opinion in *Croson*,<sup>72</sup> proscribes the very deference that the *Grutter* opinion affords.<sup>73</sup> The *Croson* Court held that, while the government

---

64. *Grutter*, 539 U.S. at 339–40.

65. *See id.* at 340.

66. *Id.*

67. *Id.*

68. *Id.* at 343 (quoting Brief for Respondent at 34, *Grutter*, 539 U.S. 306 (2003) (No. 2-241)).

69. *Id.* at 329.

70. *Id.* at 350 (Thomas, J., concurring in part and dissenting in part) (discussing the majority’s “unprecedented deference” to the Law School). Justice O’Connor argues, however, that “[o]ur scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university.” *Id.* at 328 (majority opinion).

71. *See id.* at 361 (Thomas, J., concurring in part and dissenting in part). Indeed, Justice Kennedy argues that Justice O’Connor’s deference to Michigan constitutes an abandonment of strict scrutiny. *Id.* at 387–88 (Kennedy, J., dissenting).

72. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (“[S]imple legislative assurances of good intention cannot suffice.”).

73. For an extended form of this argument, see Douglas M. Raines, Comment, *Grutter v. Bollinger’s Strict Scrutiny Dichotomy: Diversity is a Compelling State Interest, but the University*

is normally “entitled to . . . deferential review by the judiciary,”<sup>74</sup> the standard changes when the government invokes the use of racial classifications.<sup>75</sup> Arguably, Justice O’Connor’s approach in *Grutter* subverted the strict scrutiny standard as enunciated in *Croson*.<sup>76</sup> Specifically, the Court’s deference to the university “confuses deference to a university’s definition of its educational objective with deference to the implementation of this goal.”<sup>77</sup>

The deference which Justice O’Connor afforded to Michigan’s Law School should not obscure the significance of her continued emphasis of such strict scrutiny elements as the requirement of “serious consideration.” While Justice O’Connor gave the Law School the benefit of the doubt in this case, her consistent application of the stringent race-neutral-alternatives standard, coupled with the outcome in *Gratz*, suggests the continuing vitality of the “serious consideration” requirement, as would later be confirmed in *Parents Involved in Community Schools v. Seattle School District No. 1*.<sup>78</sup> What, then, explains the disparity between Justice O’Connor’s strong doctrinal language and its weak enforcement in the *Grutter* decision? One possibility is that it was not clear to Justice O’Connor what meta-evaluative standards should be applied in assessing the sufficiency of an institution’s serious consideration. The requisite evaluative standards had not been established in prior opinions, briefed by the parties, or developed in the scholarly literature. In other words, the apparent discrepancy in Justice O’Connor’s opinion may be explained by her understandable inability to traverse the gap in existing jurisprudence that this Article endeavors to fill.

### C. Developments Since Justice O’Connor’s Retirement

Since Justice O’Connor’s retirement, the most important development in this area of jurisprudence has been the Court’s decision to emphasize that strict scrutiny requires public schools to seriously consider race-neutral alternatives.<sup>79</sup> In *Parents Involved*, the Court used this requirement to strike down a public school district’s reliance on race in student assignments.<sup>80</sup> Chief Justice Roberts wrote for a four-Justice plurality, concluding that the school districts’ racial classifications were “not narrowly tailored to the goal of

---

*of Michigan’s Law School’s Admissions Plan is Not Narrowly Tailored*, 89 MARQ. L. REV. 845, 860–71 (2006).

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

75. *Id.* at 500–01.

76. *See Grutter*, 539 U.S. at 387 (Rehnquist, C.J., dissenting); *id.* at 388 (Kennedy, J., dissenting).

77. *Id.* at 388 (Kennedy, J., dissenting).

78. 127 S. Ct. 2738 (2007).

79. *Id.* at 2746 (opinion of Roberts, C.J.) (plurality opinion); *see also id.* at 2792–93 (Kennedy, J., concurring in part and concurring in the judgment) (noting that “a more nuanced, individual evaluation . . . would be informed by *Grutter*”).

80. *Id.* at 2738, 2746 (opinion of Roberts, C.J.) (plurality opinion).

achieving the educational and social benefits asserted to flow from racial diversity.”<sup>81</sup> “In design and operation,” the Chief Justice wrote, “the plans are directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate.”<sup>82</sup> The district court found that the School Board failed to seriously consider any race-neutral alternatives.<sup>83</sup> For example, School Board Member Michael Preston testified that he “chose not to read” a less racially restrictive Urban League proposal because, in his words, “I’d rather play with my bass lunger fishing game.”<sup>84</sup> This indifference rendered the district’s plan unconstitutional, as Chief Justice Roberts emphasized that school officials failed to demonstrate “serious, good faith consideration of workable race-neutral alternatives.”<sup>85</sup>

### III. EXTRA-JUDICIAL SOURCES OF GUIDANCE

Under both the Clinton and George W. Bush Administrations, federal agencies, including the Departments of Justice and Education and the Civil Rights Commission, have provided largely informal guidance regarding race-neutral alternatives. In some cases, this guidance has been detailed and extensive. Generally speaking, however, this guidance has not been closely followed, even by other federal agencies.<sup>86</sup> Non-governmental organizations, such as the College Board, have also provided useful guidance on this requirement, directing their analysis toward institutions of higher learning.<sup>87</sup>

#### A. Clinton Administration Guidance

During the Clinton Administration, the U.S. Department of Justice issued an important affirmative action guidance memorandum to regulatory agencies in the wake of *Adarand Constructors, Inc. v. Peña*.<sup>88</sup> The DOJ Guidance Memorandum, issued by then-Assistant Attorney General Walter Dellinger, provided preliminary legal guidance on *Adarand*’s standard for “assessing the constitutionality of federal affirmative action programs,” including educational programs.<sup>89</sup>

Foreshadowing Justice O’Connor’s subsequent *Grutter* opinion, the DOJ Guidance Memorandum counseled that the government need only seriously

---

81. *Id.* at 2755.

82. *Id.*

83. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 377 F.3d 949, 970–75 (9th Cir. 2004), *aff’d*, 426 F.3d 1162 (9th Cir. 2005), *rev’d and remanded by* 127 S. Ct. 2738 (2007).

84. *Id.* at 974. Judge Diarmuid O’Scannlain helpfully identifies this diversion as a handheld electronic simulation game. *Id.* at 975.

85. *Parents Involved*, 127 S. Ct. at 2760 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003)); *see also id.* at 2792 (Kennedy, J., concurring in part and concurring in the judgment).

86. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 3, at 71.

87. *See COLEMAN & PALMER, supra* note 2, at iii.

88. DOJ Guidance Memorandum, *supra* note 18, at 171.

89. *Id.*

consider race-neutral alternatives, but need not actually exhaust them.<sup>90</sup> Moreover, the Department of Justice advised that the government may, “[i]n some situations, . . . draw upon a previous consideration of race-neutral alternatives” rather than continually evaluating prospects in light of each new program.<sup>91</sup> The Department of Justice admonished agencies that, “[i]n the absence of prior experience, consider race-neutral alternatives at the time it adopts a racial or ethnic classification.”<sup>92</sup>

This admonition appears to have been largely ignored by federal agencies, which, notoriously, have largely failed to consider race-neutral alternatives in a serious manner during either the Clinton or George W. Bush Administrations.<sup>93</sup>

### B. Bush Administration Guidance

Following *Grutter*, the Bush Administration Department of Education’s Office for Civil Rights (OCR) published two monographs about race-neutral alternatives, focusing mainly on undergraduate admissions in states where race preferences have been barred.<sup>94</sup> These reports describe an array of race-neutral alternatives, including programs that seek socioeconomic diversity, percentage plans based on geographic diversity, and approaches that rely on comprehensive, individualized review without racial preferences.<sup>95</sup>

OCR also prepared an additional report, *Inclusive Campuses: Diversity Strategies for Private Colleges*,<sup>96</sup> which discussed race-neutral alternatives in private undergraduate colleges and universities, but canceled its projected volume on graduate and professional schools. *Inclusive Campuses* was briefly posted on the official website of the Department of Education, but was never issued in hard copy. *Inclusive Campuses* explicitly detailed practices for proper evaluation of race-neutral practices:

[I]dentifying and evaluating a wide range of policies; articulating underlying facts that will prove whether a race-neutral plan works;

---

90. *Id.* at 190 n.38 (“[W]hile strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every such possible alternative.” (quoting *Coral Constr. Co. v. King County*, 941 F.2d 910, 923 (1991) (alteration in original))).

91. *Id.*

92. *Id.*

93. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 3, at 71 (“Most agencies could not demonstrate that they consider race-neutral alternatives before resorting to race-conscious programs. Although DOJ offered post-*Adarand* guidance, agencies generally do not adhere to it.”).

94. ACHIEVING DIVERSITY, *supra* note 12; U.S. DEP’T OF EDUC., RACE-NEUTRAL ALTERNATIVES IN POSTSECONDARY EDUCATION: INNOVATIVE APPROACHES TO DIVERSITY (2003), <http://www.ed.gov/about/offices/list/ocr/edlite-raceneutralreport.html> [hereinafter INNOVATIVE APPROACHES].

95. ACHIEVING DIVERSITY, *supra* note 12; INNOVATIVE APPROACHES, *supra* note 94.

96. INCLUSIVE CAMPUSES, *supra* note 4.

collecting empirical research to demonstrate success; ensuring such assessments are based on current, competent, and comprehensive data; reviewing race-conscious plans periodically to determine the need for continuing them; and analyzing data to establish causal relationships before concluding that a race-neutral plan is ineffective.<sup>97</sup>

Although OCR never published these standards in hard copy, and has apparently withdrawn them, they represent OCR's clearest articulation to date of the basic evaluative standards for post-secondary educational institutions to use in evaluating race-neutral alternatives, and they have subsequently been endorsed by the U.S. Commission on Civil Rights.<sup>98</sup>

In addition, OCR has continued some post-*Grutter* enforcement activity related to race preferences in education. In an important 2004 case, the Department of Education denied Magnet School Assistance Program funding to the Berkeley, California, public school district based on OCR's determination that Berkeley's proposal for racial and ethnic classifications in its student-assignment program had not demonstrated that it had first seriously considered race-neutral alternatives.<sup>99</sup> OCR has placed a similar emphasis on institutional consideration of race-neutral alternatives in higher education. OCR has requested in its investigations "each effort by any university component or office to consider the continued necessity for the use of race and national origin and/or whether there are workable race-neutral alternatives to the use of race and national origin in any aspect of the financial aid program."<sup>100</sup>

### C. Guidance from the U.S. Commission on Civil Rights

In September 2005, the U.S. Commission on Civil Rights issued a lengthy report, *Federal Procurement After Adarand*, examining the extent to which federal agencies have complied with their constitutional obligation to seriously consider race-neutral alternatives.<sup>101</sup> The Commission found that federal agencies have "give[n] little thought to their legal obligations" under this

---

97. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 3, at xi (summarizing INCLUSIVE CAMPUSES, *supra* note 4).

98. See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 3, at xi.

99. See Brief for the United States as Amicus Curiae Supporting Petitioner at 26 n.8, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (No. 05-908). Marcus decided this case while delegated the authority of Assistant Secretary of Education for Civil Rights.

100. ARTHUR L. COLEMAN ET AL., COLL. BD., *FEDERAL LAW AND FINANCIAL AID: A FRAMEWORK FOR EVALUATING DIVERSITY-RELATED PROGRAMS* 86 (2005), available at [http://www.collegeboard.com/prod\\_downloads/diversitycollaborative/diversity-manual.pdf](http://www.collegeboard.com/prod_downloads/diversitycollaborative/diversity-manual.pdf). For a discussion of the significance of OCR's role in the system of civil rights enforcement, see Kenneth L. Marcus, *Anti-Zionism as Racism: Campus Anti-Semitism and the Civil Rights Act of 1964*, 15 WM. & MARY BILL RTS. J. 837, 856-58 (2007).

101. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 3, at ix.

requirement, have disagreed with one another about the ramifications of the Supreme Court's affirmative action decisions, and have largely ignored the Department of Justice's guidance.<sup>102</sup>

The Commission endorsed OCR's *Inclusive Campuses* report, citing the findings and lauding its "useful guidance regarding serious consideration of race-neutral alternatives in higher education."<sup>103</sup> Ironically, however, the Commission found that the Department of Education had not complied with the serious consideration requirement it had imposed on its grantees.<sup>104</sup> Nevertheless, the Commission relied on the Department of Education's conceptual framework to develop its own standards for race-neutral evaluation in the context of government procurement.<sup>105</sup> The Commission's framework consisted of four basic elements, each of which is clearly applicable outside of the narrow confines of procurement law:

Element 1: Standards—Agencies must develop policy, procedures, and statistical standards for evaluating race-neutral alternatives. . . .

Element 2: Implementation—Agencies must develop or identify a wide range of race-neutral approaches, rather than relying on only one or two generic governmentwide programs. . . .

Element 3: Evaluation—Agencies must measure the effectiveness of their chosen procurement strategies based on established empirical standards and benchmarks. The end goal should be to eliminate reliance on race-conscious programs. . . .

Element 4: Communication—Agencies should communicate and coordinate race-neutral practices to ensure maximum efficiency and consistency governmentwide.<sup>106</sup>

The Commission's evaluative standards largely parallel OCR's. The Commission's most important contribution to the evolution of program evaluation standards may have been its insistence that agencies communicate with one another about race-neutral best practices. This would help ensure that agencies are aware of new best practices as they develop—consistent with Justice O'Connor's admonition to the University of Michigan Law School in *Grutter*.<sup>107</sup>

Like previous efforts, the Commission's report was largely ignored. There is no indication that federal agencies have yet complied with these standards, or adjusted their activities in response to the Commission's criticisms.

---

102. *Id.* at 71.

103. *Id.* at 78.

104. *See id.*

105. *Id.*

106. *Id.* at xi.

107. *See id.* at 29, 75–76.

*D. Non-Governmental Guidance*

The College Board, in its conferences and publications, has taken the lead in informing institutions about post-*Grutter* ground rules, particularly in reports prepared by former Clinton Administration OCR officials Arthur L. Coleman and Scott R. Palmer. The College Board concluded that the determination of whether a program is narrowly tailored requires consideration of four factors:

- (1) Whether the use of race is necessary in the light of institutional goals;
- (2) Whether the use of race is sufficiently flexible in light of institutional goals;
- (3) Whether the impact of the use of race on non-qualifying candidates is sufficiently diffuse;
- (4) Whether there is an end in sight to the use of race and a process of periodic review.<sup>108</sup>

Accomplishing these tasks would require educational institutions to designate responsibility, allocate additional resources, and create processes for reporting the outcomes. In the same report, Coleman and Palmer set forth useful standards or “practice pointers” for the evaluation of race-neutral programs.<sup>109</sup>

The College Board standards are similar in some ways to the OCR and Civil Rights Commission recommendations and are presented with impressive clarity:

1. A body with the responsibility and authority for examining and making policy recommendations regarding race-neutral alternatives should be charged with periodically researching and evaluating possible race-neutral alternatives in light of institution-specific, diversity-related goals.
2. A record of practices considered, along with the accompanying evaluations regarding their viability, should be maintained. In addition, evidence-based foundations for making judgments about which practices to try and which to reject should be documented. (Research studies that include projections about likely results over time may also be useful, especially where comprehensive historical foundations for those conclusions do not exist.)
3. The entire array of race-neutral practices pursued by the institution should be well-documented, along with an ongoing record of research regarding the effectiveness of those practices in achieving institutional diversity goals.<sup>110</sup>

Coleman and Palmer concluded that “a pattern that reflects serious consideration, experimentation, and evaluation leading to research-based

---

108. See COLEMAN & PALMER, *supra* note 2, at 17.

109. *Id.* at 53.

110. *Id.*

policy changes is more likely to reflect the kind of deliberate and earnest consideration of alternatives that may justify some federal court deference to academic judgments regarding race-neutral alternatives.”<sup>111</sup> Coleman and Palmer’s emphasis on serious consideration, evaluation, periodic review, empirical review, and careful documentation parallels prior judicial decisions and regulatory guidance. But unlike earlier guidance, Coleman and Palmer directly enumerated experimentation as a factor for developing race-neutral alternatives.<sup>112</sup>

Similarly, a report issued by the American Association for the Advancement of Science urged science, technology, engineering, and mathematics educators to adopt a systematic approach to designing race-neutral alternatives. Specifically, the report stated: “Program activities should be designed to address specific diversity needs, be justified with research into past and present practices, and take into account the positive and possible negative impacts on other studies (minority and non-minority alike).”<sup>113</sup>

It is unlikely that program evaluations, such as those discussed by Coleman and Palmer, are being implemented by educational institutions. And if they are, the results have not been made public. Establishing the causes of this academic reticence can only be speculative. Yale Law School scholars Ian Ayres and Sidney Foster use the ironic title “Don’t Tell, Don’t Ask” to suggest that the Michigan decisions create a perverse incentive not to create institutional policies or evaluations about admissions preferences, so long as institutions claim to be only using individualized considerations regarding race.<sup>114</sup> Some institutions may be reluctant to admit they are using race in admissions at all. They may not wish to reveal the extent of this reliance to their campus community, peer competitors, or the general public for fear that disclosure of their procedures may provoke litigation by public interest advocacy groups, or administrative investigations conducted by OCR at the instigation of advocacy groups.<sup>115</sup> The difficulty of evaluating race-neutral alternatives is that it requires schools to divulge admission practices and outcomes the institutions may wish to conceal from public view.<sup>116</sup> However, if an institution had to reveal in discovery that it failed to consider race-neutral

---

111. *Id.*

112. *See id.*

113. SHIRLEY M. MALCOM ET AL., AM. ASS’N FOR THE ADVANCEMENT OF SCI., *STANDING OUR GROUND: A GUIDE FOR STEM EDUCATORS IN THE POST-MICHIGAN ERA* 36 (2004).

114. Ian Ayres & Sydney Foster, *Don’t Tell, Don’t Ask: Narrow Tailoring After Grutter and Gratz* 40–41 (Yale Law Sch. John M. Olin Ctr. in Law, Econ., and Pub. Policy Working Paper Series, Paper No. 287, 2005), *available at* <http://lsr.nellco.org/yale/lepp/papers/287> (“Quantifiable but unquantified programs may sail under the radar screen of constitutional review. . . . So long as a decisionmaker does not tell . . . the Supreme Court will be loath to ask . . .”).

115. *See* MALCOM ET AL., *supra* note 113, at 5–6 (suggesting that schools are taking an extremely cautious approach to race-conscious decision-making in light of *Gratz* and *Grutter*).

116. *See* COLEMAN & PALMER, *supra* note 2, at 56.

alternatives, it would be difficult to defend the continuing use of racial preferences in litigation. Nevertheless, the legal obligation to engage in serious consideration of race-neutral alternatives as described in previous sections should be obvious.<sup>117</sup>

#### IV. SETTING MEASURABLE GOALS AND STANDARDS FOR CONSIDERATION OF RACE-NEUTRAL ALTERNATIVES

As we have seen, Justice O'Connor has insisted that equal protection requires "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks."<sup>118</sup> From this, it is clear that these alternatives should be evaluated to determine the extent that they will achieve the university's diversity goals. What is less clear is the extent to which race-neutral alternatives may be motivated by, or evaluated against, diversity goals, which are themselves race-conscious. In other words, to what extent may institutions pursue such facially neutral programs as percentage plans or socioeconomic preferences, if their goal is to increase minority student enrollment? When race-neutral alternatives are evaluated, should they be measured against essentially race-conscious goals such as student racial diversity, or must they be evaluated against other criteria?<sup>119</sup> As we will show, diversity efforts should be evaluated against the educational benefits that they are intended to achieve. The pursuit of such race-neutral goals does not trigger strict scrutiny when advanced by race-neutral means. When diversity efforts, including race-neutral alternatives, are pursued in order to increase multi-factored race-conscious diversity objectives, however, strict scrutiny will be triggered, but it will be satisfied where no less intrusive means are available.

##### A. Race-Conscious Ends

###### 1. Race-Conscious Ends and Strict Scrutiny

Determining how race-neutral alternatives should be evaluated is a different inquiry than questioning whether the use of race-neutral procedures motivated by racial purposes will trigger strict scrutiny. The answer to the latter question is clear: governmental action always triggers strict scrutiny when "discriminatory intent or purpose" is a primary motivating factor.<sup>120</sup> This is an

---

117. See *id.* at 50.

118. *Grutter v. Bollinger*, 539 U.S. 306, 339–40 (2003).

119. This issue is explored in Kenneth L. Marcus, *Diversity and Race-Neutrality*, 103 NW. U. L. REV. COLLOQUY 163 (2008), <http://www.law.northwestern.edu/lawreview/colloquy/2008/39/LRColl2008n39Marcus.pdf>.

120. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). Since *Washington v. Davis*, the Court has established that equal protection fundamentally protects citizens from discrimination motivated by racial classifications. 426 U.S. 229, 239 (1976). Moreover, as R. Richard Banks pointed out, even prior to the adoption of the discriminatory

important point to remember in light of the widespread, casual assumption that many public universities have turned to socioeconomic affirmative action and other race-neutral approaches to increase their enrollment of minority students.<sup>121</sup>

The Court has not held “that race-neutral policies intended to benefit racial minorities are exempt from strict scrutiny,”<sup>122</sup> and could not do so consistent with *Croson*.<sup>123</sup> Moreover, these governmental procedures, such as those at issue in *Croson*, may be particularly worrisome to the extent that they represent hidden legislative racial motivations, which are less amenable to public, administrative, and judicial scrutiny.<sup>124</sup> The Court has rejected precisely this form of subterfuge in other contexts, including in higher education.<sup>125</sup> The Court has addressed this concern in a voting district case, explaining that “statutes are subject to strict scrutiny . . . not just when they contain express racial classifications, but also when, though race neutral on

purpose standard, the Court had invalidated race-neutral policies designed in part to harm racial minorities. R. Richard Banks, *The Benign-Invidious Asymmetry in Equal Protection Analysis*, 31 HASTINGS CONST. L.Q. 573, 576 (2003).

121. See, e.g., Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2346 (2000) (observing that “a number of public universities have turned to disadvantage-based and other race-neutral approaches to increase the enrollment of minority students”).

122. Banks, *supra* note 120, at 578.

123. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (“Absent searching judicial inquiry into the justification for [race-conscious] measures, there is simply no way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.”). As Richard Fallon has argued,

it is at least oddly disparate to maintain, on the one hand, that explicitly race-conscious reasoning is permissible in justifying an economically based affirmative action program, but to insist, on the other hand, that race-consciousness is an evil that may not be reflected in an affirmative action program’s distributive criteria.

Richard H. Fallon, Jr., *Affirmative Action Based on Economic Disadvantage*, 43 UCLA L. REV. 1913, 1949–50 (1996).

124. See Ian Ayres, *Narrow Tailoring*, 43 UCLA L. REV. 1781, 1795–96 (1996) (“Racially motivated legislation is inherently suspect, but unacknowledged racial motivation by legislatures is all the more worrisome.”).

125. For an analysis of the “subterfuge” problem facing racially motivated race-neutral alternatives, see Chapin Cimino, Comment, *Class-Based Preferences in Affirmative Action Programs After Miller v. Johnson: A Race-Neutral Option, or Subterfuge?*, 64 U. CHI. L. REV. 1289, 1291–92 (1997). Brian Fitzpatrick compares this “subterfuge” with the earlier “race-neutral” practices clandestinely used to limit the number of Jewish students admitted into selective higher education institutions in the twentieth century, such as the coded use of “character” requirements. See Brian T. Fitzpatrick, Essay, *Can Michigan Universities Use Proxies for Race After the Ban on Racial Preferences?*, 13 MICH. J. RACE & L. 277, 279 n.10 (2007) (citing MARCIA GRAHAM SYNNOTT, *THE HALF-OPENED DOOR: DISCRIMINATION AND ADMISSIONS AT HARVARD, YALE AND PRINCETON, 1900–1970* 62 (1979)).

their face, they are motivated by a racial purpose or object.”<sup>126</sup> For this reason, facially race-neutral programs, such as percentage plans or socioeconomic preferences, will be subject to strict scrutiny if they are instituted primarily to achieve racially conscious goals, such as increased minority enrollment.<sup>127</sup> For example, OCR has adopted the position that race-neutral criteria, used as a proxy for race, should be subject to strict scrutiny in an important case addressing a school district’s use of socioeconomic status as a selection criteria.<sup>128</sup>

There is dictum in Justice Kennedy’s *Parents Involved* opinion that may suggest, at first blush, that there is now a fifth vote on the Supreme Court for the position that racially motivated, facially neutral diversity programs should not be subjected to strict scrutiny.<sup>129</sup> In that opinion, Justice Kennedy suggested a number of facially race-neutral policies that school boards may pursue, observing that “[t]hese mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race.”<sup>130</sup> Then, in a cryptic comment, Justice Kennedy stated that “it is unlikely any of [these mechanisms] would demand strict scrutiny to be found permissible.”<sup>131</sup> Justice Kennedy cites the plurality opinion in *Bush v. Vera* for the proposition that “[s]trict scrutiny does not apply merely because redistricting is performed with consciousness of race.”<sup>132</sup> Justice Kennedy also quotes *Vera*’s teaching: “[e]lectorate district lines are ‘facially race neutral’ so a more searching inquiry is necessary before strict scrutiny can be found applicable in redistricting cases than in cases of

---

126. *Miller v. Johnson*, 515 U.S. 900, 913 (1995). Equal protection concerns are compounded when the state’s goal is not only race-conscious and race-preferential, but also race-exclusive. *See Grutter v. Bollinger*, 539 U.S. 306, 324–25 (describing Justice Powell’s view in *Bakke* that the diversity constituting a compelling governmental interest includes racial or ethnic characteristics as only a “single though important element” (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978) (opinion of Powell, J.))).

127. Coleman and Palmer have repeatedly admonished that facially race-neutral policies may in fact be race-conscious as a matter of law. COLEMAN & PALMER, *supra* note 2, at 49.

128. Coleman observed from the complaints in an OCR case that, if the evidence shows “a deliberate use of race-neutral criteria as a proxy for race,” OCR would then apply Title VI strict scrutiny standards. COLEMAN ET AL., RACE-NEUTRAL IN HIGHER EDUCATION, *supra* note 6, at 5 (citing *In re Wake County Pub. Sch. Sys.*, OCR Compl. Nos. 11-02-1044, 1104 & 1111 (Aug. 29, 2003)).

129. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2792 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

130. *Id.* Specifically, Justice Kennedy listed a number of acceptable mechanisms, “including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.” *Id.*

131. *Id.*

132. *Id.* (quoting *Bush v. Vera*, 517 U.S. 952, 958 (1996) (plurality opinion)).

“classifications based explicitly on race.””<sup>133</sup> Invoking *Vera* suggests that only if the “predominant” motivation of a governmental education program is racial will it require strict scrutiny review. As Brian Fitzpatrick has persuasively argued, Justice Kennedy’s most likely meaning is that, if the Court adopts the “predominant” motivation standard from voting district cases (as opposed to the traditional “but for” motivation standard used in other race-proxy cases), then it would be more difficult for plaintiffs to make the requisite showing to trigger strict scrutiny.<sup>134</sup> In other words, Justice Kennedy’s dictum seems consistent with the rule that government action always triggers strict scrutiny when a primary motivating factor is based on discrimination by race.<sup>135</sup>

## 2. Race-Conscious Ends and Narrow Tailoring

To acknowledge that racially motivated, facially neutral diversity programs trigger strict scrutiny does not, however, mean they are impermissible. Should university administrators wish to implement such a program, they must meet the requirements of narrow tailoring.<sup>136</sup> After all, the requirement to consider race-neutral alternatives has always been a method of assessing the *means* by which race-conscious government programs are implemented, rather than assessing the purposes for why they are implemented.<sup>137</sup> It would be rather

---

133. *Id.* (quoting *Vera*, 517 U.S. at 958).

134. Fitzpatrick, *supra* note 125, at 290. Fitzpatrick writes that the meaning Justice Kennedy most likely intended was one suggesting that, if the Court adopts the “predominant” motivation standard from the voting district cases as opposed to the more traditional “but-for” motivation standard it used in other race-proxy cases, then it will be harder for plaintiffs to make the necessary showing to invoke strict scrutiny. . . . I think the most that Justice Kennedy’s opinion can be read to say is that racial gerrymandering still must overcome strict scrutiny in order to comport with the Constitution whenever, as in the voting district cases, the gerrymandering is “predominantly” motivated by race.

*Id.* (footnote omitted).

135. *See supra* note 120 and accompanying text.

136. Interestingly, Justice O’Connor may have flirted with the notion that race-neutral alternatives must always be racially neutral in both ends and means. The University of Michigan argued that purportedly race-neutral alternatives used in other states, such as percentage plans, are not truly race-neutral because they represent an effort by preferential affirmative action. Brief for Respondents, *Gratz*, *supra* note 63, at 44–45. Justice O’Connor was evidently moved by that argument, because her opinion implicitly acknowledges that racially motivated plans may not be race-neutral, and therefore may not satisfy the requirements of narrow tailoring, when she began her discussion of percentage plans with the phrase “even assuming such plans are race-neutral.” *Grutter v. Bollinger*, 539 U.S. 306, 340 (2003). This phrase demonstrates that Justice O’Connor, writing for the Court, considered the neutrality of race-conscious plans to be, at least, a questionable matter. *See COLEMAN & PALMER, supra* note 2, at 49. For purposes of satisfying the narrow tailoring requirement, however, the question is not whether a purely neutral alternative exists; rather, the question is whether there is a workable alternative that is less racially intrusive than the program under consideration.

137. *See supra* notes 20–22 and accompanying text.

odd, after all, to suggest that a hidden racially conscious motivation could render a facially neutral program more intrusive or more restrictive.

On the other hand, if racially motivated, facially neutral programs trigger strict scrutiny to the same extent as race-conscious programs, then why must they be seriously considered before a public university or other government actor may implement the more explicit race-conscious program? Doesn't this pose a conundrum where facially race-neutral alternatives may be used to satisfy the narrow-tailoring requirement for a race-preferential program, but then cannot be implemented until after other race-neutral alternatives are first considered? Actually, it does not. The race-neutral alternatives requirement has never been a search for purity, but rather an effort to seek less burdensome procedures along a continuum of race-consciousness.<sup>138</sup>

In other words, whenever race-conscious classifications are used, government is first required to consider a range of less racially discriminatory alternatives, which may include some programs that are more neutral than others.<sup>139</sup> Facially race-neutral procedures may have some advantages over racially explicit classifications, even if such procedures are adopted with a race-conscious goal. For example, race-neutral approaches avoid the practice of defining individual applicants in racial or ethnic terms, whether the applicants choose to be so identified or not.<sup>140</sup> As the *Croson* Court observed, racial classifications "may in fact promote notions of racial inferiority and lead to a politics of racial hostility."<sup>141</sup> Arguably, race-neutral means may be preferred over race-conscious means, even to achieve race-conscious ends, if procedural neutrality can diminish the politics of division and resulting racial stigma. Moreover, racially neutral procedures may satisfy the Court's preference for less racially intrusive methods, notwithstanding the motivations

---

138. Roughly speaking, the continuum ranges from racially preferential, race-exclusive programs on one end, to non-race-conscious programs on the other. Strict racial quotas, race-as-a-factor schemes, and facially neutral race-conscious plans occupy different positions along this continuum.

139. It is not the case, as others have argued, that *Adarand* and *Croson* "leave open the question whether race-neutral alternatives are constitutional because they satisfy strict scrutiny or because they are exempt from strict scrutiny." Banks, *supra* note 120, at 578–79. Some race-neutral alternatives surely are constitutional because they are exempt from strict scrutiny—namely, those that are not motivated by race-conscious purposes or effects. Other alternatives are equally constitutional because they satisfy strict scrutiny—namely, those race-conscious alternatives that are motivated by a compelling interest and are narrowly tailored to the extent that less restrictive means have been considered. However, some facially race-neutral alternatives will likely not be constitutional at all, such as those that are racially motivated but not properly justified by a compelling governmental interest, or are not narrowly tailored in an appropriate fashion.

140. See Ayres, *supra* note 124, at 1797 ("Race-neutral means . . . do not expose society to the intrusive painful process of defining the race of individual citizens . . .").

141. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (opinion of O'Connor, J.) (plurality opinion).

for implementing the procedure.<sup>142</sup> In general, it may be that the Court considers racially motivated race-neutral procedures to be “less odious” than racially motivated race-conscious procedures, although both may be “constitutionally suspect.”<sup>143</sup> For this reason, racially motivated but facially neutral programs may be considered as part of an array of less intrusive alternatives, although non-racially motivated programs should be considered as well.

### 3. Race-Conscious Ends and Multi-Factored Diversity

Is it the goal of race-neutral policies, then, to increase the number of minority students?<sup>144</sup> Many commentators assume that this is exactly what race-neutral alternatives should achieve.<sup>145</sup> There is support for this view, including Justice O’Connor’s explicit admonition in both *Croson* and *Adarand* that government agencies should consider “the use of race-neutral means to increase minority business participation,”<sup>146</sup> as well as language from Justice Kennedy’s opinion in *Parents Involved*.<sup>147</sup>

*Grutter*, however, instructs that institutions may not use a quota or seek proportional representation, although they may seek a “critical mass” of underrepresented minority students as part of a multi-factored approach to diversity.<sup>148</sup> As Justice Powell wrote in the *Bakke* decision, Justice O’Connor emphasized in *Grutter* that “race ‘is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous

142. See, e.g., *United States v. Paradise*, 480 U.S. 149, 199–200 (O’Connor, J., dissenting) (contending that the district court’s race-based order was not narrowly tailored because there were several less intrusive alternatives available); see also *Croson*, 488 U.S. at 507 (noting that Richmond failed to give any consideration to race-neutral alternatives for construction contracts).

143. Fitzpatrick, *supra* note 125, at 288 (arguing further that “we might still prefer that government actors pursue their compelling interests through racial proxies than through explicit classifications”).

144. More specifically, an institution’s goal may be (as the University of Michigan Law School’s was) to enroll a “critical mass” of minority students. *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003). The enrollment of minority students, however, was but a means to a greater end. In particular, Michigan argued “that a ‘critical mass’ of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body.” *Id.*

145. Ian Ayres, for example, assumes that “both race-neutral and explicitly racial means share the same race-conscious motivation of remedying past discrimination.” Ayres, *supra* note 124, at 1783. In more recent years, of course, the emphasis has been on achieving diversity rather than remedying past discrimination. See, e.g., Timothy L. Hall, *Educational Diversity: Viewpoints and Proxies*, 59 OHIO ST. L.J. 551, 558 (1998) (observing that the “focus on diversity has . . . been used to escape [the] . . . remedial uses of race-consciousness”).

146. *Croson*, 488 U.S. at 507 (quoted in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237–38 (1995)). Without much exaggeration, Ian Ayres refers to this language as the “key phrase” in *Croson*. Ayres, *supra* note 124, at 1791.

147. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2793 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

148. *Grutter*, 539 U.S. at 333–34.

student body.”<sup>149</sup> Under *Grutter*, as under the Powell opinion in *Bakke*, “[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.”<sup>150</sup>

Justice O’Connor provided no further guidance on the rather nebulous concept of critical mass. The most complicated admissions issue flowing from *Grutter* is the extent of institutional discretion in weighing race or ethnicity as a factor in an individualized admission system.<sup>151</sup> If the racial point advantage is large enough, it will virtually guarantee admission to the favored group.<sup>152</sup> If it is too small, however, it may not achieve the institution’s diversity goals.

Under *Grutter*, then, it would appear that universities may evaluate race-neutral diversity programs by their ability to satisfy the institutions’ own compelling diversity goals, such as an institutional commitment to achieving multi-factored diversity.<sup>153</sup> An institution that only measured these programs according to their ability to increase minority student enrollment would likely present the appearance, in any subsequent litigation or OCR review, however, of seeking only racial balance, rather than the constitutionally sanctioned goal of multi-factored diversity.<sup>154</sup> A more appropriate method would be to assess the program according to its ability to promote multiple forms of diversity (not just racial and ethnic) in a manner that is tied to the institution’s mission statement.

#### B. Race-Neutral Ends

A program with race-neutral ends may not always be readily distinguishable from programs with race-based goals. However, such a distinction is important when determining whether strict scrutiny should apply. Generally, such programs are often motivated by goals that are not racially conscious—for example, increasing economic, social, ideological, or geographic diversity,

---

149. *Id.* at 330 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 314 (1978) (opinion of Powell, J.)).

150. *Grutter*, 539 U.S. at 325 (quoting *Bakke*, 438 U.S. at 315). Chief Justice Roberts voiced his support for this interpretation, condemning approaches that “work[] backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported [educational] benefits.” *Parents Involved*, 127 S. Ct. at 2757 (opinion of Roberts, C.J.) (plurality opinion).

151. Mark C. Long estimated that the advantage given to underrepresented minority applicants for admission at higher education institutions was equivalent to an increase of either 0.21 GPA points or 101 SAT points. Mark C. Long, *Race and College Admissions*, 86 REV. ECON & STATS. 1020, 1025 (2004).

152. *See Gratz v. Bollinger*, 539 U.S. 244, 273 (2003) (examining the University of Michigan’s undergraduate admission program, where, “as the University has conceded, the effect of automatically awarding 20 points is that virtually every qualified underrepresented minority applicant is admitted”).

153. *Grutter*, 539 U.S. at 324–25.

154. *See Marcus, Diversity and Race-Neutrality*, *supra* note 119, at 167.

or supporting students who have overcome disadvantages, such as racial or ethnic discrimination.

Indeed, the Department of Education has encouraged universities to pursue diversity initiatives defined and motivated in purely race-neutral terms.<sup>155</sup> In its first monograph on race-neutral alternatives, OCR made no reference to race or ethnicity when lauding the pursuit of diversity.<sup>156</sup> Instead, it emphasized socioeconomic background, cultural heritage, intellectual viewpoint, exceptional character, personal talents, extracurricular activities, volunteer activities, work experiences, and dedication to particular causes.<sup>157</sup> Pointedly, OCR instructed that it is precisely that diversity, broadly understood, that President Bush and the Department of Education want to help educational institutions achieve.<sup>158</sup>

Similarly, the Solicitor General's *Grutter* brief argued that a race-neutral purpose of admitting "candidates with diverse backgrounds and experiences and viewpoints" (or candidates who have overcome barriers) could be achieved through a

focus on numerous race-neutral factors including a history of overcoming disadvantage, geographic origin, socioeconomic status, challenging living or family situations, reputation and location of high school, volunteer and work experiences, exceptional personal talents, leadership potential, communication skills, commitment and dedication to particular causes, extracurricular activities, extraordinary expertise in a particular area, and individual outlook as reflected by essays.<sup>159</sup>

In this sense, increased minority enrollment would be considered a notable byproduct of race-neutral diversity measures, but not their direct goal. The Solicitor General's amicus brief goes on to describe these indirect consequences of diversity policies:

Nothing in the Constitution requires public universities and governments to . . . tolerate artificial obstacles to educational opportunity. Public universities have substantial latitude to tackle such problems and ensure that universities and other public institutions are open to all and that student bodies are experientially diverse and broadly representative of the public. Schools may identify and discard facially neutral criteria that, in practice, tend to skew admissions in a manner that detracts from educational diversity. They may also adopt admissions policies that seek to

---

155. See *ACHIEVING DIVERSITY*, *supra* note 12.

156. See *INNOVATIVE APPROACHES*, *supra* note 94.

157. See *id.*

158. *Id.*

159. Brief for the United States as Amicus Curiae Supporting Petitioner at 19–20, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), available at <http://www.usdoj.gov/osg/briefs/2002/3mer/1ami/2002-0241.mer.ami.pdf>.

promote experiential geographical, political, or economic diversity in the student body, which are entirely appropriate race-neutral governmental objectives. The adoption of such policies, moreover, has led to racially diverse student bodies in other States.<sup>160</sup>

In this section at least, the Solicitor General assumes that the goals of a race-neutral policy must themselves be race-neutral, but indicates they may indirectly increase the number of racial minority students.<sup>161</sup>

A few years ago OCR investigated a series of complaints that alleged the Wake County Public School System in North Carolina was using socioeconomic preferences in student assignments as an impermissible proxy for race.<sup>162</sup> If OCR had found that Wake County's vaunted race-neutral program was indeed a race proxy, it would have had to determine whether this usage was unconstitutional.<sup>163</sup> In fact, the OCR investigation determined that Wake County's program was actually what it purported to be: a policy designed to increase socioeconomic diversity, rather than an indirect effort to achieve racial diversity. Although "race was not absent from the district's considerations," OCR found that racial considerations were not the basis for the district's decision.<sup>164</sup> Consequently, it did not trigger the agency's use of strict scrutiny.

To the extent that a university's multi-factored diversity objectives do include race or ethnicity as a factor, consistent with the limitations set out in *Grutter*, that factor may not provide the best measure by which to evaluate race-neutral alternatives. After all, the Court did not find that multi-factored diversity per se is compelling as an ultimate goal. Rather, the university's compelling interest consists of "the educational benefits that flow from a diverse student body."<sup>165</sup> Because student body diversity is only a means of

---

160. *Id.* at 13–14.

161. *See id.* at 13–15.

162. *See* COLEMAN ET AL., RACE-NEUTRAL IN HIGHER EDUCATION, *supra* note 6, at 5 (describing *In re* Wake County Pub. Sch. Sys., OCR Complaint Nos. 11-02-1044, 1104 & 1111 (Aug. 29, 2003)).

163. *Id.* In order to determine whether facially race-neutral criteria are in fact a proxy for race, Coleman notes that OCR considers

evidence of intent to discriminate, [including]: the impact of the official action (i.e., whether it impacts more heavily upon one racial group than another); a pattern of discrimination unexplainable on grounds other than race; the historical background of a decision, particularly the specific sequence of events leading to the challenged policy; departure from the normal procedural sequence; and the legislative or administrative history, particularly contemporaneous statements of members of the decision-making body.

*Id.* (alteration in original).

164. *Id.* (quoting *In re* Wake County Pub. Sch. Sys., OCR Complaint Nos. 11-02-1044, 1104 & 1111 (Aug. 29, 2003)).

165. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (quoting Brief for Respondents at i, *Grutter*, 539 U.S. 306 (No. 02-241)). Specifically, the Law School maintained that its "admissions policy promotes 'cross-racial understanding,' helps to break down racial stereotypes,

achieving these educational benefits, it stands to reason that universities should evaluate diversity programs against their ability to achieve the educational benefits themselves.<sup>166</sup> In other words, multi-factored diversity is at best an indirect measure of the educational benefits that it is intended to increase. Moreover, it is far from clear that racial diversity is a useful proxy for these educational benefits, because research does not support the position that racial diversity alone (without measures to ensure intergroup student engagement) yields any measurable educational value.<sup>167</sup> For this reason, the use of indirect measures (such as simply counting multi-factored diversity) is also suspect, because more direct measures of educational attainment may be available. Indeed, the exclusive use of indirect measures may suggest that an institution's proffered commitment to the educational benefits that flow from diversity is itself a pretext for pursuing a somewhat more sophisticated form of racial balancing.

### C. Direct Measures

In the end, race-neutral alternatives must be assessed according to their ability to achieve the ultimate race-neutral ends that race-preferential policies are said to pursue—for example, increased intergroup understandings and reduced use of stereotypes. In *Grutter*, Michigan asserted “only one justification for [its] use of race in the admissions process: obtaining ‘the educational benefits that flow from a diverse student body.’”<sup>168</sup> It stands to

---

and ‘enables [students] to better understand persons of different races.’” *Id.* at 333 (alteration in original). Michigan argued that the “‘classroom discussion is livelier, more spirited, and simply more enlightening and interesting’ when the students have ‘the greatest possible variety of backgrounds.’” *Id.* at 330.

166. See Marcus, *Diversity and Race-Neutrality*, *supra* note 119, at 168.

167. See Mitchell J. Chang, Nida Denson, Victor Sáenz & Kimberly Misa, *The Educational Benefits of Sustaining Cross-Racial Interaction Among Undergraduates*, 77 J. HIGHER ED. 430, 432 (2006). Of course, there is some dispute as to whether diversity yields educational benefits even when it is accompanied by such intergroup engagements efforts. See U.S. COMM’N ON CIVIL RIGHTS, THE BENEFITS OF RACIAL AND ETHNIC DIVERSITY IN ELEMENTARY AND SECONDARY EDUCATION 15 (2006), available at <http://www.usccr.gov/pubs/112806diversity.pdf> (finding that “[t]here is little evidence that racial and ethnic diversity in elementary and secondary schools results in significant improvement in academic performance,” and that “[s]tudies of whether racial and ethnic diversity result in significant social and non-educational benefits report varied results”); see also *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2776–79 (2007) (Thomas, J., concurring) (“Scholars have differing opinions as to whether educational benefits arise from racial balancing.”). But that is a question for another day.

168. *Grutter*, 539 U.S. at 328 (2003) (quoting Brief for Respondents at i, *Grutter*, 539 U.S. 306 (No. 02-241)). Specifically, the Law School maintained that its “admissions policy promotes ‘cross-racial understanding,’ helps to break down racial stereotypes, and ‘enables [students] to better understand persons of different races.’” *Id.* at 333 (alteration in original). Michigan argued that the “‘classroom discussion is livelier, more spirited, and simply more enlightening and interesting’ when the students have ‘the greatest possible variety of backgrounds.’” *Id.* at 330.

reason, then, that universities should use a “direct measures” approach<sup>169</sup> to evaluate whether race-neutral procedures replicate the educational benefits in question, rather than the diverse student body that is intended as either a means to achieve these benefits or a proxy for them.<sup>170</sup> This approach is consistent, for example, with the approach of Judge Danny Boggs, who argued that diversity goals can be effectively achieved with race-neutral measures that directly focus on unique experiences and viewpoints, rather than using race and ethnicity as proxies.<sup>171</sup>

A direct measures approach has several notable advantages. First, it takes institutions at their word when they maintain that they are seeking diversity not as an end in itself, but rather as a means toward achieving the educational goals to which courts defer. Second, it directly measures the institution’s ability to satisfy its ultimate goals, rather than merely assessing its ability to measure only intermediate goals. Third, it enables institutions to maintain the holistic approach so important to Justice O’Connor in *Grutter*,<sup>172</sup> rather than requiring them to reduce students to one-dimensional representatives of racial groups for assessment purposes.

There are of course other versions of a direct measures approach, varying with the ultimate ends that an institution might seek to achieve. For example, Daria Roithmayr’s direct measures approach would seek three separate diversity-related goals:

Under a “direct measures” program, an applicant would be granted an admissions preference if her application demonstrated that she met any of three criteria: (1) that she had suffered from the

---

169. The term “direct measures” was put forward by Daria Roithmayr in *Direct Measures: An Alternative Form of Affirmative Action*, 7 MICH. J. RACE & L. 1, 6 (2001), but Roithmayr had a very different notion of what “direct measures” would look like.

170. See *id.* The extent to which Michigan was able to achieve measurable educational benefits through its race-preferential admissions was (and is) a matter of vigorous debate. Compare Expert Report of Patricia Gurin, *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000) (No. 97-CV-75321), *Grutter v. Bollinger*, 127 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 97-CV-75928), reprinted in *Reports Submitted on Behalf of the University of Michigan: The Compelling Need for Diversity in Higher Education*, 5 MICH. J. RACE & L. 363, 364–66 (1999) (finding that “the benefits of diversity are evident . . . in the studies of Michigan students”), with ROBERT LERNER & ALTHEA K. NAGAI, CENTER FOR EQUAL OPPORTUNITY, A CRITIQUE OF THE EXPERT REPORT OF PATRICIA GURIN IN *GRATZ V. BOLLINGER* 1–2 (2001) available at [http://www.ceousa.org/index.php?option=com\\_docman&task=doc\\_view&gid=154](http://www.ceousa.org/index.php?option=com_docman&task=doc_view&gid=154) (asserting that Gurin’s “findings are inconsistent and trivially weak” and some “should be ignored”). A similar debate rages around the question of whether educational benefits flow from racial diversity in the public schools. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2776–77 (2007) (Thomas, J., concurring) (describing the lack of academic consensus on this issue); U.S. COMM’N ON CIVIL RIGHTS, *THE BENEFITS OF RACIAL AND ETHNIC DIVERSITY IN ELEMENTARY AND SECONDARY EDUCATION* 15 (2006) (describing the lack of consensus and finding that “[t]here is little evidence that racial and ethnic diversity in elementary and secondary schools results in significant improvement in academic performance”).

171. *Grutter v. Bollinger*, 288 F.3d 732, 791 (6th Cir. 2002) (Boggs, J., dissenting).

172. See *supra* note 60 and accompanying text.

effects of racial discrimination; (2) that she likely would contribute an important and under-represented viewpoint to the classroom on issues of social and racial justice; and/or (3) that she likely would provide resources to underserved communities.<sup>173</sup>

Roithmayr argues that these direct measures do not create a racial classification.<sup>174</sup> Questions will undoubtedly arise if the direct measures provide preferences only for those who have suffered the effects of racial discrimination, but not other kinds of discrimination or disadvantage. Whether this approach avoids constituting a racial classification or not, it is easy to see how such measures could be used by administrators as a proxy for race because, for example, certain groups are more likely to experience racial discrimination than others.

The direct measures that institutions must use are those that align with the educational benefits which it seeks. These should be based on the institution's own independent judgment as to its academic mission.<sup>175</sup> What is important, however, is that diversity programs be compared with race-neutral alternatives according to their ability to achieve the educational outcomes that the university determines to be critical in terms of its academic mission.<sup>176</sup>

#### V. PROGRAM EVALUATION STANDARDS FOR SERIOUS CONSIDERATION OF RACE-NEUTRAL ALTERNATIVES

Serious consideration of race-neutral alternatives is a kind of program evaluation; specifically, it is a form of educational evaluation. This is a well-developed field in the social sciences with its own professional associations and a code of ethics.<sup>177</sup> There is also a sub-field called meta-evaluation, which provides standards for the evaluation of evaluations.<sup>178</sup> In other words, courts

173. Roithmayr, *supra* note 169, at 6.

174. *Id.* at 14–27.

175. For a discussion of the problems that arise when an institution fails to follow its own independent judgment, relying instead of the outside pressures exerted by an accrediting agency, for example, see Kenneth L. Marcus, *The Right Frontier for Civil Rights Reform*, 19 GEO. MASON U. CIV. RTS. L.J. 401, 432–35 (forthcoming 2008).

176. See Marcus, *Diversity and Race-Neutrality*, *supra* note 119, at 171.

177. See, e.g., American Evaluation Association, <http://www.eval.org> (last visited Oct. 1, 2008) (program evaluation association website). The American Evaluation Association has about 5000 members in fifty states and more than sixty countries, as well as its own code of ethics. American Evaluation Association, About Us, <http://www.eval.org/aboutus/organization/aboutus.asp> (last visited Oct. 1, 2008). There is also a Joint Committee on Standards for Educational Evaluation, which has developed three sets of standards for this activity, and is accredited by the American National Standards Institute. The Joint Committee on Standards for Educational Evaluation, The Evaluation Center, W. Mich. Univ., <http://www.wmich.edu/evalctr/jc/> (last visited Oct. 1, 2008).

178. See generally BLAINE R. WORTHEN & JAMES R. SANDERS, EDUCATIONAL EVALUATION: ALTERNATIVE APPROACHES AND PRACTICAL GUIDELINES 369–401 (1987) (chapter “discuss[ing] the concept of meta-evaluation, standards and criteria for evaluating evaluations, and meta-evaluation procedures . . . in education”).

do not have to reinvent the wheel when defining the requisite criteria for analyzing whether institutions have seriously considered race-neutral alternatives. The criteria already exist in established academic and professional literature, and they undergird the Department of Education and Civil Rights Commission's guidelines.

There are several forms of program evaluation: cost-benefit analysis,<sup>179</sup> natural experiments, randomized experimental design,<sup>180</sup> process evaluation, and outcome evaluation. We will focus on the latter two forms because they are most consistent with judicial interpretation of the requirement for serious consideration of race-neutral alternatives, and provide institutions with the greatest flexibility in meeting that standard.

Important program evaluation methods are: (1) clearly defining the question to be asked or problem to be solved; (2) measuring program outcomes; (3) "attributing outcomes to the program"; (4) determining the link between program characteristics and outcomes; and (5) explaining the relationship of these characteristics to outcomes.<sup>181</sup> Defining, measuring, attributing, determining, and explaining should all be elements for satisfying the serious consideration of race-neutral alternatives requirement.

In this section, we will first explore how program evaluation has been used generally in higher education, though not in the specific area of examining race-neutral alternatives. Then, we will discuss the program evaluation process in federal contracting to maximize the use of race-neutral alternatives. Finally, we will turn to the specific application of program evaluation techniques to achieving diversity in higher education.

The Joint Committee on Standards for Educational Evaluation, founded in 1975, has established an important set of standards for the evaluation of education programs,<sup>182</sup> many of which are clearly applicable to diversity programs in higher education. These standards have received widespread

---

179. Some commentators suggest that institutions use cost-benefit analysis or even marginal cost-benefit analysis—how much benefit derives from an additional preferential student admission—to determine exactly how many minority students need to be preferentially admitted to meet the institution's diversity goals. See Ayres & Foster, *supra* note 114, at 5–6, 13. Ayres and Foster acknowledge, however, that measuring "whether the costs [of preferences] outweigh the benefits is inherently a normative one, turning on judgments about what 'price' to put on the benefits of diversity." *Id.* at 77.

180. According to the United States Department of Education's strategic plan, 75% of any federally funded research that involves causal questions should use a randomized experimental design. See U.S. DEP'T OF EDUC., STRATEGIC PLAN 2002–2007 53 (2002), available at <http://www.edu.gov/about/reports/strat/plan2002-07/plan.pdf>.

181. CAROL H. WEISS, EVALUATION: METHODS FOR STUDYING PROGRAMS AND POLICIES 75–76 (2d ed. 1998).

182. See WORTHEN & SANDERS, *supra* note 178, at 371–72; JAMES R. SANDERS, W. MICH. UNIV., GENERAL BACKGROUND ON THE JOINT COMMITTEE ON STANDARDS FOR EDUCATIONAL EVALUATION 1 (1999), available at [http://www.wmich.edu/evalctr/jc/JC\\_Genl/Bckgrnd.PDF](http://www.wmich.edu/evalctr/jc/JC_Genl/Bckgrnd.PDF) [hereinafter SANDERS, GENERAL BACKGROUND].

attention over a period of many years, and are now well established as “the canon of practice for educational evaluation.”<sup>183</sup> Several of these canonical standards directly apply to the consideration of race-neutral diversity programs. For example:

Report Clarity[.] Evaluation reports should clearly describe the program being evaluated, including its context, and the purposes, procedures, and findings of the evaluation, so that essential information is provided and easily understood.

....

Evaluation Impact[.] Evaluations should be planned, conducted, and reported in ways that encourage follow-through by stakeholders, so that the likelihood that the evaluation will be used is increased.

....

Complete and Fair Assessment[.] The evaluation should be complete and fair in its examination and recording of strengths and weaknesses of the program being evaluated, so that strengths can be built upon and problem areas addressed. . . .

Disclosure of Findings[.] The formal parties to an evaluation should ensure that the full set of evaluation findings along with pertinent limitations are made accessible to the persons affected by the evaluation and any others with expressed legal rights to receive the results.

....

Reliable Information[.] The information-gathering procedures should be chosen or developed and then implemented so that they will assure that the information obtained is sufficiently reliable for the intended use. . . .

Systematic Information[.] The information collected, processed, and reported in an evaluation should be systematically reviewed, and any errors found should be corrected.<sup>184</sup>

---

183. WORTHEN & SANDERS, *supra* note 178, at 371.

184. JOINT COMM. ON STANDARDS FOR EDUC. EVALUATION, THE PROGRAM EVALUATION STANDARDS: SUMMARY OF THE STANDARDS, <http://www.wmich.edu/evalctr/jc/PGMSTNDS-SUM.htm> (last visited Oct. 1, 2008) [hereinafter PROGRAM EVALUATION STANDARDS SUMMARY]. The Joint Committee was originally initiated by the American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education. SANDERS, GENERAL BACKGROUND, *supra* note 182, at 1. The Joint Standards for Evaluations of Educational Programs, Projects, and Materials was first published in 1981. *Id.* Revised standards were published in 1994. Arlen R. Gullickson, Joint Committee on Standards for Educational Evaluation Overview, <http://www.wmich.edu/evalctr/jc/JC-OverviewNet.htm> (last visited Oct. 1, 2008). As this article goes to press, the Standards are currently undergoing their second revision.

These evaluative standards, at a higher level of generality, reflect the same approach as the OCR strategies.<sup>185</sup> The U.S. Commission on Civil Rights' government contracting provisions also draw on similar themes.<sup>186</sup> Any serious program evaluation conducted by an institution of higher learning must, at a minimum, satisfy the base requirements of the Joint Committee on Standards for Educational Evaluation.

#### A. Program Evaluations in Higher Education

Program evaluations are common in higher education. Regional accrediting associations require extensive self-study reports,<sup>187</sup> followed by visiting committees of representatives from peer institutions that write independent evaluations before accreditation is granted.<sup>188</sup> Professional associations use similar procedures to accredit the professional degree programs of their member schools.<sup>189</sup> Even Division I athletic programs are accredited by the National Collegiate Athletic Association.<sup>190</sup> Loss of institutional accreditation from a regional or professional association is often a near-death sentence that requires strenuous efforts to remediate. For example, some types of federal aid are not available to non-accredited institutions.<sup>191</sup> Even criticisms by accreditors will be taken seriously and usually lead to reforms. Further, many universities require periodic internal evaluations of both undergraduate and

---

185. See *supra* note 97 and accompanying text.

186. See *supra* note 106 and accompanying text.

187. For an example outline of an institutional self-study report required for accreditation, see RUTGERS UNIV., GUIDE TO THE SELF-STUDY: EDUCATIONAL CHANGE AT RUTGERS (2008), available at <http://middlestates.rutgers.edu/pdf/guide.pdf>.

188. educationUSA, Accreditation Guide, <http://www.educationusa.state.gov/accred.htm> (last visited Oct. 8, 2008).

189. For example, the American Bar Association promulgates regulations for accrediting law schools. See American Bar Association, Standards for Approval of Law Schools, <http://www.abanet.org/legaled/standards/standards.html> (last visited Oct. 8, 2008).

190. The certification rules can be found at NCAA Division I Athletics Certification Program, [http://www1.ncaa.org/membership/membership\\_svcs/athletics\\_certification/index.html](http://www1.ncaa.org/membership/membership_svcs/athletics_certification/index.html) (last visited Oct. 8, 2008). Among the areas for self study required in the certification process are "diversity issues," and the NCAA specifies that "areas to review for diverse backgrounds or underrepresented groups include, but are not limited to: race, ethnicity, creed, color, national origin, age, disability, sexual orientation and gender identity, in addition to other areas such as religion, marital status, education, income, geographic location and work experience." NCAA DIV. I COMM. ON ATHLETICS CERTIFICATION, NCAA ATHLETICS CERTIFICATION SELF-STUDY INSTRUMENT 46 (2008).

191. See U.S. DEP'T OF EDUC., EDUCATION IN THE UNITED STATES: A BRIEF OVERVIEW 28 (2005), available at <http://www.ed.gov/about/offices/list/ous/international/edus/overview.doc>; see also Hazel Glenn Beh, *Student Versus University: The University's Implied Obligations of Good Faith and Fair Dealing*, 59 MD. L. REV. 183, 194 n.52 (2000) ("The government has turned over much of the oversight function to private accrediting agencies by requiring institutions receiving federal funds to be accredited by federally approved and recognized accrediting agencies.").

graduate programs that result in reports reviewed by administrators, faculty senates, and sometimes governing boards.<sup>192</sup>

Traditionally, accreditation and other external evaluations focused on the availability of institutional and program resources, as well as some outcome indicators. Budgets, library or laboratory adequacy, credentials of the faculty, and numbers of degrees produced were all measured, but in the past decade a movement toward accountability has required schools to more directly assess student learning.<sup>193</sup> Consequently, higher education institutions are feeling pressure by governing boards, state coordinating agencies, regional accrediting associations, and even the federal government to design and implement direct and publicly accessible assessments of student learning.<sup>194</sup> Data is gathered and analyzed at the course, program, and institutional level in order for the institution to document what students have learned and correct teaching techniques, curriculum, and degree requirements.<sup>195</sup>

Further, almost every higher education institution is constantly evaluating its marketing regarding its admissions and financial aid programs. Based on internal and external reports, institutions often will redesign high school visits and on-campus recruitment programs, target new geographic or demographic groups, and adjust their merit- and need-based financial aid strategies.<sup>196</sup>

In short, campuses are quite familiar with the requirements of program evaluation, though they have yet to see the connection between program evaluation and the legal requirement for serious consideration of race-neutral alternatives.

---

192. See, e.g., University of Illinois at Urbana-Champaign, Program Evaluation and Assessment, <http://www.dmi.uiuc.edu/progeval/progeval.htm> (last visited Oct. 8, 2008) (noting that the provost established a task force in 1994 for evaluations).

193. BUS.-HIGHER EDUC. FORUM, AM. COUNCIL ON EDUC., PUBLIC ACCOUNTABILITY FOR STUDENT LEARNING IN HIGHER EDUCATION: ISSUES AND OPTIONS 19–21 (2004) (discussing the recent trend that focuses on student assignments and statewide scores, as opposed to focusing primarily on the institution's characteristics).

194. See THE SEC'Y OF EDUC.'S COMM'N ON THE FUTURE OF HIGHER EDUC., U.S. DEP'T OF EDUC., A TEST OF LEADERSHIP: CHARTING THE FUTURE OF HIGHER EDUCATION 4 (2006), available at <http://www.ed.gov/about/bdsxomm/list/hiedfuture/reports/finalreport.pdf> (noting the "limited and inadequate" data from higher education institutions).

195. See Peter McPherson & David Shulenburg, *Improving Student Learning in Higher Education Through Better Accountability and Assessment* 5–14 (Nat'l Ass'n of State Univ. and Land-Grant Colleges, Discussion Paper 2006), available at [http://www.voluntarysystem.org/docs/background/DiscussionPaper1\\_April06.pdf](http://www.voluntarysystem.org/docs/background/DiscussionPaper1_April06.pdf). For an example of assessment standards, see the handbook MIDDLE STATES COMM'N ON HIGHER EDUC., STUDENT LEARNING ASSESSMENT: OPTIONS AND RESOURCES (2d ed. 2007), which describes how to define student learning and goals, evaluations, improvements, and how to reap the benefits of implementing the standards.

196. See Patricia M. McDonough, *Buying and Selling Higher Education: The Social Construction of the College Applicant*, 65 J. HIGHER EDUC. 427, 431–32 (1994) (observing that the "discovery of marketing by . . . institutions" has led to these ongoing admissions and financial aid evaluations employed by colleges and universities).

*B. Higher Education's Failure to Engage in Visible Race-Neutral Program Examinations*

As described above, the culture of higher education is imbued with many requirements for constant program evaluation in a myriad of areas. Consequently, it might be reasonable to assume that, when confronted with a constitutional requirement to seriously consider race-neutral alternatives before using race-conscious means to achieve diversity, that higher educational institutions would be among the best suited to engage in this evaluation. Every institution has legal counsel, admissions officers, and faculty specialists in disciplines who could engage in such an evaluation. Some state systems and institutions of higher education have engaged in examinations of race-neutral options after law or policy banned the use of racial preferences.<sup>197</sup> But the *Gratz* and *Grutter* decisions have not visibly produced comparable effort to evaluate the availability of race-neutral alternatives by all institutions which are using race-conscious programs. While some institutions may be engaging in stealth programs of rigorous program evaluation, visible institutional program evaluations that assess the feasibility of race-neutral programs are few-to-none in states which do not bar the use of racially preferential programs at public universities.

*C. Race-Neutral Contracting Requirements and Procedures*

As described earlier, the narrow tailoring requirement to examine race-neutral alternatives was first established in the area of public contracting in *Croson*, and then developed in subsequent litigation and federal regulations.<sup>198</sup> Reviewing those developments can be instructive because the rules for evaluating the use of race in public contracting are much more developed than comparable rules in education.

Justice O'Connor's *Croson* opinion required that affirmative action in government contracting be predicated upon a rigorous study of the extent of discrimination in the relevant market.<sup>199</sup> Justice O'Connor set a clear framework for the tasks that need to be performed before race can be used in state and local public contracting.<sup>200</sup>

---

197. See, e.g., STUDENT ACADEMIC SERVS., UNIV. OF CAL., ELIGIBILITY IN THE LOCAL CONTEXT PROGRAM EVALUATION REPORT 1 (2002), available at <http://www.universityofcalifornia.edu/regents/regmeet/may02/304attach.pdf> (reviewing California's state university program that automatically admits the top four percent of high school graduates). In Florida, a commission was established to investigate Governor Jeb Bush's race-neutral initiatives, which "[g]uaranteed admission to the top 5% of all public high school graduates." ONE FLA. ACCOUNTABILITY COMM'N, AN INDEPENDENT REVIEW OF EQUITY IN EDUCATION COMPONENTS OF ONE FLORIDA 7 (2002), <http://www.flboe.org/meetings/June02/OneFloridaAccountCommRep.pdf>.

198. See *supra* Part II.B.1.

199. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499–504 (1989).

200. See *id.* at 509–11.

After *Adarand*, where Justice O'Connor's majority opinion applied the same strict scrutiny standard as *Croson* to a federal program using race for local programs,<sup>201</sup> the Clinton administration decided that various forms of affirmative action using racial preferences in federal programs had to be mended, not ended.<sup>202</sup> The most overt use of race was in federal contracting programs, particularly in transportation programs. Since 1982, the Disadvantaged Business Enterprise Program (DBE) required that ten percent of all federal transportation dollars go to firms certified as DBEs.<sup>203</sup> Such certification was granted to firms owned by selected minorities and women on the presumption these owners were "socially and economically disadvantaged."<sup>204</sup>

The post-*Adarand* Clinton administrative amendments did not touch the politically volatile definition of which groups were entitled to the presumption of disadvantage, but they did make a number of other significant changes aimed at narrowly tailoring the DBE program.<sup>205</sup> First, the economic presumption of disadvantage was limited and defined objectively in dollar terms, though the social presumption of disadvantage retained the concept of privileging firm owners identified with particular groups.<sup>206</sup> Second, the national ten percent dollar quota was abandoned in favor of requiring each state and local recipient to determine the percentage of DBEs and non-DBEs available to perform their construction contracts and then to set a "goal" based on a prediction of the percentage of dollars DBEs could be expected to receive, absent discrimination in their marketplace.<sup>207</sup> Third, each recipient was to maximize the amount of the DBE goal that could be met by race-neutral means and then seek approval from DOT of the resulting race-preferential and race-neutral shares of DBE awards expected.<sup>208</sup>

---

201. *Compare* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 213–37 (1995), *with* *Croson*, 488 U.S. at 493–516.

202. Remarks on Affirmative Action at the National Archives and Records Administration, 2 PUB. PAPERS 1106, 1113 (July 19, 1995) ("We should reaffirm the principle of affirmative action and fix the practices. We should have a simple slogan: Mend it, but don't end it."); *see also* Memorandum on Affirmative Action, 2 PUB. PAPERS 1114 (July 19, 1995) (informing heads of executive departments and agencies that "[t]his Administration will continue to support affirmative measures that promote opportunities . . . for Americans subject to discrimination and its continuing effects," and propounding policy principles for agencies to adhere to).

203. Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424 § 105(f), 96 Stat. 2097 (1982).

204. *See Adarand*, 515 U.S. at 206.

205. *See* George R. La Noue, *Setting Goals in the Federal Disadvantaged Business Enterprise Programs*, GEO. MASON U. CIV. RTS. L.J. 423, 439–40 (2007) [hereinafter La Noue, *Setting Goals*].

206. *Id.* at 424.

207. *Id.* at 439–40.

208. *Id.* at 470–71.

Considerable effort goes into creating annual goal-setting proposals. The average length of annual goal proposals is about twenty pages,<sup>209</sup> but the review of availability and utilization data can require many hours of work. Most of the proposals are done in-house, although in a few cases consultants are used. There is also a requirement that there be a period of public comment on the goals proposed and sometimes various stakeholders (DBEs, non-DBEs, and others) will submit comments.<sup>210</sup> There is some subsequent negotiation about the goals before the proposals are sent off to federal review.

While the implementation of race-neutral programs in federal transportation funding has drawn criticism,<sup>211</sup> the process for setting local agency contracting goals is well established in federal regulations,<sup>212</sup> and the outcomes of that process are reasonably transparent. Perhaps it is predictable that in the contracting field, where the landmark decisions date back to *Croson* (1989) and *Adarand* (1996) and followed by many lower court decisions,<sup>213</sup> that the

---

209. For examples of annual goal proposals, see LAKE COUNTY FLA., DISADVANTAGED BUSINESS ENTERPRISE POLICY AND PROGRAM MANUAL (2008), available at [http://www.lakecountyfl.gov/documents/procedures/c-44\\_manual.pdf](http://www.lakecountyfl.gov/documents/procedures/c-44_manual.pdf); SPOKANE TRANSIT AUTH., DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM AND GOALS, FY 2008 (2007), available at <http://www.spokanetransit.com/aboutsta/documents/FinalDBEprogram2008.pdf>; PORTLAND INT'L JETPORT, DISADVANTAGED BUSINESS ENTERPRISE PLAN (2007), available at <http://www.portlandjetport.org/document/DBEprogram07.pdf>.

210. Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097 (1982).

211. See generally La Noue, *Setting Goals*, supra note 205 (comprehensively reviewing goal-setting issues).

212. See *id.* at 443.

213. Post-*Croson* Courts have found serious flaws in the statistical evidence of discrimination presented to them in relationship to goals set. See, e.g., *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992) (“[N]o ‘strong basis in evidence’ for the use of a 35 percent goal . . .”); *Hershell Gill Consulting Eng'rs, Inc. v. Miami-Dade County*, 333 F. Supp. 2d 1305, 1326 (S.D. Fla. 2004) (“The statistical evidence presenting in the case is unreliable and fails to establish the existence of discrimination.”); *L. Tarango Trucking v. County of Contra Costa*, 181 F. Supp. 2d 1017, 1032 (N.D. Cal. 2001) (finding faulty and dated census data cannot be used to determine availability); *Builder Ass'n of Greater Chi. v. County of Cook*, 123 F. Supp. 2d 1087, 1109 (N.D. Ill. 2000) (finding county's statistical data unpersuasive in a case where Dr. La Noue served as an expert witness), *aff'd*, 256 F.3d 642 (7th Cir. 2001); *Ass'n for Fairness in Bus., Inc. v. New Jersey*, 82 F. Supp. 2d 353, 361 (D.N.J. 2000) (“Commission's report offers little support for [MWBE program] . . .”); *Webster v. Fulton County*, 51 F. Supp. 2d 1354, 1359 (N.D. Ga. 1999) (study does not provide a strong basis in evidence to justify preferences), *aff'd*, 218 F.3d 1267 (11th Cir. 2000) (mem.); *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 50 F. Supp. 2d 741, 746–47 (S.D. Ohio 1999) (finding statistical disparities in awarding of contracts, by itself, does not prove discrimination), *aff'd*, 214 F.3d 730 (6th Cir. 2000); *Phillips & Jordan, Inc. v. Watts*, 13 F. Supp. 2d 1308, 1314 (N.D. Fla. 1998) (“The Record at best establishes nothing more than some ill-defined wrong cause by some unidentified wrongdoers; and, under *City of Richmond*, that is not enough!”); *Eng'g Contractors Ass'n of S. Fla., Inc. v. Metro. Dade County*, 943 F. Supp. 1546, 1584 (S.D. Fla. 1996) (holding county's statistical evidence unpersuasive), *aff'd*, 122 F.3d 895 (11th Cir. 1997); *Contractors Ass'n of E. Pa., Inc. v. City of Philadelphia*, 893 F. Supp. 419, 438 (E.D. Pa. 1995) (city unable to provide evidentiary basis for goals), *aff'd*, 91 F.3d 586 (3d Cir. 1996). *But see* *N. Contracting, Inc. v.*

rules for setting goals and seriously considering race-neutral alternatives should be clearer than in higher education, because *Gratz* and *Grutter* were decided in 2003. Nevertheless, the program evaluation process for goal-setting and the search for race-neutral alternatives in contracting are still more transparent than any process individual universities have publicly articulated for considering race-conscious and race-neutral measures in their admissions and financial aid.

*D. Applying the Techniques of Program Evaluations to Achieving Diversity in Higher Education*

The first step in program evaluation is to precisely define the question to be asked or the problem to be solved. In *Croson*, Justice O'Connor was clearer regarding the requirements for using race in contracting than she was regarding the requirements for using race in higher education in *Grutter*.<sup>214</sup> Race can only be a compelling interest in awarding contracts when it is a remedy for previously identified discrimination, and only then can it be used in "the extreme case," where "some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion."<sup>215</sup>

In higher education, if an institution demonstrates that diversity is a part of its institutional mission, it may have met some part of its compelling interest burden. Presumably, discovery might show that, in a particular institution, "diversity" is just a pretext for prohibited forms of racial politics or racial balancing. But much future litigation will turn on the definition of diversity, and which group-based identifiers are used to achieve it. It will be necessary to measure how the university defined and achieved diversity, the frequency and thoroughness of the review of the use of race, and, most importantly, whether serious consideration was given to race-neutral alternatives.

*1. Defining Diversity*

In contemporary higher education, diversity has no universally accepted meaning.<sup>216</sup> It is doubtful that in any admission class there would be two students with identical family experiences, personalities, intellectual orientations, interests, skills, particular aspirations, or other experiences.

---

Illinois, 473 F.3d 715, 723 (7th Cir. 2007) (finding strong basis of evidence that disparities existed); *Concrete Works of Colo., Inc. v. City of Denver*, 321 F.3d 950, 992 (10th Cir. 2003) (finding that "Denver . . . established a compelling interest" and the plaintiff did not raise narrow tailoring).

214. Compare *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) (holding that a city may use race as a factor in ridding a city of "a system of racial exclusion," in which the city had been a "passive participant"), with *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (holding that a law school may use race as a factor if necessary to achieve the school's desired "diversity").

215. *Croson*, 488 U.S. at 509.

216. See PETER WOOD, *DIVERSITY: THE INVENTION OF A CONCEPT* 5–6 (2003), for a discussion of the history of the concept of diversity and its various definitions.

Diversity, however, is most often discussed in terms of group identifiers (such as race, ethnicity, gender, geography, and financial aid status), for which that institution reports statistics.

## 2. Problems of Group Selection

Just as affirmative action policy in contracting and employment has been driven by the selection of the approved minority groups targeted by each program,<sup>217</sup> academic diversity programs will be formulated to include some minority groups but not others. Moreover, few would argue that religion is insignificant in shaping the worldview of some students, but it is rarely a factor reported as a diversity category in admission statistics. The age or generational status of students may add to classroom discussion, but it is often ignored in diversity considerations.

There is clear precedent for judicial review of the groups selected as approved minority groups by governmental actors. Justice O'Connor's attention to narrow-tailoring group classification problems<sup>218</sup> established a pattern of judicial inquiry into group contracting preferences among lower courts,<sup>219</sup> but she was silent on the issue in *Grutter*. Justice Kennedy, however,

---

217. See George R. La Noue & John C. Sullivan, *Presumptions for Preferences: The Small Business Administrations' Decisions on Groups Entitled to Affirmative Action*, 6 J. POL'Y HIST. 439, 439-40 (1994) (examining the assumptions surrounding "affirmative action's sanctioned minorities").

218. See *Croson*, 488 U.S. at 506, where Justice O'Connor wrote tartly:

The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination.

.....  
The gross overinclusiveness of Richmond's racial preferences strongly impugns the city's claim of remedial motivation.

Summarizing, she wrote that "there is *absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry." *Id.*

219. See *Fullilove v. Klutznick*, 448 U.S. 448, 530 (1980) (Stewart, J., dissenting) ("In today's society, it constitutes far too gross an oversimplification to assume that every single Negro, Spanish-speaking citizen, Oriental, Indian, Eskimo, and Aleut potentially interested in construction contracting currently suffers from the effects of past or present racial discrimination."); *id.* at 535 (Stevens, J., dissenting) ("No economic, social, geographical, or historical criteria are relevant for exclusion or inclusion[ of the preferred groups]."). See also *W. States Paving Co., Inc. v. Wash. State Dep't of Transp.*, 407 F.3d 983, 998-99 (9th Cir. 2005) (finding the federal DBE category is overinclusive and local governments must first determine prior discrimination against each of six separate groups); *Rothe Dev. Corp. v. U.S. Dep't of Def.*, 262 F.3d 1306, 1330 (Fed. Cir. 2001) ("Congress may not justify a racial preference that benefits all minorities merely by identifying discrimination as to one racial group."); *Builder Ass'n of Greater Chi. v. County of Cook*, 256 F.3d 642, 646 (7th Cir. 2001) ("A state or local government that has discriminated just against blacks may not by way of remedy discriminate in favor of blacks and Asian-Americans and women." (emphases added)); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 714 (9th Cir. 1997) (the list of favored minority groups is not "narrowly tailored to remedy past discrimination, active or passive, by the State of California"); *Eng'g Contractors*

noted that the Michigan Law School's Director of Admissions from 1979 to 1990 testified that the Law School "faculty members were 'breathhtakingly cynical' in deciding who would qualify as a member of underrepresented minorities."<sup>220</sup> In *Bakke*, Justice Powell specifically expressed skepticism about the decisions made by the Davis Medical School because "[t]he University is unable to explain its selection of only the four favored groups—Negroes, Mexican-Americans, American Indians, and Asians—for preferential treatment. The inclusion of the last group is especially curious in light of the substantial numbers of Asians admitted through the regular admissions process."<sup>221</sup>

Higher education institutions need to have a research-based policy about which group identifiers will be considered important in making admissions decisions. Simple replication of the traditional affirmative action categories will be suspect. How groups are defined makes a big difference in fairness. For instance, are Asian Americans one group or many when assessing diversity?<sup>222</sup> Are Americans with Iranian or Finnish backgrounds from different groups, or are they just part of the white conglomeration? Does it depend on how many generations a family has been in the United States? Are such rules applied uniformly to Finnish Americans and Mexican Americans?

Institutions also need to be clear about the difference between diversity and under-representation. Persons from very small groups may always add diversity (Native Americans, for example) even if they are not under-

---

Ass'n of S. Fla. v. Metro. Dade County, 122 F.3d 895, 928 (11th Cir. 1997) ("It is clear as window glass that the County gave not the slightest consideration to any alternative to a Hispanic affirmative action program. Awarding construction contracts based upon ethnicity is what the County wanted to do, and all it considered doing, insofar as Hispanics were concerned."); Milwaukee County Pavers Ass'n v. Fiedler, 922 F.2d 419, 422 (7th Cir. 1991) ("The state can if it wants redistribute wealth in favor of the disadvantaged, but it cannot get out from under *Croson* by pronouncing entire racial and ethnic groups to be disadvantaged."); Ass'n for Fairness in Bus., Inc. v. New Jersey, 82 F. Supp. 2d 353, 354, 362 (D.N.J. 2000) (finding statute permitting contract preferences for a wide range of groups, including Hawaiians, not justified); *In re Sherbrooke Sodding Co.*, 17 F. Supp. 2d 1026, 1037 (D. Minn. 1998) ("[D]efendants have been singularly unable to demonstrate the connection between those individuals upon whom DBE status has been conferred by the Congress and the regulations, and any present or past discrimination against the races or gender of those individuals.").

220. *Grutter v. Bollinger*, 539 U.S. 306, 393 (2003) (Kennedy, J., dissenting); *see also id.* at 382 (Rehnquist, C.J., dissenting) ("Respondents have *never* offered any race-specific arguments explaining why significantly more individuals from one underrepresented minority group are needed in order to achieve 'critical mass' or further student body diversity.").

221. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 309 n.45 (1978) (opinion of Powell, J.); *see also Smith v. Univ. of Wash.*, 392 F.3d 367, 372 (9th Cir. 2004) (noting that Michigan's law school used an admissions procedure similar to the one Justice Powell approved in *Bakke*).

222. *See* Theodore Hsien Wang & Frank H. Wu, *Beyond the Model Minority Myth*, in *THE AFFIRMATIVE ACTION DEBATE* 191, 196, 199–200 (George E. Curry ed., 1996) (describing the negative consequences of the Census Bureau's all-inclusive concept of Asian American given the major differences among sub-groups in that category).

represented, whereas on some campuses Hispanics are under-represented but may have achieved a critical mass.

### 3. *Measuring the Attainment of Diversity*

*Grutter* instructs that while an institution may not use a quota or seek proportional representation, it can seek a “critical mass” of diverse students.<sup>223</sup> Justice O’Connor provided no further guidance on that exceedingly nebulous concept. The very difficulty of creating a rational approach to the “critical mass” issue may be a major reason why so few institutions have either engaged in careful evaluations of their use of race in admissions or released those evaluations to the public.

Logically, because the goal is intellectual diversity, it does not make sense to combine all racially and ethnically underrepresented students together to create a “critical mass.” African Americans, Hispanic Americans, and Native Americans generally bring distinctive cultural backgrounds to a campus. But by any definition, there will rarely be a “critical mass” of Native Americans on a campus. Given the percentage of African Americans and Hispanics in the overall population, there are great regional variations in the ease of assembling a critical mass of students from those groups.

But when do a group of diverse applicants reach a critical mass?<sup>224</sup> A report by science and engineering associations states candidly:

Critical mass is not capable of an exact definition and may differ from school to school and field to field and over time. [Science, Technology, Engineering, and Mathematics (STEM)] departments vary widely in terms of diversity, and diversity advancements in a Biology Department at University X will have little or no impact on the isolation that an underrepresented minority student may suffer in the Department of Mechanical Engineering at the same school.<sup>225</sup>

The report concludes with this advice:

What constitutes a critical mass of students sustainable over extended periods through successful retention and recruitment is currently amorphous—and left intentionally so by the Supreme Court. Gathering good data may go a long way to establishing what that number, both in order of magnitude and the range of possibilities, might look like.<sup>226</sup>

---

223. *Grutter*, 539 U.S. at 335–36.

224. In its joint brief for the Patterson respondents in *Gratz v. Bollinger*, the NAACP and the ACLU wrote that a university would be justified in “facilitating admission of a group of minority students sufficient to enable them to form community and social support networks,” which would “reduce the racial tensions on campus.” Brief for the Patterson Respondents at 45, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516). The organizations offered no guidance about how to measure these concepts and the Court did not appear to adopt them.

225. MALCOM ET AL., *supra* note 113, at 17.

226. *Id.* at 37.

Gathering “good data” is certainly a part of program evaluation, but by what criteria should the data be analyzed? The STEM educators suggested that a critical mass is the number of underrepresented students necessary in living, working, and classroom situations that allows each student to make individual contributions without feeling isolated or intimidated into believing that the student must speak for the entire class of underrepresented students.<sup>227</sup> The difficulties in operationalizing that concept as a constitutional standard without engaging in stereotypes are mind boggling.<sup>228</sup> Can smaller campuses give more admissions weight to race than larger campuses? Does achieving a “critical mass” mean that rural or small town campuses may accord more weight to ethnic factors than campuses in large urban areas?

Clearly one size will not fit all here. Consider, for example, one campus that has produced a large amount of relevant data regarding a race-neutral plan to diversify. After the *Hopwood* decision,<sup>229</sup> the Texas state legislature created the Top 10 Percent Plan, which gave the right to any Texas high school graduate in the top ten percent of his or her high school class to enroll in any state university.<sup>230</sup> In part, that plan was intended to and did produce more African American and Hispanic freshmen at the University of Texas at Austin than would have been admitted by considering standardized test scores and grade point averages alone.<sup>231</sup> The Top 10 Percent Plan also increased the diversity of Texas high schools that could get students admitted to the selective state university campuses.<sup>232</sup> In addition to the state legislative response to *Hopwood*, the Austin campus created a personal achievement index that considered essays, leadership, extracurricular activities, awards, work experience, school or community service, and special circumstances (such as family socioeconomic status, single parent homes, language spoken at home, family responsibilities, school socioeconomic status, and the relationship of the

---

227. *Id.*

228. Good teachers can create an environment in which all students feel free to speak, but still there will be some who choose silence and others who are more voluble without any regard to group identifiers.

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

230. TEX. EDUC. CODE ANN. § 51.803 (Vernon 2006 & Supp. 2008).

231. In 1999 about 41% of all white admits from Texas high schools came from the Top 10 Percent Plan, while the comparable percentage for African Americans, Asian Americans, and Hispanics was 55%. OFFICE OF ADMISSIONS, UNIV. OF TEX. AT AUSTIN, IMPLEMENTATION AND RESULTS OF THE TEXAS AUTOMATIC ADMISSIONS LAW REPORT 9 6 tbl.2a (2006) [hereinafter TEXAS ADMISSIONS REPORT 9]. By 2004, the last year before “affirmative action” was added to the University of Texas admissions process, the percentage of top 10% admits from Texas high schools had grown for all groups. For whites, it was 62%, African Americans 77%, and Hispanics 78%. *Id.*

232. For instance, there were 200 more Texas High Schools sending students to the University of Texas at Austin campus in 2003 than in 1997. ACHIEVING DIVERSITY, *supra* note 12.

average SAT or ACT in the student's high school to the student's own test scores).<sup>233</sup>

After *Grutter*, university officials in Texas were not satisfied with the racial results of these admission reforms. The University of Texas at Austin admissions office declared that “[b]eginning with the entering class of 2005, race/ethnicity was added to the list of special circumstances.”<sup>234</sup> This terse sentence does not reveal how much weight the University gave to racial or ethnic considerations. To further obscure matters, the number of students affected positively or negatively by the reintroduction of affirmative action can not be precisely estimated from available data. For example, in the last year before the reintroduction of affirmative action, the 2004 full-time freshmen class enrolled 3901 (57%) whites, 309 (5%) African Americans, and 1149 (17%) Hispanics.<sup>235</sup> The next year's “return to affirmative action” 2005 class comprised 3838 (56%) whites, 351 (5%) African Americans, and 1244 (18%) Hispanics.<sup>236</sup> How would a court respond to the assertion that the gain of 1% for these minority students was necessary to achieve diversity on the Austin campus, especially because the percentage gain under the race-neutral regime had increased these minorities from 16% in 1997 to 23% in 2004?<sup>237</sup> Likewise, how would a court respond to evidence that, among 2004 freshmen

---

233. TEXAS ADMISSIONS REPORT 9, *supra* note 231, at 2.

234. *Id.* Motivation for this change is only hinted at in a press release from the University quoting the provost and the director for admissions. The motivation appears to rely on two distinct considerations: (1) the difference between the percentage the Austin campus admitted students and the percentage of the state population for African Americans and Hispanics; and (2) that the use of race “levels the playing field with the rest of the country.” Press Release, Univ. of Tex. at Austin, University's Admission Policy to Include Consideration of Race (Aug. 28, 2003), available at [http://www.utexas.edu/news/2003/08/28/nr\\_admission/](http://www.utexas.edu/news/2003/08/28/nr_admission/). The level playing field argument reflects the discomfort the University of Texas felt because out-of-state competitors were coming to Texas high schools to recruit and provide financial aid, sometimes on the basis of race. Matthew Tresague, *Texas' Diversity Lures College Recruiters*, HOUSTON CHRON., Oct. 16, 2005, at B1.

235. TEXAS ADMISSIONS REPORT 9, *supra* note 231, at 6 tbl.1.

236. *Id.* The number of full-time freshmen increased by 116 from 2004 to 2005. *See id.* The percentage of freshman students from Texas high schools automatically admitted through the Top 10 Percent Plan has increased every year from 42% in 1996 to 71% in the 2006 class. *Id.* at 7 tbl.2b. The percentage growth in the number of automatic admits has caused some concern among University of Texas officials who want to preserve more discretion, even though the top-10 percent admits outperform (measured by GPAs and graduation rates) students admitted in other ways. OFFICE OF ADMISSIONS, UNIV. OF TEX. AT AUSTIN, PERFORMANCE BY ENTERING FRESHMEN FROM TEXAS HIGH SCHOOLS BY TOP 10% STATUS 1999–2005 (2006), available at <http://www.utexas.edu/student/admissions/research/GPA-Top10-longitudinal99-05.pdf>. From 1996 to 2001, the average six-year graduation rate for white Top 10 Percent admits was 82.3%, 75% for blacks, and 69.8% for Hispanics. *See* OFFICE OF ADMISSIONS, UNIV. OF TEX. AT AUSTIN, IMPLEMENTATION AND RESULTS OF THE TEXAS AUTOMATIC ADMISSIONS LAW REPORT 10 (PART 2) 4–7 tbls.3–6 (2007), available at <http://www.utexas.edu/student/admissions/research/HB588-Report10-part2.pdf>. The comparable figures for non-Top 10% admits are 69.6% for whites, 61.7% for blacks, and 60% for Hispanics. *See id.*

237. TEXAS ADMISSIONS REPORT 9, *supra* note 231, at 6 tbl.1.

who were not automatically admitted because of the Top 10 Percent Plan, the average white freshman SAT was 1267 and GPA 3.02, whereas the comparable scores for African Americans were 1116 and 2.58, and for Hispanics were 1189 and 2.81, and that the gap between whites and non-whites grew slightly for the 2005 affirmative action affected class?<sup>238</sup> Would the University be able to show any compelling educational benefits caused by the reversion to affirmative action?

In addition to practical problems of assessing reforms after *Grutter*, social science research remains inadequate to determine what constitutes tangible education benefits. For example, only three of the fifty-nine amicus briefs supporting race-based pupil assignments filed with the Supreme Court since 2000 discussed the concept of critical mass.<sup>239</sup> Most of the briefs address the very limited social science research on problems of tokenism and stereotype threats.<sup>240</sup> The National Academy of Education analyzed the authorities cited in amicus briefs supporting the use of race-conscious policies and concluded:

Although we think that these authorities, read together, are insufficiently strong to support any firm percentage for creating a critical mass, this research (and the research cited elsewhere in this report) convincingly makes the case for the harms of racial isolation. We cannot say, based on existing research, whether 15 percent is sufficient to avoid the harms associated with racial isolation; nor can we say whether a linear (or some other) relationship exists between increased diversity and educational benefits as the percent moves from 15 to 30 percent and beyond. Further research is necessary in this regard.<sup>241</sup>

This seems to say that existing national research supporting a particular critical mass metric would not pass the strict scrutiny test, because the Court would not find the data sufficiently empirical to constitute a goal for either race-conscious or race-neutral policies.

Furthermore, this research cannot be a substitute for program evaluation, which would have to reflect each institution's specific needs. Some university communities are much more racially polarized than others. Some contain only two races, whereas others are multi-ethnic. Does the sense of racial isolation among Native Americans or Hispanics change because of differences in the percentage of African Americans or whites in a school?

---

238. *Id.* at 23–24 tbls.7i & j. Asian Americans averaged about 18% percent in these years, and international students 2%. *Id.* at 5 tbl.1a.

239. COMM. ON SOCIAL SCI. RESEARCH EVIDENCE ON RACIAL DIVERSITY IN SCH., NAT'L ACAD. OF EDUC., RACE-CONSCIOUS POLICIES FOR ASSIGNING STUDENTS TO SCHOOLS: SOCIAL SCIENCE RESEARCH AND THE SUPREME COURT CASES 13 tbl.3, 33 (Robert L. Linn & Kevin G. Welner, eds. 2007). The report, prepared by a distinguished group of social scientists, analyzes the social science claims in all of the amicus briefs.

240. *Id.* at 34.

241. *Id.* at 35.

*E. Reviewing the Use of Race*

A 2006 report by the College Board stated:

Ultimately, given the obligation to ensure that race- and ethnicity-conscious measures are limited in both scope and time, higher education officials should be able to define success with respect to their goals, and to recognize when they've achieved it. . . . [T]hose judgments should have a solid empirical foundation, with clear and relevant supporting evidence.<sup>242</sup>

Program evaluation requires that institutions demonstrate the link between a program's characteristics and outcomes, and explain how that link works. Depending on the definition of diversity adopted by a campus, there is a wide range of race-neutral programs available.

Programs may be divided in two categories: pre- and post-enrollment. Assembling an admissions class can be affected by outreach and marketing strategies, alumni activities, high school and community partnerships, financial aid strategies, and selection decisions. Most public attention has focused on race-neutral selection policies that can range from class rank systems (as seen in Texas, Florida, and California) to individualized admission procedures that focus on considerations of family disadvantage or high school adequacy.

But pre-enrollment programming is not sufficient—for serious consideration of race-neutral alternatives, institutions should also focus on what happens after enrollment. Reviews of housing policies, campus organizations, invited speakers and colloquia, cultural activities and performances, student leadership development opportunities, study abroad programs and student exchanges, and faculty mentorship roles may all yield far more in the way of meaningful educational diversity than the headcounts announced in admission statistics. Finally, institutions should monitor the academic performance of diverse students in terms of progress toward a degree, graduation, and job placement. If some segment of the enrollment is falling substantially behind in these categories, then adjustments may need to be made in selection criteria, financial aid, or guidance. Admitting diverse students and letting them flounder is not an acceptable result at institutions of higher education.

Changes in an institution's diversity may or may not have anything to do with institutional race-preferential initiatives. In many states, the percentage of white high school graduates is declining,<sup>243</sup> and as a result, institutions whose admissions pools are from those states may become more diverse without any special programs. Other institutional changes can be made, such as developing new majors, changing program locations, or the times for offering courses may influence diversity, even though these actions are not at all race-conscious or

---

242. COLEMAN & PALMER, *supra* note 2, at 12.

243. See Higher Education Landscape, <http://professionals.collegeboard.com/data-reports-research/trends/higher-ed-landscape> (last visited Nov. 10, 2008) (noting current demographic trends in high school graduates).

preferential. One wonders what the Justices who decided *Parents Involved* would have thought if they had read that, a few days after the Court issued its decision, Seattle announced that the Court's decision would not substantially affect the school district's assignment program. By the time of the decision, Seattle had suspended its race-based assignment program for several years and was obtaining diversity by placing "International Baccalaureate and dual-language programs in locations where they are likely to draw a diverse student body."<sup>244</sup> Further, Richard Kahlenberg's impressive new research shows that by using economic status as a way to create racially diverse schools, benefits can accrue to less affluent students without undermining the performance of middle class students.<sup>245</sup>

Institutions should be able to demonstrate clearly not only that the use of race is necessary to justify a program's outcome, but also which aspect of the program, among the array of its initiatives, is causing the desired effect. They should be able to explain how that effect is caused, and to show that it could not be created by implementing a race-neutral program in its place. In all institutions of higher education, particular programs develop advocates among administrators and beneficiaries, which may cause those programs to last long after their need has expired or when other alternatives may achieve the goals as well or better. Rigorous, ongoing program evaluation is a method for avoiding this kind of programmatic obsolescence.

The fundamental requirement of transparency is increasingly recognized as a precondition of effective educational evaluation. For example, the current draft revision of the canonical Joint Committee Standards provides that "[e]valuations should make complete descriptions of findings, limitations, and any resulting conclusions available to all stakeholders, unless doing so would violate legal and propriety obligations."<sup>246</sup> Often, the credibility of an evaluation process depends on its transparency. A recent working paper by the National Association of State Universities and Land Grant Colleges (NASULGC) and the American Association of State Universities and Colleges (AASUC) asked the following question: Why, since "every NASULGC and AASUC member generates at considerable expense enormous amounts of accountability information for their own needs, for the needs of specialized and regional accreditation agencies, for governing boards, for state and federal legislatures and agencies, for granting agencies, etc.," was there so much

---

244. Tamar Lewin, *Across U.S., a New Look at School Integration Efforts*, N.Y. TIMES, June 29, 2007, at A25.

245. See RICHARD D. KAHLENBERG, RESCUING BROWN V. BOARD OF EDUCATION: PROFILES OF TWELVE SCHOOL DISTRICTS PURSUING SOCIOECONOMIC SCHOOL INTEGRATION 5–7 (Century Found. 2007), available at <http://www.tcf.org/publications/education/districtprofiles.pdf>.

246. Joint Comm. on Standards for Educational Evaluation, Program Evaluation Standards 1 (3d drft. Oct. 2007), available at [http://www.wmich.edu/evalctr/jc/ProgramEvaluationStandardStatementsOct2007\(3\).pdf](http://www.wmich.edu/evalctr/jc/ProgramEvaluationStandardStatementsOct2007(3).pdf) [hereinafter Program Evaluation Standards Draft].

dissatisfaction about accountability in higher education?<sup>247</sup> The paper provided two answers. First, the information produced did not create the possibility of inter-institutional comparisons and second, the data for some or all of the accountability measures are only partially made public.<sup>248</sup> The paper concluded: “All of our accountability measures should be transparent. By that we mean that both the methods by which they are derived and the results of those measures should be publicly disclosed.”<sup>249</sup>

Regarding preferential admissions, a report published by the Institute for Effective Governance concluded that

without transparency in admissions policies, the delicate constitutional balance between ends and means may not be maintained. Without transparency, institutions will not be able to conduct appropriate internal debates, will not be able to adjust their policies from year to year, will not be able to defend their policies publicly, and will not be able to avoid expensive and bitterly contentious litigation.<sup>250</sup>

The admissions office at the University of Texas at Austin has developed a model of transparency in evaluating the statewide race-neutral Top 10 Percent plan. That office has continually monitored this plan. In introducing a thirty-six-page report, its website states:

This is the ninth in a series of reports on the demographic makeup [and academic achievement] of Top 10% students entering The University of Texas at Austin. These reports were developed to provide easy access to understandable data for the press, the general public, policy analysts, political decision-makers, and fellow academicians.<sup>251</sup>

But while this kind of intensive periodic evaluation has been utilized for a race-neutral program, universities have not been willing to evaluate publicly their race-conscious programs, nor demonstrate that they have seriously

---

247. McPherson & Shulenburg, *supra* note 195, at 5.

248. *Id.*

249. *Id.* at 3.

250. GEORGE R. LA NOUE, DIVERSITY IN COLLEGE ADMISSIONS: ISSUES FOR TRUSTEES 19 (Inst. for Effective Governance Mar. 2005), available at <https://www.goacta.org/publications/downloads/DiversityinCollegeAdmissions.pdf>; see also PETER H. SCHUCK, DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE 196–97 (2003) (arguing that the various constituencies with stakes in an institution need information about its racial preferences to hold it accountable). Lani Guinier makes a different point by arguing that institutions lacking in transparency make use of obscure criteria to reproduce a comfortable elite legitimized by adding a critical mass of people of color. Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 195–96 (2003). Ayres and Foster argue that a lack of transparency is undemocratic because it deprives citizens of the information needed to judge policies and invites arbitrary decisions and maybe invidious criteria. Ayres & Foster, *supra* note 114, at 64–65.

251. TEXAS ADMISSIONS REPORT 9, *supra* note 231, at 1.

considered race-neutral alternatives.<sup>252</sup> Looking toward future litigation, Ayres and Foster are clear that:

In order for a court to conduct a necessary minimum preference inquiry, it must have available to it data on the overall and marginal costs and benefits of the affirmative action program at issue. We think that universities should be *required* to produce these data in order for their admissions programs to pass strict scrutiny. After all, courts cannot conduct the minimum necessary preference and differentiation inquiries without these data, and universities should be considering these data as they design their programs, so it makes sense to place the burden on them to produce these data. Of course, parties challenging university policies would also be free to produce their own data, and the adversarial system can sort out which data to credit.<sup>253</sup>

Some of that minimum necessary preference inquiry should examine race-neutral alternatives, but the STEM educators' admonition to "leave a paper trail of this [race-neutral alternative] examination"<sup>254</sup> has largely gone unheeded.

#### *F. The Process of Seriously Considering Race-Neutral Alternatives*

Serious consideration should require that institutions ask and answer each of the program evaluation questions discussed earlier, but this still leaves the question: "Who should participate in the evaluation process?" Evaluations of race-neutral alternatives as a path to achieve diversity involve educational as well as political and legal questions, so no single campus office will be a sufficient policy source. Admissions officers have the specific information to analyze some of the educational questions involved, but their role is to implement institutional policies, not to make them. Faculty may have evaluative skills that might involve surveys, control groups, and even regression analysis, but in most universities they are not well-informed about undergraduate admissions policies, and do not play an active role in making these labor-intensive decisions. Because constitutional issues are always inherent in these considerations and political issues are sometimes involved,

---

252. Of course, it could be argued that there is rarely much transparency in the admissions process at selective institutions about any matter. Peter Schmidt summarizes Jerome Karabal's findings about the admissions process at Harvard, Yale, and Princeton during the era when each tried to hold down the number of Jewish students as a "categorical rejection of the idea that admission should be based on academic criteria alone" in order that decisions could proceed with "discretion and opacity—discretion so that the gatekeepers would be free to do what they wished and opacity so that how they used their discretion would not be subject to public scrutiny." PETER SCHMIDT, *COLOR AND MONEY: HOW RICH WHITE KIDS ARE WINNING THE WAR OVER COLLEGE AFFIRMATIVE ACTION* 22–23 (2007) [hereinafter SCHMIDT, *COLOR AND MONEY*] (internal quotation marks omitted).

253. Ayres & Foster, *supra* note 114, at 83.

254. MALCOM ET AL., *supra* note 113, at 19.

the process and outcome of race-neutral consideration should be presented to campus governing bodies, culminating in review by the university's Board of Regents or Trustees. They should draw upon the assistance of the institution's general counsel, and the state Attorney General's office if they are a public institution. Importantly, schools must provide transparency, because secrecy undermines credibility. Multilayered review is more likely to be transparent, and this could help convince a court that the school performed race-neutral evaluations with the requisite constitutional serious consideration.

## VI. CONCLUSION

The requirement that universities seriously consider race-neutral alternatives before resorting to racially preferential policies is an important, if little understood, legacy of Justice Sandra Day O'Connor's affirmative action jurisprudence. Given the prominence of the requirement in a series of Supreme Court cases, its continuing vitality is apparent in cases as recent as *Parents Involved* and its rigorous application by OCR, universities' affirmative action programs are at peril if they fail to conduct rigorous, research-based evaluations of workable potential race-neutral programs before resorting to, or continuing to employ, race-conscious policies, such as the use of race as a factor in student admissions or financial aid.

Justice O'Connor's jurisprudence establishes that rigorous, research-based studies are not merely a sound characteristic of affirmative action policy formation and program evaluation, but a constitutionally required element of equal protection. The precise contours of this requirement have not been spelled out by the Court. We know that institutions must seriously, and in good faith, review available, workable alternatives, which may satisfy the institution's compelling, multi-factored diversity interests. This requirement can be understood best in light of various regulatory guidance, professional assessments, and the academic literature of program evaluation. In general, a university's serious consideration of race-neutral alternatives, if it is to pass constitutional muster, must meet stringent standards of rigorous, research-based evaluation, such as the following:

- The development and articulation of formal "policy, procedures, and statistical standards for evaluating race-neutral alternatives",<sup>255</sup>
- Identification and evaluation of an array of potential race-neutral policies, as opposed to only one or two,<sup>256</sup>

---

255. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 3, at xi.

256. *Id.* at xi (citing INCLUSIVE CAMPUSES, *supra* note 4); see also PROGRAM EVALUATION STANDARDS SUMMARY, *supra* note 184 (requiring that educational evaluations should be complete and fair).

- Articulation of underlying facts that will demonstrate the feasibility of particular race-neutral policies;<sup>257</sup>
- Empirical data-collection and data-analysis as the predicate of research findings;<sup>258</sup>
- Reliance upon “current, competent and comprehensive data”;<sup>259</sup>
- Measurement against established benchmarks and standards;<sup>260</sup>
- Formal written documentation of evaluative processes, empirical foundations, and the whole range of race-neutral programs evaluated but not adopted, including research studies that include projections about likely results over time;<sup>261</sup>
- Periodic review to determine whether changing circumstances or newly emergent program alternatives have altered the necessity or feasibility of current policies;<sup>262</sup>
- Data analysis to establish causal relationships properly;<sup>263</sup>
- Transparency throughout the evaluative process;<sup>264</sup>
- Communicative strategies to ensure that newly emergent programs as developed by peer institutions are efficiently identified and promptly evaluated.<sup>265</sup>

These practices are well-established in the evaluation literature and, collectively, constitute what it means for a prospective policy to be seriously considered.

---

257. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 3, at xi (citing INCLUSIVE CAMPUSES, *supra* note 4).

258. *Id.* (citing INCLUSIVE CAMPUSES, *supra* note 4).

259. *Id.* (citing INCLUSIVE CAMPUSES, *supra* note 4); *see also* PROGRAM EVALUATION STANDARDS SUMMARY, *supra* note 184 (directing that information gathering procedures should assure valid data and that information gather procedures ensure data that is reliable for its intended purpose).

260. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 3, at xi.

261. COLEMAN & PALMER, *supra* note 2, at 53; Arthur L. Coleman & Scott R. Palmer, *A More Circuitous Path to Racial Diversity*, CHRON. HIGHER EDUC. (Wash., D.C.), July 13, 2007, at B10; *see also* PROGRAM EVALUATION STANDARDS SUMMARY, *supra* note 184 (directing that the identified program should be documented clearly and accurately).

262. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 3, at xi (citing INCLUSIVE CAMPUSES, *supra* note 4); COLEMAN & PALMER, *supra* note 2, at 53.

263. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 3, at xi (citing INCLUSIVE CAMPUSES, *supra* note 4).

264. *See* PROGRAM EVALUATION STANDARDS SUMMARY, *supra* note 184 (directing that the full set of evaluation findings and pertinent limitations be disclosed to persons affected by the evaluation); Program Evaluation Standards Draft, *supra* note 246.

265. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 3, at xi.

This Article has discussed in some detail the legal obligation of higher education institutions to seriously consider race-neutral alternatives before using race in any preferential manner. It has established that these institutions regularly engage in program evaluation about a variety of other educational issues. It has described the process of program evaluation regarding setting goals in federal transportation contracting where race-neutral alternatives are maximized. It has portrayed in some detail how program evaluation steps might be applied to the problem of considering race-neutral alternatives in higher education. Finally, it has reported that visible examples of higher education institutions fulfilling this legal requirement are almost non-existent.

The failure of some institutions to engage in this kind of rigorous public evaluation should not prevent others from making assessments about the use of race-preferential or race-neutral approaches in higher education. A consortium of twenty professors and ten graduate students has been formed to collect and analyze data on the question of how students who receive admissions preferences perform while in school and afterward.<sup>266</sup> One startling piece of data has already been pried loose. According to Richard Sander, from 2004 to 2006, black graduates from the University of Michigan Law School failed state bar examinations on the first try about eight times more often than white graduates of that law school.<sup>267</sup> If this problem had been known before the *Grutter* decision, its effect on public opinion, and maybe on some Justices, might have been considerable.<sup>268</sup>

Recently, there has been an outpouring of books critical of university admissions processes,<sup>269</sup> which paints a picture that makes the *Grutter* Court's

---

266. Peter Schmidt, *Scholars Mount Sweeping Effort to Measure Effects of Affirmative Action in Higher Education*, CHRON. HIGHER EDUC. (Wash., D.C.), Jan. 18, 2008, at A19.

267. *Id.* Ayres and Foster calculate that 82% of the minorities admitted between 1995 and 2000 to the University Michigan law school benefited from preferences. Ayres & Foster, *supra* note 114, at 21 n.51.

268. Of course, Professor Sander's landmark research arguing that law school preferential admissions harmed African American students was published a year after *Gratz* and *Grutter* were decided. See Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004).

269. See, e.g., JOHN AUBREY DOUGLASS, *THE CONDITIONS FOR ADMISSION: ACCESS, EQUITY, AND THE SOCIAL CONTRACT OF PUBLIC UNIVERSITIES* 6, 237–41 (2007) (describing how admission standards as institutions affect “contemporary debates over affirmative action”); JEROME KARABEL, *THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND PRINCETON* 543–44 (2005) (noting that *Grutter* “was a tremendous victory for the elite universities” and gave “a partial, quite sanitized description of the selection process”); PETER SACKS, *TEARING DOWN THE GATES: CONFRONTING THE CLASS DIVIDE IN AMERICAN EDUCATION* 1–3 (2007) (describing the book's argument for why the education system bolsters class stratification); SCHMIDT, *COLOR AND MONEY*, *supra* note 252, at 29–34 (describing the different stakeholders that educational institutions mollify through admissions); JOSEPH A. SOARES, *THE POWER OF PRIVILEGE: YALE AND AMERICA'S ELITE COLLEGES* 2–4 (2007) (noting that, while minorities and legacies receive benefits in admissions, “[n]either . . . receive the preferential treatment given to athletes in top-tier admissions”); MITCHELL L. STEVENS, *CREATING A CLASS: COLLEGE ADMISSIONS AND THE EDUCATION OF ELITES* 186

willingness to defer to university judgments seem naive. Admissions is a high-stakes decision, fulfilling or deflating years of preparation and hope for a family. Because there are always more rejections than acceptances at competitive institutions, increased scrutiny can be expected. Research shows family wealth and educational background can be decisive advantages in admission, and that social or political connections play a role as well.<sup>270</sup> But when race and ethnicity are factors, they raise constitutional questions in ways other characteristics do not. Families clutching rejection letters will not be reassured by Peter Schmidt's conclusion:

Unable to come up with solid evidence to back its claims that affirmative action yielded educational benefits, the higher education establishment settled on an alternative plan: It would make such assertions anyway, and use spin, exaggeration, and a false sense of certainty in its assertions to pull the wool over the justices' eyes.<sup>271</sup>

Schmidt is an insider with unparalleled access to the higher education establishment,<sup>272</sup> but his suspicions have also been felt by the broader public even before the onslaught of these new publications. There is substantial public skepticism about whether higher education institutions have been candid about their use of racial preferences. Constitutional initiatives banning racial preferences were proposed for five more states (Arizona, Colorado, Missouri, Nebraska, and Oklahoma) in the 2008 election.<sup>273</sup> Transparent program evaluations of the use of race and race-neutral alternatives may be necessary if higher education institutions are to avoid further loss of public confidence and rejection at the polls.

Finally, it is inevitable that there will be another case testing the limits of the use of racial classifications in education. A key factor in Justice Kennedy's *Parents Involved* vote striking down Jefferson County's race-based pupil assignment program was the County's inability to articulate the criteria it used and how its plan was implemented.<sup>274</sup> Such defects are rife in college

---

(2007) (“[I]ndividualized consideration creates peculiar and heretofore unacknowledged forms of class bias in selective college admissions.”); see also Gary M. Lavergne, *College Admissions as Conspiracy Theory*, CHRON. HIGHER EDUC. (Wash., D.C.), Nov. 9, 2007, at B10 (addressing the basic arguments and criticisms of Douglass, Schmidt, Soares, and Sacks).

270. ANTHONY P. CARNEVALE & STEPHEN J. ROSE, SOCIOECONOMIC STATUS, RACE/ETHNICITY, AND SELECTIVE COLLEGE ADMISSIONS 11 (Century Found. 2003), available at [http://www.tcf.org/publication/education/carnevale\\_rose.pdf](http://www.tcf.org/publication/education/carnevale_rose.pdf).

271. SCHMIDT, COLOR AND MONEY, *supra* note 252, at 162 (quoted in Lavergne, *supra* note 269). Or see John Aubrey Douglass's assertion that “[t]he advocates of affirmative action . . . often manipulated the concept of the social contract as solely a matter of race and racial representation.” DOUGLASS, *supra* note 269, at 181 (quoted in Lavergne, *supra* note 269).

272. Schmidt is a senior writer for *The Chronicle of Higher Education* and its principal education writer on issues of race and law.

273. George F. Will, Column, *Fairness on the Ballot*, WASH. POST, Jan. 27, 2008, at B7.

274. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2790 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

admission decisions as well. Justice Kennedy concluded that “[w]hen a court subjects governmental action to strict scrutiny, it cannot construe ambiguities in favor of the State.”<sup>275</sup> Whether the defendant institution has engaged in the kind of program evaluation that has seriously considered race-neutral alternatives to achieving diversity may well be decisive in the future litigation and OCR investigations.

---

275. *Id.*