



RACIAL PREFERENCES
IN HIGHER EDUCATION

THE RIGHTS OF
COLLEGE STUDENTS

A HANDBOOK

A Project of the
Center for Individual Rights



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The Center for Individual Rights is a tax-exempt, nonprofit public-interest law firm, duly incorporated under the laws of the District of Columbia to provide free legal counsel to the public at large. CIR is qualified to receive tax-exempt contributions under Section 501(c)(3) of the Internal Revenue Code.

FOREWORD

The CIR has been at the forefront of legal efforts to do away with race and gender preferences. Together with our co-counsel, we have won numerous precedent-setting cases, from the 1992 decision in *Lamprecht v. FCC*, the first (and, until recently, the only) successful lawsuit challenging a federal gender preference program, to the 1996 decision in *Hopwood v. University of Texas*, which ruled that admissions programs that give preferences to certain races in order to achieve racial “diversity” in colleges and universities are unconstitutional.

As a public-interest law firm, CIR’s mandate is broader than simply litigating cases. In our view, *all* attorneys, but *especially* those who represent the “public interest,” have an obligation to keep the public informed about the law—its current state as well as where it seems to be headed.

CIR has compiled this handbook—and a companion handbook for college and university trustees—in order to provide practical knowledge about what is legally permissible in college and university admissions programs. In making this information available to the public, we hope to place the law governing racial preferences directly into the hands of those most affected by college and university admissions policies.

We are confident that with the benefit of clear, concise information about the law, students will be able to determine whether they have been treated fairly by the colleges and universities to which they have applied. And with the same knowledge, trustees and alumni will be able to undertake needed reform of admissions policies without the need for further and expensive litigation.

Michael P. McDonald
President
Center for Individual Rights

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INTRODUCTION

Nearly every elite college in America violates the law. Most competitive institutions of higher education treat applicants differently by race solely to achieve racial diversity. That is illegal. In fact, using racial preferences to achieve a particular racial mix of students has been illegal for the last twenty years, at least since the Supreme Court's landmark decision in *Regents of the University of California v. Bakke*.

Far too many of our leading schools operate what amount to dual admissions systems — one based on highly competitive measures of academic ability and the other on skin color. The effects of this double standard are obvious — high minority drop-out rates, racial tension, and cynicism about our leading educational institutions.

Most colleges and universities say they comply with the late Justice Lewis Powell's opinion in *Bakke*. While Powell thought that race could be a “plus” factor in deciding among individual applicants of similar ability, he believed that it could never be used to benefit applicants of an entire racial group wholesale. Nor, Powell thought, could schools use race in any manner if the sole purpose was to achieve a preferred racial mix of students.

Unfortunately, very few colleges and universities today comply with Powell's limits on race-conscious decision making. More recent Supreme Court cases have called into

question Powell's idea that “diversity” could sometimes justify racial preferences. Increasingly, courts will have little choice but to strike down illegal admissions systems and hold institutions — and in some cases, individual officials — liable for damages.

This handbook and a companion handbook for college and university trustees are intended to alleviate the need for further expensive litigation by making available to the public a clear statement of the existing law governing racial preferences. These handbooks are intended to be useful to those most directly responsible for, and affected by, college admissions. The handbook for college and university trustees is intended for those ultimately responsible for college admission who need to know how to evaluate and, if necessary, reform admission practices so that they comply with the law.

This handbook, addressed to students, will be of primary interest to applicants who want to know whether the institutions to which they have applied have treated them fairly according to law. It explains how to file a “freedom of information” request and where to obtain counsel if a student believes he or she has been discriminated against illegally.

Deciding which college or professional school to attend is one of the most important decisions in a student's life.

Applying to such a school is a process full of anxiety under the best of circumstances. The lingering presence of racial preferences makes the application process all the more difficult and the decision all the more arbitrary. Students, more than anyone else, need to know whether they are being treated fairly according to the law. In many cases they are, and this handbook does not shy away from saying so when that is the case. But sometimes they are not, and this handbook offers practical advice on what to do about it.

CIR's primary role is to litigate precedent-setting cases. CIR has an established record of winning lawsuits that have advanced the law. Within the framework of the judicial system, we try to make the details of the law correspond to the promise of its broad principles.

But as a public-interest law firm, CIR has another role — to explain the law to the public in clear terms that everyone can understand. Americans have always believed that the law is an instrument of self-government. To that end, it is incumbent upon lawyers, and especially law firms acting in the public

interest, to explain the law in such a way as to reduce the need for litigation.

This handbook makes available to the public a synthesis of this area of the law. And it contains a helpful compendium of the most common ways that many admissions programs violate the law. In its day-to-day work, CIR sees a range of affirmative-action policies. It is well positioned to call attention to the wide variety of practices and policies that expose institutions and officials to liability.

Many readers may find the end of racial preferences discomfoting. Most, we think, will correctly judge that discrimination on the basis of skin color, regardless how seemingly well intentioned, is almost always improper and unjust. While colleges and universities can, and in many cases should, reach out to individuals whose future promise may have been obscured by past disadvantage, they may not make judgments about an individual's merit solely on the basis of the color of his or her skin.

Terence J. Pell
Senior Counsel

William O. Douglas

A segregated admissions process creates suggestions of stigma and caste no less than a segregated classroom, and in the end it may produce that result despite its contrary intentions. One other assumption must be clearly disapproved; that blacks or browns cannot make it on their individual merit. That is a stamp of inferiority that a State is not permitted to place on any lawyer.

De Funis v. Odegaard, 1974 (dissenting opinion)

WHAT SCHOOLS CANNOT DO

Many schools today utilize racial preferences. This section identifies several common practices and provides ways to tell whether they violate the law. In general, racial preferences are illegal when they are designed not to remedy past discrimination by a particular institution, but to achieve a racially diverse student body. It is illegal for a school to employ any selection criteria designed to achieve a particular racial mix of students. It doesn't matter whether the purpose is clearly invidious or ostensibly benevolent; whether, that is, a school simply limits admissions to students of a particular racial background or claims that it is attempting to expose students to different viewpoints.

While there continues to be legal dispute about the ways schools MAY use race in the admissions process, there is no dispute that schools may NOT consider race in certain ways. This section concerns clearly forbidden uses of race. These practices have been outlawed for at least twenty years, since the Supreme Court decided *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

The following pages discuss particular admissions practices that are illegal as judged by the uncontroversial portions of the *Bakke* decision. Though by no means an exclusive list, these are the most frequently encountered illegal forms of affirmative action.

What the Courts Say

Lewis F. Powell

If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.

Regents of the University of California v. Bakke, 1978

William O. Douglas

The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized. The purpose of the University of Washington cannot be to produce black lawyers for blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for Irish. It should be to produce good lawyers for Americans...

De Funis v. Odegaard, 1974 (dissenting opinion)

SET-ASIDES

Schools Cannot Use Racial Goals, Quotas, or Set-Asides

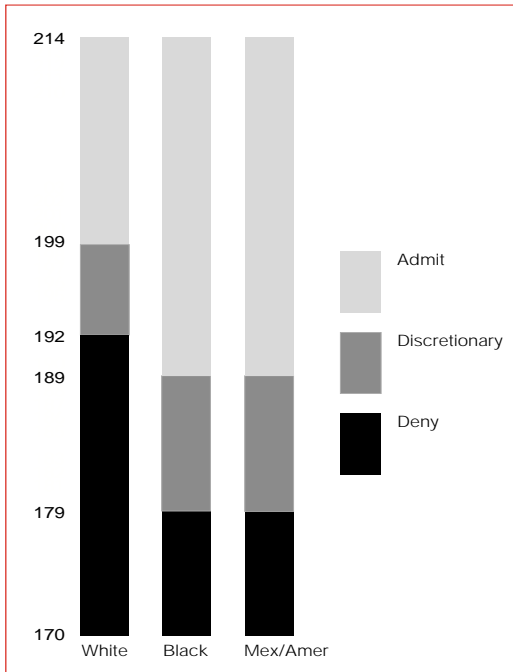
Schools may not take the race of applicants into account in order to achieve a particular racial mix of students. Calibrating admissions for this purpose amounts to “discrimination for its own sake” and is forbidden. *Bakke*, 438 U.S. at 307.

It does not matter whether a school sets a “flexible goal,” or whether it holds itself to a “quota.” Both are illegal. In *Bakke*, the Supreme Court held that “this semantic distinction is beside the point.” 438 U.S. at 289. The relevant question is whether the school draws a line on “the basis of race or ethnic origin,” regardless of how that line is described.

Though a goal implies that the racial preference can sometimes be overridden, a goal no less than a quota requires admissions officials to prefer certain students because of the color of their skin. If a goal is to have any effect at all, it means that at least in some cases, applicants are admitted solely because of their race and other applicants are rejected solely because of their race.

Despite *Bakke*'s clear injunction, some schools continue to employ explicit, numerical admissions goals for different racial groups. Some officials try to admit an entering class that proportionally represents the racial make-up of the population of the nation or a state as a whole. Other schools with “rolling admissions” policies reserve a certain number of slots for use by racial minorities. All of these practices classify applicants by skin color for the purpose of achieving a certain racial mix. In nearly every case, they violate the law.

Example: University of Texas Law School



Up until 1994, the University of Texas Law School used separate admissions pools based on different admissions criteria. Race was determinative of admissions for many students. Applicants were divided into three pools based on race: black, Mexican-American, and other (including whites). Different presumptive admit and deny “index” scores were then calculated for each of the groups. (Index scores were assigned to each applicant on the basis of grades and LSAT scores.)

As shown in the above chart, race was determinative of admissions for applicants with index scores between 189 and 192. In that range, black and Mexican-American applicants were presumptively admitted while white applicants were presumptively denied.

DUAL ADMISSIONS

Schools Cannot Segregate Applicants by Race

In addition to quotas, *Bakke* forbids the use of admissions procedures that separate individuals by race in order to judge them according to different criteria. While such procedures may not always operate in the same manner as a strict set-aside or quota, they are just as illegal.

Portions of Justice Powell's opinion in *Bakke* suggest that it is possible to give weight to the race of an applicant in the same manner as other personal characteristics if the purpose is to assemble an intellectually diverse class. However, even Powell was careful to say that a school may not segregate applicants wholesale by race in order to apply entirely different admissions standards. As the chart on the facing page shows, some schools use widely divergent admissions standards depending on the race of the applicant.

In general, a school may not construct special administrative procedures that isolate candidates of different races from direct comparison with one another. The following are examples of procedures that violate the standard laid down in *Bakke*:

- Special, full-file review for applicants of certain races only.
- Special admissions "tracks," committees, or procedures for applicants of certain races.
- Automatic addition of points to ACT, SAT, or LSAT scores (or composite "index" scores) of applicants from certain racial groups and no others.
- Special, discretionary admissions procedures available only for applicants of certain races.

What the Courts Say

Lewis F. Powell

*The 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. Petitioner's special admissions program, focused **solely** on ethnic diversity, would hinder rather than further attainment of genuine diversity.*

Regents of the University of California v. Bakke, 1978
(emphasis added)

DIVERSITY

Schools Cannot Reduce the Idea of "Diversity" to Skin Color

The Supreme Court has recognized the special role that American higher education plays in giving students wide exposure to "the ideas and mores of students as diverse as this Nation of many peoples." *Bakke*, 438 U.S. at 313. Schools have latitude to select students from a variety of geographic and family backgrounds, with different interests, talents, and outlooks.

However, a school may not single out race as a special or determinative measure of intellectual diversity. Minority applicants must be examined for their potential contributions to diversity on the same terms as applicants of all other races, "without the factor of race being decisive." *Bakke*, 438 U.S. at 317. It is illegal to assume the only or primary attribute that an applicant will contribute to "diversity" is his or her skin color or ethnic background.

Schools *may* give preference to athletes or children of alumni. Though controversial (in so far as not directly related to academic aptitude), such preferences are not illegal because they do not rely on race or ethnic origin.

Schools that are serious about recruiting a diverse student body will take steps to consider applicants of **ALL** races according to a wide range of factors:

- geographic origin
- work experience
- record of leadership
- civic involvement
- record of overcoming hardship
- demonstrated maturity
- grades
- test scores
- scholarly interests
- musical or other special talent

Some Examples

Race-Exclusive Programs

The following are some examples of race-targeted programs in use today at many schools:

- Race-exclusive scholarships
- Minority-only summer “conditional admit” programs
- Mentoring and tutoring programs for minority students
- Minority set-asides for law review, summer clerkships
- Priority course registration for minority students
- Minority-only summer camps and enrichment programs

RACE-TARGETED SUPPORT

A School May Not Restrict Academic Aid by Race

Schools may not offer scholarships on a race-exclusive basis. Nor may they offer academic or other support services, such as mentoring, tutoring, or counselling for students of a particular race only. For the same reason that the law does not permit schools to reserve a certain number of seats in each class for individuals from preferred racial groups, it does not permit schools to set aside certain academic services for the exclusive use of particular racial groups.

While a school may have a legitimate interest in ensuring a diverse student body, race-exclusive scholarships and academic support programs further only “simple ethnic diversity.” As the Supreme Court held in *Bakke*, “preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake,” which, the Court concluded, the Constitution forbids.

Nor is it relevant that race-exclusive scholarships and academic aid make up a small percentage of the total support provided all students. What matters is not how a school apportions aid among different racial groups but the purpose for which such aid is being apportioned. If the sole purpose being served is simple ethnic diversity, then the racial classification is illegal, regardless of its benefits and burdens for different racial groups.

Some schools have argued that race-exclusive scholarships are necessary to remedy past racial discrimination. The U.S. Court of Appeals for the Fourth Circuit has held that a school may not use race-exclusive scholarships to remedy the diffuse effects of societal discrimination, but *only* the *present effects* of past discrimination by *that particular institution*. The appeals court held that neither a poor reputation in the minority community nor a perception that the campus climate is racially hostile is sufficiently connected to past discrimination to justify race-exclusive scholarships. See *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994).

RACE AS A “PLUS FACTOR”?

Many colleges and universities claim that they take race into account only as a “plus factor” in individual cases and that this consideration of race is legal.

Applicants should be skeptical of such claims. The only authority for the so-called “diversity rationale” is a portion of Justice Powell’s opinion in *Bakke* that stated that race could be taken into account as part of an overall effort to achieve intellectual diversity.

Schools Fail to Comply

Unfortunately, many schools confuse intellectual diversity with racial diversity. These schools use very different admissions standards depending upon the race of an applicant. They do so because they are not primarily interested in intellectual diversity, but rather in achieving a specified racial mix among the student body as a whole.

When they are being honest, school officials concede that they violate Justice Powell’s injunction against the wholesale consideration of race. They say that using race merely as a “plus factor” to evaluate individual cases cannot ensure a sufficient number of minority students on campus—that the resulting class would be “too” white. Whether or not this is true (and there is good reason to believe that it is not) using race to ensure racial diversity (and only racial diversity) is unconstitutional.

Weak Legal Authority

Even if schools generally were to limit the consideration of race to achieving the sort of intellectual diversity Powell championed, the legal authority for using race to achieve any sort of diversity now appears increasingly weak. As discussed in the later section entitled *The Law*, the Supreme Court and several of the Courts of Appeals have called into question the view that a state school or a private recipient of federal funds may ever take race into account for this purpose. And regardless whether it is legal to do so under federal law, some states are taking steps to eliminate the consideration of race in admissions to public schools. California and Washington already have done so and, as the map on the facing page indicates, a handful of other states introduced such measures during the 1997-1998 legislative session.

Who Gets Hurt

I grew up poor, struggled as hard as almost anyone, and I always played by the rules. Now they tell me none of that matters as much as the color of my skin. Affirmative action should be used to help disadvantaged people of whatever color. You can find injustice anywhere. The fact that I have one severely handicapped child and another one died is an injustice. But nobody's helping me.

PLAINTIFF CHERYL HOPWOOD

(DENIED ADMISSION TO UNIVERSITY OF TEXAS LAW SCHOOL)

Rolling Stone Magazine, August 10, 1995

My mom was a single mom struggling to raise four kids. We lived hand to mouth. It's not a sob story. But it was hard and I was determined to get out of poverty. People will say I'm a racist or a publicity seeker. But what the school does is wrong. It has to end.

PLAINTIFF KATURIA SMITH

(DENIED ADMISSION TO UNIVERSITY OF WASHINGTON LAW SCHOOL)

Seattle Times, March 11, 1997

I hope no one else goes through what I went through. I was embarrassed and disappointed. I was a pre-med major and [after I was rejected] I started to question myself.... I feel that it's a good thing that someone stands up and says it is wrong.

PLAINTIFF JENNIFER GRATZ

(DENIED ADMISSION TO UNIVERSITY OF MICHIGAN)

Detroit News, October 15, 1997

CONFRONTING RACE PREFERENCES

Every state university must comply with the legal restrictions on the use of race in admissions set forth in the last section. Generally, such institutions may not grant racial preferences except to remedy their own past discrimination. Title VI of the Civil Rights Act of 1964 prohibits recipients of federal funds from discriminating on the basis of race. Title VI extends the legal restrictions discussed in the last section to most private schools. The Civil Rights Restoration Act of 1987 clarifies that Title VI covers *all* elements of a private school if even a single program or activity receives federal support. Thus, any private school that participates in a federal student loan or grant program is covered even if it does not receive any other federal aid directly.

This section discusses ways that an applicant can tell whether a public or private school uses illegal racial preferences in its admissions process. And it offers concrete suggestions about what to do if an applicant discovers that to be the case.

Many schools make no secret of the fact that they take race “into account” in the admissions process. Usually, though, they do not discuss the means by which race is counted. They may assert that the use of race is “complex,” or “nuanced,” or “highly variable” and that generalizations are not possible.

Applicants should probe beneath such vague assurances. The sort of systematic racial classifications discussed in the last section –almost always illegal –are neither nuanced nor difficult to identify. What is required is a modest amount of detective work. This section explains how to organize your inquiry systematically so as to identify such illegal practices.

Worksheet

Suspect Admissions and Financial Aid Procedures

- Does the university try to admit a certain percentage of minority students or admit minority students in proportion to their representation in the population as a whole?
- Does the school add points to applicants' GPA or test scores based on race?
- Does the school extend application deadlines based on race?
- Does the school offer preferences or restrict access to scholarships on the basis of race?
- Does the school automatically admit or deny individuals based on test scores, and if so, does it appear that the university utilizes lower cut-off scores for applicants of certain racial groups?
- Does the school automatically review more thoroughly applicants of certain racial groups?
- Is there a separate review process or separate review committee for applicants of certain racial groups?
- Does the university automatically classify applicants of certain racial groups as disadvantaged?
- Does the university admit students through a "conditional admit" or other special program reserved for students of certain racial groups?

HOW SCHOOLS USE RACE

Be Tenacious in Asking Questions

Few schools openly state that they employ racial preferences. Indeed, most institutions do not discuss their admissions system publicly or in detail. However, the systematic categorization of applicants according to race usually is not hard to identify.

The first step in determining whether a school illegally classifies applicants according to race is to assemble as much information as possible about a school's express policies regarding racial diversity and the means deemed acceptable to achieve it. A school that has an explicit policy of ensuring racial diversity is very likely to use systematic racial classifications in admissions.

You should examine the following sources of information (often available on the Internet):

- Admissions bulletins and brochures.
- Speeches, articles, and reports by school administrators on campus "diversity."
- Special reports or studies on campus "diversity."

In addition to examining a school's general policies on racial diversity, you need to familiarize yourself with the admissions procedures followed by the school or university. Although schools rarely state that race is decisive in admissions, published documents quite often point to procedures that inevitably make race decisive. The worksheet on the facing page contains a list of questions that you should ask as you review published materials. In addition, you should read carefully the later section in this handbook entitled *THE LAW*.

Checklist

Documents to Request

Applicants may wish to consult the sample “freedom of information” request contained in the Reference Guide at the end of this handbook. At a minimum, applicants should ask for the following documents:

- Any and all documents that describe the admissions criteria used by the university.
- Any and all reports, statistical analyses, statutes, rules, and regulations upon which the university bases its criteria for admissions.
- Any and all minutes of any meeting of the regents, faculty, administration, or admissions committee regarding the formulation and implementation of admissions criteria for the freshman class.
- Any and all documents, worksheets, forms, directives, guidelines, samples, tables, grids, and/or charts used in connection with the admissions process.
- Any and all memoranda, letters, messages, records, findings, drafts, or other documents discussing, involving, or relating to in any way the adoption, implementation, review, or assessment of admissions criteria.
- Any and all documents that describe programs or activities that target or primarily benefit any particular racial group but not other racial groups.

GETTING DOCUMENTS

Many states and the federal government are subject to “freedom of information” or “public record” laws. All publicly funded state schools in those states (including community colleges) and all federal service academies must provide internal documents to the public on request. Although you will not be able to obtain confidential information about particular decisions or individuals, you are entitled to see documents that set forth admissions policies and procedures generally.

“Freedom of Information Request”

If you applied to a state school subject to a “freedom of information” law, you should file a written request to the school’s president. A helpful example of a “freedom of information” request letter appears in the *Reference Guide*. At a minimum, it should be broadly worded and request *any and all* documents relevant to the admissions process. A checklist of useful documents appears on the facing page.

Be Persistent

Do not be discouraged if the school delays in responding, responds incompletely, or claims that it is exempt from responding at all. Most “freedom of information” laws have specific time limits for responding and you should remind school officials of their legal obligation to respond within that period. In addition, such laws generally contain explicit descriptions of the sort of documents exempt from disclosure. You should demand specific and detailed explanations of which documents are being withheld and under what exemption.

In many cases, state and federal agencies are required to disclose as much of a particular document as is not covered by an explicit exemption. Thus, you may be entitled to receive “redacted” documents—documents that have had confidential or other exempt information blanked out but continue to show non-exempt information.

You should examine carefully any documents you do receive. Frequently, such documents refer to other documents that the school has failed to release. Or you quietly may learn from a helpful member of the faculty or administration of the existence of specific documents helpful to your inquiry. You should question any exemption claimed for any unreleased document of whose existence you learn.

Checklist

Data to Request

Most schools have detailed statistical admissions information available in charts, tables, spreadsheets, and computer files. In addition to documents setting forth admissions criteria, applicants should request the following admissions data as part of any “freedom of information” request:

- The size of the freshman class and the percentage that is Asian, black, Hispanic, and white.
- The percentage of the class that is enrolled as remedial students, i.e., on the condition that they audit, take, or pass courses not required of other freshmen, and the percentage of remedial students that is Asian, black, Hispanic, and white.
- The math and verbal SAT scores and/or the composite ACT score for each Asian, black, Hispanic, and white applicant granted admission and each such applicant denied admission.
- The high school grade-point average for each Asian, black, Hispanic, and white applicant granted admission and each such applicant denied admission.
- The high school class-rank for each Asian, black, Hispanic, and white applicant granted admission and each such applicant denied admission.

OTHER AVENUES OF INFORMATION

Appeal, Appeal, Appeal

Most “freedom of information” laws set forth specific procedures for appealing a school’s decision to withhold documents. You should make ample use of such procedures. Frequently, “freedom of information” denials must be appealed several times. Be skeptical of incomplete responses. Remember that colleges and universities are bureaucracies. ***Nearly every important policy is written down somewhere and you are entitled to all documents where such policies appear.***

The key is persistence. It may take several rounds of requests and formal appeals to obtain a complete set of documents. Though it may be necessary to consult an attorney to help you, remember that in many cases, the school can be required to pay your legal expenses should you prevail in a court case challenging its failure to provide legally required documents in a timely manner.

Statistics

Even if you are unable to obtain documents detailing a school’s admissions policies and procedures, you may be able to obtain data regarding the qualifications of the freshman class, broken down by race. Although most “freedom of information” laws do not require a school to *create* documents or to collect statistics, if such documents *already* exist, it must provide them to you upon request. In addition, many schools publish detailed annual reports on their ongoing efforts to achieve racial diversity. Such reports may contain useful statistical information about the composition and qualifications of the freshman class.

Private Schools

Applicants interested in challenging racial preferences at private schools must be resourceful if they are to obtain information about admissions practices. While not subject to “freedom of information” laws, on request private schools sometimes provide information and documents helpful in determining whether admissions officials utilize racial preferences. Individual faculty members or administrators opposed to racial preferences may be willing to supplement publicly available information with additional documents and anecdotal information. Often, such individuals can be identified through electronic searches of computerized newspaper databases. The key to obtaining information from private schools is persistence.

Some Examples

Disparities That Point to Discrimination

- At the University of Washington Law School, minority enrollment jumped in 1990 from about 17.4% to about 36% of the entering class. This followed the arrival of a new dean who vigorously advocated greater racial diversity. At that time, minorities made up about 14.5% of the population of Washington State. The doubling in minority enrollment in one year –out of line with the percentage of minorities in the population –suggests a deliberate decision to make race a predominant factor in admissions that is at least worthy of further inquiry.
- Examination of the 1996 “Profile of University of Michigan” revealed that 100% of minorities who applied with a combined GPA of 2.8-2.99 and an ACT score of 27-28 were accepted. In contrast, only 11% of non-minority students were accepted with these credentials. Such a wide disparity in the acceptance rate of applicants with similar credentials suggests that race was a decisive factor in admissions.
- The University of Texas Law School ranks applicants according to an “index score,” a composite of grades and LSAT scores. During certain past years, the presumptive admit score for minority students was *below* the presumptive deny score for non-minority students. Non-minority students routinely were rejected solely on the basis of grades and LSAT scores *higher* than what earned minority students nearly automatic acceptance. This disparity made clear that race was decisive in the admissions process. *See page 4.*

INTERPRETING DATA

Colleges and universities sometimes break down data about test scores and grades of all applicants by race. This data may offer a clue as to the existence and significance of racial preferences in the admissions process.

Wide Disparities

Sometimes the existence of wide racial disparities in test scores or grades suggests the existence of racial preferences. Applicants should be attentive to disparities that could only be explained through the systematic use of race. Sudden and unexplained changes in the number or percentage of minority students may point to racially motivated changes in admissions policy. While even wide disparities themselves do not *prove* the existence of such preferences (and it is the preferences that are illegal, not the disparities), they may suggest where inquiry is warranted.

Of less importance are slight differences in “average” test score or grade-point averages between racial groups. This might well be explained by factors other than grades or test scores being given weight in the admissions process. Slight differences in average test scores do not necessarily mean that the only factor considered other than grades and test scores was race.

Policies Are Key

Of more relevance than numerical disparities is whether the school constructs admissions policies designed to “correct” for racial differences in achievement test scores or grades. A school that uses different presumptive admit or deny scores, adds “points” to minority test scores, applies different screening grids, or constructs different course or graduation requirements based on race is relying on racial classifications that very probably are illegal.

Legal Relief Available

Declaratory and Injunctive Relief

If you have been denied admission because of your race, then you may seek declaratory judgment, or a ruling by the court that the system in question is racially discriminatory and therefore in violation of the law.

If the illegal admissions system still is in effect (creating the potential for future injury to yourself or others), you may ask for injunctive relief or a ruling from the court that the school may not continue its discriminatory practices.

Admission

If you still wish to attend the school in question, you may ask the court to order that you be admitted.

Damages

If the school that you attended was (or is) more expensive than the one that discriminated against you, the school could be liable for the difference in cost.

You may seek compensation for any emotional distress, harm to your reputation, loss of future earnings, or other injuries suffered as a result of the discrimination.

If the school is found to have deliberately violated the law, you may seek punitive damages.

You may seek attorneys' fees and costs associated with bringing a successful discrimination lawsuit.

GETTING COUNSEL

As explained in the legal section of this handbook, the Constitution and Title VI of the Civil Rights Act of 1964 provide that public institutions, as well as private institutions that receive federal money, may not discriminate on the basis of race in any aspect of their programs. If you have been discriminated against in admissions or financial aid because of your race or ethnic origin, you have the right to sue for redress.

Starting a Lawsuit

Remember that you do not need *proof* of exactly how you have been discriminated against in order to file a lawsuit. The law contemplates that concrete evidence of discrimination often is in the control of the discriminating institution and emerges only after a lawsuit starts. All that is required to initiate a lawsuit is “knowledge, information, and belief” that the allegations “have evidentiary support or...are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.” (Rule 11, *Federal Rules of Civil Procedure*)

Once a lawsuit starts, of course, a court of law can compel an institution to answer interrogatories and produce documents. And once the nature of the evidence becomes clear to all parties, it is possible either to proceed with the lawsuit or move to dismiss or settle it without penalty.

Finding a Lawyer

If you think a school to which you applied may have utilized illegal racial preferences, you should consult an attorney right away. Remember, in many states you have only two years from the date you become aware of discrimination (ordinarily, the date you receive your rejection letter) to file a lawsuit. If you have the requisite financial resources, you can retain counsel specializing in this kind of civil rights case. If, however, you are unable to afford counsel, you may still be able to bring a lawsuit with the assistance of *pro bono*, or free, legal assistance. Your local bar association can refer you to appropriate counsel.

CONCLUSION

While there continues to be disagreement about what sort of racial preferences are permitted under existing law, many racial classifications in use today are patently illegal. The systematic use of race to categorize applicants broadly according to the color of their skin has always been illegal, was explicitly stated to be illegal over twenty years ago in the *Bakke* decision, and continues to be illegal today.

Students can scrutinize the admissions policies at the schools they attend and the schools to which they apply. While many schools operate sensible admissions programs well within legal bounds, many do not. No student –of any race –should be subjected to the arbitrary race-counting of college and university admissions officials who desire to achieve a preordained racial mix of students.

REFERENCE GUIDE

Antonin Scalia

In my view, government can never have a “compelling interest” in discriminating on the basis of race in order to “make up” for past racial discrimination in the opposite direction. Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution’s focus upon the individual, and its rejection of dispositions based on race. To pursue the concept of racial entitlement –even for the most admirable and benign of purposes – is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.

Adarand Constructors v. Peña, 1995

THE LAW

An applicant who has gathered information about how a university or college uses race in the admissions process needs to determine whether that use of race is illegal. The following sections discuss the tests that courts use to evaluate racial preferences. They are designed to be a ready reference to applicants trying to determine whether a particular admissions system complies with the law.

Of course, a handbook of this nature cannot pretend to be a legal treatise. Our intent is more modest –to offer the interested layman a practical guide to the major legal principles in this area and a brief synopsis of the issues typically encountered in evaluating particular racial preferences.

In addition to the following pages, applicants who have questions about the law governing the use of racial preferences at colleges and universities would do well to read some of the legal cases themselves, particularly *Bakke* and the 1996 Fifth Circuit case, *Hopwood v. University of Texas*, which emphatically rejected the widely held view that racial preferences may be used to achieve diversity in a college or university class. The citations for these and other cases can be found in the bibliography.

What the Law Says

The 14th Amendment

*Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; **nor deny to any person within its jurisdiction the equal protection of the laws.** (emphasis added)*

Title VI of the Civil Rights Act of 1964

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Civil Rights Restoration Act of 1987

[T]he term “program or activity” mean[s] all the operations of...a college, university, or other postsecondary institution, or a public system of higher education...any part of which is extended Federal financial assistance.

RACIAL CLASSIFICATIONS

The Constitution and State Colleges

All state colleges and universities are governed by the Equal Protection clause of Section 1 of the 14th Amendment of the Constitution. The Equal Protection clause requires that the states treat similar individuals in a similar manner. It prohibits distinctions between individuals on criteria unrelated to a legitimate governmental interest. The Equal Protection clause prohibits state colleges from making admissions decisions arbitrarily or based on criteria not legitimately related to the operation of an academic institution.

Strict Scrutiny of Race

If a college admissions program makes distinctions between candidates on the basis of criteria that touch upon a fundamental constitutional value, then the courts exercise what is called “strict scrutiny.” To pass “strict scrutiny,” an admissions program must be *narrowly tailored* to achieve a *compelling* state interest.

Because distinctions based on race are suspect, the courts strictly scrutinize **any** racial classification, regardless whether it reflects a “benign” intent to remedy past discrimination or an “invidious” intent to segregate on the basis of race. In addition to serving a compelling state interest, a racial classification must be narrowly tailored to achieve that interest.

Title VI and Private Institutions

Congress has extended the legal standard embodied in the 14th Amendment to most private colleges and universities as well. Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, *et seq.* prohibits recipients of federal funds from discriminating on the basis of race; it generally prohibits the same discriminatory conduct by the recipients of such funds that the 14th Amendment outlaws on the part of the states.

The Civil Rights Restoration Act of 1987 made clear that Title VI extends to *all* operations of a private college or university if even only *one* program receives federal funds. Thus, any private college or university that participates in any federally guaranteed student loan or grant program (i.e., nearly every private college) is covered by Title VI and subject to the legal standard embodied in the 14th Amendment.

COMPELLING GOVERNMENT INTEREST

By limiting distinctions based on race to those that serve a *compelling* government interest, the Supreme Court has held gratuitous racial classifications – those that needlessly reinforce racial stereotypes – to be unconstitutional. Lack of a compelling government interest renders most racial preferences unconstitutional even before considering whether the law in question is narrowly tailored to fulfill that interest or whether there is a less onerous alternative available by which to achieve the same purpose.

One Compelling Interest

The only *clearly* compelling interest that justifies race conscious admission policies is remedying the present effects of past discrimination *by a particular institution*. However, there must be strong evidence for concluding that there are present effects of past, specific acts of discrimination by the institution. Courts have held that an institution may NOT attempt to remedy the effects of past discrimination by society as a whole.

What IS NOT Compelling

The following are examples of some of the purposes the courts do *not* consider sufficiently compelling:

- Achieving a particular racial mix of students.
- Providing minority role models for minority students.
- Remedying bad reputation, racial hostility, or other diffuse effects of societal or historical discrimination.

Societal Discrimination

There remain well-documented, substantial disparities in educational achievement and economic and social well-being between whites and blacks. Some argue that these differences are the result of a society that discriminated against blacks for many years. Others argue that aspects of American social structure that reflect and perpetuate racial differences – whether standardized tests, college admissions policies, or grades – must be offset by ongoing racial preferences.

While schools have a legal obligation to remedy the effects of their own past acts of racial discrimination, the Supreme Court and all lower courts are virtually unanimous in rejecting racial preferences as a means to remedy the effects of past societal discrimination, or to remedy disparities in well-being of different racial groups.

Constitutional Limits

The Supreme Court has declared that remedying societal discrimination is never a compelling interest:

- By its nature, societal discrimination is “amorphous,” consisting of uncountable injuries reaching far into the past.
- A racial preference designed to counter such such discrimination necessarily extends into the indefinite future. Unlike a remedy for a specific injury, it soon becomes a permanent reparation.

In general, courts take the view that employing racial preferences to remedy the diffuse social effects of past discrimination would commit the government to a permanent system of racial set-asides, quotas, and preference programs –which, taken together, would reinforce and aggravate, not ameliorate, racial divisions.

DIVERSITY

Many educators assume that achieving diversity among students is an additional compelling government interest that supports the use of racial preferences. However, the legal authority for this view is increasingly weak and, in any event, limited to a narrow type of diversity.

The Supreme Court's 1978 decision in *Regents of University of California v. Bakke* is the *only* modern Supreme Court case specifically to address the voluntary use of racial preferences in higher education. Although a majority of Justices held that race sometimes could be used in admissions, the Court was unable to agree on what sort of consideration of race was constitutional.

Powell's Lone Opinion

Justice Powell thought that *intellectual* diversity was a sufficiently compelling interest to justify taking into account the race of *individual* applicants. Just as firmly, Powell said that "simple ethnic diversity" is *not* a compelling state interest. Rather, diversity must "encompass a far broader array of qualifications and characteristics of which racial or ethnic origin is but one." In a constitutional admissions program, Powell said, race may be "a 'plus' factor in a particular applicant's file," yet it cannot be systematically used to "insulate the individual from comparison with all other candidates." Most colleges and universities have a difficult time complying with Powell's opinion in *Bakke*.

Hopwood v. University of Texas

In 1996, the U.S. Court of Appeals for the Fifth Circuit in *Hopwood v. University of Texas* ruled that diversity is not a government interest sufficiently compelling to justify affirmative action by colleges and universities. The plaintiffs in that case had challenged the admissions procedures at the University of Texas Law School, which utilized separate and lower cut-off scores for minority students. The court held that "the law school...presented no compelling justification, under the 14th Amendment or Supreme Court precedent, that allows it to continue to elevate some races over others, even for the wholesome purpose of correcting perceived racial imbalance in the student body."

Bakke Today

Although *Hopwood* did not overrule *Bakke* (it acknowledged, as did a majority of the Justices in *Bakke*, that racial preferences in college admissions sometimes may be

constitutional), it did declare that diversity alone is an insufficient justification for such preferences. The Supreme Court declined to review *Hopwood*, which means that the Court allowed it to become the law in the Fifth Circuit (comprising Texas, Louisiana, and Mississippi).

The *Hopwood* court first ruled that the question of whether diversity is a compelling interest had not been decided by a majority of the Supreme Court in the *Bakke* decision. In concluding that diversity is not a compelling interest, the *Hopwood* court relied on the fact that eight Justices in the *Bakke* case seemed to reject that proposition and the fact that more recent Supreme Court cases have rejected the use of racial preferences solely to achieve diversity.

Even if Powell's opinion in *Bakke* continued to be good authority for the use of racial preferences solely to achieve diversity in education, it should be remembered that it supports only a narrow and specific conception of diversity. As set forth in the first section of this handbook, schools may not categorize students systematically according to their race in order merely to achieve racial diversity.

In fact, many racial preferences in higher education do not further the type of diversity that Powell said was a compelling interest. Often, racial preferences are focused on "simple ethnic diversity." They fail to treat race as one of many "plus factors" and effectively insulate minority individuals from comparison with other candidates. For example, the Texas admissions plan challenged in the *Hopwood* case gave significant preference to two racial groups, separated applicants by race, and applied different admissions criteria to each pool. *See* page 4.

An admissions program that extends racial preferences that are not tailored to what the Court now considers a *compelling* interest constitutes illegal racial discrimination in violation of Title VI and the 14th Amendment.

THE RECENT DEBATE

Some Questions and Answers

The following are some common arguments made in support of racial preferences, as well as some things applicants may wish to consider in response:

Claim: Racial preferences are a necessary and just means by which to remedy our country's history of discrimination against racial minorities.

Response: While the Supreme Court recognizes the legal obligation of colleges and universities to remedy their own institutional discrimination, it has never recognized the right to remedy the effects of societal discrimination. Racial preferences are a bureaucratic and largely illegal response to societal discrimination, one that unfairly categorizes individuals solely on the basis of skin color. As Justice Scalia has observed, such preferences create “creditor” and “debtor” races. *Adarand Constructors v. Peña*, 515 U.S. 200, 239 (1995).

Claim: A diverse student body at all colleges and universities is both educationally and socially valuable.

Response: Many educational institutions have determined that diversity can enhance the educational experience. However, it is unconstitutional to equate the idea of intellectual diversity to skin color –which has almost nothing to do with ability or outlook. Schools that are truly interested in intellectual –rather than merely racial –diversity have broad latitude to recruit and admit students of all varieties of experience.

Claim: If we do away with racial preferences, our colleges will become re-segregated.

Response: This assumes that racial minorities cannot compete on the basis of their individual talents, aptitudes, and achievements. Contrary to recent press reports, minority enrollment has remained stable at most California and Texas schools since these states eliminated racial preferences –the nation’s first experience with race-blind admissions. Out of approximately 74 public colleges and professional schools that converted to race-blind admissions in 1997, six –all flagship law and medical schools –suffered significant declines in minority enrollment. Minority enrollment was stable at the other 68 schools.

Claim: Standardized tests unfairly discriminate against minority students, and racial preferences are necessary to counteract that bias.

Response: Standardized tests, when combined with grades, are a good (although hardly perfect) indicator of future academic success. Nearly every researcher who has considered the question has concluded that they are equally good predictors of the future academic success of individuals of all races. While no school should rely exclusively on standardized tests, it is illegal to “race norm” standardized test scores, or to weight their use differently according to the race of the applicant.

SAMPLE DOCUMENT REQUEST

The following is a sample letter requesting all documents and other written information regarding college and university admissions practices. It is based on a letter successfully used by the Center for Equal Opportunity (CEO) in its efforts to determine the scope and extent of racial preferences in state university systems. Of course, you will have to tailor this letter to the specific institution from which you desire information. Applicants who have further questions about “freedom of information” requests may wish to contact CEO directly at 815 Fifteenth Street NW, Suite 928, Washington, D.C. 20005; 202-639-0803.

Dear Sir or Madam:

Pursuant to the [*insert name of state “freedom of information” law, e.g., “Virginia Freedom of Information Act, Virginia Code Section 2.1-340.1 through 346.1”*], I hereby request the [*insert name of college or university, e.g. “University of Virginia”*] (“University”) to provide any and all public records that are responsive to the numbered requests listed below.

If the record or records sought are stored within the University’s or State’s computer system, please provide the records on a disk readable by an IBM-compatible personal computer. If the records sought are not stored within such computer system, please provide hard copies.

This request is limited to the freshman classes for the years [*insert date three years prior to current class, e.g. “1995 through 1998”*] inclusive. Should any record become available while other records remain unavailable because of difficulties of redacting information properly excludable under law or for any other reason, please forward all available records as soon as possible.

Should information responsive to the numbered requests below be found in more than one record, you may provide a copy of the record containing responses to the largest number of such numbered requests.

1. The size of the freshman class and the percentage of the class that is Asian, black, Hispanic, and white.

2. The percentage of the class that is enrolled as remedial students, including the percentage of remedial students that is Asian, black, Hispanic, and white. For purposes of this letter, the term “remedial students” shall include any student admitted on the condition that he or she remedy academic deficiencies by auditing, taking, or passing courses not required of all other enrolled freshmen.

3. The math and verbal scores achieved on the Scholastic Achievement Test (“SAT”) and the composite scores achieved on the American College Testing Assessment (“ACT”) by each Asian, black, Hispanic, and white applicant granted admission and each such applicant denied admission.

4. The high school grade point average achieved by each Asian, black, Hispanic, and white applicant granted admission and each such applicant denied admission.

5. The high school rank achieved by each Asian, black, Hispanic, and white applicant granted admission and each such applicant denied admission.

6. Any and all documents that describe any university-sponsored or supported program and/or activity that is racially and/or ethnically exclusive or that may be perceived to be racially exclusive.

7. Any and all documents that describe admissions criteria, policies, or procedures used by the university in the admission of applicants to the freshman class.

8. Any and all documents, reports, studies, findings, directives, statutes, rules, and regulations upon which the university bases its decision in whole or in part to formulate, implement, or adopt the criteria for admission to the freshman class.

9. Any and all documents, worksheets, forms, directives, guidelines, samples, tables, and/or charts used, completed, or created in connection with the process of admission of applicants to the freshman class.

10. Any and all memoranda, letters, messages, electronic messages, records, findings, drafts or other documents discussing or involving the consideration, drafting, adoption, and implementation of the criteria and procedures used for admission to the freshman class.

Because the records sought by this request will be used to advance public understanding of the admission process and will not benefit any commercial interest, I respectfully request that any fees for searching or copying such records be waived.

Sincerely,

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