



RACIAL PREFERENCES  
IN HIGHER EDUCATION

A HANDBOOK FOR  
COLLEGE AND  
UNIVERSITY TRUSTEES

A Project of the  
Center for Individual Rights  
and the  
Pope Institute for the  
Future of Higher Education



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# FOREWORD

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This handbook on racial preferences in higher education is designed to provide guidance to trustees and other college and university officials. It is a joint project of the Washington-based Center for Individual Rights and the Pope Institute for the Future of Higher Education, based in Research Triangle Park, North Carolina.

CIR has been at the forefront of legal efforts to do away with race and gender preferences. Together with its co-counsel, it has 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.

The Pope Institute for the Future of Higher Education is a new organization formed to study public policy issues related to colleges and universities. Its mission is to promote reform in higher education through publications, conferences, a magazine, targeted newsletters, articles in journals and the popular press, and other educational efforts.

This handbook – and a companion CIR handbook for students – has been compiled 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 able to reform 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

James Arthur Pope  
Chairman  
Pope Institute



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**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)*

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# THE LAW

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The following pages discuss the tests that courts use to evaluate racial preferences. They are designed to be a ready reference to trustees 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, trustees 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 *Regents of the University of California v. 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.

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## *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.*

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# RACIAL CLASSIFICATIONS

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## *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 *one* program receives federal funds. Thus, any private college or university that participates in the federally guaranteed student loan program (i.e., nearly every private college) is covered by Title VI and subject to the legal standard embodied in the 14th Amendment.

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# COMPELLING GOVERNMENT INTEREST

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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 admissions 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.
- Remediating 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.

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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 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.

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# DIVERSITY

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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

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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 next 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 14.

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.

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*What the Courts Say*

**Lewis F. Powell**

*We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages **insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.***

*Harlow v. Fitzgerald, 1981*

*Qualified immunity is intended to allow officials to render intelligent decisions even though they may, upon further reflection, be deemed to have been erroneous. **It is not intended to allow individual officers to abdicate their decision-making obligations in blind reliance on state statutes.***

*Buddie Contracting v. Cuyahoga Community College, 1998 (held liable president, board of trustees and other community college officials for damages arising from an illegal racial preference)*

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# LEGAL LIABILITY, INSTITUTIONAL AND PERSONAL

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Many school officials are under the mistaken impression that the penalties for illegal racial discrimination are less onerous if the discrimination in question is designed to benefit minorities. In fact, the full array of legal remedies available to racial minorities is available to any plaintiff who is adjudicated to have suffered racial discrimination.

## *Personal Liability for School Officials*

Section 1983 of Title 42 of the U.S. Code permits individuals whose Constitutional rights have been violated to sue those who, acting under color of state law, violated those rights if their conduct violates “clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982). Section 1981 of Title 42 of the U.S. Code permits suits against individuals who violate the right of others to make and enforce contracts because of their race.

Individual trustees, administrators, and faculty members who violate the standards clearly stated in *Bakke* could be liable in their personal capacity whether under §1983 (state officials) or §1981 (either state officials or officials of private institutions.)

## *Private and Public Institutions Covered*

Every institution that receives federal funds is liable for suit under Title VI, 42 U.S.C. §§ 2000d, et seq. Title VI prohibits recipients of federal funds from discriminating on the basis of race. It is held generally to prohibit the same discriminatory conduct that is prohibited by the 14th Amendment of the Constitution.

## *Monetary and Punitive Damages*

Monetary damages could include lost wages, increased tuition expenses (incurred at another institution), and emotional suffering.

A school that knowingly operates a dual admissions system in violation of *Bakke* could find itself liable for punitive damages.

## *Attorneys' Fees and Costs*

A school that loses a civil rights lawsuit is liable for the attorneys' fees and costs of the injured plaintiff. In a case involving college admissions, such expenses could run several million dollars and are in addition to any fees a school or college must pay its own attorneys.

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### **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. Pena, 1995*

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# ***WHAT SCHOOLS CANNOT DO***

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**M**any 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 at 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.

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## *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)*

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## SET-ASIDES

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

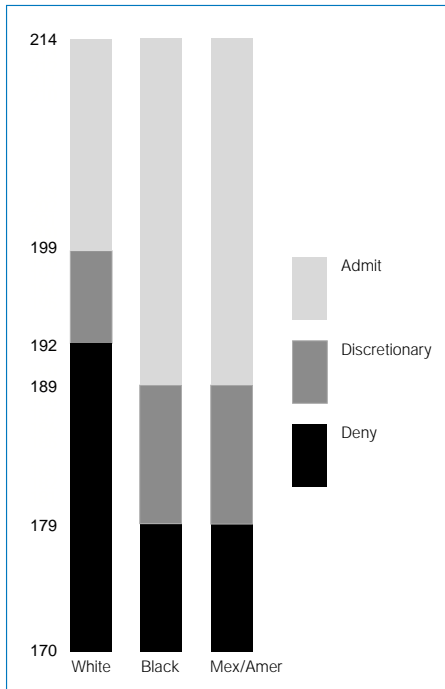
Schools may not take the race of applicants into account in order to achieve a particular racial mix of students. Calibrating admissions for this purpose amounts to “discrimination for its own sake” and is forbidden. *Bakke*, 438 U.S. at 307.

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 accepted solely because of their race, and other applicants are denied 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.

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# DUAL ADMISSIONS

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## *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.

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## *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)

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# DIVERSITY

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## *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 that 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

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### *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

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## RACE-TARGETED SUPPORT

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### *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.

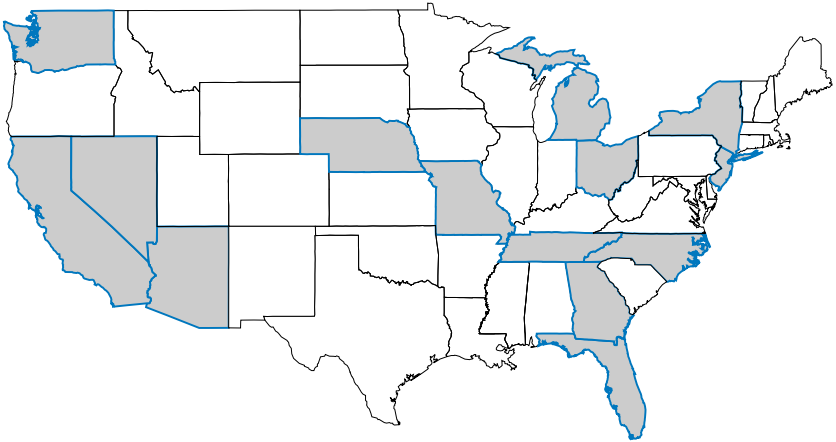
While a school may have a legitimate interest in ensuring a diverse student body, race-exclusive scholarships and academic support programs further only “simple ethnic diversity.” As the Supreme Court held in *Bakke*, “preferring members of any one group for no reason other than race or ethnic origin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

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### *Fact Sheet*



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Many states are moving to make racial preferences illegal in state programs, including state educational institutions. Generally, such legislation bans all racial preferences, including those that otherwise would be legal under the 14th Amendment. The above map shows states that have passed or are considering such legislation as of the 1997–1998 legislative session.

*Source: American Civil Rights Coalition*

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## RACE AS A “PLUS FACTOR”?

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Sometimes, college and university officials say that they take race into account only as a “plus factor” in individual cases and that this consideration of race is legal.

Trustees 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 earlier 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.

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*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

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# ***CONFRONTING RACE PREFERENCES***

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**E**very 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 the federal student loan program is covered even if it does not receive any other federal aid directly.

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

Many school officials 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.

Trustees 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. This section explains how to identify the most common and clearly illegal practices.

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*Worksheet*

**Suspect Admissions and Financial Aid Procedures**

- Does the school 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 school automatically classify applicants of certain racial groups as disadvantaged?
- Does the school admit students through a "conditional admit" or other special program reserved for students of certain racial groups?

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# HOW SCHOOLS USE RACE

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## *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.

The following are sources of information that trustees should examine:

- 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 your 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 may wish to review with school officials.

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*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 14.*

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# INTERPRETING DATA

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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. Trustees 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. Differences in average test scores do not necessarily mean that the only factor considered other than grades and test scores was race.

## *School 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.

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**William O. Douglas**

*A law school is not bound by any legal principle to admit students by mechanical criteria which are insensitive to the potential of such an applicant which may be realized in a more hospitable environment. It will be necessary under such an approach to put more effort into assessing each individual than is required when LSAT scores and undergraduate grades dominate the selection process. Interviews with the applicant and others who know him is a time-honored test...Such a program might be less convenient administratively than simply sorting students by race, but we have never held administrative convenience to justify racial discrimination.*

*De Funis v. Odegaard, 1974 (dissenting opinion)*

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# ***BEYOND RACIAL PREFERENCES***

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**M**any colleges and universities are re-evaluating their admissions policies in the wake of recent judicial rulings. That's because the continued use of racial preferences poses considerable legal risk to institutions and to individual officials. Moreover, members of the public and alumni increasingly are opposed to racial preferences, making it all the more difficult to defend their continued use.

Trustees who seek to eliminate illegal racial preferences inevitably are asked what effect this will have on minority recruitment. Generally, this question is posed by fellow-trustees and administrators who fear that the number of minority students will plummet in the absence of racially preferential admissions.

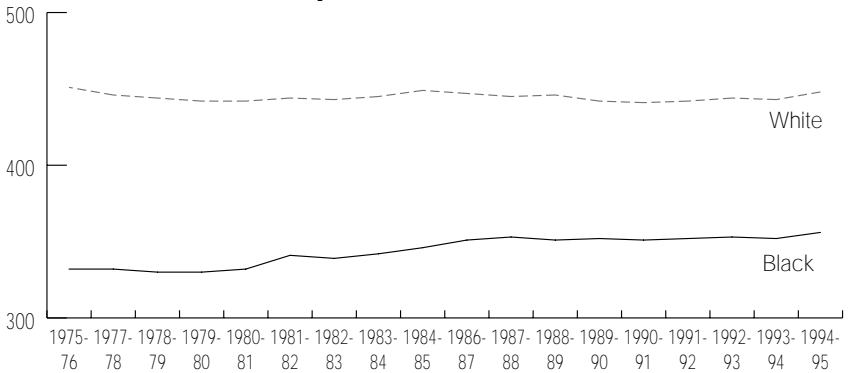
It is not at all clear that minority enrollment depends on the overt use of race in college admissions. Those who assume that minority enrollment will drop in the absence of racial preferences frequently assume that the only basis for admission *other* than race is standardized test scores. The experience in California and Texas – two states that have eliminated racial preferences – shows otherwise. Schools in those states have converted to race-blind admissions *and* have found ways to broaden admissions criteria.

But, as made clear in the preceding pages, a school that configures its admissions system in order to assure a particular racial mix of students invites legal scrutiny – and potential monetary liability – whether or not the system includes overt racial preferences. Efforts to reform college admissions must not include disguised racial preferences. Beyond that simple injunction, a school is free to adopt whatever admissions system it desires. Such a system can include many criteria beyond traditional “objective” criteria such as grades and test scores. Whatever the criteria, though, they must be applied to all applicants regardless of race.

The following pages provide an introduction to some of the issues that underlie any serious debate about the effect of the elimination of racial preferences on minority enrollment.

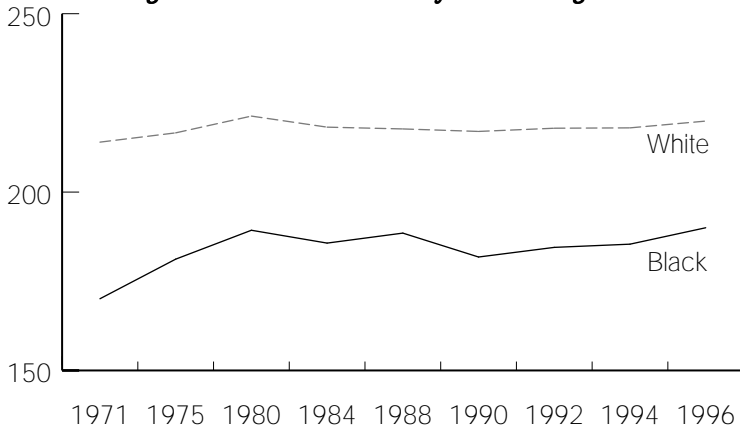
*Fact Sheet: Test Score Disparities*

**SAT (verbal) Score by Race 1975–1996**



Source: U.S. Department of Education *Digest of Education Statistics, 1997*.  
Scale ranges from 200 to 800.

**Average 9-Year-Old Proficiency in Reading 1971–1996**



Source: National Assessment of Educational Progress  
Scale ranges from 0 to 500

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# STANDARDIZED TEST SCORE DISPARITIES

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College and university admissions officials frequently claim that race is a “plus” factor used to make distinctions between otherwise equally well-qualified applicants. Of course, educators disagree about what constitutes a “well-qualified applicant.” Many schools rely on standardized tests to predict future academic performance. If such schools also take race into account in admissions, inevitably skin color becomes more than a “plus” factor. Frequently, such schools use race not to decide between candidates with similar test scores, but to give preferences to candidates with significantly lower test scores. This was the case at the University of Texas Law School and was one of the principal reasons its admissions system was found unconstitutional.

## *Good Predictors*

College officials sometimes justify different test-score standards on the grounds that test scores do not accurately predict future academic promise of minority students. However, as the charts on the opposite page illustrate, black-white test disparities are significant, begin in early grades, and continue through high school years. Test scores predict academic performance generally well for all racial groups; in fact, they somewhat overestimate black academic performance.

## *Economic Inequality*

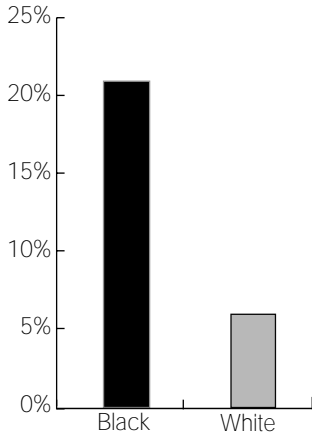
Other officials argue that the black-white gap is the result of economic inequality. In fact, however, significant racial disparities in test scores exist for students from all family income levels. Nor are test scores of low-income applicants any less predictive of future academic performance than test scores of middle- or high-income applicants. And in any event, racial preferences do not address economic inequality: They benefit both upper- and lower-income racial minorities but do not benefit low-income applicants from other racial groups.

Some schools argue they have a broader mission than educating only students with high test scores. According to this view, colleges and universities have a special duty to assist minorities to gain access to the middle and upper professional classes. While schools are free to conceive of their mission more broadly than simply rewarding academic achievement, neither the Constitution nor Title VI permits a school to have one mission for white students and a separate, “social” mission for minority students.

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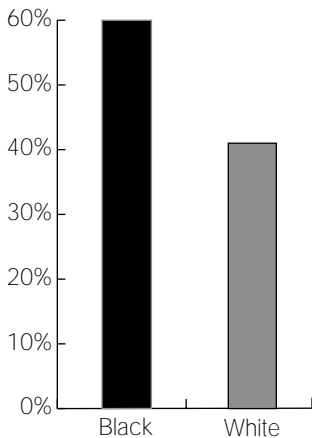
Fact Sheet: Drop-Out Rates

**Overall Drop-Out Rate by Race, 1989 Cohort (Selective Colleges)**



College and Beyond Data Base as reported in Bowen & Bok, *The Shape of the River* (Princeton: Princeton University Press, 1998)

**First-College Drop-Out Rates—NCAA Division I Schools 1989 Cohort**



National Collegiate Athletic Association, *NCAA Division I Graduation Rates Report, 1996*

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## DISPARITIES IN DROP-OUT RATES

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Aside from being illegal, making race determinative of college admissions undermines the academic prospects of minority students.

Minority students admitted on the basis of race must compete with other students selected on the basis of extremely competitive measures of academic ability. As a consequence of this double standard, minority students often don't do as well, on average, as other students. This disparity is manifested in very different graduation and professional examination passage rates.

### *Statistics Are Consistent*

Data assembled by the National Collegiate Athletic Association (NCAA) show that among Division I schools (consisting of 305 institutions that participate in higher levels of athletic competition), blacks drop out at about 1.5 times the rate of white students. Whereas 41 percent of all white matriculants who entered college in 1989 failed to graduate from the same school within six years, 60 percent of black matriculants failed to graduate in that time period.

Among more selective schools, the drop out rates decline for both races, but significantly, the disparity between races widens. According to data assembled by Derek Bok and William Bowen from 28 of the country's most selective institutions, 21 percent of black matriculants fail to graduate in six years, compared with 6 percent of white matriculants.

### *Supply and Demand*

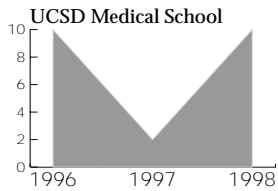
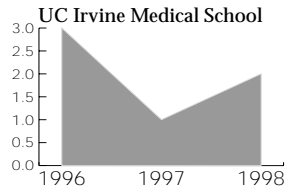
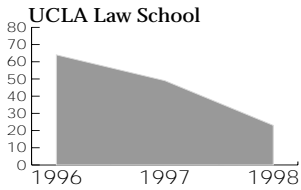
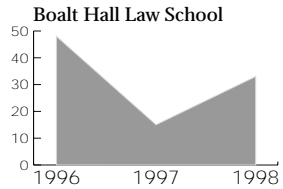
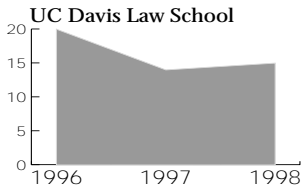
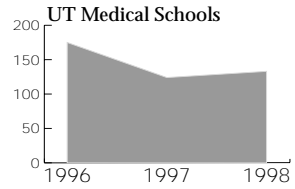
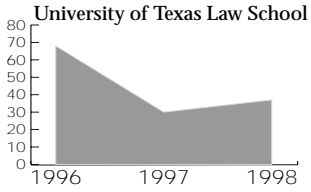
Bok and Bowen argue that the lower drop-out rates at more selective schools (for all races) support the widespread use of racial preferences intended to increase black enrollment at such schools. In fact, their data point to a more fundamental problem with granting admission on the basis of race.

Because more selective schools frequently employ racial preferences to admit minority students who wouldn't otherwise qualify for admission, less selective schools (such as the NCAA Division I institutions) must compete for less qualified minority students than would otherwise be available to them. As a result, the disparity in graduation rates widens at an accelerating rate at less selective schools.

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## Fact Sheet: Changes in Minority Enrollment

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## DISTRIBUTION OF MINORITY ENROLLMENT

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The state systems of higher education in California and Texas were the first to do away with racial preferences in admissions and financial aid. In 1997, the first year of race-blind admissions, minority enrollment dropped at six of the flagship schools in those states (out of 74 schools that eliminated racial preferences that year). These widely reported drops alarmed educators, who feared that the elimination of racial preferences would drastically reduce the number of minority students at selective schools.

Experience in the next year following, however, showed that minority enrollment at more selective schools was more dynamic than educators had assumed. As the chart on the opposite page shows, minority enrollment rebounded considerably in the second year at several of the top schools where it first had dropped.

The preliminary experience with race-blind admissions in California and Texas suggests that minority enrollment is responsive to a number of factors other than racially preferential admissions policies. Some of the race-blind techniques used at California and Texas schools are discussed in the following pages.

Researchers Stephan and Abigail Thernstrom speculate that California and Texas may see an increase in the minority graduation rate that, in coming years, may surpass declines in minority enrollment at flagship schools. To the extent that minority students are admitted on the basis of academic ability rather than skin color, they will attend schools where their abilities more closely match those of their classmates. All else being equal, this fact should help eliminate racial disparities in graduation rates.

Whatever shifts there may be in minority enrollment from school to school, one thing is clear. Future enrollment patterns in California and Texas will reflect choices of, and judgments about, individual applicants without regard to race. Such a system is superior to one based on government-sponsored racial preferences.

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### *Some Examples: Beyond Test Scores*

The following strategies are being implemented by California and Texas schools to recruit students of all races.

- Provide academic support to high schools serving disadvantaged students
- Implement more aggressive outreach efforts to stimulate applications
- Broaden admission criteria
- Increase weight given to grades
- Discontinue weighting of grades according to institution attended
- Increase weight given to applicant essays
- Increase number of applicants given full-file review
- Increase number of applicants interviewed
- Speed up admissions process
- Aggressively recruit admitted applicants

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## DE-EMPHASIZING TEST SCORES

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Schools in California, Texas, Louisiana, and Mississippi no longer can use racial preferences to offset black-white disparities in standardized test scores. Some schools in these states are attempting to achieve the same result through a variety of other race-neutral admissions policies.

Trustees need to be cautious about efforts to gerrymander apparently race-neutral admissions procedures in order to assure a specified level of minority enrollment. Any policy formulated in order to favor a particular racial group is subject to what the courts term “strict scrutiny.” Justice Powell’s opinion in *Bakke* makes it unlikely that ensuring a particular racial mix of students would qualify as a compelling state interest sufficient to pass muster under the Court’s “strict scrutiny” standard of review.

However, the law does not require that a school give any particular weight to test scores – and race-blind admissions does not mean a school is limited to grades and test scores as the only criteria of admission. If a school determines that it can get better admissions results by placing greater weight on factors other than test scores, it is free to do so, so long as it applies the same criteria to all applicants regardless of race.

Many schools in California and Texas are reducing the weight given to test scores by increasing the weight given to grades, thereby increasing the chances for admission for low-test-scoring applicants of all races who have demonstrated academic success. Other schools are taking a closer and more systematic look at personal characteristics that may be evidence of an applicant’s academic promise.

Such characteristics include demonstrated ability to excel in spite of economic, personal, family, or educational hardships; leadership; maturity; work experience; etc. While consideration of such factors does not ensure a particular racial mix of students (legally, that could not be its purpose), it makes it more likely to admit low-scoring but academically promising students of all races.

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