TOWARD CONSTITUTIONAL MINORITY RECRUITMENT AND RETENTION PROGRAMS: A NARROWLY TAILORED APPROACH

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In the renowned pair of higher education cases decided in 2003, Gratz v. Bollinger *and* Grutter v. Bollinger*, the Supreme Court affirmed the value of diversity as a compelling state interest in the higher education context, while placing careful limits on the means through which a university may utilize admissions to achieve diversity within its student body. As the challenge of creating a narrowly tailored diversity plan has grown, universities have devised a variety of ways to attract, admit, and retain a racially diverse student body, recognizing the unique challenges and frustrations that minority students may face in higher education. Schools such as the City University of New York, the University of Maryland, and the Massachusetts Institute of Technology have utilized scholarships, targeted classes and academic programs during the summer and school year, mentoring, and other student support programs in an effort to raise the low numbers of minority students enrolling in, and graduating from, their institutions. This Note applies the Supreme Court's affirmative action jurisprudence to such programs, and proposes a framework for analyzing the programs that will allow them to meet the high standards of equal protection analysis. The Note concludes that, though many colleges have ended their programs or opened them to students of all races, such drastic measures are unwarranted.*

Introduction

In 2004, officials at the City University of New York (CUNY) discovered that the proportion of minority students enrolled in the University's several undergraduate schools had declined precipitously since the school's admissions standards were raised in 1999.[1] Additionally, their figures showed that the number of African American women attending their institutions far outstripped the number of African American men who were enrolled.[2] In response, the CUNY Board of Trustees created the Black Male Initiative, a program that

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[1] Karen W. Arenson, *CUNY Reports Fewer Blacks at Top Schools*, N.Y. Times, Aug. 10, 2006, at B1.

[2] *Id.*

would identify and implement across CUNY campuses practices that have proven effective at recruiting and retaining African American men.[3]

Finding that African American men were much less likely than other students to attend the school, to return for a second year of study, or to graduate within six years,[4] the Initiative concluded that CUNY campuses should improve recruitment and retention of these students by endeavoring to hire more African American male faculty and staff, establishing mentoring and advocacy programs, and offering career and financial workshops.[5] CUNY was determined to "appeal to black males by creating holistic programs geared toward academic and personal development."[6]

In 2006, an anti–affirmative action group filed a complaint with the Office for Civil Rights of the United States Department of Education (OCR), alleging that the program violated Title VI of the Civil Rights Act of 1964[7] and, by extension, the Equal Protection Clause of the Constitution. OCR opened an investigation into the Initiative on all sixteen CUNY campuses.[8] Though OCR's investigation had not yet reached any conclusions, CUNY reacted quickly, assuring its opponents that any student could be admitted to the program:[9] CUNY announced that the programs of the Black Male Initiative were open to all "academically eligible" CUNY students, without regard to their race or gender.[10] Yet the express purpose of the program was to target a specific, struggling population of students and to improve their rates of matriculation and graduation from institutions of higher education. Thus, CUNY's fear of litigation arising out of its recruitment and retention programs ultimately undermined the core principles of the program.

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3 TASK FORCE ON THE CITY UNIV. OF N.Y. BLACK MALE INITIATIVE, FINAL REPORT TO THE CHANCELLOR 1 (2005), *available at* http://web.cuny.edu/academics/oaa/initiatives/bmi/task-force-report.html (follow "Download Complete File" hyperlink) [hereinafter TASK FORCE REPORT].

4 *Id.* at 9.

5 *See id.* at 13–14 (describing hiring and mentoring efforts); *see also* Jamal Watson, *CUNY Retention Program for Black Males Under Fire; New York Group Says Initiative Violates Civil Rights Act of 1964*, DIVERSE ISSUES IN HIGHER EDUC., June 2006, at 7, 7 (describing workshops).

6 TASK FORCE REPORT, *supra* note 3, app. B, at 10.

7 42 U.S.C. §§ 2000d–2000d-7 (2006); Watson, *supra* note 5, at 7.

8 Yoav Gonen, *CUNY "Black Men" Furor*, N.Y. POST, Feb. 5, 2008, at 23. See *infra* note 124 and accompanying text for further discussion of the role of the Office for Civil Rights (OCR).

9 *Id.*

10 Joseph Goldstein, *CUNY's Black Male Initiative Is Probed*, N.Y. SUN, Feb. 5, 2008, at 2.

The story of CUNY's Black Male Initiative mirrors a larger trend that has developed following the Supreme Court's 2003 affirmative action decisions, *Grutter v. Bollinger*[11] and *Gratz v. Bollinger*.[12] Although those decisions explicitly affirmed the constitutionality of the use of race in admissions,[13] they said nothing about its use in programs designed to recruit and retain minority students. Such programs are a crucial element in university efforts to improve racial diversity; minority students,[14] especially African American and Latino students, face unique challenges in learning about, gaining access to, and completing higher education.[15] The limits placed by Supreme Court decisions and state referenda on universities' ability to boost the level of enrollment of these students by using race in admissions compound the problem: Since they are no longer able to target racial minorities through admissions programs, the universities' ability to reach out to students who would not otherwise apply and to help them overcome the substantial obstacles that lower their graduation rates is especially essential to the cultivation of diversity.

The importance of diversity in higher education cannot be overstated: The Supreme Court has recognized diversity as one of the extremely limited number of compelling state interests that may justify race-based classifications.[16] Thus, the loss of programs that have been effective at improving racial diversity in higher education,[17] such

[11] 539 U.S. 306 (2003).

[12] 539 U.S. 244 (2003).

[13] *Grutter*, 539 U.S. at 327–33; *Gratz*, 539 U.S. at 268.

[14] The term "minority" will be used here to refer to African American and Latino students because those students are historically and currently underrepresented in higher education, and because they are typically the groups targeted by minority-focused programming. But using the term "minority" when dealing with affirmative action programs can be misleading, since Asian Americans are a minority that has generally been well represented in higher education and thus is assumed not to benefit from affirmative action programs. *See* Adrian Liu, *Affirmative Action & Negative Action: How Jian Li's Case Can Benefit Asian Americans*, 13 MICH. J. RACE & L. 391, 411 (2008) (noting argument that "[i]f Asian Americans are already being admitted in substantial numbers, the diversity rationale actually works against them and limits their admission" but concluding that any such reduction in admission of Asian Americans would be in favor of admitting more white students); *see also* Janine Young Kim, *Are Asians Black?: The Asian-American Civil Rights Agenda and the Contemporary Significance of the Black/White Paradigm*, 108 YALE L.J. 2385, 2408 (1999) (describing popular belief that Asian Americans will be harmed by affirmative action, but noting that "[t]he real risk to Asian Americans is that they will be squeezed out to provide proportionate representation to whites, not due to the marginal impact of setting aside a few spaces for African Americans" (quoting Frank H. Wu, *Neither Black nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 226 (1995))). However, a deeper look at this issue is beyond the scope of this Note.

[15] *See infra* Part I (describing minority outreach, financial aid, and retention programs).

[16] *Grutter*, 539 U.S. at 328–33; *see also infra* note 90.

[17] *See infra* Part I (describing how outreach, financial aid, and retention programs are used to increase minority representation in higher education).

as CUNY's Black Male Initiative, is an enormous problem both for institutions of higher education that would like to increase their diversity and for the minority students who benefit from such programs. However, without explicit guidance from the Supreme Court, colleges have reacted conservatively to pressure from anti–affirmative action groups, choosing to end or change their programs rather than push the constitutional boundaries of what may be done to improve the recruitment and retention of minority students.[18]

This Note seeks to fill a gap in the literature[19] by arguing that colleges may, consistent with the Constitution, maintain race-exclusive and race-targeted[20] recruitment and retention programs. The Note proceeds in three Parts. Part I outlines the need for recruitment and retention programs and describes the main types of programs currently being implemented by institutions of higher education. Part II analyzes the existing equal protection jurisprudence and describes the ways in which colleges are currently interpreting that jurisprudence to determine its impact on their programs. Finally, Part III evaluates the programs under the strict scrutiny analysis developed by the Supreme Court in *Gratz* and *Grutter*, first arguing that they are sufficiently separate from the admissions context to merit a different narrow tailoring

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[18] Colleges have opened up minority-targeted programs to white students in response to letters from affirmative action opponents. Furthermore, these opponents have filed complaint letters with OCR when schools do not respond by opening their programs to all races and ethnicities. Peter Schmidt, *From "Minority" to "Diversity*,*"* CHRON. HIGHER EDUC. (Wash., D.C.), Feb. 3, 2006, at A.24.

[19] The literature that has dealt with this issue generally has covered race-exclusive financial aid programs and focused on limited alterations that might shield such programs from legal challenge. For a definition of "race-exclusive" see *infra* note 20. *See e.g.*, Maurice R. Dyson, *Towards an Establishment Clause Theory of Race-Based Allocation: Administering Race-Conscious Financial Aid After* Grutter *and* Zelman, 14 S. CAL. INTERDISC. L.J. 237, 266–70 (2005) (advocating race-exclusive, privately funded scholarships by analogy to vouchers in Establishment Clause context); B. Andrew Bednark, Note, *Preferential Treatment: The Varying Constitutionality of Private Scholarship Preferences at Public Universities*, 85 MINN. L. REV. 1391, 1394 (2001) (proposing definition of state action that would facilitate privately funded, race-based scholarships); Andrija Samardzich, Note, *Protecting Race-Exclusive Scholarships from Extinction with an Alternative Compelling State Interest*, 81 IND. L.J. 1121, 1129–30 (2006) (noting that race-exclusive scholarships potentially could pass strict scrutiny and proposing that alternative compelling state interest be used to justify such scholarships); Amy Weir, Note, *Should Higher Education Race-Based Financial Aid Be Distinguished from Race-Based Admissions?*, 42 B.C. L. REV. 967, 985–87 (2001) (advocating use of privately funded scholarships). This Note takes a comparatively broad approach to all recruitment and retention programs and proposes a framework by which all such programs may be evaluated.

[20] Race-exclusive programs are open only to selected candidates of a particular race; race-conscious programs are open to students of all races, with race being one of several factors in allowing participation. The term race-targeted also refers to race-conscious programs, but generally indicates that the programs are explicitly tailored to meet the needs of minority students, even though they are open to nonminority students.

framework and, in the alternative, outlining ways in which schools may narrowly tailor their programs to pass strict scrutiny review.

I
Student Recruitment and Retention Programs

Colleges typically engage in a three-stage process in order to ensure that their schools benefit from a "critical mass" of minority students:[21] recruiting, admissions, and retention. Admissions has been the subject of much controversy and has been dealt with extensively by the Supreme Court.[22] Often overlooked, however, are the two other stages: the antecedent stage of recruiting minority students to submit an application to an institution, and the post-application stage of finding ways to ensure that these students enroll and have every opportunity to be academically and socially successful. These stages are in many ways more important than admissions in their ability to address the substantial social and academic challenges many minority students face in higher education. This Part will first consider the challenges of minority recruitment and briefly survey the types of recruitment programs that are in use. It will then consider the programs in place to encourage the academic success, continuing motivation, and successful graduation of minority students, all under the heading of retention.

A. Programs for Minority Student Recruitment

Racial and ethnic diversity in higher education has been increasing in recent years, due in large part to the use of recruitment programs. Over the past ten years, the number of African American college students has increased 145% , and the number of Latino college students has increased 170%.[23] Even schools located in states where affirmative action is impossible (for example, where state legislation bans it) have managed to push these numbers up, largely by

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[21] The Supreme Court first identified the term "critical mass" in *Grutter*, 539 U.S. at 318. It there defined a "critical mass" of minority students as "a number that encourages underrepresented minority students to participate in the classroom and not feel isolated," noting that "when a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no 'minority viewpoint' but rather a variety of viewpoints among minority students." *Id.* at 318, 319–20. Ultimately, the Court decided that designing programs and making efforts to achieve a critical mass of minority students was constitutionally permissible, in contrast to plans that attempted to achieve some specified percentage of minority students in each entering class. *Id.* at 329–30.

[22] *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244 (2003); *Grutter*, 539 U.S. 306.

[23] Eric LaRose, *Colleges Here Mirror National Trend of Increase in Minority Students*, Sheboygan Press (Wis.), July 26, 2007, at 1A.

increasing their focus on recruitment of minority students.[24] Still, despite the recent increased enrollment, minority students attend college at much lower rates than their nonminority peers. One study found that African American and Latino students each constituted only six percent of the freshman class at selective four-year colleges, despite African American and Latino eighteen-year-olds constituting fifteen and thirteen percent, respectively, of the total population of eighteen-year-olds in the United States.[25] Furthermore, as more and more states and schools limit the use of race in admissions, recruitment will prove essential to ensuring that the upward swing in the diversity of student bodies continues and that institutions of higher education consider sufficient numbers of minorities for admission.[26]

Frequently, recruitment programs are aimed at students whose educational experiences through high school were overwhelmingly negative. Many minority students attend schools where there are extremely poor physical conditions, inadequate assistance from teachers and counselors, and limited expectations that students would continue on to higher education.[27] Additionally, high school students in minority communities find the idea of college intimidating; their attendance at highly segregated, inner-city schools may make predominantly white institutions of higher education seem daunting

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[24] *See* Lydia Lum, *A Welcome Increase: Outreach and Diversity Efforts Appear To Be Paying Off as Some Colleges and Universities Experience Record Minority Student Enrollments This Fall*, BLACK ISSUES IN HIGHER EDUC., Oct. 2003, at 36, 36 (noting that University of Georgia has increased minority enrollment, despite affirmative action ban, through improved recruitment efforts). For an example of a way to focus on minority outreach, see David Leonhardt, *The New Affirmative Action*, N.Y. TIMES, Sept. 30, 2007, (Magazine), at 76, 80 (describing phone bank set up by alumni and students to reach out to African American high school seniors).

[25] Anthony P. Carnevale & Stephen J. Rose, *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions*, *in* AMERICA'S UNTAPPED RESOURCE: LOW-INCOME STUDENTS IN HIGHER EDUCATION 101, 106 (Richard D. Kahlenberg ed., 2004); *see also* Hanna Ayalon et al., *Diversification and Inequality in Higher Education: A Comparison of Israel and the United States*, 81 SOC. EDUC. 211, 224 (2008) (noting that African American and Native American students were less likely than non-Latino white students to attend college, though Latino students were no less likely to attend college than white students).

[26] Once admissions is removed as an available prong of the three-stage approach, *see supra* text accompanying note 21, minority enrollment likely will decrease unless the other prongs, recruitment and retention, work to compensate for the loss of the admissions prong. *See infra* note 38 and accompanying text; *see also, e.g.*, Leonhardt, *supra* note 24, at 77 (describing how "[t]he number of black students at both Berkeley and U.C.L.A. plummeted" after California ended use of affirmative action in admissions programs at public institutions of higher education). For an example of one school's approach to this issue, see *infra* text accompanying notes 39–42.

[27] *See* Laura Walter Perna, *Differences in the Decision To Attend College Among African Americans, Hispanics, and Whites*, 71 J. HIGHER EDUC. 117, 119–20 (2000) (detailing interviews with African American high school students who indicated they had been negatively influenced by these educational experiences).

or unattractive.[28] The most effective recruitment programs will aim to address these factors and may need to begin in early grades.[29]

1. Outreach Programs

Outreach programs are designed to address academic, social, and psychological factors that contribute to student preparation for and interest in higher education.[30] Such programs generally consist of visits, phone calls, and other contacts by recruiters, administrators, and students[31] that are targeted toward historically underrepresented minorities. Many also target low-income students and first-generation college students.[32] Thus, most outreach programs are race-targeted but not race-exclusive: In many cases, the programs are directed toward particular schools or school districts, reaching all of the populations that are represented in that community.[33]

Schools also engage in outreach efforts on campus, enlisting minority students and student groups to be actively involved in

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[28] *See* Kassie Freeman, *Increasing African Americans' Participation in Higher Education: African American High-School Students' Perspectives*, 68 J. HIGHER EDUC. 523, 538 (1997) (detailing "intimidation factor" affecting African American students' enrollment in higher education).

[29] When asked for ways that African American enrollment in colleges or universities could be increased, several African American high school students responded that students need to be made aware of the possibility of higher education prior to high school. *Id.* at 543. Many also suggested providing African American mentors and role models who have completed college. *Id.*

[30] Laura Walter Perna, *Precollege Outreach Programs: Characteristics of Programs Serving Historically Underrepresented Groups of Students*, 43 J.C. STUDENT DEV. 64, 64–65 (2002) (arguing that outreach programs, by attending to "steps required to be academically, socially, and psychologically prepared" for college, are alternative method of increasing minority enrollment).

[31] *See, e.g.*, Leonhardt, *supra* note 24, at 80 (describing use of phone bank and school visits by students and alumni at U.C.L.A.); Lum, *supra* note 24, at 36 (describing programs at University of Georgia in which "deans, vice presidents and senior faculty personally called high-school seniors and their families" and programs at New Mexico State University in which "recruiters travel to high schools, community events and churches" and "take students with ties to those geographical areas"). Colleges or other groups may also organize college fairs. Perna, *supra* note 30, at 70. Finally, some programs also will work to improve elementary and high school students' academic skills, typically by providing academic instruction. However, such programs are relatively rare. *Id.* at 70, 71 tbl.1.

[32] Perna, *supra* note 30, at 68. These programs target low-income or first-generation students *in addition* to targeting racial minorities, and thus are race-targeted but not race-exclusive. Programs targeting students based exclusively on their income or first-generation status are race-neutral and thus not subject to the analysis in this Note.

[33] *Id.* at 69 tbl.1, 70. Arguably, these programs are race-neutral; this determination may turn on how the targeted communities are identified for recruitment efforts. Categorizing the programs as race-neutral would certainly help schools to escape strict scrutiny, but this Note takes the position that these programs are acceptable even when outreach targets are selected expressly because of their high concentration of racial minorities.

recruiting events.[34] A common recruiting tool, especially for elite institutions, is on-campus recruiting events dedicated exclusively to minority students.[35] Such events may include weekends on campus, other campus visits and tours, and meetings with minority faculty and students.[36] Programs such as these are designed to make college accessible to minority students and to demonstrate that there are already minority students succeeding on campus.[37]

These programs have been embraced by many schools, notably those in states where utilizing race in admissions decisions has been foreclosed.[38] For example, the University of Georgia does not use race as a factor in admissions or in awarding scholarships out of concern that such efforts will not meet Supreme Court scrutiny.[39] To ensure that their minority enrollment remains high even without such use, the school relies on outreach programs, sending recruiters to African American communities across the state and then asking deans, vice presidents, and senior faculty members to reach out personally to prospective minority students who expressed interest in the school during those recruiting visits.[40] The school's senior associate director of admissions emphasizes that "[t]here's no better recruiting tool than the enthusiasm of minority students who are engaging in the overall life of the university,"[41] and, pursuant to this belief, the school also hosts on-campus events emphasizing diversity. The result is that

[34] *See* Leonhardt, *supra* note 24, at 80–82 (describing extensive programming for prospective African American students at U.C.L.A., including programs run by African Student Union and Black Alumni Association); Lum, *supra* note 24, at 36 (describing on-campus recruiting events at University of Georgia); Ilan Stavans, *How Elite Universities Fail Latino Students*, CHRON. HIGHER EDUC. (Wash., D.C.), Jan. 20, 2006, at B.20 (noting "on and off" campus events for "prospective 'students of color'" at Amherst College).

[35] *See* Stavans, *supra* note 34 (describing author's experience at "countless events . . . where admissions officers entertain prospective 'students of color'").

[36] *See* Perna, *supra* note 30, at 70 ("Among the most commonly offered services that may facilitate the search phase of the college enrollment process are campus visits and tours, meetings with college faculty and college students, and college fairs . . . .").

[37] *See* Tiffany Webber, *Schools Eye Minority Recruitment Programs*, DUKE CHRON. (Durham, N.C.), Mar. 23, 2006, *available at* http://www.dukechronicle.com/media/paper884/sections/20060323News.html (follow "Students eye minority recruitment programs" hyperlink) (describing justifications for minority recruitment offered by officials at University of North Carolina, including "generat[ing] awareness about the accessibility of the university to prospective students from minority, disadvantaged and underprivileged backgrounds").

[38] *See* Lum, *supra* note 24, at 37 (describing expanded minority recruitment by schools in Texas and California).

[39] *Id.* at 36.

[40] *Id.*

[41] *Id.* (quoting J. Robert Spatig, Senior Associate Director of Admissions, University of Georgia).

the University has continued to increase minority enrollment despite its decision not to consider race in admissions decisions.[42]

2. *Financial Aid Programs*

Financial aid packages are fundamental to the recruiting process.[43] Financial aid is generally an inducement to students to attend a school and has a powerful effect on their decision regarding which school to attend.[44] Financial aid has been shown to be a substantial factor in encouraging college enrollment for all students, but some data indicate that financial aid has a greater effect on the decision by African American students to attend college than that of their white counterparts,[45] even taking into account differences in socioeconomic status.[46]

As a result, many schools have developed scholarships and other financial aid packages geared explicitly toward minority students. As of 2003, there were more schools with race-conscious scholarship programs than schools that considered race in admissions.[47] There are two main types of race-conscious financial awards. First, schools may take race into account in deciding whether to award need-based financial aid—including grants, scholarships, loans, and work-study pay-

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[42] *Id.*

[43] Financial aid also plays a big role in encouraging the retention of minority students, but it will be treated as a recruiting tool for the purposes of this Note. *See generally* Shouping Hu & Edward P. St. John, *Student Persistence in a Public Higher Education System: Understanding Racial and Ethnic Differences*, 72 J. HIGHER EDUC. 265 (2001) (examining impact of policy shifts in financial aid in public higher education and concluding that maintenance of adequate aid is crucial to minority retention).

[44] *See* Thomas J. Graca, *Diversity-Conscious Financial Aid After* Gratz *and* Grutter, 34 J.L. & EDUC. 519, 522–24 (2005) (explaining why schools offer scholarships). Research also has indicated that African American students express uncertainty about affording the short-term costs of higher education, including the price of attendance, foregone earnings, and leisure time, and about whether the long-term benefits of higher education would outweigh these costs. Perna, *supra* note 27, at 120.

[45] Perna, *supra* note 27, at 121.

[46] *Id.* at 124. However, other data have suggested that receiving financial aid in the form of loans may depress the likelihood that African American students will enroll in college, and that receiving financial aid in the form of grants has no impact on the decision to attend college for any group. *Id.* at 133, 137. Indeed, there is often reluctance to finance education through loans, especially among "low-income, immigrant, or first-generation college" students. Francisco Vara-Orta, *Most Latino Students Spurn College Loans*, L.A. TIMES, Jan. 31, 2007, at A1. Overall, however, "[f]inancial aid is often the key to encouraging college attendance among low-income students or those who are the first in their families to consider college. And the amount of aid that institutions offer often determines where highly recruited minority students enroll." Sara Hebel, *Court Rulings May Open the Door for More Use of Race in Student Aid*, CHRON. HIGHER EDUC. (Wash., D.C.), July 4, 2003, at S.6.

[47] Hebel, *supra* note 46.

ments—or in calculating how much or what type of need-based aid to award once the decision to award has been made.[48]

Second and more commonly, schools can take race or ethnicity into account in awarding merit-based scholarships, which are designed to reward students "based on certain characteristics or aspects of their background that are important to the awarding institution."[49] Such scholarships are either race-exclusive or race-conscious.[50] For example, the University of Wisconsin-Madison has several different race-exclusive scholarships aimed at fostering diversity, including two directed at "historically underrepresented students of color" and three sponsored by alumni (but administered through the Admissions Office) that are directed at African American, American Indian, and Latino students, respectively.[51] In contrast, the University of North Carolina-Chapel Hill offers the Pogue Scholarship, "established to attract the most outstanding students to the University, with special emphasis on minority applicants."[52]

B. Programs for Minority Student Retention

Though the number of minority students attending institutions of higher education has steadily increased in recent decades,[53] minority students receive lower grades and are more likely than white students to drop out of college prior to graduation.[54] In one study by the National Center for Education Statistics, the average gap between graduation rates of African American and white students was eighteen percent, while the average gap between Latino and white stu-

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48 *See* ARTHUR L. COLEMAN ET AL., COLL. BD., FEDERAL LAW AND FINANCIAL AID: A FRAMEWORK FOR EVALUATING DIVERSITY-RELATED PROGRAMS 27–28 (2005) (describing forms that need-based aid can take and ways in which race can be factor in determining aid awards).

49 *Id.* at 28.

50 *See id.* (describing scholarships "based upon a student's race or ethnicity in whole . . . or in part").

51 University of Wisconsin-Madison, Scholarships Fostering Diversity, http://www.finaid.wisc.edu/index.php?module=articles&catid=294&ptid=10 (last visited Mar. 26, 2009).

52 The University of North Carolina at Chapel Hill, Pogue Scholarships, http://www.studentaid.unc.edu/pdf/misc/pogueapp.pdf (last visited Mar. 26, 2009).

53 Mary J. Fischer, *Settling into Campus Life: Differences by Race/Ethnicity in College Involvement and Outcomes*, 78 J. HIGHER EDUC. 125, 125 (2007) ("The enrollment of minority students in higher education has increased over the past 30 years, in both absolute terms and as a proportion of the student body.").

54 *Id.* at 128; *see also* Lindsay Renick Mayer, *Legislation Aims to Boost Minorities on Campus*, FORT COLLINS COLORADOAN, Feb. 3, 2006, at A1 (noting that minority and low-income students at Colorado State University have lower retention rates).

dents was twelve percent.[55] Though these disparities are partially the result of differences in family characteristics, such as financial means and quality of academic preparation, the college experience itself also plays a crucial role in determining a student's educational success.[56] A substantial body of research suggests that "[e]xposure to a climate of prejudice and discrimination in the classroom and on campus" may be the main factor impacting rates of minority attrition.[57] Other factors that may contribute include "stereotype threat"[58] and above-average levels of alienation among minority students.[59] Research has further shown that these negatives can be counteracted by factors such as adequate preparation, strong academic experiences and performance, and parental encouragement.[60]

In order to address these inordinate challenges, many colleges have created programs designed to help minority students overcome any gaps in academic preparation and adjust to the racial composition and culture of the school community.[61] Retention programs are most effective when coordinated, publicized, and evaluated by a single

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[55] LAURA HORN & C. DENNIS CARROLL, NAT'L CTR. FOR EDUC. STATISTICS, PLACING COLLEGE GRADUATION RATES IN CONTEXT: HOW 4-YEAR COLLEGE GRADUATION RATES VARY WITH SELECTIVITY AND THE SIZE OF LOW-INCOME ENROLLMENT 28 (2006).

[56] Fischer, *supra* note 53, at 128. For an informative overview of the scholarly literature documenting reasons for student attrition and factors affecting student retention, see Vincent Tinto, *Research and Practice of Student Retention: What Next?*, 8 J.C. STUDENT RETENTION 1, 2–5 (2006–2007).

[57] Alberto F. Cabrera et al., *Campus Racial Climate and the Adjustment of Students to College: A Comparison Between White Students and African-American Students*, 70 J. HIGHER EDUC. 134, 135 (1999).

[58] "Stereotype threat" is the idea that "whenever African American students perform an explicitly scholastic or intellectual task, they face the threat of confirming or being judged by a negative societal stereotype—a suspicion—about their group's intellectual ability and competence" and that this threat "may interfere with the intellectual functioning of these students, particularly during standardized tests." Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797, 797 (1995).

[59] Fischer, *supra* note 53, at 128.

[60] Cabrera et al., *supra* note 57, at 153.

[61] *See* Michele N-K Collison, *The New Complexion: Attacks Against Race-Sensitive Admission Policies Are Prompting Many Campuses To Refocus Retention Programs that Once Targeted Minority Students*, BLACK ISSUES IN HIGHER EDUC., Feb. 1999, at 34, 36 ("Retention programs for minority students were created during the late '60s and '70s in response to demands by Black students and professors that universities improve the graduation rates of minority students on traditionally White campuses."). It is worth noting that many of these programs may also be effective in recruiting minority students to a particular school. *See* Sandy Baum & Michael McPherson, *Introduction* to COLL. BD., THE EFFECTIVENESS OF STUDENT AID POLICIES: WHAT THE RESEARCH TELLS US 1, 2 (Sandy Baum et al. eds., 2008) ("There is considerable evidence that transparent, easy-to-predict grants do increase participation in higher education."). Nonetheless, their purpose is to help students stay on track at school, so they are discussed in this Section as opposed to the prior one.

office or administrator.[62] Thus, university-wide efforts to improve retention utilizing a variety of coordinated strategies are common.[63]

The retention programs themselves may be devoted to academic support—including summer academic "bridge" classes,[64] internship and job programs, tutoring, and academic skills development—or to social support—including mentoring programs, student groups, peer counseling, race-based housing, multicultural centers, and student activities.[65] Many programs combine elements of social and academic support. For example, the Program for Educational Enrichment and Retention at Clemson University has had enormous success in improving the retention rates of African American and Latino engineering undergraduates through the combined use of an "innovative proactive mentoring program," a mathematics workshop, a specialized study hall, and academic and personal counseling.[66] Another central issue in the retention of minority students is the recruitment of minority faculty.[67] Minority students benefit from the presence of minority faculty members, who may be able to act as role models or

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62 Carl E. Parker, *Making Retention Work*, BLACK ISSUES IN HIGHER EDUC., Feb. 1997, at 120, 120; *see also* Marvel Lang, *Student Retention in Higher Education: Some Conceptual and Programmatic Perspectives*, 3 J.C. STUDENT RETENTION 217, 219–20 (2001) (describing research indicating that retention rates improved when responsibility for retention was assigned to specific person, when entire institution was involved in improving retention, when services were "comprehensive," and when factors contributing to attrition were studied).

63 *See, e.g.*, Andrew A. Sorensen, *Opening the Schoolhouse Door*, BLACK ISSUES IN HIGHER EDUC., Jan. 2002, at 80, 80 (describing coordinated effort by University of Alabama); The City University of New York, Black Male Initiative: History and Purpose, http://web.cuny.edu/academics/oaa/initiatives/bmi/history.html (last visited Mar. 26, 2009) (describing coordinated effort by CUNY to improve recruitment and retention of African American and Caribbean men).

64 Bridge programs take place during the summer before a student enrolls in a college or university and are designed to help the student bridge the gap between his or her academic experiences in high school and the new challenges he or she will face in higher education. *See, e.g.*, The Ohio State University, (PREFACE) Summer Bridge Program, http://mep.eng.ohio-state.edu/welcome/summer_bridge.html (last visited Mar. 26, 2009) (describing summer bridge program for minority engineering students).

65 *See* ARTHUR L. COLEMAN ET AL., COLL. BD., FEDERAL LAW AND RECRUITMENT, OUTREACH, AND RETENTION: A FRAMEWORK FOR EVALUATING DIVERSITY-RELATED PROGRAMS 36 (2005) (categorizing retention programs under "Academic Support," "Social Support and Acclimation," "Mentoring," "Student Activities," and "Other Activities"); Lang, *supra* note 62, at 225 (describing categories of retention programs, including "Bridge programs," "Mentoring programs," "Development education programs," "Counseling and academic skills improvement," and "Special services"); *see also* Collison, *supra* note 61, at 37 (describing university use of multicultural centers and race-based housing).

66 Susan Polowczuk, Clemson University, *Clemson Minority Retention Program Celebrates 20 Years of Success*, Oct. 16, 2007, http://www.clemson.edu/newsroom/articles/2007/october/peer20th.php5.

67 *See* Sorensen, *supra* note 63, at 80 (noting that "recruitment and retention of minority students and faculty [have] a synergistic relationship," that "recruitment of

mentors, or simply to serve as an example of a minority within the school's leadership.[68]

Often, such programs are open to and include a small number of white students, but administrators target their advertising and efforts toward minority students.[69] While simultaneously keeping programs open to all races and targeting minorities can be effective for all types of programs, it is generally more feasible for academic programs, as these may be designed for and open to students with particular academic interests,[70] unlike social programs in which the development of support networks and communities based around a particular cultural identity are central.[71] For example, the University of Kansas has an academic retention program called Hawk Link that is "open to all students with a special emphasis on students of color."[72] The program is designed to help students manage their first year through a variety of components: "1) Recruitment, 2) Orientation, 3) Financial Aid, 4) Advising, 5) Living/Learning Environments, 6) Tutoring & Mentoring, 7) Educational & Developmental Programs, 8) Student Involvement, and 9) an Assessment of the Program."[73] Such programs can remain open to all students while maintaining their focus on a particular racial or cultural identity (i.e., they may be race-targeted rather than race-exclusive).[74]

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minority students and faculty must proceed in tandem," and that both are interdependent for success).

[68] Wendy Killeen, *Colleges Press Issue of Faculty Diversity*, BOSTON GLOBE, Mar. 13, 2005, at 7; Gil Klein, *College Faculties Short on Minorities; Minority Students, Educators Say, Need Minority Professors To Be Role Models*, WINSTON-SALEM J. (N.C.), Feb. 11, 2007, at 1; *see also* Lang, *supra* note 62, at 222 (discussing importance of student-faculty relationships to African American student retention).

[69] *See* Collison, *supra* note 61, at 34 (describing retention programs "targeted to Blacks, Latinos, and Native Americans" that nonetheless have white students participating).

[70] *See id.* (describing programs designed to increase number of minority students in science and engineering programs).

[71] *See* Lang, *supra* note 62, at 225 (describing programs that "enhance . . . multicultural environments" and allow students to "share personal and academic concerns" with mentors).

[72] The University of Kansas, Hawk Link, http://www.oma.ku.edu/hawklink/ (last visited Mar. 26, 2009).

[73] *Id.*

[74] *See, e.g.*, Cornell University Campus Life, Latino Living Center, http://www.campuslife.cornell.edu/campuslife/housing/undergraduate/latino-living-center.cfm (last visited Mar. 26, 2009) ("If cultures rich in history and dynamic with current events intrigue you, then why don't you consider making the Latino Living Center (LLC) your home at Cornell? You will live among students of varying Latino ethnicities and others from [a] mixture of cultural backgrounds."); Cornell University Campus Life, Ujamaa Residential College, http://www.campuslife.cornell.edu/campuslife/housing/undergraduate/ujamaa.cfm (last visited Mar. 26, 2009) ("Those choosing Ujamaa as their home at Cornell will not only share a friendly, warm and cooperative living environment, but also learn a great deal

Given the distressing disparities in minority persistence in higher education,[75] continued, comprehensive efforts to ensure that minority students do not face undue barriers to graduation are essential. However, conservative interpretations of the Equal Protection Clause by many colleges may end these efforts before they have taken off.

II
Affirmative Action Jurisprudence and the Responses of Colleges

The constitutionality of the recruitment and retention programs described in Part I have remained unexamined by the courts. Yet one aspect of diversity in higher education—admissions—has not escaped exacting scrutiny by the Supreme Court, advocates on all sides of the political spectrum, and the general public. The Supreme Court's 2003 decisions on the use of race in higher education admissions determinations applied strict scrutiny review, which requires that any such use of race be narrowly tailored to achieve a compelling state interest.[76] Their holdings—declaring that diversity in higher education is a compelling state interest and detailing the requirements for narrowly tailored admissions programs—have not only dictated the functioning of college admissions programs, but have colored all efforts to achieve diversity in higher education.[77] The internal and external pressures on colleges to abandon affirmative action,[78] coupled with the opacity of some of the Supreme Court's holdings, have led these institutions to make extremely conservative choices that have limited or ended important recruitment and retention efforts. It is important to better understand these decisions, since they represent the only definitive framework for a constitutional analysis of recruitment and retention

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about the history, culture and forces that helped shape the lives of Black people in the United States, Africa and the Caribbean.").

[75] *See supra* notes 53–59 and accompanying text (describing studies showing lower graduation rates for minority students and citing college environment as crucial contributory factor).

[76] *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 326 (2003) ("[Racial] classifications are constitutional only if they are narrowly tailored to further compelling governmental interests."); Gratz v. Bollinger, 539 U.S. 244, 270 (2003) ("To withstand our strict scrutiny analysis, respondents must demonstrate that the University's use of race in its current admissions program employs 'narrowly tailored measures that further compelling governmental interests.'" (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995))).

[77] Strong arguments can be made that these cases do not apply to recruitment and retention programs, since the context of admissions is so different. Part III will make some of these arguments, but will proceed from the assumption, which most colleges appear to have made, that the Court will evaluate these programs under its admissions jurisprudence.

[78] *See supra* note 18 and accompanying text (observing that affirmative action opponents have successfully pressured colleges to eliminate or alter their affirmative action programs).

programs, and because the extreme reaction of institutions of higher education to the Supreme Court jurisprudence threatens the continued operation of these programs. This understanding in turn enables the evaluation in Part III of how the Court is likely to treat recruitment and retention programs.

This Part will discuss the pair of cases that approved but tightly cabined the use of race in higher education admissions: *Gratz v. Bollinger*[79] and *Grutter v. Bollinger*.[80] It will evaluate how the doctrine these cases produced has evolved based on subsequent developments within the Supreme Court and the political arena. Finally, this Part will consider how colleges have altered their recruitment and retention programs to respond to the decisions. Part III will then argue that, though the Supreme Court will likely look to *Gratz* and *Grutter* in evaluating recruitment and retention programs, its analysis under those cases will allow far more flexibility in achieving diversity than colleges have exhibited.

A. Higher Education and the Equal Protection Clause

By 2003, when the Supreme Court issued its landmark affirmative action cases, there was substantial confusion among colleges over the degree to which the Equal Protection Clause of the Fourteenth Amendment allowed race to be considered in admitting students. In *Regents of the University of California v. Bakke*,[81] Justice Powell authored an opinion indicating that "attainment of a diverse student body" is a "constitutionally permissible goal for an institution of higher education."[82] However, there was no majority holding as to whether strict or intermediate scrutiny would apply to the programs, and lower courts, colleges, and universities were unclear whether Justice Powell's opinion was controlling authority. The result was that

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[79] 539 U.S. 244 (2003).

[80] 539 U.S. 306 (2003).

[81] 438 U.S. 265 (1978).

[82] *Id.* at 311–12. Though this diversity rationale was based in large part on amicus briefs submitted by Harvard University, Stanford University, Columbia University, and the University of Pennsylvania—indicating to many that the holding was geared toward elite universities capable of achieving diversity in many categories, including geographic, athletic, and artistic diversity—its broad-based approval of the use of race to create diversity was influential in a much wider sphere. *See* Marcia G. Synnott, *The Evolving Diversity Rationale in University Admissions: From* Regents v. Bakke *to the University of Michigan Cases*, 90 CORNELL L. REV. 463, 470 (2005) (noting that diversity rationale was inspired by amicus briefs and "proved a boon for the recruitment of black and other minority students at many of the nation's most prestigious private and flagship state universities").

a circuit split developed over the propriety of using race in admissions decisions.[83]

At the same time that these court decisions were calling into question the use of race in admissions, the political arena was becoming increasingly aware of, and unfriendly toward, affirmative action programs. In 1996, California voters passed Proposition 209,[84] which amended the state constitution to prohibit racial, ethnic, and gender preferences in public education, employment, and contracting.[85] Consequently, one of the largest state education systems in the nation could no longer utilize affirmative action to achieve diversity in higher education. This heated climate demanded a clearer statement by the Supreme Court on the constitutionality of using race to accomplish that goal.

1. *The Supreme Court's Decisions in* Gratz *and* Grutter

The Supreme Court's consideration of race-conscious admissions programs was thus a welcome development. The Court considered challenges to the admissions programs at the University of Michigan's undergraduate and law schools. In both cases, the Court held that diversity is a compelling state interest in the context of higher educa-

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[83] The Fifth Circuit called the holding of *Bakke* into question in *Hopwood v. Texas*, which considered the admissions formula employed by the University of Texas School of Law. 78 F.3d 932, 935–38, 944 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996). The Fifth Circuit held that "any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment," concluding that Justice Powell's opinion in *Bakke* was not binding precedent, and that it was, regardless, thrown into question by subsequent Supreme Court cases. *Id.* at 944–45. Similarly, the Eleventh Circuit held in *Johnson v. Board of Regents of the University of Georgia* that, despite the fact that the University of Georgia's freshman admissions plan was modeled after the "Harvard Plan" described by Justice Powell, it was not narrowly tailored to serve the interest of student body diversity. 263 F.3d 1234, 1244–45 (11th Cir. 2001). In contrast, the Ninth Circuit, in *Smith v. University of Washington, Law School*, upheld educational diversity as a compelling state interest. 233 F.3d 1188, 1201 (9th Cir. 2000). The Ninth Circuit concluded that, because many of the other Justices wrote broader opinions in *Bakke*, Justice Powell's analysis was in fact the narrowest grounds on which the issue decided by the majority could stand, and thus was binding. *Id.* at 1198–1200. Finally, the Fourth Circuit struck down a race-exclusive scholarship program at the University of Maryland in *Podberesky v. Kirwan*, 38 F.3d 147, 152–53, 162 (4th Cir. 1994). The case considered a challenge to a merit scholarship program that was only available to African American students and concluded that the program was illegitimate because it was not narrowly tailored to remedy past discrimination at the University. *Id.* at 151, 161–62.

[84] CAL. CONST. art. I, § 31; KIM CONNER ET AL., CAL. SENATE OFFICE OF RESEARCH, PROPOSITION 209: WHAT HAPPENS NEXT?, *available at* http://www.sen.ca.gov/ftp/SEN/SOR/ARCHIVE/_7ISS10.htm (last visited Mar. 26, 2009).

[85] *See* Synnott, *supra* note 82, at 475–76 (describing passage of Proposition 209 as a backlash against *Bakke* and perceived admission of unqualified students). See *infra* note 123 and accompanying text for a discussion of similar efforts in other states.

tion[86] and expounded upon the factors relevant to determining whether a given admissions program is narrowly tailored to achieve this end.[87] As a result of these decisions, it seems likely that other programs intended to achieve diversity in higher education will be deemed to be in pursuit of a compelling state interest for equal protection purposes, and that the constitutionality of diversity programs will thus turn on a narrow tailoring analysis going forward.

a. *Grutter v. Bollinger*

At issue in *Grutter v. Bollinger* was the University of Michigan Law School's admissions plan, which evaluated each applicant individually but included race among its admissions criteria.[88] The admissions policy evaluated applicants on the basis of many aspects of diversity, but specifically affirmed the school's stated policy of striving to achieve racial diversity.[89]

Justice O'Connor, writing for the majority, confirmed that diversity is a compelling state interest that could justify the use of race in narrowly tailored admissions plans under the Equal Protection Clause.[90] Justice O'Connor emphasized the substantial benefits of diversity, including the promotion of "cross-racial understanding" and the breakdown of "racial stereotypes."[91] Both of these benefits also ensure the cultivation of "a set of leaders with legitimacy," or the ability of the institution's graduates to lead increasingly diverse constituencies, which college graduates would eventually need and want from their schools.[92]

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[86] Grutter v. Bollinger, 539 U.S. 306, 327–33 (2003); Gratz v. Bollinger, 539 U.S. 244, 268 (2003).

[87] *Grutter*, 539 U.S. at 333–43; *Gratz*, 539 U.S. at 270–76; *see also supra* notes 94–98 and accompanying text (characterizing the test used in *Grutter*).

[88] *Grutter*, 539 U.S. at 315–16.

[89] *Id.* at 316. The Law School's policy also included a commitment to recruiting a critical mass of minority students in order to ensure that they would attend the school and be able to fully participate in and contribute to student life. *Id.*

[90] *Id.* at 329–33. Justice O'Connor made clear, in detailing the importance of diversity, that the University's commitment to such diversity could serve as evidence of its compelling nature, given the "special niche" that universities occupy within constitutional law and the presumption of good faith that is owed to a university. *Id.* at 329. In other words, though the use of race in other contexts, such as employment, might be subjected to more exacting scrutiny by the Court, an educational institution's determination regarding the need for diversity was entitled to greater weight.

[91] *Id.* at 330–33.

[92] *Grutter*, 539 U.S. at 330–32. Of course, this conception of diversity is substantially different from that used by Justice Powell in *Bakke*. Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 59–60 (2003). While Justice Powell's conception of diversity was grounded in the educational process, which required diversity in order to achieve true education, Justice O'Connor seemed to argue that diversity was essential to education because

Having confirmed that diversity is a compelling state interest, the Court then evaluated the law school's program under the second element of strict scrutiny review, the requirement of narrow tailoring, which ensures that "the means chosen 'fit' th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."[93] The Court set forth four requirements that a race-conscious admissions program must meet in order to be deemed narrowly tailored:[94] (1) The program must give each applicant individualized consideration;[95] (2) the university must engage in "serious, good faith consideration of workable race-neutral alternatives" for achieving diversity;[96] (3) the program must "not unduly harm members of any racial group;"[97] and (4) it "must be limited in time."[98] After considering these factors, the

it would lead to "extrinsic social goods like professionalism, citizenship, or leadership." *Id.* at 60. This version of diversity is far more expansive than Justice Powell's and may lend itself to application in contexts beyond higher education. *Id.* at 61–62.

[93] *Grutter*, 539 U.S. at 333 (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)).

[94] This analysis of the Court's narrow tailoring discussion is based in part on Post's description of the four elements that form the narrow tailoring prong of the strict scrutiny test in *Grutter*, and his identification of individualized consideration as the most important element. Post, *supra* note 92, at 66–67.

[95] The Court stated that a university "cannot 'insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants,'" *Grutter*, 539 U.S. at 334 (alteration in original) (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978)), but must instead consider all possible aspects of diversity. *Id.* at 335–37. This requirement borrows heavily from Justice Powell's opinion in *Bakke*. Indeed, one might argue that this requirement more closely reflects the type of diversity expounded by Justice Powell, which emphasized the benefit that classmates with a broad range of experiences and viewpoints would bring to the educational experience, than Justice O'Connor's notion of diversity, which is focused on the need for racial diversity in order to be prepared for civic and economic participation in modern society. Justice O'Connor's racial diversity could more easily be served by simply ensuring particular numbers of racial minorities in institutions of higher education, while Justice Powell's conception of diversity entails selecting each student for his or her particular background, which requires taking into account not simply race, but life experience and a variety of other factors. Post, *supra* note 92, at 67–70.

[96] *Grutter*, 539 U.S. at 339. The Court held that the Law School had engaged in the necessary consideration of such alternatives, since the only alternatives proposed by the lower court would have resulted in either an insubstantial impact on the school's diversity or would have sacrificed the institution's academic selectivity. *Id.* at 340.

[97] *Id.* at 341. The Court found that the University's program met this requirement through its use of individualized consideration. *See id.* ("We agree that, in the context of its individualized inquiry into the possible diversity contributions of all applicants, the Law School's race-conscious admissions program does not unduly harm nonminority applicants.").

[98] *Id.* at 342. The Court held that "[i]n the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity." *Id.*

Court concluded that the Law School's admissions program was narrowly tailored to achieve student body diversity.[99]

b. *Gratz v. Bollinger*

In *Gratz v. Bollinger*, the Court applied the same doctrinal framework to the University of Michigan's undergraduate admissions program and further clarified the criteria for finding an admissions program to be narrowly tailored. Under the admissions program at issue in *Gratz*,[100] each applicant was assigned a number of points based on various personal characteristics, such as grade point average, geographic location, and race (among others).[101] Applicants who reached a certain number of points were admitted automatically.[102]

Though the Court once again affirmed that diversity is a compelling interest for institutions of higher education,[103] the Court held that this admissions program was not narrowly tailored to the compelling state interest that it was intended to achieve.[104] The plan awarded an automatic, quantifiable advantage to minority students simply on the basis of race, which contravened the requirement laid down in *Grutter* that each applicant receive "individualized consideration."[105] Justice Rehnquist, writing for the Court, noted that a truly individualized plan would not allow "any single characteristic automatically [to] ensure[ ] a specific and identifiable contribution to a university's diversity,"[106] nor would it allow race to be the decisive factor in the admission of "virtually every minimally qualified underrepresented minority applicant."[107]

The Court next rejected the University of Michigan's argument that individual consideration would be "impractical" given the enormous size of its admissions program, holding that "the fact that the

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99 *See id.* at 343.

100 Gratz v. Bollinger, 539 U.S. 244, 253–57 (2003) (summarizing undergraduate admissions guidelines).

101 *Id.* at 255.

102 *Id.* Some applicants who scored in a middle range of points would be flagged and considered individually. *Id.* at 255–57.

103 *Id.* at 268.

104 *Id.* at 270.

105 *Id.* at 271–72; *supra* note 95 and accompanying text. The Court cited Justice Powell's opinion in *Bakke* extensively for the proposition that each applicant must be evaluated for their "ability to contribute to the unique setting of higher education." *Gratz*, 539 U.S. at 271 (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978)).

106 *Gratz*, 539 U.S. at 271; *see also id.* at 271–72 (noting that admissions committee should be able to distinguish between students of same race such that if "a good number of black students much like A but few like B had already been admitted, the Committee might prefer B; and vice versa" (quoting *Bakke*, 438 U.S. at 324)).

107 *Id.* at 272.

implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system."[108] The Court thus clearly stated its intent to subject diversity programs to careful and exacting scrutiny, without regard for the capacity of individual educational institutions to implement narrowly tailored programs.[109]

2. *The Aftermath of* Gratz *and* Grutter

While *Gratz* and *Grutter* resolved the "pivotal uncertainty" of whether diversity in higher education constitutes a compelling state interest and gave some guidance on how to narrowly tailor a race-conscious program, they left substantial uncertainty regarding how to evaluate elementary and secondary school programs, higher education programs outside of the admissions context, and even higher education admissions programs that did not precisely mirror those employed by the University of Michigan.[110] Beyond this uncertainty, the Court's subsequent decision in *Parents Involved in Community Schools v. Seattle School District No. 1*[111]—which marked a shift toward disapproval of race-conscious programs—has raised the specter that future equal protection decisions will strictly limit, or even reverse, the narrow permission to utilize race in admissions programs that the Court granted in *Grutter*. *Parents Involved* thus has impacted the way that colleges evaluate the constitutionality of their recruitment and retention programs and necessarily will impact any assessment of the Court's likely determination of that question.

Parents Involved considered a challenge to two secondary school assignment programs that utilized race as a factor in allocating slots in

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[108] *Id.* at 275 (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 508 (1989)).

[109] This determination raises the concern, also raised with respect to Powell's opinion in *Bakke*, that the Court's affirmative action jurisprudence is geared toward elite institutions with substantial resources to develop and implement constitutional admissions plans. *See supra* note 82 (describing role of elite institutions in influencing Court's decision). It seems that the Court's jurisprudence did not address the challenges facing large, public institutions of higher education with higher numbers of applicants and fewer resources with which to evaluate them.

[110] *See* R. Richard Banks, *Race-Conscious Affirmative Action and Race-Neutral Policies in the Aftermath of the Michigan Cases*, *in* CHARTING THE FUTURE OF COLLEGE AFFIRMATIVE ACTION: LEGAL VICTORIES, CONTINUING ATTACKS, AND NEW RESEARCH 37, 37 (Gary Orfield et al. eds., 2007), *available at* http://www.civilrightsproject.ucla.edu/research/affirmativeaction/charting_aa/ch2_Banks_FINAL.pdf [hereinafter CHARTING THE FUTURE OF COLLEGE AFFIRMATIVE ACTION] (noting that, despite Supreme Court's resolution of compelling state interest issue, opposition and legal challenges to race-conscious programming continue unabated).

[111] 127 S. Ct. 2738 (2007).

order to achieve racial integration within the school district.[112] The Supreme Court resoundingly struck down both plans. Though the Court could not agree whether the plans were designed to achieve a compelling state interest,[113] Chief Justice Roberts, writing for the Court, found that the plans were not narrowly tailored to achieve any compelling interest.[114] The Court focused almost exclusively on the requirement that, for a plan to be narrowly tailored, the state actor must engage in "serious, good faith consideration of workable race-neutral alternatives."[115] The Court found that neither school district could show that it had seriously considered any race-neutral alternatives to its plan, and concluded that, because the racial classifications at issue had only a minimal impact on student assignments, it was doubtful whether a plan relying on racial classifications was truly necessary to achieve the results sought by the districts.[116]

The Court, while striking down these plans, did reaffirm in dicta that "diversity in higher education" is a compelling interest, but noted that such diversity encompassed numerous factors in addition to race.[117] The Court held directly that, because of their different contexts, "[t]he present cases are not governed by *Grutter*."[118] Nonetheless, the Court's refusal to identify affirmatively a compelling public interest in the voluntary integration of local school districts[119] (tradi-

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112 *Id.* at 2740–41. The first plan, implemented in the Seattle, Washington school district, used race as a factor to break ties among students vying for spots in oversubscribed high schools if a particular student's race would increase the overall diversity of that school. *Id.* In the second plan, implemented in the Jefferson County, Kentucky school district, all students would be enrolled in or transferred to their highest choice among neighborhood schools with available space, unless their enrollment would cause the school's diversity to fall below a specified level. *Id.* at 100.

113 James E. Ryan, Comment, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 131 (2007).

114 *Parents Involved*, 127 S. Ct. at 2759–60.

115 *Id.* at 2760 (quoting Grutter v. Bollinger, 539 U.S. 306, 339 (2003)).

116 *See id.* ("While we do not suggest that *greater* use of race would be preferable, the minimal impact of the districts' racial classifications on school enrollment casts doubt on the necessity of using racial classifications.").

117 *Id.* at 2753. In other words, the Court emphasized the conception of diversity utilized by Justice Powell in *Bakke*, leaving aside the one developed by Justice O'Connor in *Grutter*. *See supra* notes 92, 95, and 105 (contrasting Powell and O'Connor approaches). The Court emphasized that the *Grutter* and *Gratz* decisions were limited to the higher education context because of "the expansive freedoms of speech and thought associated with the university environment." *Parents Involved*, 127 S. Ct. at 2754 (quoting *Grutter*, 539 U.S. at 329.

118 *Parents Involved*, 127 S. Ct. at 2754.

119 Justice Kennedy, in his concurring opinion, suggested that ensuring that the racial composition of individual schools did not "interfere with the objective of offering an equal educational opportunity to all of their students" could serve as a compelling interest that might justify integration efforts, including "strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allo-

tionally a sphere in which localities are granted significant autonomy), combined with its strict application of the race-neutral alternatives prong of the narrow tailoring inquiry, is likely to impact the calculations of school administrators at all levels of education as they attempt to achieve diversity without risking litigation.

B. The Impact of Gratz *and* Grutter *on Recruitment and Retention Programs*

Although the Court has consistently asserted that diversity in higher education is a compelling public interest and has used both *Gratz* and *Grutter* to clarify what a narrowly tailored admissions program would look like, many colleges have reacted to the decisions conservatively, hesitating to adopt new or maintain existing admissions or other policies that unapologetically consider race.[120] In the context of the recruitment and retention of minority students, several factors have contributed to the decline of race-conscious programs. First, this conservatism may result in part from concerns over practicality[121]—it is simply not possible for most flagship state institutions to consider every application that they receive individually without a metric for evaluation like the one considered in *Gratz*. Thus, colleges that are prevented by time and resource constraints from implementing the type of individualized program mandated by *Gratz* and *Grutter* are unsure how to pursue racial diversity without running afoul of the Equal Protection Clause.

Second, colleges may be equally wary of running afoul of the anti–affirmative action advocates policing the schools for their compliance with equal protection doctrine. Despite being defeated in *Grutter*, opponents of affirmative action have continued to put substantial pressure on colleges to abandon their race-conscious programs.[122] Their efforts have involved political campaigns to pass referenda, similar to California's Proposition 209, that would prohibit

cating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race." *Id.* at 2792 (Kennedy, J., concurring). This language may indicate to institutions of higher education that a majority of the current Court is not hostile to experimentation and innovative methods of achieving racial diversity. *See infra* Part III.A (providing justification for race-conscious recruitment and retention programs).

[120] Jeffrey Selingo, *Michigan: Who Really Won?*, CHRON. HIGHER EDUC. (Wash., D.C.), Jan. 14, 2005, at A.21. In the first freshman class admitted after *Gratz* and *Grutter* were decided, the proportion of African American and Latino freshmen declined at many universities, indicating that these institutions did not rush to put in place aggressive affirmative action programs following *Grutter*. *Id.*

[121] *See supra* notes 108–09 and accompanying text (discussing *Gratz* Court's rejection of impracticality as justification for lack of individualized review).

[122] Selingo, *supra* note 120.

the use of race in any government decisionmaking,[123] as well as threatening to file (and in some cases actually filing) complaints with OCR.[124] Responding to the threat of litigation or investigation by OCR, many universities have allowed the focus of their programs to shift away from ensuring educational efficacy and toward avoiding legal liability.[125]

Third, the Supreme Court was not clear on how its standard for narrowly tailored admissions programs would apply in all cases.[126] For example, colleges have struggled to know precisely what sort of exploration of race-neutral alternatives satisfies the Court's requirement. Additionally, it is hard for colleges to know whether a program, falling in between those described in *Gratz* and *Grutter*, would be deemed constitutionally acceptable. Combined with constant pressure from anti–affirmative action groups, this lack of clarity naturally has led institutions of higher education to make conservative determinations about the state of the law.

Colleges have responded to these pressures by limiting the use of race in admissions policies and abandoning recruitment and retention

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[123] *Id.*; *see also, e.g.*, MICH. CONST. art. I, § 26 (codifying Michigan ballot proposal 06-2, banning affirmative action); MICH. DEP'T OF STATE, NOTICE: STATE PROPOSALS 5–7, *available at* www.michigan.gov/documents/sos/ED-138_State_Prop_11-06_174276_7.pdf (text of ballot proposal). Affirmative action opponents have expressed commitment to advocating for passage of similar initiatives in several other states. *See* Liu, *supra* note 14, at 394 & n.12 (noting that targeted states include Arizona, Colorado, Illinois, Missouri, Oregon, and Nebraska).

[124] Selingo, *supra* note 120. OCR is responsible for investigating whether universities have violated the law with their use of race-based admissions programs. *See id.* Complaints filed with OCR have included challenges to race-conscious supplemental programs—primarily financial aid, recruitment, and retention programs. Banks, *supra* note 110, at 43–44. Troublingly, the affirmative action opponents who file these complaints often first direct letters to the universities themselves, threatening to file the complaints if the universities maintain their race-exclusive programs. Selingo, *supra* note 120. Thus, the opponents may be able to chill race-based programs by cultivating a fear of liability without OCR having fully evaluated the programs to determine their compliance with federal law.

[125] *See* Schmidt, *supra* note 18 (describing universities' responses to fears of litigation and resulting loss of control over formerly race-exclusive educational programs).

[126] *See* Post, *supra* note 92, at 71 ("Although *Gratz* leaves the precise meaning of the individualized consideration requirement ambiguous, it nevertheless sends an unmistakable message to universities that the Court is prepared to use the 'narrowly tailored' prong closely to supervise affirmative action programs."); Peter Schmidt, *Affirmative Action Remains a Minefield, Mostly Unmapped*, CHRON. HIGHER EDUC. (Wash., D.C.), Oct. 24, 2003, at A.22 ("[L]egal experts say that colleges continue to run a very real risk of being sued if their admissions policies stray from the court's guidance and give too much weight to race, lack a well-articulated educational justification, or resemble quotas by focusing too much on maintaining minority enrollments at certain levels.").

programs that are race-exclusive:[127] Some have opened such programs to more students as universities and colleges feel pressure to focus on generalized campus diversity, while others have shut down programs altogether.[128] By opening the programs to students of all races, however, colleges may have made the programs less effective at addressing all of the factors that make minority students less able or likely to attend institutions of higher education or to succeed once there.[129] Specifically, problems of intimidation and perceived and real discrimination are not as easily addressed without reference to a student's race, culture, and unique ways of experiencing higher education.[130]

Part I sought to demonstrate that race-based recruitment and retention programs can play a central role in improving diversity in institutions of higher education, while Part II established that the Supreme Court's affirmative action jurisprudence, though facially tolerant of the use of race-based programming in higher education, has led colleges to terminate or limit their race-conscious programming for fear of liability. Wariness over continuing these essential programs calls for the development of creative alternatives or an adjustment of the legal analysis to account for the unique role that these programs can play in achieving diversity in higher education.

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127 *See* Schmidt, *supra* note 18 (describing abandonment of race-exclusive programs over fears that they place colleges in "legal jeopardy"); Selingo, *supra* note 120 (describing varied, often conservative, reactions of college presidents to *Gratz* and *Grutter* decisions).

128 Collison, *supra* note 61, at 34–35 (discussing scholarship program at University of Maryland-Baltimore County that was expanded to include nonminorities); Schmidt, *supra* note 18 (discussing programs expanded or shut down at the State University of New York, the Southern Illinois University, Virginia Polytechnic Institute & State University, Tufts University, the University of Delaware, Saint Louis University, and Bryn Mawr, Haverford, and Swarthmore Colleges); *see also* Bryan A. Keogh, *Ten Universities Cut Programs for Minorities; Summer Sessions Faced Legal Threats*, CHI. TRIB., May 7, 2003, at A1 (discussing programs expanded or shut down at Princeton University and Massachusetts Institute of Technology, and discussing threats from affirmative action opponents to programs at Carnegie Mellon University, Texas A&M University, and Saint Louis University). Expanded programs may remove any eligibility restrictions or be changed to include "economically disadvantaged" students, those from "challenging . . . circumstances," or any students who may have demonstrated a "commitment to promoting diversity." Schmidt, *supra* note 18. This conversion, absent a preference for admitting minority students, renders them race-neutral rather than race-targeted.

129 *See* Karen Miksch, *Stand Your Ground: Legal and Policy Justifications for Race-Conscious Programming*, *in* CHARTING THE FUTURE OF COLLEGE AFFIRMATIVE ACTION, *supra* note 110, at 57, 74, *available at* http://www.civilrightsproject.ucla.edu/research/affirmativeaction/charting_aa/ch3_Miksch_FINAL.pdf (noting that research has demonstrated effectiveness of race-exclusive and race-targeted programs and has shown that race-neutral programs "may not be as effective in promoting the compelling interests of diversity and access"). However, the research in this area needs further development to be wholly reliable. *Id.* at 74–75.

130 *Id.* at 74 & nn.59–60.

III
Narrowly Tailored Recruitment and Retention Programs

The previous Parts have laid the foundation for understanding why institutions of higher education have reacted conservatively to challenges to their minority recruitment and retention programs. In many ways, recruitment and retention programs are an entirely separate means of achieving diversity from admissions programs—they address the quality of the educational experience available to particular students rather than dispensing desirable seats in institutions of higher education—and therefore demand an entirely separate framework for determining their constitutionality. However, the Supreme Court's admissions decisions have been used to evaluate all diversity programs in higher education and are likely to continue to play an important role in any future consideration of recruitment and retention by the Court. Therefore, this Part will argue that, even if the Court's admissions-based equal protection jurisprudence is applied to the unique context of recruitment and retention programs, many minority-targeted and minority-exclusive programs can survive strict scrutiny. I also argue that these programs cannot successfully be replaced by race-neutral alternatives and suggest ways in which colleges can ensure that their recruitment and retention programs meet each element of the narrow tailoring analysis.

The Supreme Court has clearly stated, and repeatedly reaffirmed, that achieving diversity in higher education is a compelling state interest.[131] Thus, any analysis of minority recruitment and retention programs is likely to focus solely on whether the programs are narrowly tailored to achieving their express goal of diversity.[132] As discussed in Part II.A.1, the *Grutter* standard for narrow tailoring requires that an admissions plan meet four criteria: (1) Each applicant must be considered individually; (2) the university must first undertake a "serious, good faith consideration of workable race-

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[131] *See supra* notes 90–92, 104, 117–18 and accompanying text (establishing and discussing nature of diversity interest).

[132] Of course, the determination that the programs are intended to achieve diversity in higher education will implicate the debate over which definition of diversity—Justice O'Connor's or Justice Powell's—would be utilized by a court in analyzing these programs. *See supra* notes 92, 95, 117 and accompanying text. Recruitment and retention programs can improve diversity under either conception. While recruitment programs allow a wider variety of students to be considered for admission based on their contribution to diversity (whichever conception of diversity the admissions office may choose to utilize), retention programs help to ensure that the carefully calibrated diversity established through admissions (again based on the school's preferred conception of diversity) is preserved by encouraging the students selected for admission to persevere in school.

neutral alternatives" for achieving diversity; (3) the program must "not unduly harm members of any racial group"; and (4) it "must be limited in time."[133]

The fourth of these factors may be met with relative ease—the college or university must simply commit to reevaluating the need for its programs periodically or create an automatic sunset provision for the programs.[134] However, meeting the first three criteria requires careful parsing of the Supreme Court's articulation of each, as well as consideration of the ways in which recruitment and retention programs may be different from admissions policies with respect to each prong.

A. Consideration of Race-Neutral Alternatives

To meet the narrow tailoring standard, a college or university first must show that it has considered race-neutral alternatives to programs utilizing race-based decisionmaking and has rejected them only because they are insufficient to achieve meaningful diversity or require the school to sacrifice academic quality.[135] This Section argues that colleges can meet this requirement with respect to race-targeted or race-exclusive programs for minority recruitment and retention because to be truly effective such programs must explicitly identify, acknowledge, and target the problems that are unique to the minority experience in higher education. Minorities face challenges in reaching and succeeding in higher education precisely because of their race, so programs that ignore racial issues will fail to address minority recruitment and retention problems properly. Unlike admissions, where each candidate is fighting for a spot at a particular institution for which individuals of all races are qualified, recruitment and retention programs address factors and problems that are particular to certain minority students, which therefore cannot be rectified without acknowledgement of these unique circumstances.

Under the holdings of *Grutter* and *Parents Involved*,[136] to demonstrate adequate consideration and legitimate rejection of race-neutral

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[133] *See supra* notes 94–98 and accompanying text.

[134] *See supra* note 98.

[135] Grutter v. Bollinger, 539 U.S. 306, 339–40 (2003).

[136] In *Grutter*, the University of Michigan Law School met the race-neutral alternatives prong by demonstrating that all of the alternatives to considering race in admissions would lead either to "a dramatic sacrifice of diversity, the academic quality of all admitted students, or both." *Id.* at 340. However, in *Parents Involved*, the Court struck down the voluntary integration programs because the minimal impact of the race-based assignment programs suggested that a race-neutral alternative could have been equally effective. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2759–60 (2007). Chief Justice Roberts further chastised the school districts for failing to demonstrate that

alternatives to minority-targeted recruitment and retention programs, colleges must: (1) provide evidence that they have considered the efficacy of race-neutral programs; and (2) demonstrate either that their own programs are effective at improving diversity in ways that race-neutral alternatives cannot be, or that turning instead to a race-neutral alternative would impact their academic mission negatively. This section will show that, because these programs are designed explicitly to address the very issues that make being a minority student in higher education challenging—racial identity, stereotype threat, and perceived and actual discrimination—they necessarily will be more effective at achieving diversity and ensuring a successful academic experience than race-neutral alternatives, which by definition ignore these issues.

The first of these requirements should be relatively easy to meet; though it is not altogether clear how thoroughly a school must consider race-neutral alternatives,[137] documenting consideration of such programs and the rationale for their rejection is a straightforward step that schools must take to meet this prong. Because schools already spend a good deal of time and effort formulating the diversity programs that they put in place, fulfilling this requirement is likely to only require documentation of the process by which they determined the best possible combination of recruitment and retention programs.[138] The second requirement is more difficult. Concrete evidence of the efficacy (or lack thereof) of race-neutral alternatives is difficult to identify, largely because of the difficulties of using social science to prove value with perfect accuracy.[139] Though extensive debate has continued over the actual impact of affirmative action programs on

they had even considered race-neutral alternatives to their proposed race-based plan. *Id.* at 2760.

[137] In fact, the Ninth Circuit concluded that the Seattle School District *had* demonstrated adequate consideration of a race-neutral alternative to their race-based assignment plan, concluding that a poverty-based assignment plan would not achieve true racial diversity and would have the adverse effects of insulting minority groups and forcing students to reveal their socioeconomic status. *See* Samuel Estreicher, *The Non-Preferment Principle and the "Racial Tiebreaker" Cases*, 2006–2007 CATO SUP. CT. REV. 239, 241 n.11 (describing Ninth Circuit's rationale for rejecting poverty-based assignment plan (quoting Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1188–89 (9th Cir. 2005))). It thus seems unclear what level of consideration and documentation would have been sufficient to demonstrate a serious and good faith consideration of the alternatives. Nonetheless, documentation of some level of serious consideration is an essential element of this prong.

[138] *See, e.g.*, TASK FORCE REPORT, *supra* note 3, at 1 (describing process used to develop Black Male Initiative at CUNY).

[139] *See* Henry F. Fradella, *A Content Analysis of Federal Judicial Views of the Social Science "Researcher's Black Arts*,*"* 35 RUTGERS L.J. 103, 109 (2003) ("[T]he Supreme Court has cautioned against the use of social science research in several contexts . . . . [and]

minority students,[140] less evidence exists to demonstrate the impact that recruitment and retention programs have on the level of diversity in an institution of higher education.

Nonetheless, there is strong support for the proposition that race-conscious programming is more effective than race-neutral alternatives. Recruitment and retention programs targeted toward minority students are explicitly designed to counteract race-related factors that negatively impact student attendance and persistence in higher education. Thus, if these programs are no longer race-targeted or race-exclusive, their purpose largely will have been thwarted.[141] To have the maximum impact, programs must be targeted toward those students facing demonstrated challenges and for whom the interventions have been designed.

Reports from colleges indicate that, at schools where outreach programs explicitly target racial minorities,[142] the enrollment of minority students has increased in response to these efforts.[143] Despite this evidence, some charge that race-neutral alternatives, especially in the context of recruitment programs, could be equally effective in achieving campus diversity—for example, by targeting particular geographic areas instead of simply racial minorities. Nonetheless, universities have consistently reiterated the importance of encouraging minority students and alumni to reach out to minority

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when social science evidence has been used, it has been used inconsistently in the years since *Brown* embraced it.").

[140] *See, e.g.*, Thomas J. Espenshade et al., *Admission Preferences for Minority Students, Athletes, and Legacies at Elite Universities*, 85 SOC. SCI. Q. 1422, 1430, 1444 (2004) (noting that at elite colleges African American and Latino applicants had much greater chance of being admitted than their white or Asian American peers with similar grade point averages and SAT scores); Mark Nadel, *Retargeting Affirmative Action: A Program To Serve Those Most Harmed by Past Racism and Avoid Intractable Problems Triggered by Per Se Racial Preferences*, 80 ST. JOHN'S L. REV. 323, 325 & n.6 (2006) (discussing idea advocated by one scholar that students helped by affirmative action do poorly in law school and "furious response" this statement provoked); Leonhardt, *supra* note 24, at 77–78 (noting that, after passage of Proposition 209 banned affirmative action in California, the "number of black students at both Berkeley and U.C.L.A. plummeted").

[141] *See infra* text accompanying note 153.

[142] This analysis assumes that recruitment programs will be subjected to strict scrutiny; however, it is possible that courts will find that such programs, intended to increase the number of applicants, are not subject to strict scrutiny so long as they do not confer tangible benefits upon recruits based on race. COLEMAN ET AL., *supra* note 65, at 10; *see also* Weser v. Glen, 190 F. Supp. 2d 384, 399 (E.D.N.Y. 2002) ("Racial classifications that 'serve to broaden a pool of qualified applicants and to encourage equal opportunity,' but do not confer a benefit or impose a burden do not implicate the Equal Protection Clause." (quoting Honadle v. Univ. of Vt., 56 F. Supp. 2d 419, 427–28 (D. Vt. 1999))).

[143] Lum, *supra* note 24, at 36–37.

candidates[144] as a means of encouraging students who may be intimidated by the prospect of moving from a mostly minority community to a predominantly white college. Thus, though geographically based race-neutral alternatives to these programs may provide a possible compromise, the effectiveness of the programs appears to depend upon the inclusion of race-conscious aspects, such as the deployment of minority role models to minority communities. To the extent that colleges want to use race-targeted outreach rather than disguise their purpose through geographically targeted alternatives, they will be able to argue that they are utilizing the superior means of achieving racial diversity.[145]

Financial aid programs, perhaps the most controversial of minority-targeted recruitment efforts because they impact the availability of limited and coveted scholarship funds, have a clear impact on the decision of a student to attend college and have been shown to have a greater impact on the decisions of minority recruits than on their white counterparts.[146] Thus, though race-based financial aid programs may present issues with respect to the other prongs, these programs are clearly superior to race-neutral alternatives to the extent that racial targeting will result in more minority students receiving financial aid, and therefore deciding to attend a particular institution.[147]

[144] *See id.* at 36 (interviewing school administrators who tout importance to recruitment efforts of having enthusiastic minority students encourage candidates); *see also* Leonhardt, *supra* note 24, at 80–82 (discussing increase in outreach efforts by African American students and alumni in response to dramatic decrease in numbers of minority students at U.C.L.A. due to Proposition 209).

[145] Race-neutral outreach programs raise the specter of using the geography or underrepresentation of a school as a pretext for targeting recruitment efforts to those schools where minorities comprise a majority of the students. *See* Gratz v. Bollinger, 539 U.S. 244, 305 (2003) (Ginsburg, J., dissenting) ("If honesty is the best policy, surely Michigan's accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises."); *supra* note 33 and accompanying text (noting that race-targeted programs arguably may be considered race-neutral).

[146] *See supra* notes 44–46 and accompanying text. In contrast with other recruitment and retention programs, financial aid awards are in many ways comparable to awarding a student admission; the benefit conferred comes from a limited pool of resources and cannot be conferred readily on a wider body of students. Thus, there are few race-neutral replacements for scholarships to the extent that, the more financial aid is awarded to minority students, the more minority students are likely to attend a particular institution. However, schools will need to carefully address issues of individualized consideration and harm to members of other racial groups in narrowly tailoring their financial aid programs. *See infra* Part III.B (contrasting need for individual consideration in financial aid context with lack of such need in recruitment and retention context).

[147] *See infra* Part III.B (acknowledging probable need for individual tailoring of financial aid programs). Though individualized consideration may be necessary in order to make race-targeted financial aid constitutionally permissible, race-targeted or race-

Retention programs that "enhance the multicultural environments [of] campuses" have demonstrated "exemplary success" in increasing retention among minority students.[148] Research has shown that such programs are successful when they pay "attention to the legitimate needs and concerns of those students who are the focus of retention efforts."[149] Thus, because mentoring, summer bridge, counseling, and academic programs are addressed to the specific concerns of minority students, such as alienation and stereotype threat,[150] they are more effective than race-neutral programs that fail to address these specific concerns. Many of the factors that make choosing a college and adjustment to college life more difficult for minority students are often directly related to their race and issues of difference.[151] Thus, schools may persuasively argue that creating race-neutral retention programs ignores the most pressing issues causing student attrition. Only by creating programs that acknowledge and address race can schools hope to have an impact on retention.

Academic retention programs are somewhat more difficult to defend than social programs, since mentoring programs more clearly need to address issues of race and identity to be successful, while academic programs provide an important benefit to minority students that might also be helpful to many other students. However, discrimination in the classroom and stereotype threat are important components of the demonstrated reasons that minority students are less likely to persist in higher education, and positive academic experiences have been shown to counteract these factors.[152] Specifically, if the concern being addressed is stereotype threat, a special academic program that is as dominated by white students as the average college class will not alleviate the stressors that cause the apprehension and self-doubt associated with the problem.[153] Thus, a genuine argument can be made that allowing minorities to have a positive academic experience free from discrimination is essential to improving minority

exclusive aid programs are more *effective* than race-neutral programs to the extent that they lead directly to minority students being more likely to receive financial aid, which in turn allows them to attend a given school.

[148] Lang, *supra* note 62, at 225.

[149] *Id.*

[150] *See supra* notes 57–59 and accompanying text (discussing stereotype threat and other factors contributing to minority attrition).

[151] *See supra* notes 28, 57–59 and accompanying text (discussing intimidation factor, stereotype threat, and alienation among minority students as reasons for minority underenrollment).

[152] *See supra* notes 57–60 and accompanying text (detailing factors that counteract discrimination and stereotype threat).

[153] *See* Steele & Aronson, *supra* note 58, at 808 (discussing factors that induce stereotype threat).

student retention. Race-targeted programs that consider each student's particular academic challenges will be more effective at addressing the unique challenges faced by racial minorities than any race-neutral alternative.

This prong will likely remain a flash point in the controversy over race-targeted programs, so colleges should dedicate resources to further shore up evidence that these programs are not only effective, but superior to race-neutral alternatives.[154] However, until such data is gathered, the existing evidence allows institutions to argue persuasively that they have given good faith consideration to, and legitimately rejected, the workable race-neutral alternatives to their minority-targeted programs.

B. Individualized Consideration and Avoiding Undue Harm to Any Racial Group

The final two prongs of the narrow tailoring analysis in *Grutter* are individualized consideration and avoiding undue harm to any racial group. *Grutter* essentially conflated the avoidance of undue harm with providing individualized consideration: The Court noted in a single sentence that, because the Law School considered each student individually, there was no undue burden to other groups, as they would all receive the same level of individualized consideration.[155] Since the Supreme Court thus indicated that individualized consideration was one means—presumably among several—of preventing undue harm to any racial group, this section will consider both prongs in unison, arguing that the undue burden prong may be met through other means than individualized consideration in the context of recruitment and retention programs.

This Section will make two arguments: First, except in the context of financial aid, individualized consideration should not be a necessary element of a narrowly tailored recruitment or retention program. Second, even if it is deemed necessary, colleges may take several steps to incorporate individualized consideration into their programs and thus survive strict scrutiny.

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[154] In fact, for the many schools that have altered their programs in order to make them race-neutral, concerted study and analysis of the impact that the shift has had on minority recruitment and retention can create a substantial body of evidence that may shed further light on this question.

[155] Grutter v. Bollinger, 539 U.S. 306, 341 (2003) ("We agree that, in the context of its individualized inquiry into the possible diversity contributions of all applicants, the Law School's race-conscious admissions program does not unduly harm nonminority applicants.").

1. Individualized Consideration Is Not Necessary for Recruitment and Retention Programs

In *Grutter*, the Supreme Court wrote that "in the context of its individualized inquiry into the possible diversity contributions of all applicants, the Law School's race-conscious admissions program does not unduly harm nonminority applicants."[156] In other words, individualized consideration was the element of the admissions program that satisfied the requirement that there be no undue burden on nonminority students as a result of race-based decisionmaking. This Section will argue that, because recruitment and retention programs do not cause an undue burden on nonminority applicants even absent individualized consideration, individualized consideration is not separately necessary in order for these programs to be sufficiently narrowly tailored.

Unlike admissions decisions, which allocate limited spots within a college or university, outreach and retention programs are designed to address specific problems that are in many ways unique to minority students.[157] These programs, while allocating a distinct benefit such as academic assistance or mentoring, might not exist at all absent a school's desire to increase racial diversity—they are created and designed for this explicit purpose. Thus, the existence of the program does not deny a benefit to any other racial group; rather than apportioning limited resources to minority students over nonminorities, schools are creating resources that are necessary to ensure those minority students arrive and remain at their institutions,[158] leaving nonminorities in the same position that they would have been in absent such programs.[159]

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156 *Id.*

157 Indeed, as discussed above, some courts have found that certain outreach programs that do not confer any benefits to students based on their race are not even subject to strict scrutiny. *See supra* note 142 and accompanying text. Therefore, this analysis is more focused on those programs that *do* confer benefits to minority students based on their race, but allocate benefits specifically dedicated to achieving minority recruitment and retention, rather than doling out a closed universe of available benefits.

158 This argument does not apply to financial aid programs, which do apportion limited resources.

159 The likelihood that a court will accept this argument may depend on whether it adopts Justice Powell's or Justice O'Connor's conception of diversity. *See supra* notes 92, 95, 105, 117 and accompanying text (describing Justice Powell's and Justice O'Connor's positions). If Justice O'Connor's conception is adopted, the school may be able to emphasize the need to ensure that minority students attend and succeed at their institutions in order to achieve the type of "leadership legitimacy" she touted. *See supra* note 92 and accompanying text. However, given the *Parents Involved* Court's emphasis on "broad-based" diversity, the Justices may be unwilling to accept a program dedicated only to achieving one element of that diversity. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2754 (2007) (noting that *Grutter* Court limited its holding to "a

Opponents of these programs may argue that, though these programs provide a benefit to minority students that would not otherwise be provided to nonminorities, the resources expended on the programs by colleges could go toward other programs that would benefit nonminority and minority students alike. However, this ignores the fact that colleges' and universities' budgets are not fully fungible:[160] Money spent on a particular program does not equate to an equal benefit that would otherwise be enjoyed by all students. Colleges develop budgets based upon individual programs that they believe are a priority and adjust their funding accordingly.[161] If the college or university determines that funding is needed for a recruitment or retention program, they will request funding specifically for that program. They do not start with a given level of funding that they must allocate among various programs and therefore are not starving some

specific type of broad-based diversity"); *see also supra* note 117 and accompanying text (noting that broad-based diversity reflects Justice Powell's conceptualization of diversity in *Bakke*). On the other hand, colleges may argue that, because racial minorities are the ones in need of these particular interventions, providing the programs is contributing to a broader version of diversity. Further, because these students may have already been selected based on their contribution to the school's diversity, retaining them will simply serve to reinforce whichever conception of diversity was used by the admissions office.

160 This argument applies for both public and private universities. While public universities create a budget that is then funded through a combination of student fees, alumni donations, endowment profits, and state money, *see* Laura Houston, *Schools Seek Self-Sufficiency—Universities Search for Ways To Raise Funds*, ARIZ. REPUBLIC, Jul. 15, 2006, at 10 (noting that most public university funding comes from tuition and state and federal funding, but describing plans to develop other revenue streams), private universities are likewise able to control the funding available to meet their budget requests by adjusting tuition levels, fundraising, and using the school's endowment. *See, e.g.*, Tracy Jan, *Harvard To Reduce Dependence on Drawing from Endowment*, BOSTON GLOBE, Mar. 20, 2009, at B2 (describing Harvard's plans to adjust budget to meet endowment shortfalls, but noting that Harvard's reliance on endowment had increased enormously "as the funds' returns outpaced other sources of income and its operating budget grew as well").

161 *See, e.g.*, VA. CODE ANN. § 23-9.9 (2006 & Supp. 2008) (describing submission of budget proposals to State Council of Higher Education and approval or modification of proposals by Council according to "Council's plans, policies, formulae and guidelines"); WASH. REV. CODE § 28B.76.210 (2009) (describing how Washington's institutions of higher education submit budget proposals); *see also* HUMBOLDT STATE UNIV., BUDGET REVIEW PROCESS 2, http://www.humboldt.edu/~budget/documents/HSU_Budget2_Process.pdf (last visited Mar. 26, 2009) ("Deans and directors develop a budget in full consultation with department chairs and unit heads who in turn develop a unit budget in consultation with faculty/staff and submit any augmentation to base resource requests to dean/director."); Rutgers, Budget Facts and Figures: New Jersey Budget Process and Hearing Timeline, http://budgetfacts.rutgers.edu/timeline.shtml (last visited Mar. 26, 2009) (detailing process by which budget requests are made, funding levels are set by state government, and tuition and fees are adjusted accordingly by University).

programs in favor of minority-exclusive or minority-targeted programs when defining their budgetary priorities.[162]

The objection that these programs burden nonminority students may also be rebutted through an analogy to taxpayer standing. The Supreme Court has noted that a federal taxpayer's interest in the way the federal government spends the money in the treasury "is comparatively minute and indeterminable" and that, even if the government uses taxpayer money for expenditures with which the taxpayer disagrees, the taxpayer cannot allege a sufficiently "direct injury" in order to gain standing.[163] Minority-targeted and minority-exclusive programs are similarly a relatively tiny portion of university and college budgets.[164] Unlike in the admissions context, where being denied admission wholly bars an applicant from the tangible benefit of attendance at the school, the discretionary use of budgetary funds by university or college administrators to support minority-specific programming is one of any number of discretionary budgetary determinations that are made by administrators. Thus, any injury to nonminority students is so small as to be noncognizable.[165] Given the extent to which administrators have discretion to determine the uses to which university and college budgets are put, these relatively minor budget items cannot be said to injure any particular student.

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[162] Opponents of these programs may still feel that, despite the absence of a direct correlation between more spending on minority-targeted or minority-exclusive programs and less spending on programs for all students, these programs are using funds that would eventually be budgeted for and expended toward other, school-wide programs. To the extent that the Supreme Court agrees with this objection, the argument made below in Part III.B.2 would be more applicable.

[163] Massachusetts v. Mellon, 262 U.S. 447, 487–88 (1923).

[164] *Compare* THE OHIO STATE UNIV., THE OFFICE OF MINORITY AFFAIRS BUDGET 3, http://oaa.osu.edu/documents/OMA_07_BudgetTransparencyDoc.pdf (last visited Mar. 26, 2009) (listing overall Office of Minority Affairs budget as $6,791,000), *with* THE OHIO STATE UNIV., FY 2008 BUDGET IN BRIEF 16 (2007), http://www.rpia.ohio-state.edu/cfb/docs/cfb-2008.pdf (listing total budget for The Ohio State University as $4,000,000,000, rendering Office of Minority Affairs budget 0.1% of University's overall budget). *Compare also* UNIV. OF WASH., UNIVERSITY OF WASHINGTON FISCAL YEAR 2009 OPERATING AND CAPITAL BUDGETS, at 8, http://www.washington.edu/admin/pb/home/pdf/regents-item-fy09.pdf (last visited Mar. 26, 2009) (listing budget for attracting and retaining diverse students as $1,509,000), *with id.* at 19, 23 (listing total operating budget for University of Washington as $3,090,390,000 and capital expenditure budget as $238,185,473, rendering diversity initiatives 0.045% of University's proposed budget).

[165] *Cf.* Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553, 2559 (2007) ("In light of the size of the federal budget, it is a complete fiction to argue that an unconstitutional federal expenditure causes an individual federal taxpayer any measurable economic harm."). The Court has created only one exception to the general rule against taxpayer standing—for allegations that use of federal funds violate the Establishment Clause. *Id.* In all other cases, the injury to the taxpayer is presumed to be too attenuated to merit standing.

In contrast, financial aid programs are more likely to disburse funds from a limited pool that might otherwise go to another, nonminority student.[166] Though schools may argue that particular scholarship programs, for example those funded by a minority alumnus explicitly for minority students,[167] would not exist absent this diversity goal, schools will likely need to provide individualized consideration to students in awarding financial aid. This should be especially simple in the context of scholarships, which are generally awarded within the admissions context. Financial aid determinations can thus provide individualized consideration while taking race into account in the same manner as admissions programs do under *Gratz* and *Grutter*.[168]

In sum, most recruitment and retention programs provide minority students with benefits that otherwise would not be present on campus. Moreover, these benefits address specific gaps in educational opportunity that are unique to minority students. Thus, recruitment and retention programs do not require the same one-to-one consideration of whether a student merits a particular benefit, as is required in the admissions context. Financial aid programs are the exception, being more analogous to admissions in that they are sought after and needed by many students and come from a limited pool of funding. However, even if a court were to apply the traditional four-pronged narrow tailoring test to all recruitment and retention programs, colleges can design them appropriately in order to withstand strict scrutiny analysis.

2. *Schools Can Add Elements of Individualized Consideration to Their Programs*

Though there is a strong argument to be made that many recruitment and retention programs can escape the individualized consideration prong of the test, schools can, in the alternative, ensure that individualized consideration is a part of these programs.[169] As the fol-

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[166] Though affirmative action opponents may argue that minority-exclusive academic advising or summer bridge programs likewise award limited resources that might otherwise go to nonminority students, it can at least be maintained that those programs are intended explicitly to increase diversity, unlike financial aid or admissions, which are undeniably sought by most qualified students at virtually every college or university. In other words, while admission to and funding to attend college are things that every student needs in order to achieve their educational goals, retention programs are essentially a bonus that could benefit all students but are needed by only a few.

[167] For a more in-depth discussion of the legality of such scholarships, see generally Bednark, *supra* note 19.

[168] *See infra* Part III.B.2 (discussing the practicality of individualized consideration in financial aid and other non-admissions decisions).

[169] For some programs, particularly outreach programs, individualized consideration is a virtual impossibility; only if outreach is targeted toward a particular candidate who has

lowing discussion elaborates, race-targeted programs are much more likely to be able to incorporate individualized consideration than race-exclusive ones. Because of the administrative and financial cost of considering students individually for participation in recruitment and retention programs, as well as the limitation such consideration would put on the number of minority students who could participate,[170] schools often prefer to base admission into their programs on simple criteria, including race. Thus, any minority student who is enrolled in the school or meets particular criteria (such as having an engineering major or a grade point average below a specified level) could participate automatically in such programs. Nonetheless, adding a screening level to these programs so that prospective participants of all races are considered individually for participation would be a relatively simple change.

Many programs, such as mentoring, academic, summer bridge, counseling, and financial aid programs, may be designed so that the ability to participate mirrors the admissions program approved by the Court in *Grutter*.[171] However, in the recruitment and retention context, in contrast with admissions where institutions must consider all the facets of diversity necessary to create an optimal class of admitted students, institutions are considering whether an individual student faces particular challenges that make him or her less likely to persist or enroll in school. Even if the school has done the work through the admissions process of ensuring an optimal level of diversity in an entering class, these programs must likewise be geared toward achieving and maintaining that diversity. Experiencing high levels of attrition among, or low levels of applications received from, particular populations makes such diversity impossible, regardless of admissions efforts, and thus can only be remedied by targeted programming.

For example, in order to determine which students will be invited to an academic summer bridge program prior to freshman year, the

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already applied to the school may there be individualized consideration, which would leave out a large sector of the population that such outreach efforts seek to target. However, such programs are the most likely either to be replaced by race-neutral alternatives or to be catapulted outside of the narrow tailoring analysis since they do not confer a concrete benefit. *See supra* notes 142, 144–45 and accompanying text.

170 Individualized consideration requires that various staff members be devoted entirely to evaluating a large number of applications, which may force schools to hire more staff. Limitations on time and resources available for this sort of evaluation may also mean that fewer students may be considered for admission or accepted into the program.

171 In fact, many of the enormous universities that lack the resources to give individualized consideration to all of their applicants may be more able to give closer consideration to whether or not a student qualifies for additional academic assistance once admitted. *See supra* notes 108–09, 121 and accompanying text (discussing challenges for large public institutions seeking to implement affirmative action programs).

school could evaluate each candidate's application on a range of criteria, such as quality of home school, geographic area, number of advanced placement courses taken, and grade point average, all the while taking into account the degree to which the student's race may impact their academic integration into the school. Similarly, schools might provide mentoring or counseling services to any student who applies for it but give preference to minority students, or they might ask residential advisors or other student leaders to identify students for such interventions while paying special attention to minority students' adjustment to the campus. Selection of students to be peer mentors likewise might require individualized consideration of applicants for these positions, with a preference given to prospective minority mentors.

Such changes likely would foreclose race-exclusive programs, but race-conscious and race-targeted programs may be maintained.[172] Further, this individualized consideration will ensure that there is no undue harm to any other racial group; students of all races will have access to these programs. The precise form that this individualized consideration takes may vary depending upon the type of program. However, by giving consideration to an individual's circumstances, with reference to the unique impact that race may have on his or her likelihood of application, matriculation, and persistence in higher education, a university can meet both the individualized consideration and undue harm prongs of the narrow tailoring requirement. Thus, institutions of higher education can—consistent with the Constitution—maintain programs improving minority recruitment and retention.

Conclusion

Absent explicit guidance from the Supreme Court, colleges may be wary of standing up to pressure from affirmative action opponents who seek to end any race-conscious programs in higher education. However, given the extremely important role such programs play in improving the racial diversity of institutions of higher education—especially as state initiatives and the Supreme Court's admissions

[172] The Court in *Gratz* held that the admissions program at issue was not narrowly tailored because race had a specific, identifiable, and decisive impact on a student's admission to the program. *Gratz v. Bollinger*, 539 U.S. 244, 269–72 (2003). Thus, provided that the programs employ a holistic and individualized evaluation of a student's qualification for a particular program and do not make the programs entirely race-exclusive, maintaining the race-targeted quality of the program should be within the bounds of the Court's holding. *See supra* notes 106–09 and accompanying text (discussing Rehnquist's opinion for majority in *Grutter*).

decisions have limited the extent to which admissions can be used to achieve diversity—colleges should consider carefully whether there are ways of demonstrating that their current programs are narrowly tailored to achieve diversity or, alternatively, tailoring their programs to the guidance provided by the Supreme Court. Though many schools may be reluctant to gamble on the likelihood that the Court will approve their programs, the vital need for race-conscious recruitment and retention programs justifies the aggressive design of these programs to achieve maximum impact while complying with the Equal Protection Clause.