Virginia Tech Board of Visitors Meeting
April 6, 2003

Minutes

A: Resolution Regarding Resolutions to Be Presented For Board of Visitors Adoption

B: Resolution Rescinding the Board Policy Regarding Speakers on Campus

C: Mr. Rocovich's timeline presentation

C: July 12, 2002 Article from Chronicle of Higher Education

C: Correspondence from the Center for Equal Opportunity

C: Letters from State Solicitor Hurd, various dates (36 pages)

C: Feb 21, 2003 and March 7, 2003 Articles from Chronicle of Higher Education

C: Letter from David Johnson to Rectors of Boards of Visitors, March 18, 2003

C: March 19, 2003 & March 28, 2003 Articles

C: U.S. Secretary of Education report on "Race-Neutral Alternatives in Postsecondary Education" March 2003 (37 pages)

C: April 4, 2003 Article from Chronicle of Higher Education

C: Summary of the Tuttle Court Case

D: President Steger's Remarks to the Board

E: Presentations by Invited Speakers (Daniel, Blieszner, Katz, Watford, Allen)

E: Resolution from the GSA

E: University Council Resolution

F: Letter from State Solicitor William H. Hurd to the Rector and Board dated April 3, 2003

G: Memo from Admissions to University Counsel

H: Presidential Policy Memorandum #112

I: Resolution Rescinding the "Resolution ... Articulating The University's Policy Against Discrimination"

MINUTES
April 6, 2003

The Board of Visitors of Virginia Polytechnic Institute and State University held a special meeting on Sunday, April 6, 2003, at 2:00 p.m. in the Owens Hall Banquet Room on the Virginia Tech campus at Blacksburg, Virginia.

Present	**Absent**
Mr. Mitchell O. Carr	Mr. L. Bruce Holland
Mr. Ben J. Davenport, Jr.	
Mr. Donald R. Johnson	
Mr. William C. Latham	
Mr. John R. Lawson, II	
Mr. T. Rodman Layman	
Mr. Jacob A. Lutz, III	
Mr. A. Ronald Petera	
Mr. Thomas L. Robertson	
Mr. John G. Rocovich, Jr.	
Dr. Beverly Sgro	
Mr. Bruce B. Smith	
Mr. Philip S. Thompson	
Mr. Brian Montgomery, Undergraduate Student Representative	
Mr. Christian Rieser, Graduate Student Representative	
Dr. Edd Sewell, President, Faculty Senate	

Special Guest: David E. Johnson, Deputy Attorney General for Health, Education, and Social Services, Commonwealth of Virginia.

Also present were the following: Dr. Charles W. Steger, Dr. Mark McNamee, Mr. Minnis E. Ridenour, Dr. Raymond D. Smoot, Jr., Dr. Lanny Cross, Dr. Ben Dixon, Mr. Erv Blythe, Dr. Tom Tillar, Dr. Pat Hyer, Mr. Larry Hincker, Mr. Jerry Cain, Dr. Karen DePauw, Dr. Joe Merola, Mr. Dwight Shelton, Mr. Ralph Byers, Ms. Kim O'Rourke, Dr. Elizabeth Flanagan, Ms. Kay Heidbreder, Dr. Lay Nam Chang, Ms. Sandy Smith, Ms. Teresa Wright, Ms. Gail Williams, Dr. Hassan Aref, Ms. Jean Elliott, Mr. Paul Lancaster, Ms. Sherry Box, Mr. Daniel Sterling, Dr. Rosemary Blieszner, Ms. Meredith Katz, Dr. Bevlee Watford, General Jerrold Allen, faculty, staff, students, reporters, and others, totaling more than 200 people.

This special meeting of the Board was called to order by the Rector, Mr. Rocovich, at 2:00 p.m.

Mr. Rocovich introduced Mr. Bruce Smith and welcomed him to the Board.

Mr. Rocovich made a motion that the agenda be approved as distributed. This motion was seconded by Mr. Robertson. (no vote was taken)

* * * * *

Resolution Regarding Resolutions to be Presented for Board of Visitors Adoption

Mr. Latham made a motion to postpone consideration of this resolution until the June meeting of the Board, and it was seconded. During the discussion, Mr. Latham explained that he thought it would take too much time to deal with this item, particularly given the full agenda. Others cited the importance of this resolution because it speaks to the issue of inadequate time to review policy matters that has disturbed many Board members and others within the university community since the March 10 meeting. Another issue discussed was who has the authority to present resolutions. In response, it was noted that resolutions typically are brought forward through the committees of the Board or by the President; however, only members of the Board can move for approval of a resolution and vote. Another concern raised was that this resolution might preclude Board members from acting on emergency items; however, it was noted that the resolution specifically provides a mechanism for dealing with emergency situations.

The Rector then called for a vote on postponing the resolution until the June Board meeting. With a vote of 5 in favor of postponing, and 8 in favor of taking up consideration of the resolution at this time, the motion to postpone consideration of this resolution until the June Board meeting was lost. The Rector declared that the Board would then enter into a discussion of the merits of the resolution that relates to Section 4 of the Board's bylaws.

Mr. Layman then made a motion for an amendment to the resolution that adds a paragraph after the second "be it resolved" statement to read:

> **Further be it resolved that it being the sense of the Board that resolutions making or altering policy of the University should have the widest and most mature consideration reasonably practical, and should also be referred to and considered by a Board committee when feasible, a committee shall be appointed by the Rector to evaluate whether these guidelines might be strengthened, which committee shall report no less than fifteen (15) days prior to the August Board meeting; and**

Mr. Latham expressed a point of order, noting that a motion had not yet been made to consider the original resolution. Mr. Lutz then made a motion to consider the original resolution, and it was seconded by Mr. Latham.

Discussion returned to the amendment, and Mr. Layman was asked for clarification. Mr. Layman clarified that if the original resolution with his proposed amendment were adopted, the Board would commence operating under the three days' notice provision as an interim measure; and at the same time, the Board would appoint an ad hoc committee to study whether that is indeed the correct amount of advance notice or if there may be some other better or different advance notice requirement for matters

coming before the Board. Mr. Lutz then seconded Mr. Layman's motion to amend the resolution as described above.

There was considerable discussion dealing primarily with whether the three-day rule would also apply to amendments. It was clarified that nothing in this resolution would preclude amendments to a matter brought before the Board from being introduced at the meeting itself.

The Rector then called for a vote to adopt the amendment moved by Mr. Layman and seconded by Mr. Lutz. The motion to adopt the amendment passed.

The Rector subsequently called for a vote to adopt the resolution (moved by Mr. Latham and seconded by Mr. Lutz), as amended. The motion to adopt the resolution as amended passed.

(Copy filed with the permanent minutes and marked Attachment A)

* * * * *

Resolution Rescinding the Board Policy Regarding Speakers on Campus

Mr. Rocovich noted that the resolution adopted on March 10, 2003, expired by its own terms and became null and void based upon the determination made by the Virginia Attorney General's Office. Mr. Lutz moved for adoption of this resolution to rescind, and it was seconded by Mr. Johnson. There was no further discussion. The resolution was carried by unanimous vote. (Copy filed with the permanent minutes and marked Attachment B.)

* * * * *

Resolution Rescinding the Resolution on Non-Discrimination Adopted March 10, 2003

Mr. Rocovich announced that, as noted on the agenda, he would make comments, call upon President Steger for comments, and then call upon five invited speakers who each will make a four-minute presentation.

Mr. Rocovich reviewed with Board members, administration, faculty, staff, students and guests a timeline of activity that he had developed beginning with the adoption of *The Civil Rights Act of 1964* and concluding with the issuance of the U. S. Secretary of Education's report on "Race-Neutral Alternatives in Postsecondary Education: Innovative Approaches to Diversity" in March 2003. Copies of the additional supporting materials referenced in his timeline were distributed to members of the Board. These included:

- *Chronicle of Higher Education* article of July 12, 2002,
- Letter from the Center for Equal Opportunity to Mr. Rocovich dated July 15, 2002,

- Letter from State Solicitor Hurd to the Boards of Visitors dated November 26, 2002, and marked "confidential and privileged attorney-client communication,"
- Memo from State Solicitor Hurd to the Presidents, Boards of Visitors, and others dated April 22, 2002,
- Letter from State Solicitor Hurd to Mr. Rocovich dated November 27, 2002,
- *Chronicle of Higher Education* article of February 21, 2003,
- *Chronicle of Higher Education* article of March 7, 2003,
- Letter from David Johnson to Rectors of Boards of Visitors dated March 18, 2003,
- Op-ed piece by Blum and Clegg published in *Roanoke Times* on March 29, 2003,
- U.S. Secretary of Education Rod Paige's report on "Race-Neutral Alternatives in Postsecondary Education" released March 2003,
- *Chronicle of Higher Education* articles of April 4, 2003,
- Summary of *Tuttle* Case decided by the U.S. Court of Appeals for the Fourth Circuit in 1999.

Simultaneously, any items that previously were confidential became public documents and were made available to the public. (Copies filed with the permanent minutes and marked Attachment C.)

At this point Mr. Rocovich asked President Steger to make remarks. President Steger addressed the members of the Board, faculty, staff, students and guests. Within his remarks, he also responded to some of the issues raised in Mr. Rocovich's statement. (Copy filed with the permanent minutes and marked Attachment D.)

Break – 3:25 to 3:35 p.m.

Mr. Rocovich called the meeting back to order and called upon speakers, each of who delivered brief comments:

Mr. Sterling Daniel, President, Student Government Association
Dr. Rosemary Blieszner, Alumni Distinguished Professor, Human Development and former Director of the Strategic Planning Process
Ms. Meredith Katz, Graduate Student Assembly
Dr. Bevlee Watford, Associate Dean, Academic Affairs, College of Engineering
Major General Jerrold Allen, Commandant, Corps of Cadets

(Copies filed with the permanent minutes and marked Attachment E.)

Mr. Rocovich introduced David Johnson, Deputy Attorney General of Virginia for Health, Education and Social Services. David Johnson's comments began with a letter dated April 3, 2003, and sent from State Solicitor William H. Hurd to the Rector and members of the Board as a "Confidential – Attorney-Client Communication." Although copies had been sent to all Board members, David Johnson handed out copies to the Board members at the meeting in open session. [Note: Simultaneously, this letter of April 3 became a public document.]

(Copy filed with the permanent minutes and marked Attachment F.)

David Johnson: This letter is the starting point for my comments because it shows that despite the advice from our [the Attorney General's] office dating back to April 2002, a substantial number of illegal, constitutionally problematic, or suspect programs are still in place at Virginia Tech. It has been difficult for our office to determine the exact number of problems because we have not been provided information from all programs. He referenced a memorandum from the Office of Undergraduate Admissions that provides no information.

Robertson: This [April 3 letter] was provided to the Board under the Attorney/Client Privilege. Are we violating that privilege by this discussion in open session?

Lutz: Does this constitute a waiver of that privilege?

Rocovich: We are not currently being sued under this circumstance. The privilege is ours. Any member can waive the privilege.

Lutz: I think as a Board we must collectively deal with the waiver, not individually.

Rocovich: As I understood it, we are having a meeting to have open and candid discussion about the situation, and this is a report from the Attorney General's Office advising us on how well we are complying with the law.

Robertson: On many other occasions we have gone into Closed Session to discuss attorney/client communication to maintain that privilege. I think it is the Board's decision on whether to waive it, is it not?

Rocovich: My judgment is that any member can waive it, but I defer to Deputy Attorney General Johnson for his thought on that matter.

David Johnson: General counsel is here as well. The provision that allows a Board to go into closed session with their attorney is based on consultation pertaining to actual or probable litigation or specific legal matters requiring the provision of legal advice. I am happy to say what I have to say about this issue in open meeting, I am happy to say it in closed meeting. Either way, what I have to say will not change. What I say will begin with this letter. The privilege of electing to go into closed session for reason authorized by the *Code* [*of Virginia*] belongs to the collective Board.

Lutz: This letter says "Confidential - Attorney-Client Communication," so that must have been put on there for the purpose of telling us that this is confidential information protected by some privilege. Is this correct?

David Johnson: That is correct.

Lutz: And the privilege is the privilege of the Board collectively. It is up to us as the client as to whether we waive it. It is not up to you as counsel to waive it for us?

David Johnson: That is correct. I was pointing out that is where my advice will start.

Mr. Latham made a motion that the privilege be waived and this be discussed fully in open session. It was seconded by Mr. Donald Johnson.

Rocovich: The motion has been made by Mr. Latham and seconded by Mr. Don Johnson that this advice and analysis be open to the public.

Lutz: What is the impact of our waiver of attorney/client privilege?

David Johnson: If the Board or University were sued on any of these issues next month or next year, you could still go into closed session and receive advice from counsel [at that time] because the act of going into a closed session for litigation, actual or probable, or to consider advice on legal issues is fact-specific. So, staying out today and hearing what I have to say, which will be fairly broad and most of it has been discussed already through the memos and statements of our office, is not in my judgment going to constitute any subject matter waiver as there is no specific case pending. If there were a case filed and you needed to talk to university counsel in closed session [at that time], you would make the motion pursuant to the *Code* [*of Virginia*] and go into closed session.

Lutz: Is it your advice today as our counsel that we proceed to waive the privilege with regard to the information that you are prepared to discuss? Yes or no answer.

David Johnson: This is not a yes-or-no question. It is your decision to go into closed session. You have asked me what the effect is. If you are sued and you are to discuss a suit on this very issue with counsel, you will be able to go into closed session. What I will talk about today is what the status of the law is. In general, I will talk about what we have done in interaction with this office, which has already been read into the record by the Rector and has already been mentioned by everyone who has spoken on this.

Lutz: I am asking you as my lawyer whether we should waive this privilege.

David Johnson: For what reason?

Lutz: For purposes of your presentation today.

David Johnson: I see no reason why I should speak in closed session. If you have concerns regarding litigation, you need to speak to those and I will speak to that if you have any other concerns. I cannot issue some broad opinion on a speculative question that says is it my advice to go into closed session. You can only go into closed session for very specific reasons in the *Code* [*of Virginia*] and the *Code* is actual or probable litigation or the advice of counsel on substantial legal issue.

Lutz: I am not asking if we should go into closed session. You have given us a document that says "confidential attorney client communication," but you are prepared to speak about that in open session.

David Johnson: All I said is that will be the starting point of my remarks, and I am giving it [the April 3 letter] in the event that Board members had not received it. That is the last thing I am going to say about it.

Rocovich: Call for additional discussion. Mr. Latham made the motion that we continue in open session to hear Mr. David Johnson's remarks. It was seconded by Mr. Don Johnson.

Latham: Mr. Rector, it was not my motion that we discuss this document. My motion was to waive the confidentiality and discuss it in open session. Seconded by Mr. Don Johnson.

Carr: What is the objection? Didn't we come here to hear the public comment and hear both sides?

Robertson: My objection is not that I want to go into closed session, but I personally do not want to waive the attorney-client privilege. Not being a lawyer, I only know the information I received on Friday [some Board members received the April 3 letter on Friday, April 4] had a heading that it was "Confidential - Attorney-Client Communication." My understanding is that that is not to be shared, and I have not shared it with others. I don't object to discussing any of this information. I think we should. I just want to understand my legal obligation.

Lutz: I echo Mr. Robertson's concern. If you [David Johnson] said that is your only reference to this document, then I don't know if we need to take action on the motion on the table.

Latham: The motion on the table deals with the content of the document.

Lutz: He said he plans to discuss it.

Rocovich: I don't believe he said that.

David Johnson: I said that my analysis is going to start from the letter of April 3 provided to the Board late Thursday or early Friday, actually the State Solicitor's letter. I said that is where my discussion will start because the Rector has given the history. There are things in there that obviously I will say, but they are things that have been said in other contexts as well. That was the reference to April 3, and passing it out was to see if anybody did not have it.

Thompson: A lot of how we got to where we are has been predicated on the fact that we felt threatened concerning our personal liability for being on the Board with regard to race-conscious programs. As I read the report, which I also just received prior to coming here, there are a number of assertions in here that are based on very sketchy information and leaning back toward law to draw conclusions that are perhaps incorrect. I think it is a valid question with regard to us waiving attorney-client privilege or not so we know where we stand. It is not to avoid public discussion. The Attorney General's office has basically threatened all of us that we lose all of our protection.

David Johnson: The Attorney General's Office has not threatened anyone.

Thompson: The words have been quite clear.

David Johnson: They advise only on the basis of the law.

Thompson: Smart-aleck responses don't help.

Rocovich: Perhaps you can address the timing issue. Why is it we only recently got this letter? We directed these to be developed after December 15. When did the Office of the Attorney General get to review them?

David Johnson: The reason it [the April 3 letter] is sketchy is because the information was incomplete and in many parts. The reason we sent it out on Thursday [April 3] was because it was a prompt response in getting it the Friday before or so from university counsel, who made an effort to collect it for months. It was difficult because there was a varying degree of cooperation with the office here [at Virginia Tech] with our office. When we got the notebook [from the university's legal counsel containing materials on potentially race-conscious programs at Virginia Tech], we immediately advised. The timing was not of our choosing, but we responded promptly because there are serious matters this Board needed to know. As I said, it was not a topic I was going to bring up today other than mentioning it. I apologize if I sounded like a smart aleck, but I could not allow someone to say the Attorney General's office makes threats. The Attorney General's office advises, and Mr. Hurd laid out very clearly in his letter of November 26, 2002, the arguments as to why we believe you as Board members should be advised that there might be personal liability if once the law is determined and you are advised on it, you proceed in another way. Had we not done that, we would not be fulfilling our obligation as your [the Board's] attorney. I apologize that I snapped, but we cannot have it said that the Attorney General threatens his clients.

Mr. Rocovich then called for further discussion. Hearing none, he asked Mr. Latham to remake his motion.

Latham: The proposition is a simple one: that we discuss fully in open session the document drafted on April 3 by the Attorney General's office. Mr. Don Johnson seconded the motion.

Mr. Rocovich called for the vote by a show of hands, and announced that the motion carried with eight (8) votes. One (1) person (Robertson) stated that he opposed. There were two (2) abstentions (Lutz, Thompson). Mr. Rocovich then asked David Johnson to continue.

David Johnson: The memo just handed out from the Office of Undergraduate Admissions provided no information on whether or how it considers race in determining admission to Virginia Tech. [The memo under discussion is the response from the Office of Undergraduate Admissions to the university legal counsel's request for

information about race-conscious programs.] A follow-up memo from Admissions to university counsel mentions ethnicity and provides no details. (Copies filed with the permanent minutes and marked Attachment G.) It is disturbing from our [the Attorney General's Office] perspective that despite the Board's direction to the university officials to provide the Office of Attorney General information related to admissions and hiring, it is clear that that request has not been fully honored. I noted in yesterday's *Richmond Times Dispatch* that representatives of the Admissions Office stated that the school gives preference based on race and gender. Similar statements were made to the *Roanoke Times* March 13, 2003. Yet the details of this information are not provided to our office as you directed. It is also disturbing that comments from the same office here on campus state that Admissions will not implement your resolution of March 10 until after today's meeting and after the Supreme Court decision. Despite this lack of information provided to our office, this Board's resolution of March 10, 2003, mandating racial neutrality, once implemented, would cure the problems we have described as well as any similar problems that may exist. On the other hand, rescinding that resolution without more carries with it the distinct possibility of ratifying and reviving these unlawful programs. That could expose Virginia Tech and possibly individual Board members to liability. There are no circumstances under which I could advise this Board to leave here today with any policy or resolution in place that perpetuates unconstitutional race-conscious programs. Maintaining the current policy, however, combined with review by our office of all programs, both current and projected, would eliminate liability and provide the legal support to achieve the constitutionally permissible goals of the university.

Sgro: Mr. David Johnson, I think the Attorney General's Office has advised us that there were two options the Board could take. One is a policy we passed in March; the second option is narrow tailoring. I think this what we asked the Board to do in December. Is it still the Attorney General Office's opinion that we have those options available to the Board of Visitors?

David Johnson: The Attorney General's opinion has not changed since the April 22, 2002, memo from the State Solicitor to all Presidents, Rectors, and Boards of Visitors. In that, we outlined the ways race could be considered.

Sgro: And narrowly tailored is one of those?

David Johnson: The diversity plan--and diversity not meaning race--if you are talking about the five-pronged test [for narrow tailoring] of the total case, which is the law in the United States Fourth Circuit Court of Appeals, which is by shorthand the narrow tailoring plan, we have advised consistently for over a year that that is acceptable.

Latham: Let me understand clearly. If we leave the motion [March 10 resolution] in place which the Attorney General's office participated in drafting, that protects members of this Board and this University from legal liability?

David Johnson: The resolution of March 10 that states race is no longer a factor will, if implemented, have the effect of ending all race considerations in these programs.

Therefore, there could not be any argument made against the university or Board members that they are constitutionally race-based.

Latham: Would it not have been implemented effective March 10, the date of the resolution?

David Johnson: By implemented, I mean carried out by the administration of Virginia Tech. I have no idea if it has been. I know from the December 15 resolution that we were not getting information as directed. I have no idea, to this day, how many programs are implemented at this school. They may be fine; we have no way of knowing.

Mr. Latham: The December resolution has not been followed by the University. Am I accurate, as a result of the information Mr. Hurd based this letter on?

David Johnson: All I will say is that after the December 15 resolution directing information to be collected and forwarded to our office, your university counsel began to spread out to the University, yet we received sketchy information. In the letter that I referenced, we show you – here some people said this, some people said projected programs, some responded that we have no race-based programs. They may not, but that is their conclusion. We need to see what the programs are and analyze them and give our opinion of them.

Thompson: Was the policy [university non-discrimination policy including sexual orientation for the first time] established in the early 1990s illegal? That statement included all the various protected groups including sexual orientation. The March 10 resolution in effect deleted sexual orientation.

David Johnson: The matter of Boards of Visitors classifying sexual orientation as a protected class is one that has not yet been fully explored by the Office of the Attorney General. The public policy of the Commonwealth rejecting such classification has been demonstrated on many occasions. The Virginia Human Rights Act states as a policy of the Commonwealth to safeguard all individuals from discrimination because of a variety of factors – race, disability, age, etc., - in places of public accommodation including educational institutions, but specifically does not include sexual orientation. On many occasions, the General Assembly has had legislation before it to include sexual orientation and has declined to do it. Prior opinions of the Office of Attorney General have noted that local school boards and local governments [such as Fairfax County, Virginia, and its school board, later cited by Mr. Thompson] have no authority to include sexual orientation in their policies on non-discrimination. All of this taken together tends to establish a consistent policy of the Commonwealth on the issue of sexual orientation as a protected class. Whether or not a Board can do something the Commonwealth has consistently declined to do is a very close call given the broad authority the Boards have to conduct the affairs of their colleges. Our office cannot predict the consequences of such an action with a comforting degree of certainty.

Thompson: I apologize for my not being a lawyer and tendency to get frustrated with this. That was not my question. If you extract sexual orientation, do we have an illegal statement policy for our school?

David Johnson: The resolution that was passed on March 10 is legal.

Thompson: I did not ask about the March 10 resolution. The prior policy for the school that was in existence prior to March 10, including sexual orientation, was it legal or illegal?

Latham: Does Mr. David Johnson have that resolution before him?

David Johnson: It is my fault; I did not hear the question correctly. I thought we were talking about the resolution of March 10, which did not include sexual orientation in the list of protected classes.

Thompson: I understand the difference between protected classes and non-protected classes as reflected in the Executive Order and in following through with Title VII. That is not my question. The question is simple: if the Attorney General's office has taken the position about what is legal and what is not relative to our personal liability, I wanted to know if the prior policy statement was a legal statement or not a legal statement.

The Secretary of the Board provided Mr. David Johnson with a copy of the prior policy statement in the form of Presidential Policy Memorandum #112 issued by President McComas on March 11, 1991. (Copy filed with the permanent minutes and marked Attachment H.)

David Johnson: The prior policy statement that you asked me to comment on is the one that approves the resolution that adds the phrase sexual orientation to the non-discrimination statement.

Thompson: To offer a little help, let us take it in two pieces. First without sexual orientation, and second tell us about sexual orientation.

David Johnson: I can answer it in one piece. What I have said is that this Board has broad authority to govern the operations of this school.

Thompson: I know what we can do to the formation of law – we can do nothing relative to the formation of law. The Attorney General has made that clear in his statements in Fairfax; that is not what I am debating. We are here to find a solution to a very complex problem, where there is a lot of emotion, rightfully so, because the world is not yet where we all would like it to be. If you want to talk about sexual orientation, there are 13 states forbidding sodomy among same sex partners. Virginia is one of these states. There are 23 states that have statements about discrimination not being tolerated. These are in the public sector as well as the non-public sector. You can talk about sexual orientation as a part of Title VII and talk about the fact that harassment applies and the fact that you are going to protect people from harassment

in the workplace. But again, that is a second piece of this equation. We started with the assertion that we have a number of programs that are not complying with the law. The differentiation between the programs being in non-compliance versus the policy being in non-compliance is critically important to this Board to make decisions. We set policy; we do not set execution. We expect execution to make sure it complies. I think that is what our job is – if I am misinformed, I apologize. I just want to understand - is the policy screwed up, or is the execution screwed up? We know we have to deal with fixing it. You made your assertion about some of the programs being not in compliance with the law. Perhaps they are. If they aren't, the President has said he is willing to fix them, and so are we behind him to fix them. The distinguishing point between policy being correct or not correct and execution being correct or not correct is critically important to what we have to do today.

David Johnson: And the response is up to where you began the questions on sexual orientation, that is where I was talking about programs we [the Attorney General's Office] believe have problems. That was on race matters, not sexual orientation. We were given no information whatsoever about programs that deal with sexual orientation. I don't know if there are any. The only question that was about was in the resolution [of March 10]. If you are talking about the execution of program, I am talking about race-conscious programs. If you are talking about policy in regard to race, our position is the same as it has been for over a year. On sexual orientation, the strong public policy of the Commonwealth tends to draw the conclusion that it is not a class that is included in protected classes. However, given the power of the Board, we [the Attorney General's Office] are saying it is a very close call. That may not be the answer you want to hear, but it is the best legal answer. If I say you can or cannot do it [include sexual orientation in the university's non-discrimination statement], we are basing it on a faulty legal analysis. But, we can tell you that the strong public policy of the Commonwealth has over, over, and over again rejected the inclusion of sexual orientation as a protected class. The question becomes, can this Board do something as a policy that the Commonwealth has refused to do, and the answer to that is that it is very close. You decide it, and we will render an opinion on it.

Thompson: In terms of being in a protected class, usually the debate is concerning remediation or compensation as to whatever judgments are brought to bear.

David Johnson: No, not always. When you get into diversity, that has nothing to do with remediation; that is a forward-looking program again about race.

Davenport: I went through the document given to us April 3rd. Have you provided in a proactive way a kind of blueprint for our university and others to use as far as dealing with narrow tailoring programs? Have you worked proactively to tell us a way? It would seem to me that a lot of these things [programs] you would say we don't meet [comply with law or legal advice] and on the other hand you don't tell us how to meet them.

David Johnson: The memo of April 22 [2002] lays out the five factors of narrow tailoring. Then when university legal counsel sent out the memo saying please send us all the material, there were a number of questions that were listed. If you answer

these questions you are going to meet it. It was not necessary to explain to every department that here is the Supreme Court language; we took the language and said here are questions. Answer these questions, and we can draw the conclusion. The memo of April 22 to all universities lays out what the five factors are on the narrow-tailoring test of *Tuttle* in the 4th Circuit.

Davenport: In the memo of April 3 [2003], I did not see any suggestions about how to deal with this.

David Johnson: In the April 3 letter, the one we just sent, if I am not mistaken, after we lay it out, we say be assured we [the Attorney General's Office] stand ready to assist the Board to in developing the lawful strategies to accomplish its objectives. The President directed very helpfully to gather the information. Very much of the information came to university counsel and came to us. There have already been some proactive steps here [at the university] and the President has done consistent with what the Board has directed him to do. He does not need me to say that, but he has. It is just that the information has been sketchy, incomplete and slow and that is why the timing of the letter, April 3, came out because we gave the advice as soon as we got what appeared to be everything. I still cannot tell you what Undergraduate Admissions does other than reading the *Richmond Times Dispatch* yesterday.

Latham: Did the *Richmond Times Dispatch* article have content in it that the AG's office should have received and did not?

David Johnson: It specifically talked about SAT scores and things of that nature. It was something that would have been helpful to us [in the Attorney General's office]. To me it is not necessarily good, bad, or indifferent. It is information I would have expected to see in a memo from Undergraduate Admissions. I would not have expected to see what I circulated to you [from Undergraduate Admissions], which basically were three programs. There was a follow-up memo to university counsel [from Undergraduate Admissions] that said here are the things we consider and one of the things they said was ethnicity. That is fine as far as it goes, but how do you do it? We cannot make a legal analysis on someone saying yes we do this. I need to know how, why, when, how much, what is the purpose, and all that to meet the narrow tailoring test.

Latham: I think we are nitpicking a lot of things that are not going to solve the problem. I think most of the Board believes in diversity and wants to promote it and develop it any way we can legally. And I think we could better use our time trying to find a way we can narrow tailor this and make it work legally, because I am not going to vote for a proposal that I have been told by the highest legal authority in the state is illegal. It is my duty as a Board member to follow the laws, and that is why I voted for it [the March 10 resolution] to start with. I think we could spend time a lot better if we were trying to hone in on information from this man [David Johnson] that teaches us and tells us how we can narrow tailor the program to accommodate diversity to the fullest extent the law will allow us to. We have to have information from administration, especially from the Admissions Office, and I am terribly disturbed that you did not get that. I don't know why it was not forthcoming. That is part of the solution, in my

opinion, that we get all the information we can to comply with the law and then put a committee to work with the best minds we can put on it that can solve the problem and can accommodate the University diversity programs, but also can comply with the letter of the law.

Robertson: Normally we can have this type of material coordinated through administration, and I am curious to know how this information was collected since the counsel on the campus is a part of the Attorney General's office. I would be interested in knowing when President Steger knew the first of these shortcomings. I understand it was when he received the letter the same time the Board did. You have the Attorney General's office working with the people on campus, but not with the administration.

Steger: Even before the December 15 resolution, we began the process of collecting materials from all the programs people thought had some race-based component to them. We have hundreds of programs, as you know. This was put together and reviewed by our legal staff; three attorneys worked for several weeks trying to sort it out. At the end of that--and I understand the point of view of the Attorney General's office--they were not able to provide me with a report, and I understand why you [the Attorney General's Office] want to be consistent in your rulings on that. This is not a statement of criticism; it is a fact that I did not have access to the review. The material was sent to the Attorney General's office, it was reviewed, and we received a letter this past Friday. As I stated in my comments, it is our intention to sit down with your people, and if there is additional information you need and we have it, you will get it. There are some differences of view of descriptions of some of these programs, which is natural when you look at the scale of this enterprise. I am sure we can sit down and we certainly will sit down and deal with them on a case-by-case basis and resolve any questions that you have. Once we determine that, we will proceed to correct these programs that we both agree have problems. That is not an issue. It is a difficult process, and everybody is overworked.

Latham: I want to pick up on Mr. Robertson's comment because I think it is absolutely pertinent. We have had at least since last December the time to submit the information you refer to, and for some reason it did not occur. We are sitting around this table today not because we put ourselves here, but because certain functions did not occur and the Attorney General's office did not have an opportunity to address it properly. And it really bothers me to think those same pieces of information went to the Associated Press and the *Richmond Times Dispatch* but yet have not arrived at the Attorney General's office. This is terribly frustrating for those of us who love this institution as much as all of you who are sitting out there [in the audience]. We love diversity as much as you do. But we have to do it within the framework of the law, and you [in the audience] only have to do it politically. We will continue to address it as long as I am on the Board attempting to expand diversity.

Smith: To be honest with you, this information I am reading frightens me from a standpoint of legality and so far as being brought about in a court of law and being sued. It is very frightening from a standpoint that I have embraced since 1991 since I was a student-athlete. I loved and cherished this university, and I still do. But the fact that we have decided to adopt this resolution [of March 10] is alarming. We are not

trying to take a step in a positive direction; we are trying to take a step backwards. I hope I am not jumping the gun here. There is a place in our society for affirmative action and at this university.

Thompson: In all the comments made, I have to conclude that I did not hear anything suggesting that the policy [on non-discrimination that included sexual orientation] prior to March 10 was illegal, incorrect, or wrong. What I did hear were concerns about sexual orientation not being a protected class. As a policy for this school and its impacts, unless you are overly concerned about damages and recourse for us telling people we will not discriminate against those who have a different sexual orientation, I guess I don't really understand what the problem is.

David Johnson: Again I am going to separate - when you talk about policy, your March 10 policy of the resolution, as I understand the issues that are presented today, deal with race-conscious programs and sexual orientation.

Thompson: Programs are on the execution side; policy is policy. We have to go work on our programs; the President has already said that. Everyone else has said that. I accept that.

David Johnson: You cannot draw the conclusion from anything I have said that any race-conscious programs that we [the Attorney General's Office] have now identified that were in place prior to March 10 and that we have said are dangerous or unconstitutional, not in any way have I said they were legal. Now if you are talking about sexual orientation, I have given you the closest and best answer the Office of the Attorney General can give. I have told you what the policy of the Commonwealth of Virginia is, and I have told you what the question is about what Boards can do and that we cannot predict the consequences of such an action. Now, I have not said anything confirming any of the race-conscious programs we have identified to be legal.

Thompson: Virginia accepting the 4th Circuit Court is an interesting position, and the five factors relative to narrow tailoring I think are all reasonable things most of us could get our mind around. There are a couple of legal opinions with regard to this subject that are far different than those arrived at in 4th Circuit and in conclusion most of them all still support diversity in some form whether we do narrow tailoring or otherwise. I agree with your point about the Supreme Court needing to get through it. I believe there are things we need to wait for, but certainly with regard to the policy decision, I don't think I have heard anything here that would cause me alarm about our liability nor the illegality of the policy as it was previously written.

David Johnson: I will direct your attention to all the information we provided.

Mr. Robertson then made a motion that the Board approve the resolution that would rescind the resolution of March 10, 2003, articulating the university policy against discrimination. Mr. Thompson seconded the motion. The Rector then announced a short break would take place prior to the discussion of the motion and vote.

Break – 4:35 to 4:50 p.m.

Rocovich (Rector): Just before we took our break I believe I heard Mr. Robertson move the resolution we have in our book and Mr. Thompson seconded. My thoughts about proceeding would be two things: 1) go around in alphabetical order to the Board, including the students and faculty member, to speak on the subject as you see fit and then take the vote on the resolution. If the resolution passes, it already provides for an ad hoc committee to be appointed. If it happens not to pass, I would then want to follow up with the idea of appointing a committee to do the narrow tailoring. That is my thought on the procedure going forward. Is that satisfactory with the Board to do it in alphabetical order?

Board – agreed by general consensus.

Carr: I am glad we had a big turnout [in the audience] and hoped we had more. It is refreshing to see this much interest in the Board of Visitors' opinions and decisions we make. I wish we had more participation on the much larger issues like the $70 million budget deficit we are trying to face and solve. It is not going to get better, but probably will get worse as far as public money coming to us. Unfortunately, we have not had much participation when it comes to some of those real tough issues. I would welcome all of you [in the audience] to become more involved, learn more about our budget and where the money is coming from, and I think this will have a huge impact on the long-term success of the institution, as this will also. I am glad to see this many people turn out and I would like to see it continue. The problem at hand is that almost everyone agrees that we need to find ways to promote diversity at the University and the real problem is how do we do it legally. Unfortunately, it has become a political issue. A lot of the bickering that has gone on today, I think, did not really solve the problem. We need to come up with a solution that accomplishes diversity at the campus, and apparently the best possibility of that coming about in a legal way is through narrow tailoring. We have not talked any about that. I would like to see us form a committee and not a political committee—a committee of people who are genuinely interested in the institution in trying to find a solution. But we have to find a solution that is legal. There is a lot of denial here about what is legal and what is not. I am not a lawyer. All I can do is listen to advice of the top public office in the State of Virginia, which is elected by the citizens of the state; that is, the Attorney General's office. We have to listen to what he says; he is the final authority when it comes to legal issues when it comes to this institution. I would like to see us pursue a path where we really put together a good committee that can accomplish a legal answer to this problem and quit the political bickering and the Governor going back and forth with the Attorney General. I hope we can all put this behind us and come up with a real sensible solution that works legally.

Davenport: First, I want to thank and recognize the hard work you [Mr. Rocovich] and others have done trying to help us deal with this issue because it is a very complicated one. We have to always in life figure out whether the good outweighs the bad in determining the stance we take on any given issue. Things are not always easy to understand; they are not either one way or the other. Our Attorney General's office has given us advice on how we should deal with this issue, a second path that deals with the narrow tailoring of our admissions policy. Certainly we have to realize we are

awaiting the U.S. Supreme Court hopefully giving us a lot of help on how we view this issue. Looking forward to this advice and also with the recommendation of our University administration, I would agree that we adopt a resolution dealing with discrimination that would rescind our actions of March 10 and would reaffirm our December 15 resolution.

Donald Johnson: Thanks to you and all the members of the Board who have worked so hard on this matter and put so much time into it. I also want to thank those at the University that have done likewise and the administration of this great University. I was asked what troubled me most about all of this, and my response was that it is taking away from other efforts that the University could undertake in its efforts with regard to Top 30 status. It is a matter that has to be dealt with, and it is a matter that we have all been considering and pondering for the past several months. My view on this is that we need a policy that is lawful and that follows the recommendations of the Attorney General's office. It is my view that we should adopt a narrow tailoring approach, or alternatively that we make adjustments in the resolution to the extent that those adjustments accomplish the same goals and objectives of the March 10 resolution, while making adjustments that will be satisfactory with regard to the prior resolution that we passed in December. I feel this is a very important matter that the University must deal with and it is one that we are obligated to deal with. Again, I want to thank everyone for their efforts. I want to tell Mr. Smith that the Board does not do this every day. We do have a good time when we get together for our Board meetings, and I would encourage him to come and join us also on occasions we do not have meetings with 500 people attending, although we do welcome your [the audience's] attendance. Mr. Carr said you [the audience] should be here for budget meetings, and that is certainly appropriate. Again, I thank the members of the Board and administration. One other comment: I did hear from the administration that they felt they needed more information from the Attorney General's office with regard to matters that have been submitted to them so they can make appropriate adjustments as quickly as possible, and I want to encourage the Attorney General's office to be much more forthcoming in sharing information with the administration after they have had an opportunity to review it and make their comments.

Latham: I think it is extremely important that we support diversity. I don't think there is a person around this table that does not support diversity--and certainly within the law. I want to see us get a narrowly tailored program. I can tell anyone who chooses to listen that I have made a substantial commitment to this University, and I am not willing to put that at risk. It seems to me that since the [freshman admissions] selection process has already taken place for the fall semester, to leave the [March 10] resolution in place until we get the narrowly tailored acceptable parameters drawn and moved on by this Board is not too much to ask. We have a fiduciary responsibility, and to put this University and ourselves at risk does not make any sense. The result is that I would like to see us develop the narrowly tailored program and have it put in place with a time limit of 30 days. I think that can be done. I think the Attorney General's office would be willing to work with us. But we have to get all the information available. It bothers me that there are several major components of the University that have not sent to the Attorney General's office any information about the selection process. That is frustrating to all of us. It really bothers me that the same information that should

have gone to the Attorney General's office has come out in the *Roanoke Times* and the *Richmond Times Dispatch*. Anyway, we will get through it in spite of all the difficulties and the University will be better for it. I was on this Board a long time [several years ago], and we went through some very difficult times, but the University is better off for it and I know that we will be at the end of this activity.

Lawson: I, too, appreciate the hard work everyone has put in on this very difficult issue. I think we have tried to be as fair as we possibly can and that we have tried to view everybody's interest, and we are still faced with having to make a decision. In similar problems in my life, I try to look at the big picture and not try to live my life by a formula--to look at what is fair and what is the right thing to do. Sometimes you have to stick your neck out, and sometimes you get your hand slapped. But I support rescinding this resolution because I think we have to be more active in the healing process. If we have parts of the school that are not promptly submitting information so that we can develop a narrowly tailored program, I think we need to set deadlines and make requirements even if those deadlines put somebody's job on the line. But, we cannot stick our head in the sand, and we have to heal this situation with our school.

Layman: I think we have to recognize--and I believe we did do so in adopting the resolution regarding prior notice for policy resolutions earlier--that we need to be more deliberate at times. I certainly accept the Rector's lengthy statement that we had been considering this issue for a very long time. Our problem is that we had not vetted this particular resolution. We had no doubt, some of us had our own views, and some of us are attorneys and may have thought we knew something about the law. However, we are not the Board's attorneys even if we are attorneys. We know clearly that the Attorney General of Virginia is by statute our lawyer, and so we are very interested--were then and are now--very interested in hearing from the Attorney General. But, nevertheless, we should have listened to the constituent groups that are very important to Virginia Tech. I am sure everyone knows these [Board] positions pay no salary, and none of us has any agenda except that of the welfare of Virginia Tech. I think we need not only to hear from the constituent groups, but also I think we need to hear from the Supreme Court. It is very likely, some say, that the Supreme Court's decision will not be definitive. We also need to look at these narrow tailoring possibilities. I would note—the Rector has already said that I am somewhat a parliamentarian and maybe I am a bit of a stickler on that—that it is not necessary in my opinion that we rescind this resolution in order to get it off the table. Two other actions would do the same. One would be a motion to reconsider the resolution, which means we adopt that we would have taken no action and it would be open for debate. And then the concern of the many constituent groups might be: Well, it is still a threat because it is on the agenda. But then a further motion to refer it to a committee to study as we work on these narrow tailoring matters and as we hear from the constituent groups, and as we review the Supreme Court's decision, will take it off the Board's agenda. That is a possibility I have considered and discussed. However, if it is the will of the majority of the Board to rescind, I will certainly go along with that.

Lutz: I want to thank the chosen speakers. I think their statements were very compelling. I think it is important for us to listen better to our constituencies. We have not done a good job of that, and that is why the earlier resolution we passed today

[regarding advance notice for resolutions] was so important to me personally so we can give notice of the actions we are going to take. That gives an opportunity for our constituencies to come forward and give us the advice we need to make the right decision the first time. There is no question in my mind that narrow tailoring can be done, and I don't doubt the ability or the commitment of either the Attorney General's office or of the University administration to get that done in the right way and on a timely basis. My concern is that our March 10 resolution takes us too far. There are many obvious areas that are addressed in the March 10 resolution that I think are problematic. Once of those that has not gotten any discussion today, but that I am very concerned about, is the way it treats our veterans, because it does not allow us to give any optional positive consideration to veterans. All the March 10 resolution allows us to do is what is required by law, but there are also many additional things we can do that are optional for the University. I do not think anyone in this room would seek to deprive the University from continuing those optional programs for veterans, especially in a time of war. The December 15 resolution provides us the goals and guidance that we need and also the legal protection. I think we will be protected by that as Board members, and I am not concerned about my personal liability. Rod, you and I had talked about your idea of referring, and I think this is not a good option because I believe it would perpetuate the problem we have. I think the better option is to rescind the March 10 resolution.

Montgomery (undergraduate student representative): Thank you, everyone, for being here. You are here before the community of Virginia Tech, which has been very vocal over the past month over the decisions of the March 10 meeting. First of all, unfortunately, we don't know a whole lot. You have seen from the lawyers and from the press that there are no legal standings that have been definitive on any of the things we have talked about today. There is nothing definitive on any legal action being taken against the Board of Visitors for not having sexual orientation in the non-discrimination statement, or for having it in the non-discrimination statement. Are we saying that other universities who have it [sexual orientation] in their non-discrimination statement are wrong? I think we need to reinstate sexual orientation beyond a doubt into our non-discrimination statement. Secondly, I am not a lawyer; I am a 22-year-old college student. But I would give far more weight to the decision of the [United States] Supreme Court than to the opinion of the Attorney General of the State of Virginia. The timeliness of our decision is very important, and I urge you to wait until after the decision of the Supreme Court to make any decision on the admissions and hiring processes of Virginia Tech. Access to higher education is an equaling process in our society. We must know that students come from all kinds of backgrounds--social and economic. High schools have different levels of support. Plans such as those instituted in Texas and Florida and California do not adequately address the differences in the high schools that our students are coming from because those differences are so great. We need a policy of admissions that is flexible enough to take those differences into account. Our University community has been very vocal about these decisions. We have had alumni, friends of the University, and corporations calling and questioning our commitment to diversity. I think it is imperative today that we make a statement to those outside the University--and we especially make a statement to those within the University--that Virginia Tech will support diversity, and I urge you to rescind the resolution of March 10 in its entirety.

This includes going back to our former admissions policy, which has not been proven illegal by any means, and reinstating sexual orientation in our non-discrimination statement. I urge us to create a committee that will be able to deal with these issues to balance the needs of the legal side of things after the Supreme Court has met.

Petera: This University needs diversity and must increase diversity--and has to do it within the letter the letter of the law.

Rieser (graduate student representative): As I have done in the previous meetings, I like to explain things I send to you [the Board]. Previously you received a resolution [from the Graduate Student Assembly] that was referenced by our graduate speaker, Meredith Katz. I would like to comment on her description of how the graduate students feel about the recent resolutions that were adopted by the Board of Visitors. Before I reiterate and reinforce what she said, I would like to read something that resonated with me about our community because I think it is important. She spoke to graduate education and the importance of that. I would like to read something briefly if it is okay with the Rector. (Mr. Rocovich: "Go ahead.") "One of the realities of teaching, of course, is that the people who benefit the most are students, (this is written from a professor's perspective) who disappear from our lives quickly and usually permanently the moment they graduate, if not before, and give us few opportunities to see how we have affected them. Yet nothing is clear from the long history of education that good teachers, like good parents, play an enormously important role in the lives of many students, but they do in fact change students' lives. One of the rewards of good teaching, therefore, (emphasize this) should be the knowledge that we have instilled modes of thinking, created intellectual passions, promoted forms of tolerance and understanding, and of course increased knowledge. " Any modern university has to have diversity at the center of what is going on because of the creativity that is required for solving the solutions of the 21st Century. I would like to reaffirm and explain some of the comments made by the Graduate Student Assembly that were sent to you and re-read them so you understand the graduate students' position on this. If you recall, this resolution was passed unanimously by the graduate student body. I will read the resolutions part of it: "Therefore be it resolved, that the GSA urges the Board of Visitors to revisit and reconsider the resolutions passed at the March 10, 2003, Board of Visitors' meeting; and be it further resolved that the GSA urges the Board of Visitors to engage in public discourse with the university committee regarding resolutions affecting the student body, faculty, staff and university community." I commend the Board on doing this today; I think this is important. "Be it further resolved that the GSA encourages the Board of Visitors to include sexual orientation in non-discrimination policies; and be it further resolved that the GSA encourages the Board to explicitly recruit, support and welcome students, faculty, staff and perspectives of diverse backgrounds." I would like to end by saying that I am particularly appreciative of the resolution that was passed today, which encouraged more of an open understanding of what will be going on at future meetings. At least for Brian [Montgomery] and I, it has been very difficult to explain to our constituency what is going on because we have not received all of the facts. I would like to commend the Board on passing that resolution. Thank you.

Robertson: I agree with Mitch Carr that we have a challenge we have to address. This issue is not going away. I think, as Jake Lutz indicated, that the December 15 resolution provides us adequate protection while we work through this in a thoughtful and thorough way to develop a narrow tailoring that will meet the letter and spirit of the law. I am troubled by the process we used on March 10 to arrive at these conclusions, and I think we should vacate that decision by basically repealing those resolutions, get a fresh start--as someone said earlier, "let the healing begin"--and move on together in a proactive way to find a solution to this challenge.

Sewell (faculty representative): I think there is no question what the Board should do, but then I represent the faculty, and I think the faculty has been very forthright. The Faculty Senate has spoken very concretely on this issue, as has University Council, as have a number of other petitions from the faculty. At the same time, I would like to suggest on a personal side that my life has been enriched by many people. By people who were very wealthy and by people who were very poor. By my grandmother, who taught me in the 1950s as a young child in west Texas that there was no difference between the water that came out of the colored drinking fountain and the white drinking fountain. By my brothers, who accept me as a gay man--an invisible minority, a minority that was unfortunately totally deleted, omitted from the last resolution. By my friends who are African-American, ones who in the 1960s some of us went through struggles with. And thankfully they are going through with us now the same kinds of struggles. I think the African-American community has stood solidly behind not their own interests, but the interests of all the other people--the disabled; the veterans; and the gay, lesbian bisexual, transgendered community. Finally, had Mr. Jefferson acted solely on the basis of a perceived legal liability, we would not be where we are today.

Sgro: Mr. Rector, I want to first thank you for the work you have done. I know the work you have done has been on behalf of the University and on behalf of each of the Board members, and I do appreciate that. I would also like to say that I do believe that each of the Board members has acted responsibly. There has been greater discourse on this issue, as is appropriate, than on any I have ever seen in my four years on the Board and I deeply appreciate that. I also would say that I think this will be a much stronger Board as a function of having to discuss a very complex and a very emotional issue. In terms of the issue that is before us today, I think the Attorney General provided very good advice to the Board. I think he provided and gave advice that there can be two opportunities for the University: 1) a race-neutral policy that we passed on March 10; and 2) the narrowly tailoring policy that I think we should adopt. It is my opinion--and I will support--that we in fact rescind the policy that was passed on March 10 and that we appoint a committee to develop a narrowly tailored policy that will meet our goals. I think it is imperative that this Board give consideration to it. Therefore, I can't agree with my good, dear colleague on a 30-day plan for this. I encourage the Board to wait until the Michigan decision is made [by the U.S. Supreme Court], and then of course apply all applicable federal and state laws. I think it is very prudent for the Board to take sufficient time to develop a policy that sets the course for this University for the long term. I also am very eager for the University to get back to its purpose and its mission, which is to educate students and provide an environment in which they can learn and employees can work and all of us can benefit--and

particularly that we can increase the stature of this University as this Board has so determined and as this administration is diligently working to do.

Smith: It is certainly a pleasure to be here today. I have fond memories of this University. My hectic schedule during the [professional football] season prevents me from attending some of the Board meetings, but I have been kept abreast by the President's office and some other people who have kept me in the loop as to what has taken place. In a book that I read, it stated that in the midst of adversity it builds character, togetherness, and that is what we see here today. You see a group of individuals that have come together, and a result of this is strengthening that bond that is the well-being of this University, and that is what we are all here for. We want to see this University move in a positive direction together, not divided. I think when we talk about eliminating affirmative action and even tailoring it to a certain degree, we are separating the goal at hand--and that is to become one of the greatest universities in this country. That is one of the reasons I decided to attend Virginia Tech, and that is one of the reasons I brag and boast about Virginia Tech, whether it be in the locker room with the guys or when other guys are bragging on their university. I think this is absolutely one of the most beautiful campuses in the country. The people here are genuine, they are caring, and they have a concern for diversity. I vote we rescind the resolution of March 10.

Thompson: Thank you, Mr. Rector, colleagues for your debate, and audience members for your comments and reflection on the issues at hand. Before I get into the issue at hand, I just want to spend a moment on the personal side of my story because I think there are broader lessons to be learned about the journey that people like me have made in our lives. Certainly, I am the product of affirmative action at its very best. Given an opportunity to go to school not only at Virginia Tech but another school in Ohio. Frankly, having done well in my career as a result of that, and then having an opportunity to reach back and give not only in the black community but also in the white community, most notably in Minnesota as well as in Virginia. And I am quite proud of the mix of people I mentor in our company, which represent a fairly strong rainbow view. Frankly, the values I have learned through life have been the result of many good people I have come into contact with here at this University as well as other paths of my journey in life. In the early days, we started with the moral proposition to do what was right as a result of people who look like me being disadvantaged. We are trying to get over that legacy and move beyond it. I think I have an obligation as a result of the success I have had to help those who are willing to be helped and who want to promote and move ahead in their lives. I am not advocating social welfare, but I think if you teach a man to fish you really can empower him and make him much better. So, while others may be concerned and plagued by remediation and recourse relative to monetary damages and so forth, frankly, I am not concerned by those. I was not born with it, and I am sure I cannot take it with me when I die. However, there is an economic proposition at hand here that many often fail to look at. Blacks constitute roughly 12.7 percent of the population. Hispanics are somewhere in the vicinity of 13 percent and are growing faster than any other group. For those of us who are able to get through the needle and are able to generate some level of wealth and success, certainly state taxes are higher, federal taxes are higher, the collections are good, everybody benefits. To the extent that we don't and we are

willing to put smart people in jail who somehow feel disenfranchised and see no way to achieve success, certainly we all have to pay for that. The cost for paying for people in prison versus the cost for paying for people to go to college is extraordinarily different. And I would tell you it is much more expensive to be in prison than it is to go to Virginia Tech. We do have an extreme labor shortage of highly talented technical people in our country. However, I have a belief that we cannot feed that need totally with the infusion of foreign talent into our country, many of who become well education and return home. Some return home and do great things. Some of them return home and create things that ultimately kill other people, as we see in this current situation we are going through [incidents of terrorism and the Iraqi war]. I think we have to find a way somehow to look beyond all of that. We must put as much energy, focus, and intellect into creating a solution as we have perhaps placed in dividing people. We are better collectively than we are separately. Unless you are going to take many of those who look different than the mainstream and kill them, certainly they are going to be here. For us to invest in people and promote their getting through the system is a very, very good thing for all of us. There have been a number studies that have shown that among those companies that have a more diverse constituent base, the creativity exhibited in their products is certainly much, much better. They have hit the market faster, they have had the things people are willing to buy, and these companies have succeeded and have done very well. I come from a company that believes that and lives that everyday with every policy statement we make. We are careful to sort out what is policy and what is execution. We have done groundbreaking work, not to brag on my company [IBM], relative to being first in a number of areas--relative to what we have done for women, what we have done for blacks, what we have done for diversity on a broader basis. Many companies try to model themselves after our company. This includes the subject of sexual orientation. In 1996, we created benefits for same-sex partners. It is important to note that we come really to work. We hire the best and brightest. We have a basic set of beliefs. There is one of them that deals with respect for the individual, and respect for the individual means just that. We also have eight principles, and in there is one that deals with customers. I have personally been involved in deals where we have been on the edge of losing, some of which we did in fact lose, because we did not present the right constituent group to our clients. Our goal is to win in the marketplace. We have a set of business conduct guidelines that govern our behavior. All of our employees are required to sign and certify that they have read, that they understand, and that they are going to comply with these things. I think if you were to read them, you would say that those are good, good things that people ought to have. As it relates to things that people perceive to be illegal matters, we let the legal system handle those. In closing, I would say that our [the Board's] problem is not with our policy, but perhaps we have some issues with execution that we have to deal with. My first thought is that we should rescind what we had [the March resolution] and we should go back to the December policy statement. We should move forward in defining a narrowly tailored program. I believe that is exactly what we should do, and I believe improving our diversity here at the University is extremely important. Certainly waiting for the Supreme Court to render its decision is an important thing and I support that, as Bev [Sgro] has pointed out we should probably do. But there is a lot that can be done in the interim, and having a commission or group go work on that to define what the narrowly tailored approach would be is absolutely essential.

Rocovich (Rector): The time has come for a vote. Being an attorney for all of my adult life, I have approached things in a lawyer-like manner. That is, you identify problem, you identify a solution, you consult an expert, and then you follow the advice of your attorney. I don't approach problems any differently for Virginia Tech than I do in my personal life or in my business life, and that is the approach that I adopt in this particular area for myself. We have consulted the Attorney General of Virginia, he has given us advice what to do, and we followed it. You will recall that our very first effort was at narrow tailoring and that we did not quite get it to work out. I think I hear everybody saying they are in favor of moving forward with narrow tailoring. However, from my standpoint, when I consult my lawyer and he gives me advice, I always take it since that is what I have expected my clients to do in my last 36 years of law practice. I believe that is the most businesslike and solid approach to the matter. I believe it is time now to call for a vote.

Carr: I have been listening to all the people around the table, and it is apparent to me that most everybody has the same goal in mind. How we arrive at the goal, we are trying to debate and decide on today. Whether we vote the thing straight up or down is going to create more dissension. I like Bruce Smith's idea of togetherness. We need to work together. If we can find a way to work together, I think we will go away from this meeting a whole lot better in a better frame of mind to solve the problem. And I like Rod Layman's idea of forming a committee and maybe not voting on it straight up or down. But if there is a way we could find a compromise in between where we don't implement it until the Supreme Court decides, I guess in July. I would hope that maybe we could amend the March resolution if it is the will of the Board so that we don't go away in disarray and not everybody pulling together on the same team. I would welcome a modification similar to what Rod Layman had discussed, whereby we could delay implementation of the March resolution, form the study committee, and figure out how we can do this legally with narrow tailoring, and that way I think everybody can go away pulling together as a team. And we do have a lot of implications when it comes to donor giving and raising money that we impact by this decision. I think a compromise is in order, and if Rod has similar thoughts I would like us to entertain an amendment.

Layman: To respond to that, Mitch, I posed that possibility, but I think I sense a rather overwhelming sentiment on the Board to rescind--although let me say clearly that I think it is high time that we speak our own mind on this Board and we quit trying to seek unanimity and sit back and meekly go along and that is one of our problems. Nevertheless, I don't propose to offer the amendment at this time, but I would certainly be glad to help you do it if you want me to.

Rocovich: Mitch, I am confident that no matter how the vote goes, whatever the Board decides, all of us are going to pull together and support the policy that is announced.

Rocovich [to the Board]: The proposition is put forth. You have the resolution in your book, and it is a resolution rescinding the resolution articulating university's policy against discrimination adopted by the Board of Visitors on March 10, 2003. It also has within it a resolution to appoint an ad hoc committee to review the recommendations and pursue the narrow tailoring approach that is included within that. If I don't hear any further discussion, I will call for a vote in regard to approving Tom Robertson's motion [seconded by Thompson] and rescinding the March resolution.

Mitch Carr - No
Ben Davenport - Yes
Don Johnson - No
William Latham - No
John Lawson - Yes
Rod Layman - Abstain - Changed to Yes
Jake Lutz - Yes
Ron Petera - No
Tom Robertson - Yes
John Rocovich - No
Beverly Sgro - Yes
Bruce Smith - Yes
Phil Thompson - Yes
Bruce Holland - Absent from Meeting

Rocovich: The ayes have it by a vote of seven (7) to five (5) [Note: The final vote with change by Rod Layman was eight (8) to five (5) in favor.]

(Copy filed with the permanent minutes and marked attachment I.)

Committee to Conduct the Study on Narrow Tailoring Required in the Resolution Rescinding the Resolution on Non-Discrimination Adopted April 10, 2003

Rocovich: The next matter has to do with a committee to make the study required in the resolution. I guess I slightly disagree with Phil Thompson and more with Bev Sgro on this matter, and I don't believe we need to wait on any court decisions to move forward. I think we need to move forward immediately. I would certainly hope the committee would invite public comment both in writing, as many people as want to submit thoughtful propositions. We have the 40-page guide from the [United States] Secretary of Education on this subject that helpfully came out March 28 [Secretary Rod Paige's "Report on Race-Neutral Alternatives in Postsecondary Education"]. I would hope we might have some public hearing involved and welcome input from all sides. I am sure it will take some time. I guess I agree with Phil Thompson that what we arrive at is more important than when we get there. It is important to try to get it as right as we can and make sure, unlike one of our previous resolutions, that we run it past the Attorney General before we pass it instead of afterward.

Mr. Rocovich then asked for volunteers and, based on the response, appointed the following Board members, faculty, and students to the ad hoc committee: **Tom Robertson, Bill Latham, Jake Lutz, Ben Davenport, Phil Thompson, Mitch Carr, Brian Montgomery, Christian Rieser, and Edd Sewell. At the Rector's request, Mr. Davenport agreed to chair the committee.**

* * * * *

Committee on Advance Notice for Resolutions (amending Board Bylaws)

Mr. Rocovich then appointed the ad hoc committee to consider and make a recommendation to the Board on the issue of advanced notice for resolutions, which requires amending the Board's bylaws. The committee members are: **Rod Layman (chair), Jake Lutz, and John Lawson. [Note: Mr. Layman asked Brian Montgomery to participate as well.]**

* * * * *

Mr. Rocovich thanked those who attended and expressed appreciation for their input as well as the hope of seeing them at future meetings.

Mr. Rocovich adjourned the meeting at 5:45 p.m.

* * * * *

Dates for the next meeting are June 1-2, 2003.

* * * * *

[redacted]

John G. Rocovich, Rector

[redacted]

Kim O'Rourke, Secretary

Attachment A

RESOLUTION REGARDING RESOLUTIONS TO BE PRESENTED FOR BOARD OF VISITORS ADOPTION

WHEREAS, Section 4 of the By-laws of the Board of Visitors of Virginia Polytechnic Institute and State University provides that "As public trustees the members of the Board have the overall responsibility and authority, subject to constitutional and statutory limitations, for the continuing operation and development of the institution as a state land-grant university, and for the evolving policies within which it must function;" and

WHEREAS, in order to carry out their responsibilities, the members of the Board need sufficient time to prepare for their deliberations; and

WHEREAS the Board of Visitors desires to establish guidelines for preparation of an agenda for its meetings,

NOW, THEREEFORE, BE IT RESOLVED that all Resolutions prepared for adoption by the full Board must be circulated to each member and the Board Secretary no less than a minimum of three full working days prior to the meeting; and

FURTHER BE IT RESOLVED that no Resolution shall be adopted by the Board of Visitors if presented less than three working days, unless an emergency is declared by a majority of the members present justifying a shorter time frame, and

FURTHER BE IT RESOLVED that the Board of Visitors re-affirms that its deliberations will conform with the letter and spirit of the Virginia Freedom of Information Act, §2.2-3700, *Code of Virginia, 1950, as amended.*

RECOMMENDATION: THAT THIS RESOLUTION BE ADOPTED.

Attachment B

RESOLUTION

WHEREAS, The Board of Visitors adopted a Policy on March 10, 2003, regarding meeting on University property; and

WHEREAS, implementation of that Policy was contingent upon receiving a written ruling by the Attorney General as to whether the Policy complied with existing law; and

WHEREAS, an Opinion has been received that the Policy does not so comply with applicable federal and state law;

NOW, THEREFORE, BE IT RESOLVED that the Board of Visitors' Resolution regarding meeting on University property is hereby rescinded.

RECOMMENDATION: THAT THIS RESOLUTION BE ADOPTED.

VIRGINIA TECH BOARD OF VISITORS MEETING - APRIL 6, 2003

TIME LINE

Attachment C

1964 **The Civil Rights Act of 1964 is adopted.**

Section 601 of Title VI states **"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."**

The enforcement provisions provide that violation of this Act can result in the loss of all federal funding for the institution.

Section 703 of Title VII states: **"It shall be an unlawful employment practice for an employer- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."**

1978 The Commonwealth adopts a detailed plan for redressing conditions that the Office of Civil Rights then identified as traceable to the prior dual system of higher education. The plan was known as the "Virginia Plan for Equal Opportunity in State Supported Institutions of Higher Education."

1991 **The Civil Rights Act of 1991 amends several sections of Title VII.**

Section 102 inserted a new section, providing for compensatory and punitive damages in cases of intentional discrimination in employment. A jury trial is available if the complaining party seeks compensatory or punitive damages. **Section 107** also was added to clarify the prohibition against impermissible consideration of race, sex, religion, or national origin in employment practices.

1997 A collaborative process begins among the U.S. Secretary of Education, the Governor of Virginia, and the Office of the Attorney General of Virginia to provide educational opportunity to all citizens of the Commonwealth and to address Virginia's efforts to remove the effects of past discrimination from its system of higher education.

February 1999 The University of Massachusetts at Amherst stops giving minority applicants an edge in admissions and financial-aid decisions, partly in response to the Center for Equal Opportunity's scrutiny. (*Chronicle of Higher Education* 4-4-03)

June 1999 "The University of Virginia's president, John T. Casteen, III, quietly alters its race-conscious admissions policies, largely in response to scrutiny by the Center for Equal Opportunity and fear of a lawsuit by the Center for Individual Rights." (*Chronicle of Higher Education* 4-4-03)

November 2001 Execution of "Accord between the Commonwealth of Virginia and the U.S. Department of Education, Office of Civil Rights" (the "Accord") placing Virginia squarely in support of equal access to higher education for all citizens of Virginia regardless of race, color, or national origin.

According to the Attorney General's Office, "The inescapable consequence of the Commonwealth's policy success [the Accord] was that as a matter of constitutional law - remediation of former discriminatory policies and practices could no longer justify race-conscious decision making in higher education in Virginia." (March 18, 2003 Letter from David E. Johnson, Deputy Attorney General of Virginia)

Prior to this date, the states of Texas, California, Washington, and Florida adopt race-neutral and gender-neutral policies. (*The Chronicle of Higher Education* 4-4-03)

This Accord is the triggering event that mandates the fiduciary obligations of the Virginia Tech Board of Visitors' and that requires Virginia Tech to come into compliance with Federal law.

The question is, "What will Virginia Tech do to comply with the Federal law, and when will it be done?"

March 2002 The Virginia Tech Board of Visitors holds its regular quarterly meeting. No mention is made of the Accord.

April 22, 2002 William Hurd, State Solicitor in the Office of the Attorney General of Virginia, issues a memorandum to the presidents, governing boards, and attorneys of Virginia's public colleges and universities responding to inquiries about the effect of the Accord on race-conscious admissions and scholarship programs.

He concludes that:

> "While sovereign immunity precludes awards of monetary damage against the Commonwealth, its institutions and officials (in their official capacity), courts may award injunctive and declaratory relief as well as attorneys' fees, which can be substantial. Additionally, monetary damages and attorneys' fees may be assessed against officials in their individual capacity if they act in a manner that violates a clearly established constitutional right. (*Wilson v. Layne*, 526 U.S. 603 (1999))." (Memorandum, p. 9, fn 16)

This decision clearly puts Board of Visitors members (and administration officials) at risk of personal liability if their institutions engage in race-conscious programs on the

theory that they are needed to remedy racial discrimination or engage in diversity programs that are not "narrowly tailored" in accordance with the *Tuttle* decision.

June 2002 The Virginia Tech Board of Visitors holds its regular quarterly meeting. No mention is made of the Accord or the Hurd Memorandum.

July 12, 2002 *The Chronicle of Higher Education* publishes a front-page article detailing Virginia Tech's practices of gender-based and race-based hiring in its Arts and Sciences College (i.e. 88% of its hires in the fall semester were women and minorities).

July 15, 2002 The Center for Equal Opportunity sends a letter, which apparently was widely circulated, referring to State Solicitor Hurd's April 22, 2002 memorandum, citing overwhelming evidence of racial and ethnic preferences in admissions, advising of potential plaintiffs in litigation and reminding Board members of personal liability for "monetary damages and attorneys' fees if they act in a manner that violates clearly established constitutional rights."

Apparently, Virginia Tech is not the only school receiving such letters. *See The Chronicle of Higher Education's* March 7, 2003 article entitled **"Excluding Some Races From Programs? Expect a Letter From a Lawyer."**

July & August 2002 Because the Board of Visitors has received no communication from the Virginia Tech administration or its attorneys about how it plans to comply with Federal law, the Attorney General's Office is consulted to advise the Board of Visitors members concerning the Accord, the Hurd Memorandum, and the *Chronicle* article concerning what action the Virginia Tech Board of Visitors could take to bring Virginia Tech into compliance with Federal law, to maintain Virginia Tech's federal funding, and to maintain the Board of Visitors' (and administration officials') immunity from lawsuits.

The Attorney General's Office advises that if the Board adopts a race-neutral policy in hiring, admission, and financial aid, it would be complying with Federal law and its members (and administration officials) will be protected from personal liability.

In addition to that advice, the Attorney General's Office advises that, in accordance with the Hurd Memorandum and the *Tuttle* case, the Board could endeavor to draft a diversity policy in accordance with the "narrow tailoring" requirements, which, if carefully drawn and if upheld by the courts, would avoid personal liability. In other words:

1. A race-neutral policy

   (a) complies with the Civil Rights Act of 1964;
   (b) protects Virginia Tech's federal funding; and
   (c) protects the Board members (and administration officials) from liability.

2. A "narrowly tailored" race-neutral diversity policy may protect the Board from liability so long as it is carefully drafted and approved by the proper authorities.

August 2002 Virginia Tech Board of Visitors holds its quarterly meeting. No mention is made of the Accord, Hurd Memorandum, *Chronicle* article, or letter from the Center for Equal Opportunity.

In a closed session of the Board of Visitors with President Steger, Provost McNamee, and other administrators, the legal advice from the Attorney General's Office is discussed. A race-neutral resolution based on that advice from the Attorney General's Office is presented with the following goals:

(1) obey the letter and spirit of the 1964 Civil Rights Act;
(2) protect the Board members (and administration officials) from personal liability; and
(3) avoid the risk of Virginia Tech's losing its federal funding pursuant to the 1964 Civil Rights Act.

Two members mention that the real problem is implementation because Virginia Tech already is supposed to be following the law. President Steger advises that he is reviewing some implementation guidelines and suggests that perhaps the problem can be handled in that way.

The Board unanimously goes along with President Steger's suggestion with a copy to be provided as soon as the President finishes his draft for the purpose of submitting the proposed guidelines to the Attorney General's Office for an opinion on their effectiveness.

Thus the first effort of the Board of Visitors to bring Virginia Tech into compliance is the "narrow tailoring" approach with President Steger's undertaking the document drafting effort.

September 2002 At the Statewide Board of Visitors conference sponsored by the State Council of Higher Education of Virginia (SCHEV), the Governor, the Secretary of Education, and State Solicitor Hurd speak. State Solicitor Hurd further admonishes Board of Visitors members to comply with the law to avoid incurring personal liability for racial preference policies of their institutions. Following his speech, Hurd advises that he will be putting his comments in writing.

Mid-October 2002 The draft of President Steger's implementation policies is finished and is forwarded to the Attorney General's Office for review.

November 2002 The Virginia Tech Board of Visitors holds its regular quarterly meeting. A modest proposal for a diversity and equal opportunity commission is put forward by the administration. The Board of Visitors tables the proposal with directions to the administration to develop a more comprehensive program to bring back to the Board of Visitors at a future meeting.

In closed session with the Board of Visitors, President Steger, Provost McNamee, and other administrators, the Attorney General's Office's legal advice concerning a race-neutral policy resolution is discussed once again.

Because State Solicitor Hurd has not yet put his September 2002 advice in writing, nor has the Attorney General's office finished its review of the implementation guidelines drafted by President Steger in hopes of meeting the "narrowly tailored" approach, the Board unanimously decides to postpone a decision pending receipt of those two items.

November 26, 2002 State Solicitor Hurd sends his letter putting his comments from the September Board of Visitors Conference in writing.

November 27, 2002 State Solicitor Hurd sends his letter concerning President Steger's guidelines and expresses "serious concerns about their legal viability." In addition, Hurd concludes, ". . . with some certainty that, based on the information provided, the expressly race-conscious provisions of these proposed procedures are unlikely to survive the 4th Circuit's narrow tailoring analysis, as explained in the Memorandum of April 22, 2002."

December 3, 2002 Over a year after the date of the Accord, a special meeting of the Board of Visitors is called to respond to State Solicitor Hurd's two letters.

December 15, 2002 In closed session, the Board once again discusses the legal advice from the Attorney General's Office to the Board of Visitors concerning how to bring Virginia Tech into compliance with Federal laws. At the request of the Virginia Tech administration, the Board of Visitors passes a general resolution as follows:

> **NOW, THEREFORE, BE IT RESOLVED** that the Board of Visitors of Virginia Polytechnic Institute and State University directs that the University shall at all times be in compliance with Federal and state laws, regulations, rules, and opinions of the office of the Attorney General of Virginia with regard to the recruitment, admission, and support of students, and in the application of the University's employment practices for faculty and staff; and
>
> **FURTHER**, that the Board encourages the University to develop, as appropriate through a process involving faculty, staff, and students, University policies and procedures that provide for the implementation of programs pertaining to the recruitment, admission, and support of students, and to the employment, promotion, and development of its faculty and staff, in accordance with this policy of the Board of Visitors and existing Federal and state laws and in compliance with all rules and regulations based upon official interpretation of those laws by the office of the Attorney General of Virginia; and

FURTHER, that the President of the University, working through senior administrations and with University legal counsel, will be accountable to the Board of Visitors for ensuring that all University policies, procedures, and programs are in full compliance with this policy of the Board; and

FURTHER, that the President, working through senior administrators and with University legal counsel shall review, in accordance with the guidelines of the Virginia Attorney General's office, all programs with regard to the recruitment, admission, and support of students, and in the application of the University's employment practices for faculty and staff; and shall provide a full report to the Board at its March 2003 meeting.

FURTHER, that the Board retains ultimate authority for approving university policies.

RECOMMENDATION:
That the Board of Visitors' policy requiring that the University be in full compliance with Federal and state laws, regulations, rules, and opinions of the office of the Attomey General of Virginia pertaining to the recruitment, admission, and support of students and to the employment and promotion of faculty and staff, and the development of a commission as an arm of University Council to ensure the representation and involvement of the broader segments of the international community in the academic and student life of Virginia Tech be adopted and approved.

February 21, 2003 "Massachusetts Institute of Technology and Princeton open two summer programs to students of all races. MIT in response to a Federal investigation and Princeton fearing one." (*Chronicle of Higher Education* 2-21-03)

March 2003 Virginia Tech's Board of Visitors holds its regular quarterly meeting.

(1) The Virginia Tech administration advises that it has completed its tasks under the December resolution and has prepared some materials about its programs to send to the Attorney General's Office for review.

(2) The Board passes a resolution commending the administration for its work, adopting a race-neutral policy with respect to admissions, employment, and financial aid with the result of bringing Virginia Tech into compliance with Federal law by obeying the Civil Rights Act of 1964, protecting the Board of Visitors members (and administration officials) from personal liability, and preserving Virginia Tech's federal funding.

(3) The resolution also directs the administration to cast the widest possible net and to make the maximum recruiting effort to attract students and employees of every sex, racial, ethnic, social, and economic background.

In the open session, this resolution, and a resolution approving an extremely comprehensive Diversity and Equal Opportunity Commission, are approved unanimously by the Board of Visitors.

March 18, 2003 - The Attorney General's Office of Virginia sends another letter to the Board of Visitors summarizing and reaffirming its previous advice.

March 19, 2003 Roger Clegg and Edward Blum of the Center for Equal Opportunity publish an op-ed article in the *Roanoke Times* entitled "Virginia Tech Board did the Right Thing," thereby eliminating the risk of a lawsuit by that organization.

March 2003 In response to requests from several constituencies, a special meeting of the Board of Visitors is called to discuss publicly the previously adopted resolution.

March 28, 2003 U.S. Secretary of Education, Rod Paige, releases "Race-Neutral Alternatives in Postsecondary Education Innovative Approaches to Diversity," a report that seeks to foster innovative thinking at educational institutions that are seeking race-neutral means to achieve diversity on their campuses.

He also released a 40-page guide of race-neutral recruiting and enrollment ideas that he says has shown promise in states such as California, Texas and Florida.

Although Virginia Tech's first effort at "narrow tailoring" was unsuccessful, the call for the meeting suggested the possibility of appointing a committee to develop a "narrow tailoring" approach for the Board's consideration. The Board informally had indicated a strong desire to proceed with that approach.

The question is not whether the Virginia Tech Board of Visitors favors diversity and equal opportunity. Its commitment to diversity and equal opportunity has been demonstrated by its unanimous vote in favor of a truly comprehensive new Diversity and Equal Opportunity Commission.

The Board of Visitors has adopted a policy that complies with the Federal law. Virginia Tech must comply with Federal law whether or not the Board of Visitors adopted the March resolution. The question is as follows: When will Virginia Tech comply with Federal law by implementing race-neutral admissions, hiring, and financial aid policies?

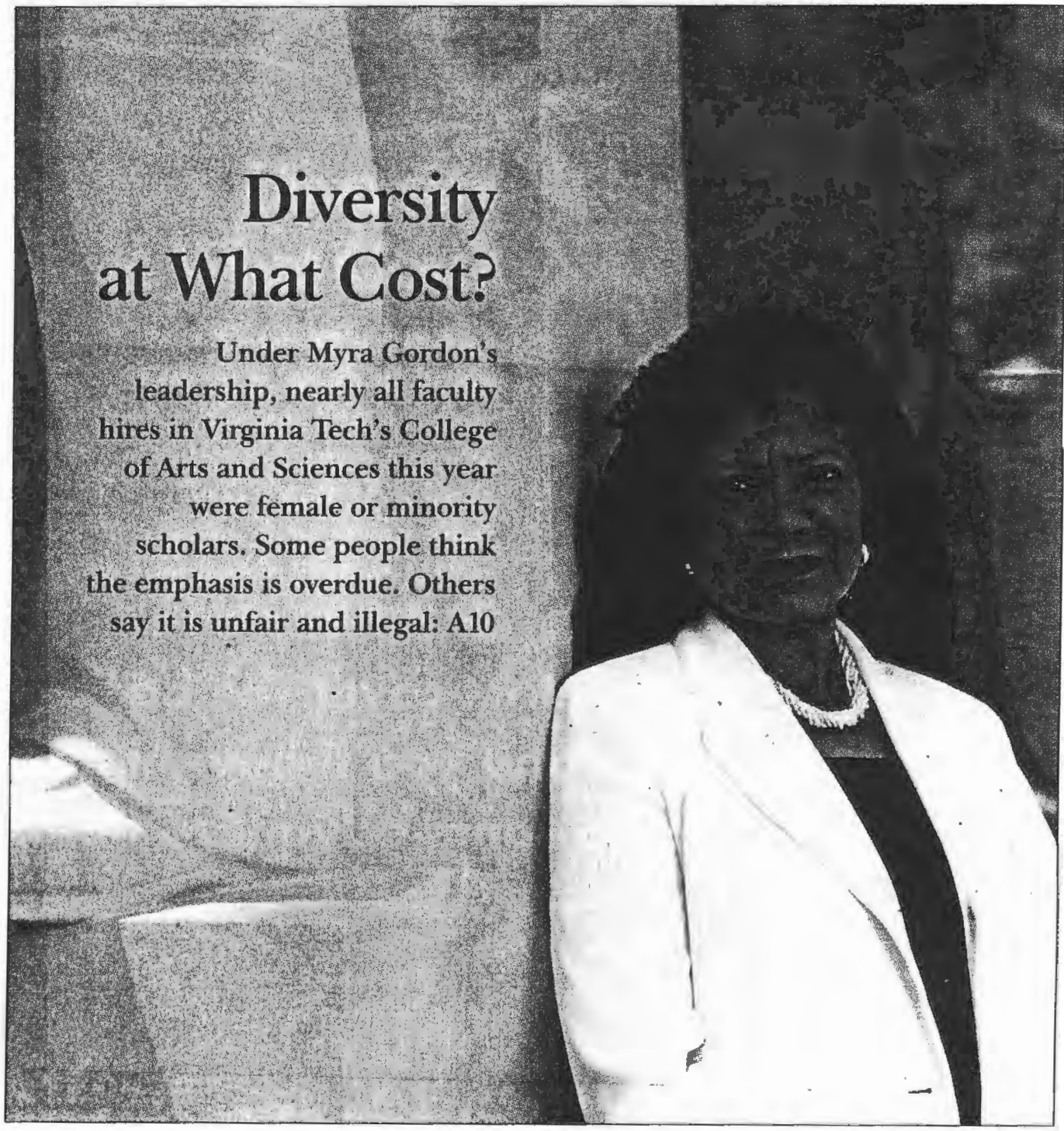
The November 2001 Accord was the triggering event that required Virginia Tech to implement race-neutral admissions, hiring, and financial aid policies. The Board of Visitors adopted a careful, business-like approach to this problem. It identified the problem; it consulted its legal counsel, the office of the Attorney General of Virginia; it reviewed the problem with the administration; it deferred to the administration's request for an opportunity to draft a narrowly tailored guidelines; and it deferred to the administration's request for the December resolution.

Sixteen months after the Accord that triggered Virginia Tech's obligation to comply with Federal law, and almost one year after State Solicitor Hurd's initial advice, the Board adopted the March policy resolution designed to bring Virginia Tech into compliance with Federal law.

THE CHRONICLE

of Higher Education.

July 12, 2002 • $3.75
Volume XLVIII, Number 44



Diversity at What Cost?

Under Myra Gordon's leadership, nearly all faculty hires in Virginia Tech's College of Arts and Sciences this year were female or minority scholars. Some people think the emphasis is overdue. Others say it is unfair and illegal: **A10**

Stacking the Deck for Minority Candidates?

Virginia Tech has diversified its faculty, but many professors there doubt the efforts are fair—or even legal

BY ROBIN WILSON

BLACKSBURG, VA.

IF IT WEREN'T for a controversial new effort to make the faculty at Virginia Tech more diverse, Moses E. Panford probably wouldn't be here.

An assistant professor of Spanish, he was the first black man to win a tenure-track post in the department of foreign languages and literatures. But he didn't exactly ace his campus visit, in January 2000. Some female students who attended a Spanish-language class Mr. Panford guest-taught were so intimidated by his demands for perfect pronunciation that they left the classroom in tears. And a factual error Mr. Panford made in his research presentation, regarding when an author's work had been published, left professors whispering in the hallways. (Mr. Panford says he wasn't told about the mistake, although he concedes that some of the audience's questions were outside of his field of expertise.)

Either of those gaffes would have eliminated him from the shortlist in the past. "Before, objections would have knocked him right out," acknowledges Judith L. Shrum, the department's chairwoman.

COVER STORY

Still, Mr. Panford came out on top, thanks to a set of rules adopted by the College of Arts and Sciences in 1999 that changed how faculty members here are hired. The rules were designed to bring in more female and minority professors.

Mr. Panford says that to his knowledge, he was not a diversity hire. "I don't want anyone giving me any crap or thinking, He got the job because he's black," says Mr. Panford. "You hire me because of my color, and I find that out, I'm out of here tomorrow. Period."

But that's exactly what happened, says Justo C. Ulloa, a professor of Spanish. "The reason Panford got the job is because he's black."

As enrollments have grown more diverse, virtually all colleges have put a premium on hiring more minority professors. They have devised a range of recruitment strategies, some of which—like those at Virginia Tech—strike critics as illegal, given the skepticism federal courts have shown for explicit preferences in hiring decisions.

Virginia Tech's recent push to diversify its faculty [illegible] while a bit behind the curve—is even more aggressive [illegible]st. But has the university gone too far?

Administrators here make no excuses and cite [illegible]n-bers. In the last three years, the College of Arts [illegible]ci-ences has hired eight black and four Hispanic [illegible]rs and 25 women. Over the same period, the Uni[illegible]f Virginia—which has 533 faculty members in a[illegible]i-ences, compared with Virginia Tech's 437—has h[illegible]n black and no Hispanic professors in its equivale[illegible]n. Two years before the rules took effect at Virgin[illegible]35 percent of the hires in arts and sciences were fem[illegible]i-nority professors; this spring, 88 percent were.

To put so much emphasis on applicants' race [illegible]i-der, the university had to take hiring decisions a[illegible]m the faculty and give them to the dean, on the the[illegible]t—if left on their own—white male professors will si[illegible], replicate themselves.

Professors call the process a radical departu[illegible] from academic tradition, and question whether it is f[illegible]r even legal. "This says something else is more im[illegible] than having good, solid people," says L. Leon G[illegible]ofessor of agricultural and applied economics wh[illegible] resident of the Faculty Senate. "It removes the tra[illegible] faculty role in hiring, and says they don't trust me

ROBERT ROYAL, BLACK STAR, FOR THE CHRONICLE

Moses E. Panford: "I don't want anyone giving me any crap or thinking, He got the job because he's black. You hire me because of my color, and I find that out, I'm out of here tomorrow. Period."

But proponents of the approach say drastic steps had to be taken to shake up this genteel Southern institution, which has been so conservative, and so white, for so long. "The traditional faculty M.O. is they don't have to explain anything, nothing is checked, and then we just end up with more white males," says Myra Gordon, associate dean of

the College of Arts and Sciences and the force behind the initiative.

THE MILITARY INFLUENCE

Blacksburg is all about Virginia Tech, and Virginia Tech for years was all about its male military tradition. The academic buildings here are set around a large, oval drill field used by the university's 650-member Corps of Cadets. On a spring day, it's not unusual to spot uniformed students stopping to salute an American flag.

Just off the drill field, four or five thick-chested white undergraduates are working out. They grunt and groan through sets of push-ups. One student wears a National Rifle Association T-shirt that asks, "What Part of Infringe Don't You Understand?"

Joseph C. Pitt, head of the philosophy department, says it is important to remember Blacksburg's history. Rules to promote diversity "may not be necessary in New York City," he says. "But 50 years ago, there were still Friday teas here, where faculty wives were expected to wear white gloves. There are some old-timers here with some attitudes that are pretty out of date."

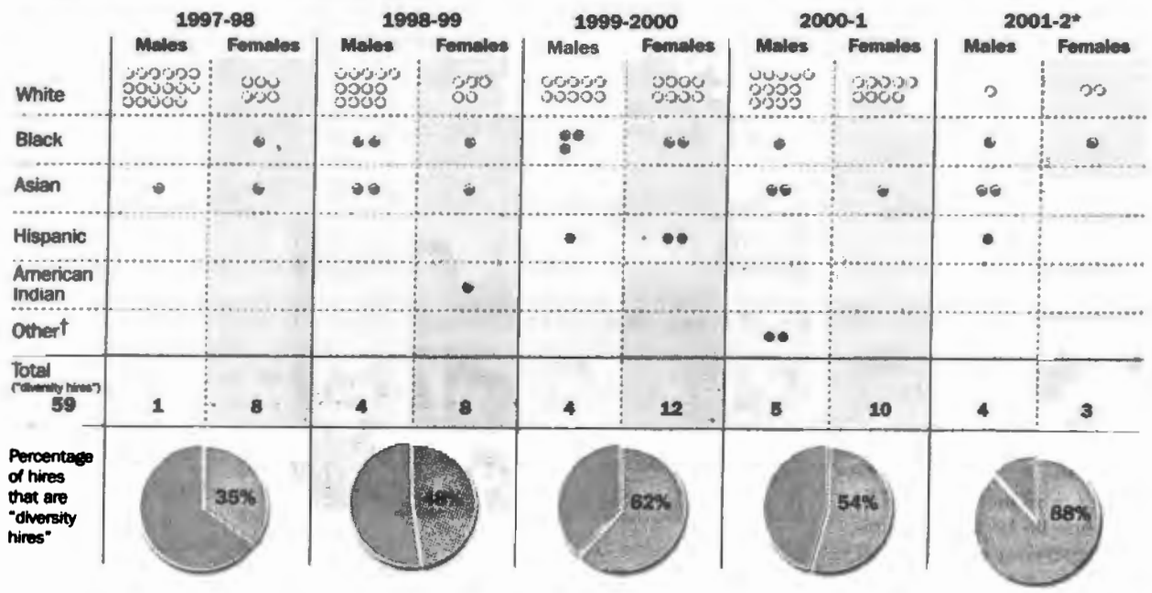
Patricia B. Hyer, associate provost for academic administration, is less forgiving. She cites a "historic legacy" of discrimination against minority and female students and faculty members.

Virginia Tech graduated its first black student in 1958, and 11 years after that, it hired its first black faculty member. But, more than 30 years later, some departments still have no black or Hispanic professors.

A spate of racial incidents on the campus in the mid-1990s pushed the issue to the forefront. During work on an honors thesis in political science, a black undergraduate uncovered information suggesting that a prominent

New Virginia Tech Hires

At Virginia Tech's College of Arts and Scienc more female and minority scholars are being hired for tenured and tenure-track positions.



Note: Any hire that is not a white male is considered a "diversity hire."

* As of July 1, 2002.

† Nonwhite, but not in one of the other categories.

SOURCE: VIRGINIA TECH

CHRONICLE GRAPHIC BY JAMIE BAYLIS

alumnus—who later became a professor—had been a member of the Ku Klux Klan. Black students were regularly harassed by people who drove around the drill field yelling "nigger" out of car windows, and a white student sent out an e-mail message that black students found offensive.

All of that persuaded Robert C. Bates, then dean of arts and sciences, that something substantial had to be done. He had already asked academic departments to develop plans to diversify, but the attempts had been "spotty," he recalls.

So in 1995, Mr. Bates—who in February left to become Washington State University's provost—established a collegewide committee to study the issue. Its No. 1 recommendation was that Virginia Tech hire a point person on diversity issues, and two years later, Ms. Gordon got the job. Although Ms. Gordon grew up just 80 miles away, in Lynchburg, Va., and attended a segregated high school, she might be from a million miles away. With her deep-red fingernail polish, long curly hair, jangling earrings, and chain-link belt, she seems out of place here.

Myra Gordon is part cheerleader and part bulldozer, both characteristics critical to her efforts to transform the overwhelmingly white male faculty. The signal accomplishment of her tenure so far is the creation of the new hiring rules, which she helped push through in 1999, two years after she arrived.

Ms. Gordon had faced similar issues elsewhere. Before coming to Virginia Tech, she helped create offices of multicultural affairs at both East Tennessee State and Fort Hays State Universities. Her doctorate is in psychology. Still, she says, "this is an incredibly tough place to be doing what I'm doing."

In fact, Ms. Gordon has decided to move next month to Kansas State University, where she'll be associate provost for diversity and dual careers. Virginia Tech says her departure won't jeopardize its own efforts to diversify. And Kansas State says it plans to use her ideas there.

Some white male department chairmen at Virginia Tech have accused her of being more interested in color than quality. She responds: "Every white man that holds a position at Virginia Tech is not a rocket scientist. They are not the smartest people in this world. They have been privileged by their maleness and their whiteness, while others were being discriminated against and excluded."

A LIMITED POOL

Taken together, African-American, Hispanic, and American Indian scholars represent only 8 percent of the full-time faculty nationwide. And while 5 percent of professors are African-American, about half of them work at historically black institutions. The proportion of black faculty members at predominantly white universities—2.3 percent—is virtually the same as it was 20 years ago.

When universities do hire minority professors, it is usually under special circumstances, according to a new study of 700 faculty searches at three unidentified public research universities. It found that 86 percent of the African-American hires and all the American Indians had been brought in using "proactive strategies" and "interventions"—what critics might label affirmative action. Just 23 percent of white professors had been hired under such circumstances. The special hiring methods included creating posts—and writing job descriptions—designed to attract minority candidates, as well as making "target of opportunity" hires without a search.

"Business as usual doesn't yield the diversification of the faculty, but interrupting—by focusing attention and being more intentional—does," says Daryl G. Smith, a professor of education and psychology at Claremont Graduate University. She is the principal author of the study, which was financed by the Spencer Foundation and has not yet been published.

Virginia Tech had experimented with special hiring programs. But Mr. Bates and Ms. Gordon believed the university had to ensure that female and minority candidates were considered as part of the normal hiring process. So they built into the process several checkpoints that would force professors to give every consideration to candidates who were not white men.

First, each search committee at Virginia Tech must itself be diverse. If a department lacks enough female or minority professors to serve, it must look elsewhere, considering professors in other departments and even staff members and administrators. Moreover, the committee must have more than token diversity: A single black member may not satisfy the requirement. If the dean (or someone in his office, like Ms. Gordon) determines that a committee lacks diversity, he can order a department to reconstitute it. In a few instances, people who work at other universities, or people who don't work in higher education at all, have been asked to serve because of their race or gender. That's almost unheard of in academe.

Once the applications for a post are in, the head of the search committee reviews them to determine the applicants' race and gender, using voluntary-action cards kept by the university's equal-opportunity office and making educated guesses based on the candidates' C.V.'s. If there aren't enough female and minority applicants, administrators can ask the committee to go back and find more.

The dean's office reviews the C.V.'s of all the applicants who are "diverse," whether or not the search committee has identified them as top candidates. If a committee decides not to interview any of the diverse candidates, it must give the dean an explanation. After the interview process is complete, the committee sends written profiles of three or four of its top candidates to the dean. But unlike committees at most universities, Virginia Tech's do not rank the finalists. It is up to the dean, working with the department chairman, to choose finalists and make an offer.

Although the rules do not require officials to consider a candidate's race when making an offer, that appears to be commonplace.

CULTURALLY UNAWARE

Take the case of Mr. Panford. Some members of the search committee were concerned that he had published more work in the *Afro-Hispanic Review* than in more-prominent journals, such as the *Revista de Estudios Hispanicos*. And although Mr. Panford had earned tenure already at Stephen F. Austin State University, he had not been promoted to associate professor there, a troubling fact to some professors.

The job was offered to a white woman, but she turned the university down. So it became a choice between Mr. Panford and a white man who was finishing his Ph.D. at Michigan State University. While Mr. Panford—whose doctorate is from Temple University—had more teaching experience, four of the six members of the search committee thought he was the weaker candidate, says Mr. Ulloa, the Spanish professor, who was among them. The white man, meanwhile, "was received very well and people were very comfortable with him," reports Ms. Shrum, the chairwoman.

But she and Mr. Bates, the dean, decided that hiring Mr. Panford would be "consistent with our diversity principles," Ms. Shrum recalls. Two years later, both Ms. Shrum and Mr. Ulloa report that questions about Mr. Panford's qualifica-

tions have disappeared. "After he was here for three months, everyone said, 'We did the right thing. We hired the right guy,'" says Ms. Shrum.

In 2000, the same year it hired Mr. Panford, Virginia Tech's foreign-languages department held a search for a visiting professor of French. It hired Janell Watson, a white woman who Ms. Shrum says was the search committee's first choice. When the department needed another visiting professor of French, it reviewed the same applicants and, "with diversity in mind," says Ms. Shrum, agreed that Médoune Guèye, an African man, should be hired. But it decided to create a tenure-track job for Mr. Guèye, even though Ms. Watson—the department's top choice in the original search—was and still is working as a visitor off the tenure track.

Some minority professors themselves aren't entirely comfortable with Virginia Tech's recruitment tactics. While administrators clearly want more diversity, the new hires say the university is sometimes ignorant of candidates' cultural needs.

When the computer-science department hired Manuel A. Pérez-Quiñones, one of its first two Hispanic professors, the university told him its computer system could not handle two surnames without a hyphen—even though two unhyphenated last names are common among Hispanic people and that is how Mr. Pérez-Quiñones's name appears on his Social Security card. The university asked him to change his name with the Social Security Administration, something he refused to do. But, in the end, the professor did

Continued on Following Page

PHOTOGRAPH BY DENNIS BRACK, BLACK STAR, FOR THE CHRONICLE

Virginia Tech asked Manuel A. Pérez-Quiñones to hyphenate his name because its computer system could not handle two surnames.

Larry T. Taylor, chairman of chemistry, says he was told that his department had a "racist reputation."

agree to insert the hyphen for university business, so as not to stump its computer system, and suggested that it be used in this article.

IS THIS LEGAL?

While cultural misunderstandings could jeopardize Virginia Tech's efforts to diversity, the more important question is whether its approach is legal. Federal courts have struck down a number of programs in which minority applicants for jobs received preferences.

"There seems to be a growing consensus among courts that it's legal to look for minority candidates," says D. Frank Vinik, a lawyer for United Educators, a member-owned insurance pool for colleges. "But very few courts have taken kindly to programs that allow for preferences based on race in the actual hiring decisions."

Roger B. Clegg, a lawyer at the Center for Equal Opportunity—a research group in Virginia that opposes affirmative action—says that discriminating on the basis of race is illegal, regardless of who is helped or harmed. "There's nothing wrong with the dean being involved in the hiring process, or going outside the university for the creation of a search committee," he says. "But if your motive for doing that is to give a preference to some groups and to discriminate against others, then you're breaking the law."

Virginia's attorney general, who serves as the de facto general counsel for Virginia Tech, was unaware of the university's new hiring procedures, according to a statement by Randy Davis, a spokesman. But Mr. Davis says "periodic review" of such procedures "is good for any institution in order to ensure its policies are consistent with the current state of the law."

Assuming Virginia Tech's policy could withstand a legal challenge, the university must still consider the price it pays for diversity. Is it worth ignoring the views of the faculty?

The Faculty Senate at Virginia Tech is only 30 years old and not very powerful. There were murmurs of unease when the hiring procedures changed three years ago, although no one publicly complained. But this May, after surveying professors about the new rules, the Faculty Senate sent a statement to administrators. It called the procedures "cumbersome," and said they established "minority quotas" on faculty-search committees and required professors and administrators to focus on the race and gender of applicants in ways that may violate the Civil Rights Act of 1964.

A case in point is a search conducted last year by the psychology department. First it convened a search committee of five people, including one African-American. Two months into the hiring process, the dean's office surprised the committee by determining that it was insufficiently diverse. The department reconstituted the committee, which ended up with two black members, one of whom was a therapist in the university's counseling center.

As a result of the shuffle, the committee's job advertisement didn't go out until December. By April, when other universities had already begun making offers, Virginia Tech still had not finished interviewing candidates. Budget cuts at the university this spring scuttled the entire search.

Not every department here that has hired minority candidates has done so based on race or gender. Aris Spanos, chairman of the economics department, says the Latin American man he just hired—Marcelo Mello—was the best person for the job. "I was determined to do everything on merit," says Mr. Spanos.

As he sees it, the larger problem is that administrators have inserted themselves into the hiring process. Professors on most other campuses probably would have revolted at the practice.

Ms. Gordon, the associate dean, insists that administrators are as unobtrusive as possible. They never take more than three days either to sign off on a decision or to ask a search committee to make a change. And Lay Nam Chang,

"The traditional faculty M.O. is they don't have to explain anything, nothing is checked, and then we just end up with more white males."

interim dean of arts and sciences, says the administration tries not to overrule search committees. "Either you trust your department or you don't," he says. "If there is a credible candidate who stands head and shoulders above everyone, and this person is a white male, then this is the candidate you go with."

UNREALISTIC EXPECTATIONS?

Larry T. Taylor, chairman of chemistry, says the university's heavy-handed approach has made him resort to desperate measures. "When I took this position four years ago, Myra came in and lowered the boom," remembers Mr. Taylor. "She said that chemistry had a racist reputation on the campus and kept calling to ask: When is chemistry going to do something?" Ms. Gordon says she never used the word "racist," but she did tell Mr. Taylor that his faculty was too white.

Although the department has 10 black graduate students, none of its professors are black. For that reason, the department has had to look outside the university to make its search committees diverse. It has recruited a black alumnus with a Ph.D. and black chemists from other universities, and it even paid one of them $2,000 to help with a search. But because those people didn't work on the campus, Mr. Taylor says, they had little time or insight to offer.

Two years ago, Mr. Taylor grew desperate enough that when he learned a black chemist at Florida A&M University would be traveling north on Interstate 81 to visit his relatives, Mr. Taylor arranged to meet him at a Cracker Barrel restaurant just off the nearby highway. The chairman wanted to feel out the chemist about a possible job at Virginia Tech. But the meeting was a bust. "He had no charisma and was totally self-absorbed," recalls Mr. Taylor.

Finally, that same year, the department found the perfect candidate: Milton L. Brown, a black chemist with a Ph.D. in organic chemistry and a medical degree to boot. Virginia Tech offered him $90,000 a year, $35,000 more than the typical starting salary here. But Mr. Brown accepted an offer from the University of Virginia.

Mr. Taylor says it is unrealistic to expect Virginia Tech to hire black chemists when there are so few of them. Last year, 50 chemistry departments that received the most research money from the National Science Foundation employed a total of only 18 African-American professors.

Ms. Gordon says the chemistry department here has set the bar for hiring minority professors too high. "If you are only going for superstar people, you are only looking in the most prestigious band," she says. "That doesn't mean there is no excellence in others if they don't fit the typical mold."

'ME AND LARRY, THE JANITOR'

For all the hand-wringing over the new rules, the results are indisputable. The college's plan has worked, and its faculty is gradually growing more diverse. The entire university is expected to adopt the procedures over the next couple of years despite the anticipated objections of more faculty members.

Ms. Gordon says the influx of minority professors "has meant changes in the curriculum, in research, and in the cultural competence of those who have just never worked with a black or Hispanic professor."

It has also made a difference for students. Marquea D. King just finished her Ph.D. in veterinary medical sciences, and for four years she did not have a single black professor. "I realized I wasn't going to see someone who looked like me every day," she says. "It was just me and Larry, the janitor."

But Ms. King, who was president of the university's Black Graduate Student Organization, found some mentors among the new minority hires. "I needed to know that somebody who looked like me could make it," she adds.

Still, there are some losers in the equation. Virginia Tech passed over Chad M. Gasta when it hired Mr. Panford for the Spanish job two years ago. Mr. Gasta, who is white, went on the market the following year and got five offers.

He accepted one at Iowa State University, where he is now an assistant professor of Spanish. "I'm not bitter," he says. "But to this day, I still wanted that job at Virginia Tech." ■

Faculty Diversity at Virginia Tech

Following are tenured and tenure-track positions by race and sex in the College of Arts and Sciences.

	Fall 1999		Fall 2000		Fall 2001		Fall 2002*	
Total	452	100%	460	100%	473	100%	437	100%
American Indian	2	0.44	2	0.43	2	0.42	2	0.46
Asian	19	4.20	18	3.91	21	4.44	19	4.36
Black	11	2.43	16	3.48	17	3.59	17	3.89
Hispanic	3	0.66	6	1.30	6	1.27	7	1.60
Other†	—	—	—	—	2	0.42	2	0.46
Nonwhite	35	7.73	42	9.12	48	10.15	47	10.76
White	417	92.27	418	90.88	425	89.85	390	89.24
Women	93	20.58	102	22.17	109	23.04	103	23.57
Men	359	79.42	358	77.83	364	76.96	334	76.43

* Figures are approximate.

† Nonwhite, but not in one of the other categories.

SOURCE: VIRGINIA TECH

CENTER FOR EQUAL OPPORTUNITY

July 15, 2002

Mr. John Rocovich, Jr.
5264 Falcon Ridge Road
Roanoke, VA 24014

Dear Mr. Rocovich, Jr.:

Enclosed are two documents that should be of interest to you. The first is a legal memorandum from the state Attorney General's office, dated April 22, that points out the legal problems with state schools using racial and ethnic preferences in their admission and scholarship policies. The other is a study by the Center for Equal Opportunity, documenting overwhelming evidence that Virginia undergraduate admissions decisions are made using racial and ethnic preferences.

If you put these documents together, it is obvious that something needs to be done. If it isn't, Virginia schools will be violating the law and courting expensive and damaging litigation. We have already received many supportive phone calls and e-mails from potential plaintiffs and your alumni. But even if admissions discrimination were not illegal, it would still be wrong.

The fact that your lawyers in the attorney general's office have apprised you and you are aware of the legal problems with the use of racial and ethnic preferences may bear on your ability to claim immunity in a lawsuit naming you in your personal as well as your official capacity—as the Center for Individual Rights did in its lawsuit against the University of Michigan, the University of Washington, and their officials—and on your right to indemnification should such a lawsuit hold you personally liable for damages. See Attorney General memorandum, page 9 footnote 16 (citing *Wilson v. Layne*, 526 U.S. 603 (1999)): "Additionally, monetary damages and attorneys' fees may be assessed against officials in their individual capacity if they act in a manner that violates a clearly established constitutional right."

While the evidence of discrimination at Virginia Polytechnic and State University is less dramatic than at the University of Virginia and William & Mary, we still urge you to look into the situation at Virginia Tech and to do what you can to require the university to make its admissions decisions without granting preferences or penalties on the basis of a student's skin color or national origin. I would also request the opportunity to discuss this issue with you and at the board of visitors' next meeting.

Sincerely,

Linda Chavez

14 Pidgeon Hill Drive / Suite 500
Sterling, VA 20165

Phone: 703-421-5443
Fax: 703-421-6401

COMMONWEALTH of VIRGINIA

Jerry W. Kilgore
Attorney General

Office of the Attorney General
Richmond 23219

900 East Main Street
Richmond, Virginia 23219
804 - 786 - 2071
804 - 371 - 8946 TDD

November 26, 2002

CONFIDENTIAL AND PRIVILEGED
ATTORNEY-CLIENT COMMUNICATION

The Rectors and Visitors
Virginia's Public Colleges and Universities

Re: Potential Liability for Unconstitutional Race-Conscious Programs

Dear Sir or Madam:

As you may know, the State Council of Higher Education ("SCHEV") requested this Office to make a presentation last month at SCHEV's annual conference for members of the Boards of Visitors. We were asked to address legal implications of the recently executed Accord Between the Commonwealth of Virginia and the United States Department of Education, Office for Civil Rights ("the Accord").

One aspect of our presentation – and a topic on which several Board members previously sought our advice – dealt with whether individual members have any personal exposure if the courts determine that their institution is operating an unconstitutional race-conscious program.[1] This letter repeats and expands on our presentation at the SCHEV conference.[2]

Although it is difficult to predict the likelihood of a lawsuit, this is an area where there may be some risk of individual exposure should a suit be filed. In keeping with our responsibility to provide you with our best legal advice, this letter explains why we believe this

---

[1] The term "race-conscious programs" is not limited to programs involving a racial quota. Instead, the term includes *all* institutional programs, practices and policies that take race into account in any manner.

[2] The presentation also addressed issues related to the Accord and discussed in the Memorandum issued by this Office on April 22, 2002. An additional copy of the Memorandum is being provided as an enclosure to this letter. Copies of the Accord may be obtained by calling the Office of the Attorney General at (804) 786-2436, or by e-mail directed to bsaunders @oag.state.va.us.

is so and what can be done to limit the risk. The three central points to be taken from this letter are:

- If an institution is found to have unconstitutional race-conscious programs, whether or not its Board members could be held personally liable (*i.e.* monetary damages and attorneys' fees) would likely depend on whether they are entitled to "qualified immunity."

- If qualified immunity is not available, the Division of Risk Management ("DRM") decides whether indemnification will be provided. If DRM denies coverage, the members will be personally liable to satisfy any monetary judgment or attorney's fee award from their own resources.

- Board members can eliminate or reduce their exposure by (i) obtaining complete information about all race-conscious programs at their institutions, (ii) obtaining advice from counsel concerning the likely constitutionality of such programs, and (iii) weighing the risks of maintaining the programs against the benefits the Board believes such programs provide.

1. Whether or Not Board Members Could Be Held Personally Liable for Monetary Damages and Attorneys' Fees Would Likely Depend on Whether They Are Entitled to "Qualified Immunity."

If a student, an applicant for admission, or an applicant for financial aid sues an institution, alleging an unconstitutional use of race-conscious criteria, the plaintiff may also choose to sue – in their individual capacities – the officials responsible for the challenged program.[3] The persons thus sued may include the individual members of the Board of Visitors. If a court finds that a violation of constitutional rights has occurred, the doctrine of sovereign immunity shields the institution from liability for monetary damages.[4] However, the individuals

---

[3] Whether any officials would be sued in the individual capacities depends largely on the plaintiff's litigation goals and the attorneys' choice of litigation strategy.

[4] Sovereign immunity also protects administrators and Board members sued in their "official" capacities. Personal liability becomes an issue only when officials are sued in their "individual" capacities. However, the fact that the acts at issue were undertaken by administrators or Board members in the discharge of their official duties does *not* preclude a suit

[footnote continued]

responsible for unconstitutional programs do not enjoy sovereign immunity. Instead, whether they will be held personally liable is decided according to the doctrine of "qualified immunity." Thus, the question of liability for individual Board members is two-fold. First, are the Board members responsible for any unconstitutional race-conscious programs undertaken at their institutions? Second, if so, are they entitled to qualified immunity?

A. Are Board members responsible for race-conscious programs undertaken at their institutions?

No one could reasonably expect Board members to be aware of everything happening at their institutions. For example, actions undertaken by lower level administrators – without the knowledge or approval of the Board – are unlikely to result in personal liability for Board members, even if those actions are found to be unconstitutional and even if they result in personal liability for the administrators responsible. However, there are other situations in which Board members may be held responsible for the programs of their institutions. Under a concept known as "supervisory liability," Board members may be held responsible where they did not affirmatively vote to adopt the program in question. As the Fourth Circuit has explained, "supervisory officials may be held liable in certain circumstances for the constitutional injuries inflicted by their subordinates." *Tigrett v. Rector & Visitors of the Univ. of Va.*, 290 F.3d 620, 630 (4th Cir. 2002) (quoting *Baynard v. Malone*, 268 F.3d 228, 235 (4th Cir. 2001)). Specifically, Board members may be held responsible for unconstitutional conduct by their institution where a plaintiff can show all three of the following elements:

> (1) "the supervisor [*i.e.*, Board members] had actual or constructive knowledge that his subordinate [*i.e.*, institutional administrator(s)] was engaged in conduct that posed 'a pervasive and unreasonable risk' of constitutional injury to citizens like [the plaintiff];"
>
> (2) "the supervisor's response to that knowledge was so inadequate as to show 'deliberate indifference to or tacit authorization of the alleged offensive practices;'" and
>
> (3) "there was an 'affirmative causal link' between the supervisor's inaction and the particular constitutional injury suffered by [the plaintiff]."

---

against them in their individual capacities. Where a monetary judgment or award of attorneys' fees is entered against a defendant in his individual capacity, he may be required to satisfy the judgment or award from his own, private resources.

Tigrett, 290 F.3d at 630 (quoting *Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir. 1994)).

When this standard is applied to race-conscious programs at Virginia institutions of higher education, Board members may be held responsible for such programs.

(1) Given the wide publicity about race-conscious programs at Virginia institutions of higher education, [5] it is likely that a court would find Board members to have actual or constructive knowledge that institutional administrators were operating such programs and that such programs were pervasive.[6] Given the constitutional presumption against racial classifications, such programs are likely to be viewed as posing sufficient risks of constitutional injury so as to require a response by Board members.

(2) Courts most likely will consider whether Board members inquired into the details of race-conscious programs and evaluated their compliance with applicable constitutional standards. Where Board members have not made such a detailed inquiry and evaluation, courts may determine that they have been deliberately indifferent to potential constitutional violations, or that they have tacitly authorized the programs causing any such violations.

(3) Where, by such inaction or tacit approval, the Board has allowed an unconstitutional race-conscious program to continue, then courts may find an affirmative causal link between such inaction or approval and any harm suffered by students or applicants as a result of such program.

---

[5] Groups objecting to race-conscious programs at Virginia's colleges and universities have been active in the press in recent months and have, in some cases, written directly to Board members to call their attention to race-conscious programs in place at their institutions. At many institutions, the existence of race-conscious programs has been formally discussed at Board meetings or informally discussed among Board members. Some institutions advertise race-conscious programs in their catalogues and on their websites.

[6] In this context "persuasive" means that "the conduct is widespread, or has at least been used on several different occasions." *Shaw*, 13 F.3d at 799.

B. Are Board members entitled to qualified immunity?

If it is determined that Board members will be held responsible for an unconstitutional race-conscious program, then the next step is to decide whether the Board members will nevertheless be entitled to "qualified immunity."[7] Whether "qualified immunity" will protect a public official from an award of monetary damages depends on whether the program at issue violates "a clearly established statutory or constitutional right of which a reasonable person would have known." *DiMeglio v. Haines*, 45 F.3d 790, 794 (4th Cir. 1995) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). In other words, public officials will not be held individually liable unless they should have known their agency was acting illegally.[8] If Board members are held personally responsible for monetary damages – even nominal damages – they may also be held responsible for attorneys' fees incurred by the plaintiff in pursuing the damage claim. *See* 42 U.S.C. § 1988. Such an attorney's fee award could greatly exceed the value of the monetary claim.

Where members of a Board of Visitors are found responsible for an unconstitutional program, the question of personal liability will turn on whether or not the right violated by the program was "clearly established" at the time of the unconstitutional conduct.[9] In determining whether a right was "clearly established," courts apply an objective standard, looking not to the good faith of the individual defendants, but to the state of the law as explained by the courts.[10]

---

[7] "There is a complex intersection between qualified immunity and supervisory liability. If a plaintiff can establish the requisite indifference in the face of a policy or widespread and pervasive abuses caused by a policy, the plaintiff may hold the responsible official liable in a supervisory capacity. However, if the official can respond that a reasonable person would not have known of the effects of the policy or that the policy violated clearly established laws, then that official is entitled to qualified immunity from suit." *Dolph v. Treat*, 86 F. Supp. 2d 572 (E.D.Va. 2000).

[8] *See, e.g., Alexander v. Estepp*, 95 F.3d 312 (4th Cir. 1996), *cert. denied* 520 U.S. 1165 (1997)(holding that government agency's affirmative action program was invalid because it was not narrowly tailored to achieve its goals and denying qualified immunity to officials responsible for the program).

[9] *See generally* Memorandum (setting out the state of the law in Virginia with regard to race-conscious programs).

[10] *See* Memorandum at 9 n.16 (noting that monetary damages and attorneys' fees may be assessed against officials in their individual capacities if they act in a manner that violated a clearly established constitutional right)(citing *Wilson v. Layne*, 526 U.S. 603 (1999)).

2. If There Is No Qualified Immunity, the Division of Risk Management Makes the Decision About Whether to Provide Indemnification Coverage for Board Members.

Under Virginia law, Board members are insured against risks incurred in the performance of their duties under the risk management plan ("the Plan") developed and administered by the Division of Risk Management ("DRM"). *See* Virginia Code § 2.2-1837. Two portions of the Plan are significant here. First, the coverage provisions of the Plan state:

> This Plan shall pay all sums, *except as herein limited...* which the Commonwealth of Virginia, its... boards, ... officers, ... or employees ... shall be obligated to pay by reason of liability imposed by law for damages resulting from any claim arising out of acts or omissions... while acting in an authorized governmental... capacity and in the course and scope of employment or authorization.

Commonwealth of Virginia, Risk Management Plan, I.A. (dated March 9, 2001) (emphasis added).

Second, in detailing the exceptions to coverage, the Plan states, in pertinent part:

> The following are excluded from coverage under this Plan:
>
> F. Liability for punitive damages or liability in any suit or action in which by judgment or final adjudication it is determined that such liability was incurred by reason of... (2) acts of intentional... misconduct...

Id. at III.F.

As noted above, in order to impose any liability upon a Board member in his individual capacity, the court must find that the institution's program violates "a clearly established statutory or constitutional right of which a reasonable person would have known." *See supra* at 2. Depending on the circumstances, such a finding could be read to trigger the "intentional misconduct" exclusion so as to deprive the Board member of coverage under the Plan, thereby exposing the Board members' personal assets. In addition, in cases of alleged constitutional deprivation, there is a potential for punitive damages, which the Plan does not cover.

3. Board Members Should Protect Themselves from Potential Liability.

Given the risk of personal liability, it is especially important for Board members to obtain sound legal advice about any and all race-conscious programs at their institutions. Two questions about each program are most significant. First, if a program is challenged, is a court likely to find that it violates constitutional rights? Second, if the program *is* found to be unconstitutional, is a court likely to find that the rights thus violated were *clearly established*, thereby exposing responsible officials to personal liability? Not surprisingly, it is impossible to give complete answers to these questions in the abstract. However, some general guidance can be given, following the same distinction between *remediation* and *diversity* that was explained in the Memorandum. *See* Memorandum at 2-3.

Remediation: As noted in the Memorandum, "we are unaware of any facts or any credible legal theory that would support the use of race-conscious programs – for *remedial* purposes – at any of Virginia's public institutions of higher education. Circumstances today no longer support such remedial programs, and they must be discontinued as contrary to law." Memorandum at 13. Consistent with this advice, it is our view that, if an institution relies on a theory of remediation to justify a race-conscious program, courts will predictably find that the program is unconstitutional. Moreover, courts are also likely to find that the rights thus violated were *clearly established*, and therefore deny "qualified immunity" to those officials responsible for such programs.

Diversity: As also noted in the Memorandum, whether a race-conscious program may be administered for *diversity* purposes involves two questions: (i) whether diversity of the student body is a *compelling interest*, and (ii) whether any particular program is *narrowly tailored* to serve that interest. *See* Memorandum at 2, 14-15. Whether diversity is a compelling interest is a question on which neither the Supreme Court nor the Fourth Circuit has yet ruled and on which other circuits are divided. *Id.* at 4-5. In short, the law on this point is *not* clearly established. Thus, we are persuaded that no personal liability would arise today from an institutional decision to treat diversity of the student body as a compelling interest, even if the courts ultimately determine, as a matter of law, that such diversity is not compelling.

The same assurance cannot be offered, however, about whether particular programs are *narrowly tailored* to achieve such diversity. The Fourth Circuit has recently explained the test that must be applied in determining whether the requirement for narrow tailoring has been met.

See Tuttle v. Arlington County School Board, 195 F.3d 698, 707 (4th Cir. 1999).[11] In our opinion, the Fourth Circuit is likely to decide that a reasonable public official would (a) be aware of the *Tuttle* decision, and (b) re-evaluate any race-conscious diversity programs in light of that decision and other legal developments. *See Alexander*, 95 F.3d at 318 (denying agency officials qualified immunity because they did not re-evaluate affirmative action program in light of recent Fourth Circuit decisions). In other words, it is not enough that programs were thought to be constitutional when they were implemented. Without a periodic review in light of evolving legal standards, there remains a significant possibility that Board members and administrators would be denied qualified immunity.

How to Address the Potential Risk:

In order to minimize the risk associated with race-conscious programs, this Office recommends the following three-step process.[12]

(1) Each Board of Visitors should collect in writing all relevant information about each race-conscious program at its institution. Without such information in hand, there is simply no persuasive basis for believing that those programs justify a departure from the constitutional presumption that racial classifications – even benign ones – violate the Equal Protection Clause. Moreover, as a practical matter, a court is not likely to be sympathetic to Board members who cannot demonstrate that they made a diligent effort to obtain the details of any race-conscious programs at their institution.

(2) Once this information has been assembled, the Board can submit it to this Office for review in light of the current law regarding race-conscious programs, including the five-part test adopted by the Fourth Circuit in *Tuttle*. *See* Memorandum at 16-20. The evaluation would advise the Board concerning (1) the risk that the program will be found unconstitutional, and (2) if so, the risk that the rights found violated would be treated as clearly established, thereby exposing institutional officials to personal liability.

---

[11] As explained by the Fourth Circuit, the five factors are: (1) the efficacy of alternative race-neutral policies, (2) the planned duration of the policy, (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population or work force, including the provision of waivers if the goal cannot be met, (4) the flexibility of the policy, and (5) the burden of the policy on innocent third parties. *Tuttle*, 195 F.3d at 707.

[12] Alternatively, an institution may decide that it will no longer administer any race-conscious programs and thereby avoid the need for any such review. Whether to follow such a course is not a legal question, but is a policy matter committed to the judgment of the Board.

(3) With the facts and analysis of legal risks in hand, the Board can then weigh the risks of each program against the benefits the Board believes such program provides and, thus, make an informed decision concerning the value and continuation of such programs.

We enclose with this letter a list of detailed questions to assist your Board in gathering the information necessary to permit a legal analysis of any race-conscious programs at your institution. With responses to these and any necessary follow-up inquiries, this Office will be in a better position to provide the Board with the legal advice it needs to make well-informed policy decisions in this area.

In the meantime, if it would be helpful to you, we will be happy to meet with your Board and discuss these issues in more depth. Please do not hesitate to contact us in this regard at (804) 786-2436. We look forward to working with you.

Sincerely yours,

Wm. H. Hurd

William H. Hurd
State Solicitor

Enclosures

cc: Secretary of Education
State Council of Higher Education of Virginia
Presidents, Virginia's Public Colleges and Universities

COMMONWEALTH of VIRGINIA

Office of the Attorney General
Richmond 23219

Jerry W. Kilgore
Attorney General

900 East Main Street
Richmond, Virginia 23219
804 · 786 · 2071
804 · 371 · 8946 TDD

MEMORANDUM

TO: **Presidents, Boards of Visitors and Counsel of Virginia's Public Colleges and Universities;**

The Chancellor, Board and Counsel of the Virginia Community College System; and

The Director and Members of the State Council of Higher Education for Virginia

FROM: **William H. Hurd**
State Solicitor

DATE: **April 22, 2002**

RE: **The Accord Between the Commonwealth of Virginia and United States Department of Education, Office for Civil Rights**

In November of last year, Virginia reached an important milestone in our efforts to provide educational opportunity for all citizens of the Commonwealth. After an in-depth, collaborative process spanning four years, the U.S. Secretary of Education and the Governor of Virginia executed an agreement addressing Virginia's efforts to remove the effects of past discrimination from our system of higher education. This agreement – entitled "Accord between the Commonwealth of Virginia and United States Department of Education, Office for Civil Rights" – marks an historic achievement by the Commonwealth and by each of our public colleges and universities.

In the months since the Accord was announced, this Office has received a number of inquiries from colleges and universities about what the Accord means for race-conscious admissions and scholarship programs administered by our institutions of higher education. This memorandum has been prepared in order to respond to those inquiries.

I. EQUAL PROTECTION – A CONSTITUTIONAL MANDATE

Any analysis of race-conscious measures by a public institution must begin with the 14th Amendment, which provides that States shall not deny to any person "the equal protection of the laws." In interpreting this constitutional guarantee, the U.S. Supreme Court has ruled that any attempt by States to classify citizens based on race is inherently "suspect" and is subject to "strict scrutiny" by the courts. This same standard applies whether the racial classification is invidious or "benign." *See, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274 (1986) (plurality); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

In order to meet the legal test of strict scrutiny, the program[1] in question must: (i) serve a compelling state interest, *and* (ii) be narrowly tailored to further that interest. *See, e.g., Adarand*, 515 U.S. at 227; *Tuttle v. Arlington County School Board*, 195 F.3d 698 (4th Cir. 1999). Two state interests have been proffered as sufficiently compelling to justify race-conscious programs at institutions of higher education. They are: (i) the state's interest in eradicating vestiges of a prior educational system segregated by law (remediation); and (ii) the state's interest in providing educational institutions that offer a diverse student body (diversity). These are fundamentally different concepts. To explain, a brand new public college would have no past unconstitutional conduct in need of remediation; however, its administration may believe that the educational

---

[1] Throughout this memorandum, the term "program" will be used in a broad sense, to include policies, practices and other government conduct.

environment would be enhanced by attracting a diverse student body. These two government interests – remediation and diversity – will be discussed in turn.

II. REMEDIATION – A COMPELLING STATE INTEREST

There can be no doubt that remediation – *i.e.*, eliminating present effects of past discrimination – qualifies as a compelling state interest. *See, e.g., Wygant*, 476 U.S. at 274; *Podberesky v. Kirwan*, 956 F.2d 52, 55 (4th Cir. 1992) (*Podberesky I*). The question is how this broad principle translates into the specifics of what must be done – and what may not be done – by our institutions of higher education. It is a question largely answered by the courts in *United States v. Fordice*, 505 U.S. 717 (1992) and *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994)(*Podberesky II*), *cert. denied*, 514 U.S. 1128 (1995).[2]

These two decisions were discussed at length by Virginia's Secretary of Education, Beverly H. Sgro, in a 1996 advice letter written at the direction of the General Assembly. *See* Ch. 912, item 129(B), 1996 Va. Acts (Reg. Sess.) 1823; and letter of B. Sgro to Presidents and Boards of Visitors of Virginia's Colleges and Universities, dated Dec. 3, 1996 ("Secretary's Letter"). Because the Secretary's Letter was sent to state institutions pursuant to legislative mandate – and because it accurately analyzed both cases – we will quote from it at length.

A. The *Fordice* Decision

The Secretary's Letter explained the impact of *Fordice* as follows:

---

[2] *Podberesky* was before the Fourth Circuit twice and resulted in two separate opinions from the Court. The first decision, *Podberesky I*, recognized remediation of past discrimination as a compelling state interest and remanded the case. In *Podberesky II*, the Court considered whether the University of Maryland had established, as an evidentiary matter, that there existed present effects of past discrimination sufficient to justify a race-conscious remedy and concluded it had not.

"It has been many years since the Commonwealth required its institutions of higher education to be racially segregated; but, as *Fordice* makes clear, one cannot simply assume, based on the passage of time, that the remedial obligations arising from that by-gone era are necessarily completed. *Fordice* involved the State of Mississippi, a state which – like Virginia – once maintained a racially segregated system of higher education. Eventually, Mississippi replaced its policy of segregation and implemented race-neutral admissions standards. The Fifth Circuit Court of Appeals reasoned that, having made these changes, the state 'need do no more.'[3] The Supreme Court, however, rejected this approach as overly simplistic:

> We do not agree with the Court of Appeals or the District Court, however, that the adoption and implementation of race-neutral policies alone suffice to demonstrate that the State has completely abandoned its prior dual system. That college attendance is by choice and not by assignment does not mean that a race-neutral admissions policy cures the constitutional violation of a dual system. In a system based on choice, student attendance is determined not simply by admissions policies, but also by many other factors. Although some of these factors clearly cannot be attributed to state policies, many can be. Thus, even after a State dismantles its segregative *admissions* policy, there may still be state action that is traceable to the State's prior *de jure* segregation and that continues to foster segregation. The Equal Protection Clause is offended by sophisticated as well as simple-minded modes of discrimination. If policies traceable to the *de jure* system are still in force and have discriminatory effects, those policies too must be reformed to the extent practicable and consistent with sound educational practices.[4]

"Accordingly, the *Fordice* Court articulated the following legal standard:

---

[3] *See* 505 U.S. at 728; *see also* 914 F.2d 676 (5th Cir. 1990).

[4] 505 U.S. at 729 (internal quotations marks and citations omitted) (emphasis in original).

> If the State perpetuates policies and practices traceable to its prior system that continue to have segregative effects – whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system – and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system.[5]"

Secretary's Letter at 2-3.

B. The *Podberesky* Decision

The Secretary's Letter also discussed the *Podberesky* decision at great length, saying:

"You should also be aware of the decision by the Fourth Circuit Court of Appeals in *Podberesky v. Kirwan*.[6] This decision, which is binding in Virginia, sets some limits on what the courts will recognize as lingering effects of past discrimination and demonstrates that institutions may be subject to liability when they use race-conscious remedial measures inappropriately. In *Podberesky*, the Fourth Circuit invalidated a race-restricted scholarship program, known as Banneker scholarships, offered by the University of Maryland at College Park only to African-Americans. The plaintiff, a nineteen year old Hispanic, filed suit contending unconstitutional 'reverse discrimination' by the school in excluding him for this financial aid program because of his race. College Park defended its scholarship program as a partial remedy for past discrimination by the State of Maryland.

"The case went before the Fourth Circuit on two separate occasions. In 'Round I,' the Court recited the state's interest in 'ameliorating, or eliminating

---

[5] *Id.* at 731.

[6] 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 115 S.Ct. 2001 (1995)[*Podberesky II*]

where feasible' the present effects of past state segregation in Maryland.[7] Nevertheless, the Court ruled that College Park failed to show sufficient lingering present effects of past state segregation that justified its race-restricted program. The fact that Maryland – like Virginia – historically operated a dual system was not enough. Nor was it sufficient that Maryland's higher education system was being monitored by the Office of Civil Rights ('OCR'), or that the president of College Park testified generally about the continuing need for race-based measures because of 'the lingering effects of historic discrimination.'[8]

"Because there was no showing by College Park of *present* effects of past discrimination, the Fourth Circuit remanded the case to the District Court for further proceedings. In so doing, the Fourth Circuit stated:

> In determining whether a voluntary race-based affirmative action program withstands scrutiny, one cannot simply look at the numbers reflecting enrollment of black students and conclude that the higher educational facilities are desegregated and race-neutral or vice-versa.[9]

"On remand, College Park contended that present effects or vestiges of prior segregation were shown by (1) the poor reputation of the University in the African-American community; (2) the underrepresentation of African-Americans in its student population; (3) low retention and graduation rates of African-American students; and (4) a hostile climate on campus to African-Americans.[10] The University argued for its program to compensate for past injury and attract black student leaders as role models or 'magnets' for further enrollment and retention of other black students. When the case returned to the Fourth Circuit Court of Appeals ('Round II'), the court concluded that to survive the 'strict scrutiny' analysis applicable to any race-based remedy:

---

7 956 F.2d at 56 [*Podberesky I*].

8 *Id.* at 57.

9 *Id.* at 57.

10 38 F.3d at 152.

> [T]he party seeking to implement the program must, at a minimum, prove that the effect it proffers is caused by the past [state] discrimination and that the effect is of sufficient magnitude to justify the program.[11]

"The Fourth Circuit found a number of deficiencies in College Park's scholarship program. First, the Banneker program was not 'narrowly tailored' to compensate for past state segregation since the financial aid was available to both residents and nonresidents. Second, the Court rejected the notion that race-base[d] remedies can be justified today to redress poor reputation of a public institution in the community, or a hostile climate on its campus. The Court observed that such racially discriminatory programs, even if well-intentioned, only breed racial hostility rather than cure it. The Court stated that 'these tensions and attitudes are not a sufficient ground for employing a race-conscious remedy at the University of Maryland.'[12] Third, and importantly, College Park failed to show that the statistical underrepresentation of blacks at its institution in the 1990s was, in fact, due to prior state or institutional discrimination.

"Following *Podberesky*, it appears that statistical numbers reflecting racial imbalance in an institution's student population will not, by itself, justify race-based measures purporting to remedy prior state segregation. The institution must examine the underlying causes for the numerical disparity and factor out, to the extent practicable, other explanations unrelated to state discrimination. In Maryland's case, for example, it failed to make any effort to account for African-Americans who '(1) [choose] not to go to any college; (2) [choose] to apply only to out-of-state colleges; (3) [choose] to postpone application to a four-year institution for reasons relating to economics or otherwise, such as spending a year or so in a community college to save money; or (4) voluntarily limited their applications to Maryland's predominantly African-American institutions.'[13]

---

[11] *Id.* at 153.
[12] *Id* at 155.
[13] *Id.* at 159-160.

"The Fourth Circuit went on to say that:

> [T]he failure to account for these, and possibly other, nontrivial variables cannot withstand strict scrutiny. In analyzing underrepresentation, disparity between the composition of the student body and the composition of a reference pool is significant in this case only to the extent that it can be shown to be based on present effects of past discrimination. In more practical terms, the reference pool must factor out, to the extent practicable, all nontrivial, non-race-based disparities in order to permit an inference that such, if any, racial considerations contributed to the remaining disparity.[14]

"The Fourth Circuit also criticized use of race-based financial aid measures without preliminary consideration of the effectiveness of race-neutral measures:

> [T]he University has not made any attempt to show that it has tried, without success, any race-neutral solutions to the retention problem. Thus, the University's choice of a race-exclusive merit scholarship program as a remedy cannot be sustained.[15]

"The *Podberesky* decision is *not* an invalidation of the state's interest in redressing lingering effects of historical *de jure* segregation. Indeed, under *Fordice* and other applicable law, remedial action is *required* when such lingering effects are found. *Podberesky*, however, illustrates the burden on institutions to justify race-based remedies both in scope and in purpose. In other words, the ends will not justify the means if the means are not closely tailored to the end of redressing present effects of past segregation. Moreover, after *Podberesky*, the federal courts in Virginia will reject claims of present effects based on gross statistical enrollment data without a reasoned analysis of the underlying causes. Unless and until *Podberesky* is overruled or modified, if race-based remedies are to

---

[14] *Id.* at 160.

[15] *Id.* at 161.

be employed, institutions must also be prepared to show that less intrusive race-neutral alternatives would likely be ineffective."

Secretary's Letter at 4-8.

C. Application of *Fordice* and *Podberesky*

The question that must be addressed is whether – in light of *Fordice* and *Podberesky* – public institutions of higher education may lawfully use remediation as a basis for race-conscious programs. The answer to this question turns upon the facts as they may be found to exist at any given institution; however, we are aware of no facts that would justify *any* Virginia college or university in using remediation as a basis for race-conscious admissions or scholarship programs. Upon a review of the law and the facts, it appears that any institution that operates race-conscious admissions or scholarship programs – based on a remedial justification – is almost surely acting unlawfully and is exposed to substantial legal liability.[16] We base this conclusion on the following:

1. **Self-Assessments:** In her 1996 letter, Secretary Sgro called upon each institution to conduct a self-assessment. She directed Virginia's institutions of higher education to:

> carefully examine their present policies, practices and conditions to determine if any of the policies or practices are "traceable to the *de jure* system," and/or "were originally adopted for a discriminatory purpose" and have "present discriminatory effects." If such practices or policies are found, then the institution should take steps to

[16] While sovereign immunity preclude awards of monetary damage against the Commonwealth, its institutions and officials (in their official capacity), courts may award injunctive and declaratory relief as well as attorneys' fees, which can be substantial. Additionally, monetary damages and attorneys' fees may be assessed against officials in their individual capacity if they act in a manner that violates a clearly established constitutional right. *Wilson v. Layne*, 526 U.S. 603 (1999).

> eliminate them insofar as practicable and in accordance with sound educational policy and constitutional limitations.

Secretary's Letter at 3.

More than five years have passed since those self-assessments were to have been conducted. This Office is unaware of *any* institution that identified any policies, practices or conditions that implicate *Fordice*. Indeed, during the course of OCR's review, many institutions affirmatively represented to OCR that they had no such policies, practices or conditions.

2. The Accord: Before executing the Accord, OCR spent years conducting an independent and comprehensive review of the policies, practices and conditions at a majority of Virginia's institutions of higher education.[17] OCR examined, *inter alia*, institutional missions, program offerings and duplication, facilities, admissions, boards of governance, funding, recruitment, retention, graduation, articulation and financial aid. It visited campuses, met with institutional officials, examined tens of thousands of pages of institutional and system-wide records and researched historical funding and statutory governance practices.

As reflected in the Accord, "OCR's review of [formerly white institutions] did not reveal *any* institutional policies or practices that can be traced to the former *de jure* system and that continue to have a discriminatory effect." Accord at 4

---

[17] OCR conducted reviews of the following formerly white institutions: the University of Virginia, James Madison University, Virginia Polytechnic Institute and State University, Virginia Commonwealth University, Old Dominion University, Mary Washington College, Longwood College, Christopher Newport University, Radford University, and the College of William and Mary.

OCR also reviewed the Commonwealth's two historically black institutions, Virginia State University ("VSU") and Norfolk State University ("NSU"), as well as one institution, George Mason University, formed after the end of *de jure* segregation.

(emphasis added). OCR reached a similar conclusion about George Mason University, an institution that was not organized until after the end of *de jure* segregation. *Id.* at 4-5. Moreover, as stated in the Accord:

> Insofar as Virginia's institutions of higher education may be regarded as a single statewide system — and subject to the qualification relating to VSU and NSU set forth in the next paragraph — OCR's review did not reveal any current system-wide policies or practices that can be traced to the former segregated system and that continue to have discriminatory effects.

Id. at 5. While OCR also expressed "concerns" about VSU and NSU, both OCR and the Commonwealth agreed that any such concerns would be remedied by the non-race-based measures to which the Commonwealth committed in the Accord.[18]

In sum, with the exception of specific enhancements for VSU and NSU, the Accord demonstrates that Virginia has successfully eliminated the effects of its past discrimination at its institutions of higher education. While factual determinations by OCR are not dispositive, they are persuasive, especially when no problems are found. The fact that a federal agency charged with civil rights enforcement did not find effects of past discrimination after so comprehensive a review makes it exceedingly difficult to argue that such effects still exist.

3. The Virginia Plan: In 1978, the Commonwealth adopted a detailed plan for redressing conditions that OCR then identified as traceable to the prior dual system of higher education. This plan was known as the "Virginia Plan for Equal Opportunity in State-Supported Institutions of Higher Education" (or, more commonly, "the Virginia Plan"). As described by the Secretary's Letter, the

---

[18] OCR's review "raised *concerns* about the *possibility* that these institutions may be subject to policies and practices that can be traced to the former segregated system, continue to have discriminatory effects, and could have an impact of the system as a whole." Accord at 5 (emphasis added). The Commonwealth did not share this assessment. *Id.*

Virginia Plan included "facilitating changes in the racial composition of its student bodies through affirmative measures designed to attract 'other race' students to the historically black and white institutions... [and] incorporated separate 'affirmative action plans' of each of the institutions...." Secretary's Letter at 9. In 1983, the Virginia Plan was amended to include certain additional programs and activities.

As reported by the Accord, "[i]n May 1988, OCR notified the Commonwealth that there were 13 specific measures that had to be completed by December 31, 1988, in order to complete the provisions of the Virginia Plan." Accord at 2. By April 1990, only four items remained, three of which were later completed. *Id.* By the time of the execution of the Accord, only one item in the Virginia Plan remained to be completed. This one item was expressly incorporated into the Accord and the Virginia Plan was otherwise superceded and is no longer of any force or effect:

> This Accord contains the entire agreement between the Commonwealth and OCR with respect to the Commonwealth's obligation to eliminate the vestiges of its former *de jure* segregation of its system of higher education. All previous negotiations, agreements and discussions between OCR and the Commonwealth are superceded hereby with the exception of the accreditation of the VSU School of Business which is reincorporated in this Accord.

Accord at 14.

Before the Accord was signed, it may not have been clear whether measures forming a part of the Virginia Plan were still necessary or permissible under *Fordice* and *Podberesky*. *See, e.g.*, Secretary's Letter at 10. Many institutions continued to rely on the Virginia Plan – and continued legislative funding of its programs – as the justification for various race-conscious programs. As explained, the Virginia Plan has now been expressly superceded; and, as a result, legislative funding for the Plan has now been ended. Accordingly, the Virginia Plan no longer supports the administration of race-conscious policies or practices.

In sum, we are unaware of any facts or any credible legal theory that would support the use of race-conscious programs – for *remedial* purposes – at any of Virginia's public institutions of higher education. Circumstances today no longer support such remedial programs and they must be discontinued as contrary to law.[19] Whether race-conscious policies or practices may be administered for *diversity* purposes is a separate question on which the Accord has no effect one way or the other. It is to that question that the discussion will now turn.

III. DIVERSITY – A POSSIBLE STATE INTEREST

There has been much debate in legal and academic circles about whether "diversity" qualifies as a compelling governmental interest so as to permit the use of narrowly tailored, race-conscious measures at institutions of higher education. Both sides can point to precedent supporting their position.

Those who argue in favor of such race-conscious measures typically base their position on the concurring opinion of Justice Lewis F. Powell, Jr., in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). In that opinion,

---

[19] This advice should not be construed to require revoking or discontinuing individual scholarship awards already made using racially preferential criteria. In our opinion, institutions should act in good faith to fulfill any scholarship commitments already made to these individuals, including any implied commitment to consider renewing an individual's scholarship for a later semester during the same course of study.

We recognize that some institutions may administer scholarship funds – including privately donated funds – that are expressly earmarked for minority students; however, such race-based programs can no longer be justified on grounds of remediation. Whether they can be justified on grounds of diversity – and, if not, what to do with the money – are separate questions addressed later in this memorandum.

Justice Powell relied on principles of academic freedom to conclude that diversity is a compelling interest, and that a university may take race into account – along with other factors – as it goes about selecting its student body. *See id.* at 312-19. Yet, as the Fourth Circuit has noted, a majority of the Court has not addressed the issue, and it remains unresolved. *Tuttle v. Arlington County School Board*, 195 F.3d 698, 704-05 (4th Cir. 1999).

Those who argue against such race-conscious measures frequently point to the decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996). There, the Fifth Circuit said that using racial classifications, even for purposes of diversity, "simply replicates the very harm that the Fourteenth Amendment was designed to eliminate." *Id.* at 946. Thus, it held unequivocally that "[a]ny consideration of race or ethnicity... for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment." *Id.* at 944. Yet, Virginia is not in the Fifth Circuit, and *Hopwood* is not the law here.[20]

The Fourth Circuit aptly summarized the unsettled state of our law when it observed: "Although no other Justice joined the diversity portion of Powell's concurrence, nothing in *Bakke* or subsequent Supreme Court decisions clearly forecloses the possibility that diversity may be a compelling interest." *Tuttle*, 195 F.3d at 705. It is not within the scope of this memorandum to analyze which argument is stronger, or to predict which way the Supreme Court or Fourth Circuit will ultimately rule. Instead, this memorandum will simply assume, without deciding, that diversity may be a compelling governmental interest and will address those factors likely to affect whether race-based programs will be deemed narrowly tailored. This focus on the second prong of strict scrutiny is consistent

---

[20] *Hopwood* has not gone unrebutted. In *Smith v. University of Washington*, 233 F.3d 1188 (9th Cir. 2000), the Ninth Circuit took a position contrary to *Hopwood*, holding that Justice Powell's opinion in *Bakke* establishes diversity as a compelling state interest that satisfies the first prong of strict scrutiny. But, just as Virginia is not governed by the Fifth Circuit, neither is it governed by the Ninth.

with the approach that the Fourth Circuit has announced it will use in considering challenges to race-conscious measures based on diversity in the context of education. *Id.*

A. What "Diversity" Means

In order to decide whether any particular program is narrowly tailored to achieve diversity, it is first necessary to be clear about what diversity is – and what it is not. Diversity does *not* mean achieving a remedial goal, such as removing lingering effects of past discrimination by the institution or, more broadly, compensating for present or past discrimination by society at large.[21] Likewise, diversity is *not* racial balancing. The Supreme Court and the Fourth Circuit have both been very clear about this. *See, e.g., Freeman v. Pitts*, 503 U.S. 467, 494 ("Racial balance is not to be achieved for its own sake."); *Tuttle*, 195 F.3d at 705 ("[N]onremedial racial balancing is unconstitutional.") Nor is diversity solely a question of racial or ethnic diversity. Despite his emphatic support for diversity as a compelling state interest, Justice Powell was also emphatic that a program "focused *solely* on ethnic diversity... would hinder rather than further attainment of *genuine* diversity." *Bakke*, 438 U.S. at 315 (emphasis added).

According to Justice Powell in *Bakke*, "diversity" means a student body composed of persons drawn from a variety of different backgrounds, life experiences and qualities, so as to enhance the exchange of ideas. Justice Powell's opinion suggests that examples of background may include geographic origin or whether the student was raised in an urban or rural setting. *Id.* at 316. Other examples could include "exceptional personal talents, unique work or

---

[21] To the extent that an institution's purpose may be to remedy past discrimination by the institution, the constitutional issues concerning race-based measures have been discussed in Part II of this memorandum. To the extent that the purpose may be to compensate for discrimination by society at large, the Fourth Circuit has been clear that such an objective – while laudable – cannot justify use of race-conscious measures by government. *Podberesky I*, 956 F.2d at 55. *See also Podberesky II*, 38 F.3d at 155.

service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important." *Id.* at 317. In short, diversity is not just about race and ethnicity. Instead, as Justice Powell wrote, "the diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Id.* at 315.

B. Narrow Tailoring – Five Factors

In *Tuttle*, the Fourth Circuit found that the race-conscious admissions policy used by Arlington County at one of its alternative schools was invalid because it was not narrowly tailored to further diversity. In so deciding, the Court considered five factors, which it drew from *United States v. Paradise*, 480 U.S. 149 (1987). *See Tuttle*, 195 F.3d at 706. The Fourth Circuit reviewed the Arlington County program under all five factors before concluding that "on balance" the challenged policy was "not narrowly tailored." *Id.* at 707. The five factors are:

> (1) the efficacy of alternative race-neutral policies, (2) the planned duration of the policy, (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population or work force, including the provision of waivers if the goal cannot be met, (4) the flexibility of the policy, and (5) the burden of the policy on innocent third parties.

Id.

Any Virginia institution of higher education that proffers diversity as a justification for race-conscious practices will likely face a similar analysis. Thus, it is important to have a clear understanding of what the factors require. Each will be discussed in turn.

1. **"The efficacy of alternative race-neutral policies."** Under this factor, the institution must show that there are no race-neutral alternatives available to promote diversity or, to put it another way, that race-neutral alternatives would not be effective. This is likely to prove difficult if there has been no experience with race-neutral measures and no study of their likely results.

2. **"The planned duration of the policy."** Any use of racial classifications to accomplish diversity "cannot continue in perpetuity but must have a 'logical stopping point'." *Id.* (*quoting Croson*, 488 U.S. at 498 (1980)). An institution that uses race-conscious measures, but has not articulated a logical stopping point, risks a finding that it has not complied with narrow tailoring. In order to comply with this factor, an institution must be able to explain its goal and have some way of determining when it has achieved it, with the intention of abandoning the use of racial classifications when the goal has been accomplished.

3. **"The relationship between the numerical goal and the percentage of minority group members in the relevant population or work force...."** Given the Fourth Circuit's explicit rejection of racial balancing, it is unclear whether numerical race-conscious goals have any legitimate role in achieving diversity. As the Fourth Circuit has acknowledged, the five factors from *Paradise* are "particularly difficult to assess" in a diversity context. *Tuttle*, 195 F.3d at 706 (quoting *Hayes v. North State Law Enforcement Officers Ass'n*, 10 F.3d 207, 216 n.8). Such difficulty is evident here. It is clear, however, that a public institution acts unlawfully if it "explicitly set[s] aside spots solely for certain minorities" or "skew[s] the odds of selection in favor of certain minorities," at least where diversity is not sought on any basis other than race or ethnicity.

Assuming that numerical goals have some legitimate role in achieving diversity, there is an additional problem of defining the relevant population. It is not clear what definition of "relevant population" would be acceptable to the Fourth Circuit in the context of a higher education diversity analysis. In *Podberesky II*, the Fourth Circuit said that, for an institution of higher education, the relevant population – or "reference pool" – may not be equated with the

population of high school graduates eligible to attend a particular institution. Instead, the Fourth Circuit said that other variables that might reduce the size of the reference pool must also be considered, and that a failure to do so precludes a finding of narrow tailoring. *Podberesky II*, 38 F.3d at 159.

Podberesky was a remediation case – not a diversity case. It is unclear whether the Fourth Circuit would assess "relevant population" in the same way for diversity as it did for remediation. But, it seems unlikely that the Court would apply a less stringent analysis, especially since remediation is a constitutional duty, while diversity is never constitutionally required.

4. "The flexibility of the policy." In explaining what it means by "flexibility," the Fourth Circuit turned to *Bakke*, where "Justice Powell explained that constitutionally permissible programs such as the Harvard College admissions program promote diversity by 'treating each applicant as an individual in the admissions process.'" *Tuttle*, 195 F.3d at 707 (quoting *Bakke*, 438 U.S. at 318). The Court then criticized the Arlington County policy on the grounds that it "does *not* treat applicants as individuals. The race/ethnicity factor grants preferential treatment to certain applicants *solely* because of their race." *Id.* (emphasis added).

Given the Fourth Circuit's reliance of Justice Powell's statement about individualized determinations, it is useful to examine *Bakke* more deeply to see just what he had in mind.[22] Justice Powell said that "race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats." *Bakke*, 438 U.S. at 317. Justice Powell carefully described what he meant:

---

[22] Such examination must be accompanied by two observations. On the one hand, the deeper one goes into *Bakke*, beyond what the Fourth Circuit expressly recognized, the less certain one can be that the Court will ultimately agree with Justice Powell. On the other hand, it would be surprising if the Fourth Circuit – or any other appellate court – were to allow a broader role for diversity than what was approved by Justice Powell, whose opinion in *Bakke* has been the touchstone for advocates of diversity.

> The file of a particular black applicant may be examined for his *potential contribution* to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough to consider *all pertinent elements of diversity* in light of the particular qualifications of each applicant, and to place them on the *same footing* for consideration, although not necessarily according them the same weight.

Id. at 317 (emphasis added).

There are at least two important lessons to be drawn from this passage. First, under the approach described by Powell, the files of minority applicants must not be approached in a *per se* manner, but be *examined* to determine their *potential* contributions to diversity. Second, in considering how competing applicants may contribute to diversity, Justice Powell said that the factor of race must be placed in the same mix with an array of non-racial factors, so that the applicants are on the same footing. In other words, just as apples must be compared with apples, diversity must be compared with diversity.

In sum, it is unlawful to provide minority applicants with an advantage having no counterpart for applicants making contributions to diversity for reasons other than race or ethnicity. Moreover, in evaluating any use of race-conscious measures, courts are likely to look not only at what diversity factors an institution considers, but how they are weighted and the practical effect on admissions. A diversity policy that purports to use a wide range of factors may still be held

unconstitutional if it gives undue weight to race and ethnicity or if the policy changes the outcome for few applicants other than minorities.

5. "The burden of the policy on innocent third parties." This final factor may well present the most difficult obstacle for institutions seeking to justify race-conscious measures. Admission to the college of one's choice is an extremely valuable benefit that can have important consequences for the rest of one's life. If applicants are denied admission as a result of race-conscious measures, then the burden they bear will be substantial and the race-conscious measures at work will be less likely to survive judicial scrutiny.

C. Virginia Law – An Additional Requirement

In addition to surviving constitutional scrutiny, any race-conscious program administered by a public college or university must also conform to state law. Virginia Code § 23-7.1:02 provides:

> Participation in and eligibility for state-supported financial aid or other higher education programs designed to promote greater racial diversity in state-supported institutions of higher education shall not be restricted on the basis of race or ethnic origin and any person who is a member of any federally recognized minority shall be eligible for and may participate in such programs, if all other qualifications for admission to the relevant institution and the specific programs are met.

Therefore, any diversity program that involves classifications on the basis of race must be open to all federally recognized minorities.[23] Even where

---

[23] The U.S. Department of Education, Office of Post Secondary Education, recognizes seven minority groups. *See, e.g.*, 34 CFR 364.4 ("Minority student means a student who is Alaskan Native, American Indian, Asian American, Black (African American), Hispanic American, Native Hawaiian, or Pacific Islander.").

discrimination among minorities might be *constitutionally* permissible, this statutory provision limits the discrimination that may be employed.

IV. CONSTITUTIONAL COMPLIANCE

Given the Accord, public colleges and universities cannot credibly defend race-conscious programs on the theory that they are needed to remedy the effects of past discrimination. Moreover, while the Accord does not affect the diversity rationale, no race-conscious program administered to achieve diversity can survive legal challenge if it runs afoul of the narrow tailoring requirement. It is critical that each Virginia institution of higher education assure itself that it is not administering any program that is legally indefensible. Thus, colleges and universities administering race-conscious programs to advance diversity should examine these programs using the five factors to determine whether – on balance – such programs are narrowly tailored.

If a program is clearly not narrowly tailored, then it should be modified or discontinued as a matter of constitutional obligation. On the other hand, if it appears that a program *is* narrowly tailored – or if it is arguably so – then institutional presidents and boards of visitors should assess how much risk – and expense – they are willing to accept in the event such program is challenged in court. Such assessments necessarily involve the careful application of legal standards to particular sets of facts. This Office is prepared to assist state colleges and universities in making these assessments on a case-by-case basis. Additionally, this Office can offer the following general guidance about revising race-conscious scholarships created for remedial purposes and about achieving diversity through race-neutral measures.

A. Scholarship Programs

Faced with the need to revise a race-conscious scholarship program, an institution may find itself confronted with a conflicting obligation to private donors, whose funding of the scholarship program may have been made with the

understanding that the program would be administered using race as a selection criteria. In such a situation, the alternatives are: (i) to persuade the donor to modify or discontinue the restrictions placed on the funds; (ii) to make arrangements for the funds to be administered privately in a manner that does not involve any participation by the institution or by related foundations; (iii) to return the funds to the donor; or (iv) where the donor is no longer living, to use the *cy pres* doctrine to modify or discontinue the restrictions. This Office is available to assist with the details of what is required to achieve any one of these goals.

B. Race-Neutral Measures

This Office recognizes that our Virginia colleges and universities are committed to maintaining student bodies that are diverse, and that the General Assembly has signaled its own appreciation of diversity when it enacted § 23-7.1:02. The challenge is to square the achievement of that objective with methods that comply with the constitutional mandate of equal protection and state statutory limitations. As part of that process, it is important that every effort is made to identify measures that will promote diversity without engaging in racial discrimination. Such measures may include the following:

- Special consideration may be given to applicants who grew up in homes without a college-educated parent, and whose academic performance may thus understate their true potential.

- Special consideration may be given to applicants who graduated at the top of their high school class, even though their individual test scores may lag behind the scores of top graduates elsewhere.

- As the Fourth Circuit suggested in *Tuttle*, some sort of geographic diversity may constitute a plausible alternative to race-conscious measures.

- Without changing admission standards, an institution may seek to enhance its applicant pool by informational efforts targeted to high schools or localities that are under-represented in the existing applicant pool.

Such measures would be racially-neutral. While the effectiveness of these and other race-neutral measures is primarily a matter for educational expertise, this Office is prepared to work with institutions of higher education in identifying and evaluating race-neutral alternatives that promote genuine diversity.

PRIVILEGED AND CONFIDENTIAL
ATTORNEY-CLIENT COMMUNCIATION[1]

Please provide the following information separately for each "race-conscious program" administered by the institution or by any school, department, or other component of the institution.

The term "race-conscious program" includes any and *all* institutional programs, practices and policies that provide a benefit to students or prospective students and that take race or ethnicity into account in any manner. Such programs may include but are not necessarily limited to, recruitment, admissions, scholarships, fellowships, grants, entitlements, courses of study, academic support, residence or other programs, whether written or not, in which the race of a student or applicant for the benefit is taken into account in any manner by the institution, its agents or employees.

To the extent that your responses employ terms that may be subject to different interpretations – such as "diversity" or "under-representation" – please define the term as you intend it.

1. Identify the program by its name or by a short descriptive label.

2. Identify the persons responsible for administration of the program. (Please include name. title. address, phone number and e-mail.)

3. Identify the person completing this questionnaire about the program. (Please include name, title, address, phone number and e-mail.)

4. Describe the purpose of the program, and the purpose of using race in the program.

5. Describe the operation of the program, including details regarding the role of race as a factor in decision-making in the program. Include in you answer:

    a. What race(s) are favored/disfavored in decision-making.
    b. How race is used as a factor in decision-making.
    c. What other criteria are used in decision-making.
    d. What is the relative weight given to each factor, including each racial factor and each non-racial factor.
    e. How long has race been a decision-making factor for this program?
    f. Has the purpose or operation of the program changed since race first became a factor? If so, how?

---

[1] The information sought by this questionnaire is being gathered at the direction of the Board of Visitors. upon advice of legal counsel and for delivery to counsel for the purpose of obtaining legal advice. Therefore, this questionnaire and all information thus provided should be treated as confidential.

6. Explain how the use of race (as explained in paragraph 5) advances the purpose of the program (as explained in paragraph 4).

7. Describe all race-neutral measures that were used or considered in an effort to accomplish the purpose of the program (as explained in paragraph 4). For each such race-neutral measure, provide the following:

    a. State whether the race-neutral measure was used or considered before or after beginning use of the race-conscious criteria.
    b. Describe the results of using the race-neutral measure; or, if not used, explain why.

8. Does the program – or the use of race in the program – have an established limit based on time or based on any other logical stopping point? If so, please explain. If not, please explain.

9. By what measure will you assess when the program – or the use of race in the program – has achieved its purpose?

10. Do numerical goals play any part in your assessment of the program? That is to say, is there a number or percentage or minority population that you seek to achieve. If so, please provide the following:

    a. What is the number, percentage or population that you seek to reach?
    b. Explain the basis for adoption of that number, that percentage or population goal.
    c. What relevant population is used to determine that goal?
    d. What is the racial and ethnic composition of that population?

11. Please provide the following information for each of the last five years:

    a. By race, how many students applied or other sought to participate in the program?
    b. By race, how many students were selected to participate in the program?
    c. By race, how many similarly-situated non-minority students were not selected for or offered the opportunity to participate in the program, or were ineligible to participate or seek participation because of race?

12. Please provide any other information that you believe may be helpful in evaluating the lawfulness of using race as a factor in this program.

COMMONWEALTH of VIRGINIA

Office of the Attorney General
Richmond 23219

Jerry W. Kilgore
Attorney General

900 East Main Street
Richmond, Virginia 23219
804 - 786 - 2071
804 - 371 - 8946 TDD

November 27, 2002

John G. Rocovich, Esquire
Moss & Rocovich
P.O. Box 13606
4415 Electric Road
Roanoke, Virginia 24035

Dear Mr. Rocovich:

In keeping with our recent discussions, I am enclosing our advice concerning potential Board member liability and detailed questions for use in limiting potential risk on the subject of race-conscious programs. The advice letter provides a detailed analysis on the points I covered in my presentation to SCHEV's Board of Visitors' Conference in October. I hope it is helpful to you.

In addition to your interest in the enclosed materials, you have asked us to review the "Faculty Search & Screen Procedures" submitted to you in advance of your last Virginia Tech Board of Visitors meeting. We have serious concerns about their legal viability. First, applying the strict scrutiny standard used to review the constitutionality of race-conscious programs, we have serious doubt about whether "diversity" - as expressly described by these materials - would constitute a compelling state interest, even under Justice Powell's analysis in *Bakke*. This is especially true because the concept of diversity used in these materials is much narrower than what Justice Powell had in mind and because the concern here is employment, a very different context than the student admissions that were the suhject of *Bakke*. However, even without resolving our doubts ahout diversity in faculty and staff as a compelling state interest, we can say with some certainty that, hased on the information provided, the expressly race-conscious provisions of these proposed procedures are unlikely to survive the 4th Circuit's narrow tailoring analysis, as explained in the Memorandum of April 22, 2002.

The current administrative status of these proposals is unclear to us. If it would be useful to discuss these conclusions in greater detail, we would be happy to do so. Similarly, if we can be of additional assistance in reviewing any revision of these proposals, please do not hesitate to let us know.

Thank you for your dedication and hard work on behalf of Virginia Tech and higher education in the Commonwealth.

Sincerely yours,

Wm. H. Hurd

William H. Hurd
State Solicitor

MIT and Princeton Open 2 Summer Programs to Students of All Races

BY PETER SCHMIDT AND JEFFREY R. YOUNG

Both the Massachusetts Institute of Technology and Princeton University have decided to ditch admissions policies for summer programs that accepted only minority students—MIT in response to a federal investigation and Princeton fearing one.

At MIT, officials decided last month to open two summer programs to applicants of all racial and ethnic backgrounds in response to a discrimination complaint being investigated by the Education Department's Office for Civil Rights, officials at MIT said last week.

The two programs are Project Interphase, which helps incoming freshmen adjust to college life, and the Minority Introduction to Engineering, Entrepreneurship, and Science, which enrolls high-school students, mainly between their junior and senior years. Both were open only to black, Hispanic, or American Indian applicants, and each enrolled about 60 students annually.

The Education Department began investigating the programs last spring, after receiving a complaint from two organizations that oppose race-conscious college-admissions policies, the Center for Equal Opportunity, based in Sterling, Va., and the American Civil Rights Institute, based in Sacramento, Calif.

The groups alleged that MIT, which is private, was violating Title VI of the Civil Rights Act of 1964, which forbids racial discrimination at any institution that receives federal funds, including federal financial aid and research grants.

"We are not aware of any racially exclusive programs that have been successfully legally defended."

Roger B. Clegg, general counsel for the Center for Equal Opportunity, said his organization initially contacted MIT in early 2001, after receiving a complaint about the institution's admissions policies from the parent of a white applicant who was rejected by one of the summer programs. The parent then contacted the Office for Civil Rights after MIT refused to abandon its policies.

Soon after MIT retracted its policies, Princeton decided to revamp or scrap its Junior Summer Institute, which accepted only minority students. Princeton's program brought 30 students each summer from other colleges to study at the university's Woodrow Wilson School of Public and International Affairs, with the aim of encouraging them to undertake graduate study in public service. According to a page from the program's Web site, which was taken down

Continued on Following Page

Continued From Preceding Page
this month by university officials, applicants to the program must "be a student of color from historically underrepresented backgrounds.

Princeton's decision, sparked in part by a letter from the same two advocacy groups complaining about the program, was made after university officials learned of the Education Department's investigation of similar programs.

This summer's program will go forward as planned, since Princeton has already chosen and notified the participants. Beginning in the summer of 2004, though, Princeton officials have decided at least to eliminate the race-based admissions policy for the program. They may decide to drop the program altogether.

FEELING VULNERABLE

MIT officials made their decision to alter their summer programs after concluding that race-based admissions criteria could not withstand a legal challenge. Jamie Lewis Keith, the university's senior counsel, revealed the changes in the policies last week, in response to questions about the federal investigation.

"From a legal perspective, we did not have a lot of choice," said Ms. Keith. She characterized MIT's decision to alter the admissions criteria as based on "an analysis of what our peers were doing around the country, and what conclusions other institutions have reached on the legality" of such policies.

"We are not aware of any racially exclusive programs that have been successfully legally defended," said Robert P. Redwine, who oversees the two programs as MIT's dean of undergraduate education. He said that MIT's president, Charles M. Vest, had approved the admissions-policy change.

Both MIT summer programs will continue to take the race and ethnicity of applicants into account, in keeping with their mission of bringing more black, Hispanic, and American Indian students into the fields of science and engineering, university officials said. But the programs no longer will be off-limits to white and Asian-American applicants, and the admissions criteria have been expanded to look at other factors related to disadvantage.

For example, MIT plans to consider whether an applicant is part of the first generation in his or her family to attend college, or comes from a high school that does not send a large percentage of its students on to four-year colleges, university officials said.

MIT has informed the Office for Civil Rights of its change in the summer programs' selection criteria, but has yet to receive a response from the agency, university officials said. Susan Aspey, a spokeswoman for the Education Department, said the agency is continuing its investigation.

Meanwhile, Princeton's lawyers determined that the Junior Summer Institute's admissions policy would also probably not survive a court challenge "in this legal climate," said Robert K. Durkee, the university's vice president for public affairs.

The U.S. Supreme Court is considering two major affirmative-action cases involving the University of Michigan at Ann Arbor, and the Bush administration has taken an extremely narrow view of when colleges may take race into account in admitting students. Most legal experts say that a ruling against the Michigan programs would apply to private colleges as well.

Mr. Durkee said that Princeton had decided to change the summer program because it wanted to avoid a broader inquiry into its policies, even though its officials insist that those policies would withstand legal scrutiny. "The risk was if we tried to defend this program and failed, we could be putting other programs at risk," he said.

Princeton officials said they also hoped to continue the goals of their summer institute, however.

"We're completely committed to finding some mixture of things that have the same impact as the Junior Summer Institute consistent with the law," said Anne-Marie Slaughter, dean of the Wilson school.

This is not the first time that the admissions policy at Princeton's Junior Summer Institute has been questioned. Five years ago, the Ford Foundation withdrew its support for the program after it determined that the policy might not withstand a legal challenge, said Mr. Durkee. Princeton then began financing the program itself.

Mr. Clegg, of the Center for Equal Opportunity, welcomed the changes made by Princeton and by MIT. But he said that MIT did not go far enough, and that his group would push the university to adopt admissions criteria that are completely race-neutral. "Our hope is that, by the end of the process, MIT will conclude that admission into these programs should no longer consider the applicants' race or ethnicity at all. We also hope that OCR will make that point to them," Mr. Clegg said.

Mr. Clegg said his group has sent letters to other colleges contesting similar admissions policies, and that some of those are also under investigation by OCR, though he would not name the institutions. ■

Excluding Some Races From Programs? Expect a Letter From a Lawyer

Critics of affirmative action, with federal backing, aren't waiting for the Supreme Court

BY PETER SCHMIDT

DOZENS of private and public colleges around the nation may soon become the targets of federal civil-rights investigations over programs that exclude students who do not belong to certain minority groups.

Three prominent advocacy organizations are working in tandem to find and challenge any college program that serves only members of specified racial and ethnic minorities. In those cases where the colleges refuse to open up the programs to the excluded groups—in most cases, white or Asian-American students—complaints are being filed with the Education Department's Office for Civil Rights.

Unlike the admissions policies that are the focus of two cases before the U.S. Supreme Court, the programs being attacked tend to be smaller and more focused. Such programs include summer sessions for minority students, as well as minority scholarships, fellowships, and internships. In contrast with the admissions policies, which only give some consideration to race and ethnicity in weighing applicants, these programs have specific, race-based limits on who can participate.

The Office for Civil Rights has already prodded one college, the Massachusetts Institute of Technology, into changing the admissions polices for two summer programs, and signaled last week that other race-exclusive programs will have difficulty passing its legal muster.

"Generally, programs that use race or national origin as sole eligibility criteria are extremely difficult to defend" under the legal standards being applied by the Office for Civil Rights, an Education Department spokesman said in a prepared statement.

Driving the effort are the American Civil Rights Institute, based in Sacramento, Calif., and the Center for Equal Opportunity, based in Sterling, Va. In recent weeks, the groups have jointly sent letters to several colleges that accuse them of violating federal civil-rights laws by operating certain race-exclusive programs. All of the letters asked the institutions to open the programs in question to all students, regardless of race or ethnicity, and gave a deadline to take steps to comply. "If we do not receive a satisfactory response by March 7, we will file a formal complaint" with the Office for Civil Rights, one typical letter warns.

The National Association of Scholars is aiding the effort by asking its members to report any race-exclusive programs at their colleges or others to the American Civil Rights Institute. The scholars' group has about 4,500 members on a total of about 1,000 college campuses, as well as chapters in 46 states, and has been providing the civil-rights institute with a steady stream of tips about colleges with race-exclusive programs.

CARNEGIE MELLON U.

One of the programs under scrutiny from critics of affirmative action is an academic-preparation camp for minority high-school students at Carnegie Mellon University.

"These institutions should have been called on the carpet years ago," says Edward J. Blum, director of legal affairs for the American Civil Rights Institute.

"We want them to open these programs up to all students based on their merit and need, and not their race and ethnicity," Mr. Blum says. His institute was established by Ward Connerly, the University of California regent who led a successful ballot campaign to end the use of racial and ethnic preferences by public institutions in that state and in Washington state.

CARNEGIE MELLON DEFIANT

Mr. Blum and Roger B. Clegg, general counsel for the Center for Equal Opportunity, argue that most race-exclusive programs clearly are illegal. They add that the law is much more settled in this area than it is in regard to college admissions policies that give only some consideration to race and ethnicity, and back their claim by citing a long list of past cases, in Texas and elsewhere, where colleges have dropped race-exclusive programs in the face of legal challenges.

But Martin Michaelson, a Washington-based lawyer who advises many colleges and universities, says it is difficult and unwise to make generalizations about the legality of race-exclusive programs. "There is considerable variation among them," he says. "One wants to look at their particulars."

Mr. Blum and Mr. Clegg would not name all of the colleges to which they have sent letters. But they include Carnegie Mellon, Cornell, Indiana, Iowa State, and Saint Louis Universities, and the University of Missouri at Columbia, all of which were given until the end of this week to respond. Many of the programs in question are in the fields of science, medicine, and engineering.

Several of those colleges declined to comment, saying that their lawyers were still reviewing the letters. But Mary Jo Dively, Carnegie Mellon's general counsel, says, "we believe that what we are doing is legal," and the institution is likely to continue offering an academic-preparation camp for minority high-school students until the Office for Civil Rights or a court directs it to do otherwise.

"I certainly am not going to take the word of some outside group that presumes to tell Carnegie Mellon what to do," Ms. Dively says.

"Ultimately," she adds, "this may be a situation where a court case has to tell everybody what the law is."

Jane M. Jankowski, a spokeswoman for

the Indiana University system, says that lawyers there are consulting with officials of the National Institutes of Health and the National Cancer Institute, which provide funds for the program in question, a summer research fellowship for minority students at the university's Cancer Center.

Saint Louis University issued a statement that said adminstrators there are confident that its scholarship program for black students complies with the law. But the February 13 edition of the *St. Louis Post-Dispatch* quoted Harold Deuser, the university's director of financial aid, as saying that the university has been aware for 10 years that the scholarships probably could not pass legal muster, but kept them anyway because they are consistent with the university's "Catholic Jesuit mission and with the Jesuit tenet of social justice." *The Chronicle* could not reach Mr. Deuser for comment.

ONLY THE BEGINNING

Mr. Blum says that many other colleges are likely to receive letters because he now believes "there could be as many as 50 to 70 public institutions, and perhaps as many as 25 private institutions, that have these racially exclusive programs."

But officials at public colleges and higher-education associations offered substantially larger estimates and noted that many are supported with federal grants from the National Institutes of Health and other agencies. Indeed, it is hard to find a selective university that does not have at least one race-exclusive program listed on its Web site. Among the institutions with online descriptions of such programs are Columbia, Northwestern, Stanford, and Tufts Universities, and the Universities of Chicago, Michigan, North Carolina at Chapel Hill, and Virginia.

Bradford P. Wilson, the executive director of the National Association of Scholars, says he decided last month to get his group involved in the effort to identify colleges with race-exclusive programs based on its formal stand against the use of race preferences by colleges—a position shared by few, if any, other faculty organizations.

"If we didn't act, no one would. At least, no association would be able to," Mr. Wilson says.

"We thought this was something that was all for the good," Mr. Wilson adds. He calls college programs with race-conscious admissions policies "distasteful and illegal," and says, "for everyone who benefits on the basis of race, someone else is disadvantaged on the basis of race."

Ms. Dively of Carnegie Mellon argues, however, that many of the programs under attack there and elsewhere exist for the sole purpose of serving minority students. She notes that the groups involved in the campaign against race-exclusive programs also are leading opponents of race-conscious college admissions. She expresses frustration that Carnegie Mellon is being challenged for operating a summer camp that aims to increase the number of minority high-school graduates applying to selective colleges, and as a result, alleviate some of the need for race-conscious admissions policies among colleges seeking to bolster their minority enrollments.

"It strikes me as quite disingenuous—given what I have read from these same critics of college admissions—for them to be attacking the very solutions to the problems they describe," Ms. Dively says.

FIRST FORAYS

Mr. Clegg of the Center for Equal Opportunity says that one of his goals in pointing out and challenging race-exclusive college policies is to demonstrate that the Supreme Court, which is currently weighing the constitutionality of race-conscious admissions policies in two cases involving the University of Michigan at Ann Arbor, cannot trust colleges to narrowly tailor their policies if it lets them take race and ethnicity into account in admissions.

"It shows how important it is for the Supreme Court, in the Michigan cases, to hand down a decision that provides clarity and some bright lines," Mr. Clegg says.

If the Supreme Court rules in favor of those challenging Michigan's admissions policies, the Center for Equal Opportunity and the American Civil Rights Institute may seek out and challenge race-conscious admissions policies in much the same way that they are currently going after race-conscious programs, Mr. Clegg says.

In their letters to colleges, those groups argue that the race-exclusive programs in question violate Title VI of the Civil Rights Act of 1964, which forbids any organization that receives federal money from discriminating "on the basis of race, color, or national origin."

The only complaint that the two groups have forwarded to the Office for Civil Rights is the one filed last year against two race-exclusive summer programs at MIT. Although that complaint is pending, MIT officials decided to drop the race-exclusive criteria in January, after concluding that the programs would not hold up in court. "We are not aware of any racially exclusive programs that have been successfully, legally defended," MIT's dean of undergraduate education, Robert P. Redwine, said in an interview last month.

Princeton University decided to either revamp or scrap a summer program for minority students after learning of the federal investigation of MIT.

The Education Department's Office for Civil Rights declined to comment on the MIT case, or how it would treat other types of race-exclusive programs that it may be asked to review.

The statement issued by the Education Department last week said that colleges' consideration of race or ethnicity in determining who benefits from a program must "be justified by a compelling interest, for example, the obligation to remedy the effects of racial discrimination," and also "must be narrowly tailored to achieve that interest."

Mr. Clegg said his organization was "quite satisfied" with the Office for Civil Rights' response to the MIT complaint. He called President Bush's appointments to key Education Department positions dealing with civil rights "absolutely first-rate." ■

Poll Finds Wide Support for Bush's Stance on University of Michigan Case

BY PETER SCHMIDT

A MAJORITY of Americans approves of the Bush administration's recent decision to oppose the University of Michigan's race-conscious admissions policies, in two cases now before the U.S. Supreme Court, according to a *Los Angeles Times* poll published last month.

Most Americans feel that colleges should not consider the race or ethnicity of applicants, even though a solid majority also believes that the nation has not come close to eliminating discrimination against racial or ethnic minority groups, the poll found.

Even nonwhite Americans, as a whole, were more likely than not to support the Bush administration's decision.

The newspaper conducted the telephone poll by randomly contacting 1,385 Americans from January 30 through February 2. It placed the margin of error for its sample at plus or minus 3 percentage points. For certain subgroups, the margin may be higher.

RESULTS REAFFIRM PLAINTIFFS

The leaders of groups opposed to race-conscious admissions said the poll's results affirmed their belief that such policies have little public support.

"Politicians who are afraid to speak out against racial preferences should read the polls," said Curt A. Levey, director of legal and public affairs for the Center for Individual Rights, which is providing legal representation to the rejected white applicants who are challenging Michigan's admissions policies in the cases before the Supreme Court. "The unpopular position is supporting racial preferences, not opposing them."

But supporters of race-conscious admissions policies said the *Times* poll and others like it misrepresent the policies and pose questions with inflammatory language that skews the results.

"We think surveys such as this one greatly oversimplify the issues at hand," said Julie Peterson, a spokeswoman for the University of Michigan.

Shirley J. Wilcher, executive director of Americans for a Fair Chance, a coalition of civil-rights groups that support race-conscious admissions policies, objected to the poll's frequent use of the phrase "racial preferences." She argued that the use of such "loaded terms" in poll questions ensures "polarized, emotion-laden results."

The *Times* poll found that the respondents' views of affirmative action were closely tied to their race and self-reported political affiliations and beliefs.

In dealing with race and ethnicity, however, the newspaper characterized poll respondents only as being either "whites" or "minorities" because, it said, its pool of respondents was not large enough to break out the results for those who were Asian, black, or Hispanic.

Fifty-five percent of respondents approved, and 27 percent disapproved, of the Bush administration's decision to oppose Michigan's use of racial preferences in admissions. (The remaining 18 percent answered "don't know.")

The group that approved of the Bush administration's decision included 59 percent of white respondents, 46 percent of minority respondents, 44 percent of Democrats, 77 percent of Republicans, 54 percent of independents, 43 percent of liberals, 53 percent of moderates, and 68 percent of conservatives.

The group that disapproved included 21 percent of white respondents, 41 percent of minority respondents, 39 percent of Democrats, 11 percent of Republicans, 29 percent of independents, 47 percent of liberals, 28 percent of moderates, and 15 percent of conservatives.

ACADEMICS AND OTHER FACTORS

Answering another question, 57 percent of the respondents said colleges should consider only the academic records of applicants, while 33 percent said institutions should attempt to balance their student bodies by also taking race, ethnicity, gender, and geographic location into account.

Democrats were evenly split on that issue, while liberals narrowly favored the academics-only approach, and minority respondents favored it by a small enough margin to be within the poll's margin of error. Every other subgroup overwhelmingly supported academics-only admissions policies.

When asked how close the nation was to eliminating discrimination against racial and ethnic minorities, 58 percent of respondents, and solid majorities of each subset, answered "not close."

Respondents also were asked how often affirmative-action programs in employment and education end up depriving people of their rights.

Six percent answered "almost always," 28 percent said "quite a lot," 47 percent said "only occasionally," and 9 percent said "almost never."

Republicans were the only subset to predominantly answer "almost always" or "quite a lot."

Affirmative-action programs that give preferences to people from socioeconomically disadvantaged backgrounds, regardless of their gender or ethnicity, were strongly supported by every subset of respondents except Republicans, who favored them narrowly. ■

COMMONWEALTH of VIRGINIA

Office of the Attorney General
Richmond 23219

Jerry W. Kilgore
Attorney General

900 East Main Street
Richmond, Virginia 23219
804 - 786 - 2071
804 - 371 - 8946 TDD

March 18, 2003

The Rectors of the Public Colleges and
Universities of Virginia

Dear Mdm. or Mr. Rector:

Over the past few days, you may have seen news stories about a resolution adopted by the Board of Visitors of Virginia Tech on March 10, 2003. The resolution provides that race, color, national origin, or ethnicity – among other factors – will not be considered by Virginia Tech in the admission or hiring process.

You may have also seen statements by the Governor – and by the Virginia Secretary of Education – criticizing the decision by Virginia Tech and suggesting that racial preferences should not be addressed until after a ruling by the U.S. Supreme Court in a pending case involving the University of Michigan. You have additionally been copied on a letter dated March 14, 2003 and a memorandum dated March 17, 2003, from Secretary Wheelan to Attorney General Jerry W. Kilgore regarding the advice given by this office on this topic.

These developments have had the unfortunate consequence of confusing law with policy. I write to underscore the need to comply with the law. Some of the comments recently made by the Secretary convey a misunderstanding of both the law and the legal advice given by this Office.[1] This letter is intended to correct those misunderstandings. While I do not wish to be unduly critical, it is important that your boards not be drawn inadvertently into a course of action – or inaction – that might expose your college and, possibly, individual board members to liability.

In 1997, a collaborative process began between the U.S. Secretary of Education, the Governor of Virginia, and the Office of the Attorney General, to provide educational opportunity to all citizens of the Commonwealth and to address Virginia's efforts to remove the effects of past discrimination from our system of higher education. That four-year process culminated in November 2001 with the execution of the "Accord between the Commonwealth of Virginia and the U.S. Department of Education, Office of

[1] *See, e.g.*, Letter from the Secretary to the Attorney General, dated March 14, 2003 (copied to Presidents, Rectors and Visitors), and Memo from the Secretary to Presidents, Rectors and Visitors, dated March 17, 2003.

Civil Rights." This historic achievement placed Virginia squarely in support of equal access to higher education for all the citizens of Virginia regardless of race, color, or national origin. The inescapable consequence of the Commonwealth's policy success was that – as a matter of constitutional law – remediation of former discriminatory policies and practices could no longer justify race-conscious decision making in higher education in Virginia.

On April 22, 2002, William H. Hurd, State Solicitor, sent a memorandum (the "Hurd Memorandum") to all presidents, boards of visitors, and counsel, responding to inquiries about the effect of the Accord on race-conscious admission and scholarship programs. The memo stated: (1) that public colleges and universities cannot credibly defend race-conscious programs on the theory that such programs are needed to remedy the effects of past discrimination; and (2) while the courts have not yet ruled whether diversity of a student body is a "compelling interest," no race-conscious program administered to achieve diversity can survive legal challenge if it runs afoul of the "narrow tailoring" requirement. This memo was followed on November 26, 2002, by a letter from Mr. Hurd to the Rectors and Visitors of Virginia's public colleges and universities (the "Hurd Letter"). This letter responded to additional questions by board members about potential liability if their colleges continued race-conscious programs that fail to survive constitutional challenge.

Thus the formation of the legal conclusions of this Office regarding the law on race-conscious programs took place over a five year period – during which time two elections for Governor occurred, with the corresponding opportunity for debate and discussion of this issue – and has been detailed in three documents: the Accord, the Hurd Memorandum, and the Hurd Letter. In addition, several colleges and universities have sought advice from this office on various details of the law and its application to specific programs and practices; boards have discussed the issue (the Board of Virginia Tech, for instance, began public discussions in December 2002); and all those connected with higher education have been aware for some time of the University of Michigan case working its way through the federal court system. Indeed, no issue has offered more opportunity for public debate, discussion, and analysis than has this one. It is also important to note that, even now, the Secretary does not suggest that the advice contained in the Hurd Memorandum or Hurd Letter falls short in any way.[2]

In regard to the Virginia Tech resolution, it is again important to note the difference between issues of law and issues of policy.[3] The Hurd Memorandum and the

---

[2] Secretary Wheelan, in her memo of March 17, 2003, however, misrepresents the Attorney General's legal advice. The Attorney General did not state that the resolution adopted by the Virginia Tech Board of Visitors was required by the law of the Fourth Circuit; rather, the Attorney General's position is that the decision by the Board is consistent with the law.

[3] Indeed, it is the failure to distinguish between law and policy that apparently caused the Secretary to make the careless inference that the advice of this Office has been inconsistent. While the Attorney General has expressed his personal view that race-neutral policies are preferable, he has sought above all to give sound advice about the options available under the current state of the law and to urge compliance with it. Thus, contrary to the Secretary's March 17 memo, this Office's statement regarding the Virginia Tech resolution did not craft new legal advice or contradict previously given advice.

Hurd Letter describe the current state of the law regarding the constitutionality of race-based decisions by public institutions of higher education. On the one hand, it is clear that racial quotas are unconstitutional. On the other hand, it is clear that racially neutral policies, such as the one adopted by Virginia Tech, are constitutional. In the middle are diversity programs that take race into account to some degree. They may or may not be constitutional. While the Supreme Court may shed additional light on this issue, this much is already clear: they are not constitutional if they are not narrowly tailored. Moreover, while the Supreme Court may also speak to this issue, the current law on narrow tailoring has been explained by the Fourth Circuit and schools in Virginia should not ignore that explanation.

To the extent that the Secretary or the Governor may disagree with our legal advice, they have not made the first attempt to raise that issue with the Attorney General at any time since the release of the Hurd Memorandum almost a year ago. Moreover, to the best of our knowledge, neither the Secretary nor the Governor expressed a position on the policy issue until now – after the Board of Virginia Tech did what it deemed prudent and in the best interests of the Commonwealth and Virginia Tech. This the Board did consistent with its duty to make policy decisions about programs and practices that present a risk of litigation and liability.

This office welcomes the input and assistance of any officer or government agency to explore legal and policy avenues designed to secure equal access to higher education for every citizen of Virginia, within the boundaries of the law. It is the duty of this Office, however, to correct any misstatements of law conveyed to client agencies.

The Secretary concludes her letter of March 14 by asking the Attorney General to work with her to "sort through these difficult issues." In our view, the best way to work together is to respect the options available under the law, and to make sure that the programs implemented are in accord with the law. Accordingly, as suggested in the Hurd Letter last November, if your college or university has any race-conscious program, we invite you to provide the details of such program to this Office for review.

Sincerely,

David E. Johnson
Deputy Attorney General
Health, Education, and Social Services

cc: Belle S. Wheelan, Ph.D., Secretary of Education

Race has no place in admissions process

Virginia Tech board did the right thing

By EDWARD BLUM and ROGER CLEGG

THE OPINION editors at The Roanoke Times ("Abandon all thought, oh ye who select students," March 12) are unhappy about the recent changes made to Virginia Tech's employment, admissions and financial aid policies — especially its ban on the use of racial and ethnic preferences, aka "affirmative action." But the new policy does nothing more than bring the school into compliance with our nation's civil rights laws and the principle of racial nondiscrimination. This is a welcome and proper development, whether the editorial page editors like those laws and that principle or not. The Virginia Tech Board of Visitors and Attorney General Jerry Kilgore should be applauded for bringing this about, not vilified.

Here's what happened. Last April, Kilgore's office issued a lengthy legal memorandum clarifying the status of the law concerning the use of race and ethnicity by colleges in Virginia. The memorandum painstakingly and evenhandedly discussed the federal law regarding the use of racial and ethnic preferences and concluded that such discrimination makes state schools very vulnerable to lawsuits. That conclusion is unremarkable, as any expert in this area will tell you. The attorney general was doing exactly what a good lawyer should do for his clients: Telling them what the law is, so that the clients can avoid getting into legal trouble.

As a matter of fact, when our organization — which has documented and criticized the use of racial and ethnic preferences at various Virginia state universities — read the memorandum, we welcomed it but wished it had gone further. In our view, the only problem with the memorandum was that the law is even more hostile to discrimination in the name of "affirmative action" than Kilgore concluded.

Tech's Board of Visitors, in turn, did exactly what it should have done. It read the memorandum and concluded that it needed to take steps to ensure that its school was following the law. As noted above, there is evidence that many Virginia universities use racial and ethnic admission preferences, and Virginia Tech in particular had been exposed this summer by the Chronicle of Higher Education as discriminating in its faculty selection as well.

And one hopes that the board was motivated not only by fear of lawsuits, but by a moral principle as well, namely that a student's skin color or family's country of origin should never be used to deny him or her admission to a school. The resolution follows the letter and spirit of the Civil Rights Act of 1964. How can anyone who believes in the rule of law and the principle of racial equality think this is a bad development?

The Times' editorial to the contrary notwithstanding, there is nothing in the resolution that is inconsistent with treating students as individuals and carefully weighing the students' individual qualities in weighing applications for admission. To the contrary: The resolution demands that this be done, and that no student be pigeonholed as more worthy or less worthy simply because of the student's skin color or where his ancestors came from.

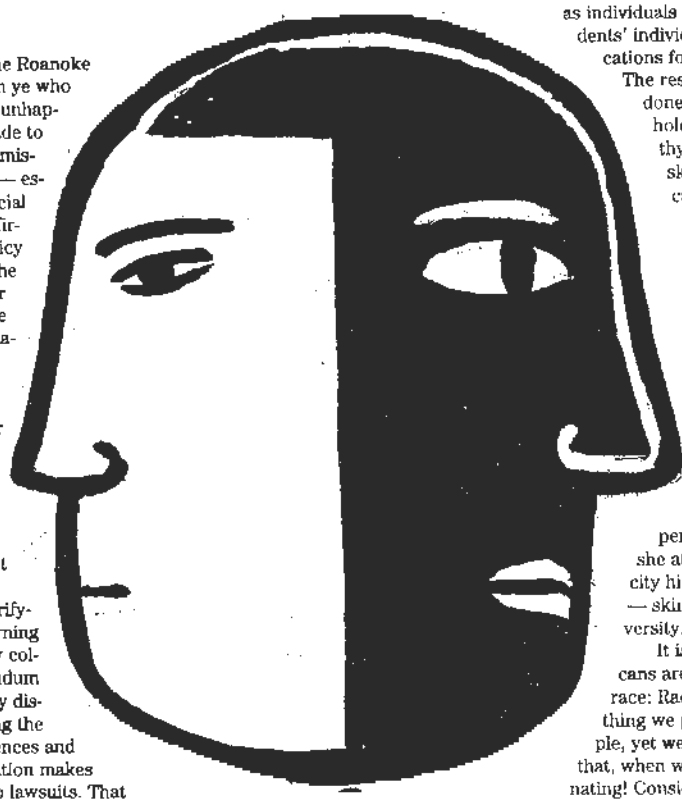
Indeed, using race or ethnicity to achieve "diversity" at Tech assumes that all black, Hispanic or Asian students have the same backgrounds, experiences and outlooks. At its very foundation, this approach assumes that all black students, for instance, are somehow interchangeable. Any black student in a college classroom is assumed to bring a "black" perspective to the discussion and the learning experience. It doesn't matter if he or she attended an impoverished inner-city high school or a chic prep school — skin color supposedly creates "diversity."

It is no wonder that so many Americans are exasperated about the issue of race: Race is not supposed to be something we pay attention to in treating people, yet we are then told by some people that, when we ignore race, we are discriminating! Consider the logic of The Times' editorial: If race can be considered as a factor in college admissions, then can it also be a factor during the sentencing phase of a criminal trial? How about police profiling to prevent crime? Can race be one factor that the police consider in whether to pull over a suspicious driver? It is very doubtful anyone — but especially the editorial writers at most newspapers — would endorse those uses of race.

Every college and university in the state should adopt Tech's new colorblind policies. Kilgore's office has provided each school with the legal basis for doing so, and failure to bring policies into legal compliance only invites costly and polarizing litigation that his office will not be able to defend in court. And even if the Supreme Court rules that racial and ethnic admissions discrimination is sometimes permissible, the justices will not require such discrimination, and Virginia's schools should voluntarily end it. Tech's policy changes are long overdue, and every resident of Virginia should welcome them.

• •

EDWARD BLUM and ROGER CLEGG *work at the Center for Equal Opportunity, which is based in Sterling. CEO's studies of Virginia universities are posted on its Web site, www.ceousa.org.*



MARK WEBER / *LOS ANGELES TIMES SYNDICATE*

In our view, the only problem with the attorney general's memorandum was that the law is even more hostile to discrimination in the name of 'affirmative action' than Kilgore concluded.

Federal guide pushes colleges to use 'race-neutral' admissions

Release comes before Supreme Court hearing of Michigan case

Associated Press

WASHINGTON — As Supreme Court arguments near, the Bush administration is aggressively encouraging schools to avoid race-based admissions programs like those at the University of Michigan, which it contends are unconstitutional.

The Education Department released a 40-page guide of "race-neutral" recruiting and enrollment ideas on Friday that it says have shown promise in states such as California, Texas and Florida.

Leaders say they want to help schools maintain diversity without using the racial preferences that the president calls divisive and legally untenable.

The Supreme Court will hear arguments Tuesday on what experts say is the most significant affirmative action case in a quarter-century — a challenge to undergraduate and law school admissions policies at the University of Michigan.

Federal officials acknowledged that hearing's importance but said its timing happened to coincide with the wrap-up of their yearlong effort.

The Bush administration filed a brief opposing the Michigan policies, which consider race as one factor in determining which students are accepted.

Efforts by colleges to help train and recruit high school students in poor communities merit more attention, said Brian Jones, the department's general counsel.

The guide also draws attention to policies such as one in President Bush's home state of Texas that guarantees college admissions to students who finish at the top of their high school class.

Mr. Jones said the guide was not endorsing the Texas model.

The promise of admission to a top percentage of students is perhaps the best-known race-neutral alternative, and its use is expected to grow if the court rules against Michigan. But under the plan, a high-achieving student in one school may lose a college slot to a student who earns lesser grades but finishes at the top of a low-performing school.

"Any approach, including the current ones, will have shortcomings," said Gerald Reynolds, the department's assistant secretary for civil rights.

He and others contend the key difference is that those other choices are not in conflict with the U.S. Constitution.

But eliminating race as a factor could inhibit schools from enrolling minorities for fear of legal scrutiny, even if race was not the reason those students were admitted, said Victor Bolden, a lawyer in New Haven, Conn. He wrote a brief supporting Michigan's policies on behalf of Philadelphia, Cleveland and the National Conference of Black Mayors.

Increasingly, schools are considering a student's socioeconomic status in admissions. That approach avoids a direct reference to race but targets diversity because many racial and ethnic groups are disproportionately poor.

Inside OPA

- OPA Home
- ▶ Press Releases
- Speeches
- Radio Broadcast News
- Official Photos
- Senior Staff Bios
- White House Releases
- Video Broadcasts
- ED Publications
- ED Offices
- ED Budget

Search press releases

Go

(Help with search)

These press releases are provided by the Office of Public Affairs. Most documents contain a contact name and telephone number. Education-related press releases and statements from the White House are located on a separate page.

Education Department Releases Report on Race-Neutral Alternatives in Higher Education

Department to host conference on diversity in higher education

FOR RELEASE:
March 28, 2003

Contacts: Dan Langan, Susan Aspey, (202) 401-1576

U.S. Secretary of Education Rod Paige today released "Race-Neutral Alternatives in Postsecondary Education: Innovative Approaches to Diversity," a report that seeks to foster innovative thinking at education institutions that are seeking race-neutral means to achieve diversity on their campuses.

"Make no mistake that it will take time, creativity and constant attention by government and university officials to pursue effective race-neutral policies," Paige said. "However, as Americans we owe it to our heritage and to our children to meet those challenges head on, rather than looking for shortcuts that divide us by race and betray the nation's fundamental principles.

"This report describes innovative, race-neutral ways to achieve diversity in higher education. We believe this report and next month's conference will equip college and university leaders with information they may need to explore these alternatives and ensure that all citizens have access to higher education in this country."

Secretary Paige also announced that the Department of Education is hosting a conference on this critical issue on April 28-29 in Miami, Fla., for leaders of the education community. More information about the conference will be available at a later date.

Education institutions that use race-neutral approaches use admissions and college preparatory policies that do not focus on or single out racial or ethnic groups for preferential treatment. The report demonstrates that as education institutions seriously investigate the options available to them, they will find that there are dozens of race-neutral approaches they can consider.

For example:

- Many education institutions provide preferences on the basis of socioeconomic status
- Colleges and universities are expanding their recruitment and outreach efforts by targeting students from schools that traditionally have not been "feeder schools" for those institutions;
- States are creating new skills-development programs, ones designed to improve education achievement among students who attend traditionally low-performing schools. Examples of these programs include the Texas Advanced Placement Initiative and Florida's partnership with the College Board;

- Many universities are entering into partnerships with low-performing public schools to strengthen their students' abilities to succeed in college; and

- Texas, California and Florida have all created admissions plans for students who finish at the top of their high school classes.

The report also demonstrates that, while many race-neutral approaches are relatively new, the early results from these programs are promising. The report points out that the initial positive results are only the beginning; the full advantages of many of the race-neutral alternatives will not be fully known until they are seriously implemented for a sufficient period of time and several classes of students have been able to benefit from them.

The report does not endorse any particular program but rather provides a catalog or description of what education institutions are attempting.

The report is available at: http://www.ed.gov/ocr/raceneutral.html.

###

This page last modified—March 28, 2003 (jer)

Technical questions about the Web site: webmaster@inet.ed.gov
Other inquiries/comments: customerservice@inet.ed.gov

Race-Neutral Approaches to Diversity

Overview

Americans overwhelmingly agree that diversity in our schools, neighborhoods, workplaces, and community organizations is enormously positive. Because of strong legal and political trends, many educational institutions are implementing innovative "race-neutral" alternatives to ensure that their student bodies are accessible to people from a wide variety of backgrounds. In other words, they continue to strive for diversity, but are using admissions and college preparatory policies that do not focus on or single out racial or ethnic groups for preferential treatment - they are neutral toward race. For example:

- Many educational institutions are providing preferences on the basis of socioeconomic status;
- Colleges and universities are expanding their recruitment and outreach efforts by targeting students from schools who traditionally have not been "feeder schools" for those institutions;
- States are creating many new "skills development" programs – projects designed to improve educational achievement among students who attend traditionally low-performing schools. Examples include the Texas "Advanced Placement Initiative" and Florida's partnership with the College Board;
- Many universities are entering into partnerships with low-performing public schools to strengthen their students' ability to succeed in college; and,
- Texas, California and Florida have all created admissions plans for students who finish at the top of their high school classes.

The Office for Civil Rights seeks to provide educational institutions with information about the "race-neutral" options available to them. Educational institutions will find that there are dozens of race-neutral options available. They will also find that the early results from these programs are promising. Moreover, the initial positive results are only the beginning; the full advantages of many race-neutral alternatives will not be fully felt until they are seriously implemented and several classes of students have been able to benefit from them.

The Office for Civil Rights does not endorse any particular program. Rather, our hope is to foster innovative thinking about using race-neutral means to produce diversity among educational institutions. We hope to create a positive climate in which race-neutral alternatives can be seriously considered.

Report:

Race-Neutral Approaches in Postsecondary Education: Innovative Approaches to Diversity

 (Report as MS Word file in zip archive for download)

Resources:

Remarks by the President on the University of Michigan affirmative action litigation (January 15, 2003)

Brief for the United States as Amicus Curiae Supporting Petioners in Gratz and Hamacher v. Bollinger, et. al. PDF

Brief for the United States as Amicus Curiae Supporting Petitioner in Grutter v. Bollinger, et. al. PDF

Remarks by Secretary Rod Paige at the National Center for Educational Accountability Region VI Conference (January 24, 2003)

Paige to Highlight Race-Neutral Alternatives in Higher Education (January 24, 2003) (Press Release)

[Know Your Rights] [Prevention] [Civil Rights Data] [About OCR] [Reading Room] [Related Links] [Previous Page]

This page last modified March 27, 2003 (ts)

RACE-NEUTRAL ALTERNATIVES IN POSTSECONDARY EDUCATION:

INNOVATIVE APPROACHES TO DIVERSITY

March 2003

U.S. Department of Education
Office for Civil Rights

March 2003

To order copies of this publication, write:

ED Pubs
Education Publications Center
U.S. Department of Education
P.O. Box 1398
Jessup, MD 20794-1398

You may fax your order to: 1-301-470-1244 or send an e-mail request to: edpubs@inet.ed.gov.

You may also call toll-free: 1-877-433-7827 (1-877-4-ED-PUBS). If 877 service is not yet available in your area, call 1-800-872-5327 (1-800-USA-LEARN). Those who use a telecommunications device for the deaf (TDD) or a teletypewriter (TTY), should call 1-800-437-0833.

To order online, point your Internet browser to: http://www.ed.gov/pubs/edpubs.html

This publication is also available on the Department's Web site at http://www.ed.gov/ocr.

Any updates to this publication will be available at this Web site. On request, this publication is also available in alternate formats, such as Braille, large print, audiotape or computer diskette. For more information, please contact the Department's Alternate Format Center at 1-202-260-9895 or 1-202- 205-8113.

CONTENTS

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

OFFICE OF THE ASSISTANT SECRETARY

March 2003

Leaders of the Education Community,

Americans overwhelmingly agree that diversity in our schools, neighborhoods, workplaces, and community organizations is enormously positive. In the past, many educational institutions have tried to reach this important goal by giving preferences to certain individuals based on their race or ethnicity. People of goodwill have reached different conclusions about the merits of these policies. But there are serious and important reasons for educational institutions to look for new alternatives. Policies granting preferences on the basis of race and ethnicity raise constitutional questions and are increasingly being overturned in the courts. Moreover, voters in various jurisdictions have passed state and local initiatives restricting the use of racial preferences. These legal and policy trends mean that we must work together to look for new solutions.

This publication describes innovative "race-neutral" programs being implemented across the country. Educational institutions will find that there are dozens of race-neutral options available to them. They will also find that the early results from these programs are promising. Moreover, the initial positive results are only the beginning; the full advantages of many of the race-neutral alternatives described in this publication will not be fully felt until they are seriously implemented and several classes of students have been able to benefit from them.

This publication does not endorse any particular program discussed in these pages. Rather, our hope is to foster innovative thinking about using race-neutral means to produce diversity among educational institutions. The purpose of this publication is to help create a positive climate in which such race-neutral alternatives can be seriously considered.

Sincerely,

Gerald A. Reynolds
Assistant Secretary for Civil Rights
U.S. Department of Education

INTRODUCTION

President George W. Bush has said, "America is a diverse country, racially, economically, and ethnically. And our institutions of higher education should reflect our diversity. A college education should teach respect and understanding and goodwill. And these values are strengthened when students live and learn with people from many backgrounds." [1]

> "Some states are using innovative ways to diversify their student bodies. Recent history has proven that diversity can be achieved without using quotas."
>
> President Bush

Young people benefit greatly when they are exposed to a wide variety of people-for example, people from various geographic regions, socioeconomic backgrounds, cultural heritages and different points of view. Students grow substantially as they exchange ideas with others who have exceptional character and personal talents; who are involved in a variety of extracurricular activities; who have a number of volunteer and work experiences; and who have extraordinary dedication to particular causes. It is precisely that diversity, broadly understood, that President Bush and the Department of Education want to help educational institutions achieve.

Race-Preferential Versus Race-Neutral Approaches

Postsecondary institutions are grappling with the question of how to ensure that students come from a wide variety of backgrounds. For many years, some educational institutions have used "race-preferential" approaches to admitting students. That is, these colleges and universities use race and/or ethnic origin as a factor in determining which students to admit.

However, many colleges and universities, as well as elementary and secondary schools, are reconsidering preferences based on race and ethnicity. In several states, courts have struck down racial preferenecs that were being used by educational institutions. [2] In others, voters have passed referenda directing that state institutions can neither discriminate against, nor grant preferential treatment toward, persons on the basis of race or national origin. [3] In the state of Florida, Governor Bush created a new equal opportunity initiative. [4]

Because of these strong legal and policy trends, many educational institutions have responded by looking for innovative "race-neutral" alternatives to ensure that their student bodies are accessible to people from a wide variety of backgrounds. In other words, they continue to strive for diversity, but are using admissions and college preparatory policies that do not focus on or single out racial or ethnic groups for preferential treatment-they are neutral toward race. For example:

- Many educational institutions are providing preferences on the basis of socioeconomic status;

- Colleges and universities are expanding their recruitment and outreach efforts by targeting students from schools who traditionally have not been "feeder schools" for those institutions;

- States are creating many new skills development programs-projects designed to improve educational achievement among students who attend traditionally low-performing schools. Examples include the Texas Advanced Placement Initiative and Florida's partnership with the College Board;

- Many universities are entering into partnerships with low-performing public schools to strengthen their students' ability to succeed in college; and,

- Texas, California and Florida have all created admissions plans for students who finish at the top of their high school classes.

Cataloging Race-Neutral Approaches

The purpose of this report is to describe a number of race-neutral approaches that postsecondary institutions across the country are using. This report cannot describe all race-neutral approaches because institutions are employing so many kinds of programs to help improve their communities and strengthen the diversity of their student bodies. Instead, this report highlights some notable race-neutral efforts currently employed.

The primary purpose of this report is not to assess these programs; this should not be read as a "best practices" guide. This report merely describes these programs, relying primarily on a review of the literature published about these programs. This report provides nothing more than a catalog of options that are available.

After reading this catalog of programs, it will be clear to the reader that there are dozens of race-neutral options available to educational institutions and that the early results appear promising. The early results may also understate the full effectiveness of these programs-the true impact of these programs will not be known until they are implemented over time and in diverse, widespread educational contexts.

The purpose of this publication is to create a positive climate in which these race-neutral alternatives can be seriously considered.

Why Provide a Catalog?

We believe that this catalog or description of race-neutral approaches can significantly assist educational institutions across the country. First, focusing the nation's attention on innovative race-neutral programs will have civic benefits. These programs can help expand equal opportunity in our society while avoiding the controversy caused by traditional race-preferential policies. Race-neutral programs have the potential to promote diversity of viewpoint and experience without employing racial preferences. In other words, they respond to the goals of those on both sides of the divisive debate about the role of race in admissions. Civil rights progress in this country has often been stagnated by a focus on the zero-sum game of pitting one group against another. A serious effort to implement race-neutral programs, coupled with education reform efforts such as the No Child Left Behind Act of 2001 (No Child Left Behind), could help unite our country as we focus on attacking the root causes of the various achievement gaps.

Second, focusing on race-neutral alternatives promotes the principles and goals of No Child Left

Behind. No Child Left Behind encourages innovative approaches to educating all of our young people. Many of these race-neutral programs are focused on closing the achievement gaps and promoting education within traditionally low-performing schools in a manner consistent with No Child Left Behind.

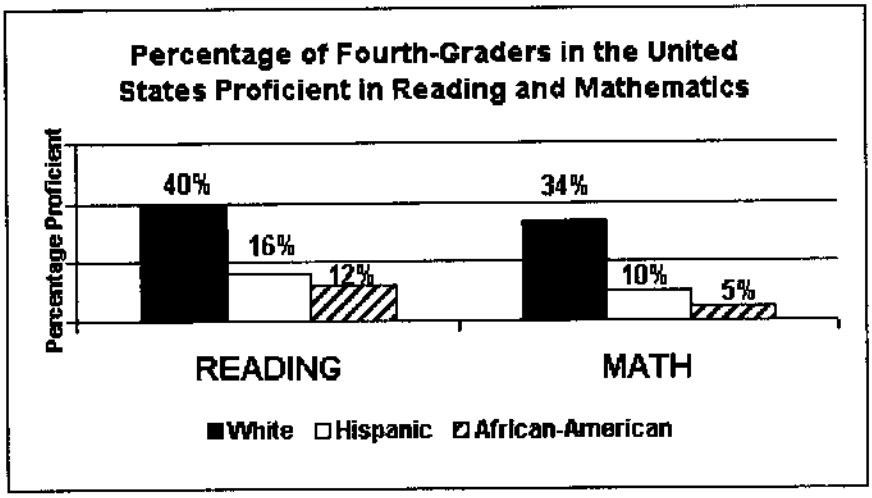
Finally, educational institutions need guidance on these issues. Race-preferential programs may trigger costly and counterproductive litigation. Implementing race-neutral programs will help educational institutions to minimize litigation risks they currently face.

NO CHILD LEFT BEHIND

> "Much progress has been made; much more is needed. University officials have the responsibility and the obligation to make a serious, effective effort to reach out to students from all walks of life, without falling back on unconstitutional quotas."
>
> President Bush

The goal of equal opportunity for all our citizens is elusive in large part because low-performing schools year after year, generation after generation, graduate young people who cannot compete on an equal basis with others. If we could ensure that all children receive the world-class education they deserve, the pool of applicants prepared to succeed in our selective institutions would be significantly diversified and enriched. No Child Left Behind addresses this critical area of need.

The story of American education today reads like a tragic novel for too many children. The achievement gaps in our schools are real and persistent. While 40percent of white fourth-graders are proficient or above in reading according to the National Assessment of Educational Progress reading assessment, only 16 percent of their Hispanic peers and 12 percent of their black peers read at that level.[5] In math, 34 percent of white fourth- graders scored at or above proficient, while just 5 percent of African American and 10 percent of Hispanic students reached that level.[6] The statistics are similar in science and other areas of study.[7] The evidence is clear that many schools fail to adequately prepare their students-a great many of whom are minorities-for the competition for admission to our elite colleges and universities.



U.S. Department of Education, *The Nation's Report Card: Fourth Grade Reading 2000*, p.30-31 (2001).

A similar achievement gap exists between low-income and more economically advantaged children. This can be measured by looking at the gap between the academic achievement of students eligible for the federal free and reduced-price lunch program and more economically advantaged students not eligible for the program. [8] While 41 percent of non-eligible fourth-grade children are proficient or above in reading, only 14 percent of their low-income peers read at that level. [9] In math, 33 percent of economically advantaged fourth-graders in public schools are proficient or above, while just 9 percent of low-income students performed at this level. [10]

The No Child Left Behind Act, a bipartisan effort at education reform, proceeds from the assumption that every child can learn and excel. By authorizing increased federal funding levels while holding states accountable for the achievement of all students and by empowering parents with information and options, No Child Left Behind aims to close the achievement gaps. No Child Left Behind is holding schools accountable for the achievement of all students without regard to their race, national origin, disability and other factors. Four principles are embedded in No Child Left Behind: (i) stronger accountability for results; (ii) increased flexibility and local control; (iii) expanded options for parents and students; and (iv) an emphasis on teaching methods that have been proven to work. No Child Left Behind will make our colleges and universities more diverse not through artificial means such as the use of racial preferences, but rather by ensuring a more diverse pool of fully prepared, high-achieving students.

While No Child Left Behind will deliver dramatic reforms to our educational system, the country must also renew family structures and rebuild our urban communities. We cannot expect young people to concentrate on homework and research when the conditions in their homes and neighborhoods are so difficult. Families and communities must recapture a culture of learning-an environment that both nurtures young people as they learn and places heavy demands on them to be successful in the classroom. President Bush's faith-based initiative is emphasizing work in these areas.

DEVELOPMENTAL APPROACHES

Race-neutral programs can be divided into two categories. Most of the attention is focused on admissions plans (for example, the Texas 10 Percent Plan). However, another large category of race-neutral efforts must also be considered-policies designed to develop the skills, resources and abilities of students who might not otherwise apply to and succeed in, college. These race-neutral programs seek to improve the educational performance of our nation's students, particularly those who attend traditionally low performing schools, to such an extent that the admissions process will naturally produce a diverse student body. In other words, these policies try to ensure that students from traditionally low-performing schools receive such a good education that they can qualify for admission to an excellent postsecondary institution.

These developmental or systemic approaches to the problem attempt to meet two goals: first, to build skills in students who would not otherwise be competitive in the admissions process; and, second, to provide support throughout the post-secondary educational experience that will enable these students to succeed. State and federal initiatives also reach out to students from traditionally low-performing schools to encourage them to attend and graduate from highly selective universities through recruitment and financial aid strategies.

The following is a description of a number of race-neutral developmental approaches.

Expansion of Advanced Placement Courses

In August 1999, the University of Texas System created an Advanced Placement Initiative to diversify the range of students who take college-level courses before they graduate from high school. Taking Advanced Placement (AP) courses helps high school students in three ways. First, AP students may learn more because they are in a more demanding and challenging course. Second, AP students often receive enhanced grade point averages. For example, in some districts, an "A" in an AP course can earn the student a 4.5 grade point average in that class instead of a 4.0. Naturally, a student who has achieved a 4.5 grade point average in several classes will present a more compelling application to a college admission official than a student who has not had this opportunity. Finally, AP students can often earn college credits.

The AP Initiative tries to reach underserved students populations that have not previously participated in the AP program. The state found that in 1998, only slightly more than one-half of middle and high schools in Texas had any student taking an AP or International Baccalaureate exam. [11]

The AP Initiative provides incentives for schools and teachers to offer more courses. For example, teachers are offered the opportunity to participate in summer institutes at University of Texas schools that enable them to teach the AP courses. The state pays each teacher who attends a seminar a stipend on the condition that the teacher begin at least one new AP course when he or she returns to school. Texas has expanded the number of AP Summer Institutes and has created a Master Teacher Summer Institute. Within the U.T. System, the number of teachers participating in AP Summer Institutes has grown from 1,882 in the first year of the initiative, to 2,584 in 2002, an increase of 37 percent. [12]

Schools are provided bonuses for each student who successfully completes one or more AP exams-in 2002; it was $100 per student per successful exam. In 2002, the state paid schools $3.5 million under this incentive program. The state also offers financial incentives to students to encourage them to take the courses and pass the examinations (paying, in some cases, all but $5 of the $80 fee for an exam). [13]

The results have been dramatic. Participation in AP courses in Texas has increased since 1999 by 29,012 students-a 57 percent increase. A great deal of this growth comes from schools where AP courses were never before offered. The percentage of minority students taking AP courses in Texas has increased by 74 percent for the same period. Participation in AP classes has grown steadily in all counties where there is a University of Texas-affiliated college or university, but most notably in the border regions that have a majority Hispanic population.

The state of Florida has created a similar initiative. The state found that AP courses were rarely offered in schools serving low-income populations. [14] Florida, working closely with the College Board, offered incentives similar to those in Texas. State law provides that, for each student who scores a 3, 4 or 5 on an AP exam, teachers receive a $50 bonus. The law also provides that AP teachers in a low performing school (categorized as a "D" or "F" school) who have at least one student scoring a 3 or higher receive a $500 bonus. Again, the results are significant. Prior to the new initiative, just over 4,000 students in low-performing schools were enrolled in AP courses. By 2002, over 7,000 students were enrolled-an increase of more than 3,000 students in traditionally low-performing high schools who

are now able to take these more challenging courses. Gaston Caperton, the president of the College Board, has stated that, "Florida is now the leader in the number of black students taking advanced placement courses." [15]

The U.S. Department of Education also administers two related programs: the Advanced Placement Test Fee program and the Advanced Placement Incentive Program. The purpose of the programs is to support state and local efforts to increase access to AP classes and tests for low-income students. The fee program makes awards to state education agencies to cover part or all of the cost of test fees for low-income students who are enrolled in an AP course and plan to take the exam. The incentive program provides funds to states and local school districts with the purpose of expanding access to AP classes. For example, funds are provided for the development of pre-advanced placement courses, for coordination and articulation between grade levels to prepare students for academic achievement in AP courses and exams and to provide teacher training. The Department spent $22 million in fiscal year 2002 on these AP initiatives. [16]

Partnerships Among Colleges and Low-Performing Schools

Many colleges and universities around the country are investing in nearby elementary and secondary schools. These postsecondary institutions recognize that these types of partnerships expand their educational mission by giving professors and students an opportunity to put into practice the theories they are learning in the classroom. Moreover, they recognize that helping to better educate young people who attend traditionally low-performing schools will broaden the pool of students who can qualify for admission to college.

For example, the University of California higher education system has adopted a detailed plan to expand partnerships with elementary and secondary schools. [17] U.C. has four types of outreach programs. First are "student-centered programs." University of California students and professors work directly with K-12 students in the areas of tutoring, mentoring, advising about college, helping with college preparatory coursework and helping to find educational experiences outside of the classroom that would be helpful to K-12 students. Nearly 100,000 K-12 students in California are now being tutored or mentored by U.C. students and professors. [18]

Second are "school partnerships." Each campus in the University of California system partners with K-12 schools that are the lowest performing in the state (established by the school's rank on the state's Academic Performance Index). The universities offer help in curriculum development, direct instruction, community engagement, and other assistance. These partnerships now extend to 256 low-performing California schools, including 73 high schools, 55 middle schools and 128 elementary schools.

Third, the University of California system offers a number of professional development programs to help K-12 teachers increase their skills and effectiveness. More than 70,000 teachers are served by teacher training initiatives such as the California Professional Development Institutes and the Subject Matter Projects. These programs are concentrated in the same schools that are the subject of the school partnerships-the state's low-performing schools.

Finally, there are informational programs-enrichment programs designed to provide information about effective ways to improve the educational system and provide additional opportunities for students in

low-performing schools.

> "Academics and administrators throughout the system admit that the university would never have shouldered this burden had it not been for the elimination of affirmative action [racial preferences]; and many say that the price is worth paying."
>
> James Traub, "The Class of Prop. 209," *New York Times Magazine*, May 2, 1999.

One example of an outreach program is UC Links, "a statewide network of after-school program sites, [that] offers computer and multi-media activities for low-income youth." [19] Another example is the Expedition program developed by U.C.-Berkeley students. It is an after-school program that helps low-income youth in Oakland explore their own community using "archeological inquiry and content as a learning framework." Anthropology undergraduates use hands-on activities, multimedia CD-ROMS and computer games, word processing and spreadsheets to introduce ancient history and cultures to middle school students. [20]

California reports that the early results of these programs have been promising: "[T]he students with whom the University has worked have made substantial progress in recent years and the rates of change are expected to increase rapidly over the next several years." [21] Establishing direct contacts with more than 100,000 at-risk children and 70,000 teachers will clearly change California's education landscape.

California's expanded outreach efforts have also encountered obstacles that must be overcome. One challenge is simply to coordinate all of the efforts. Another is to sustain the commitment to these outreach programs over the long haul and not to lose patience seeking immediate rewards: "Improving the educational fortunes of California's most educationally disadvantaged students is not a short-term endeavor, though short-term gains will be made. The ultimate objectives of the Educational Outreach and K-12 Improvement Programs are expected to take years to reach, making the sustained support of the University, its partners and the state critical to the success of these programs." [22]

A news article reporting on California's outreach programs concluded, "U.C. campuses are now reaching down into the high schools, the junior highs and even the elementary schools to help minority students achieve the kind of academic record that will make them eligible for admission, thus raising the possibility that diversity without preferences will someday prove to be more than a fond hope. Academics and administrators throughout the system admit that the university would never have shouldered this burden had it not been for the elimination of affirmative action [racial preferences]; and many say that the price is worth paying." [23]

The University of Pennsylvania has made a major commitment to the neighborhoods that surround its campus. The University established a Center for Community Partnerships to help build bridges between the University and the community of West Philadelphia. [24] The Center attempts to use the University's vast resources to help reform West Philadelphia's schools and community organizations. For example, the University offers approximately 130 courses in which community service is an element. One product of this community involvement is the West Philadelphia Improvement Corps (WEPIC), an organization created by undergraduates in an honors history course that has expanded to such an extent that it now works with approximately 10,000 children and family members. Through WEPIC, the Center has invested in University-assisted Community Schools, an effort to help reform the local schools. The Center sponsors an Urban Nutrition Initiative, involving approximately 1,000 young people in classes that promote health and nutrition in the context of social studies, math and language arts and Access Science, which connects professors and students in the Math, Physics, Chemistry and Biology departments with teachers and students in the community schools. The University also leads an effort to coordinate with other colleges and universities in the Philadelphia area to expand the work (The

Philadelphia Higher Education Network for Neighborhood Development) and is part of a national and international effort to encourage colleges and universities to invest in local communities (the WEPIC Replication Project).

The University of Vermont has created a partnership with one specific school– Christopher Columbus High School in Bronx, New York. [25] The University recognized that it receives very few applicants from students in urban schools such as Christopher Columbus. The admissions department from the University holds workshops for students and parents, attempting to demonstrate that college is a viable option for the graduates. The workshops initially focused on freshmen and sophomores, emphasizing early awareness of the option of attending college. University of Vermont education students teach at the high school as part of their course fieldwork experience and numerous professors have spent time teaching classes at the school or helping train teachers. The University also directly recruits from Christopher Columbus High School. It works closely with promising students from the school, flying them to the University for recruitment trips and attempting to secure financial aid to make tuition more affordable. A New York Times article on the Vermont-Christopher Columbus partnership noted, "In putting down roots in the Bronx, the University of Vermont joins a growing list of institutions in rural areas-including Colgate University, Skidmore College and St. Michael's, another Vermont college-that have created similar partnerships in recent years with public schools in New York or Boston. With federal courts in Texas and Georgia having chipped away at race-conscious admissions practices in recent years and the Supreme Court being urged to revisit the issue, the arrangements offer the prospect of an alternative....The university makes a direct pitch to students who might not otherwise have Vermont on their radar. (Many of the students from Columbus are immigrants or the children of immigrants from Africa and the Dominican Repuhlic). And the students get an inside track on how to apply to a highly regarded public institution, with advising sessions conducted in their school by the very admissions officers who would soon be reading the students' submissions." [26] More than thirty students from Christopher Columbus High School now attend the University of Vermont, meaning it "instantly became the single largest feeder to the university outside Vermont." [27]

> "In putting down roots in the Bronx, the University of Vermont joins a growing list of institutions in rural areas... that have created similar partnerships in recent years with public schools in New York or Boston. With federal courts in Texas and Georgia having chipped away at race-conscious admissions practices in recent years and the Supreme Court being urged to revisit the issue, the arrangements offer the prospect of an alternative."
>
> *New York Times, December 26, 2001*

The state of Florida also has instituted partnerships among universities and elementary and secondary schools. Every public and private community college and four-year institution has been challenged to form Opportunity Alliances with low performing elementary and secondary schools. Many of these Opportunity Alliances take place in high-poverty areas of the state. The universities are asked to provide tutoring for students, training for teachers and other assistance to those schools. For example, Florida Atlantic University (FAU) entered into partnerships with several schools. In one school, a university student recognized that the school could benefit from a grant to provide state money for mentoring; the student wrote the grant proposal and the school was awarded the money. One of FAU's partner schools moved from being classified by the state as a "D" school-low-performing-to a "B." The University of Florida has formed Opportunity Alliances with three low-performing schools. In addition to working closely with students from those schools, the University announced that it would offer full scholarships to the top five high school graduates from these partnership schools. [28]

Partnerships Among the College Board and Educational Institutions

In 2000, the state of Florida entered into a partnership with the College Board, the nonprofit education services association that seeks to prepare students for postsecondary education. The State provides the College Board with resources and provides it with access to Florida's students and teachers. [29] The College Board offers a number of different services to Florida's schools and attempts to concentrate its work in the low-performing school districts.

The partnership helps support students in a number of ways. It begins with helping to prepare students for the PSAT, a standardized test given to tenth graders. The state government provides the PSAT free to all students in Florida. The state was concerned that test preparation programs such as the College Board (and similar organizations) offers may not be taken by students from low-income families. By providing the test for free, the state seeks to attract students who might not have had the opportunity to attend college. The PSAT produces data that are given to the student. This diagnostic information helps the student and the student's family understand how to best prepare for college. The test also produces data that are given to the school-helping to identify strengths and weaknesses in the student body and helping to identify students that should be targeted for advanced classes. The test produces data for colleges and universities, helping them to identify promising students. These policies have led to a 191 percent increase in the number of minority students who take the PSAT exam. [30]

The partnership helps students in other ways. For example, it offers free tutoring to interested students at local high schools. In cooperation with Florida's community colleges, tutoring opportunities have been offered at 62 of the lowest performing schools in the state, in which 107,000 students are served. The partnership also emphasizes SAT test preparation courses. More than 2,000 students have taken these courses through partnerships among the state of Florida, the College Board and the Urban League of Miami and the Urban League of Broward County. The College Board has provided free college planning and readiness materials to more than 275,000 public school students in English, Spanish and other languages. The focus of this effort has been to deliver information to students in low-performing schools.

The partnership also provides support for teachers. The College Board offers professional development workshops, primarily targeting those who work in difficult school districts. Teachers employed at the low-performing schools are given priority for any workshop they desire to attend and the state government pays the registration fees. Workshops are offered to train teachers in a number of areas, including how to prepare students to successfully complete standardized tests such as the Florida Comprehensive Assessment Test and the PSAT. The College Board provides teachers with strategies for integrating materials into their daily routine that will allow them to teach their typical curriculum as well as prepare the students to be successful in these critical tests. The workshops also certify teachers in administering AP courses. More than 1,000 teachers and administrators have enrolled in these professional development workshops. [31]

While the College Board has a statewide partnership with only one state, it has similar agreements with a number of school districts. For example, it has a similar agreement with the Charlotte-Mecklenburg school district, which has more than 100,000 students. [32] The partnership has resulted in a large increase in the number of students who take AP courses (the number of African Americans students enrolled has tripled since 1995-96) and who pass AP exams (more than 90 percent of the students in AP courses take the exams). But the partnership also emphasizes more than just getting senior high school students to take these more challenging courses. In addition, the College Board uses its Pacesetter program to implement changes to the curriculum, help teachers develop and assess the performance of students in English, math and Spanish courses. Each of the 16 high schools in the school district offers at least 12 AP courses and more than 300 teachers completed the AP training courses in 2001-02.

Other states and school districts could implement similar partnerships with the College Board or with similar organizations.

Expanding Online Course offerings

Students attending low-performing schools have less opportunity to take courses that will challenge them and help them to reach their full potential. Florida has bypassed poor school curricula by expanding the Florida Virtual School, which provides an online curriculum. The state has expanded the number of courses offered through this online option, and many minority students are taking advantage of them. In the 1999-2000 school year, only 200 minority students took classes from the Florida Virtual School; two years later, more than 1,200 minority students were enrolled. [33] Texas has similarly expanded the number of courses it offers online, and also emphasizes providing Advanced Placement classes for students.

Expanding Financial Aid

Some institutions are expanding access to financial aid as part of a strategy for diversifying the pool of students who have the skills to complete a college education but lack the resources. [34] U.T.-Austin's major new financial aid program is called the Longhorn Scholars and draws students from 70 high schools that were historically underrepresented at the university. [35] In the fall 2002 class, approximately 300 Longhorn Scholars received scholarships worth between $8,000 and $20,000 over four years. The University also provides the Scholars with academic advantages. The Longhorn Scholars: take freshman seminars and writing courses limited to 15 students; take interdisciplinary forums and seminars aimed at developing research relationships with faculty; have smaller sections of large lecture classes; and have their own advisers. In the fall of 2002, the 300 Longhorn Scholars were 58 percent Hispanic, 28 percent African American, 8 percent white and 6 percent Asian American. Texas A&M has a version of this type of program, called "Century Scholars." [36] Florida has similarly increased needs-based financial aid. [37]

President Bush announced in his proposed budget for 2004 a record amount of money for federal Pell Grants, which seek to ensure that low-income and disadvantaged students will be able to afford a postsecondary education. [38] The budget proposal includes a $1.4 billion increase for these grants, taking the funding to a record level of $12.7 billion. President Bush estimates that 4.9 million students would be able to take advantage of Pell Grants, nearly one million more than two years ago.

Recruitment and Outreach

Many students from low-performing schools never consider that college might be an option for them. In many neighborhoods where these schools are located, few people have attended postsecondary

institutions and much of the economy of those areas is built on occupations that are not dependent on college graduation. Therefore, young people growing up in these communities are rarely presented with information about the opportunity to attend college.

All of the postsecondary institutions described in this report undertake active recruitment and outreach efforts. One of the early positive results of the Texas 10 Percent Plan discussed in more detail below is the vast increase in recruitment that has been undertaken by college officials. [39] The University of Texas and Texas A&M have greatly increased their efforts to appeal to a broader pool of students through the Longhorn Scholars and Century Scholars programs, among others.

Another example is the University of Vermont's active recruitment of promising students from its partner high school. The University of Florida has hired four new admissions officers, and has provided funding for another three to four new officers in future years. [40]

Florida attempts to persuade all children in the state to consider the college opportunity in a variety of ways, such as providing the PSAT and PLAN tests free of charge to all students. Before, only students who were already aspiring to attend college (and could afford the fee) would sign up for these standardized tests. Now, more students are aware of the option of taking these exams and see it as an affordable opportunity. The result has been a two-year increase in African American PSAT test-takers of 176 percent. Similarly, there has been an increase of 257 percent in the number of Hispanics taking the PSAT in Florida. [41] These students are significantly more likely to see college as a viable option.

College Summit

College Summit is a national nonprofit organization that focuses on increasing the number of low-income students to enroll in college. [42] The College Summit believes that most low-income students do not attend college because they do not know their options and cannot successfully navigate through the process of applying to college. The organization argues that the highest performing low-income students are identified and then recruited by colleges and universities, but the "mid-performing" low-income students are left behind. These types of students in suburban schools are enrolling in college in part because they benefit from a culture that encourages college attendance-parents and neighbors who are college graduates themselves and school systems that are very familiar with the college enrollment process. However, low-income students who are not at the top of their classes but who are capable of being successful in postsecondary settings do not enroll because of a lack of information and encouragement.

The organization works directly with rising high school seniors by providing them with an intensive four-day summer workshop. During the workshop, students are educated about the options for financial aid and the process of applying to college. A professional college counselor also works with each student to help identify colleges that match their interests and abilities. The workshop focuses heavily on teaching writing skills through a methodology developed specifically for the College Board (the "Writing Team Method"). While the short-term goal is to produce an effective essay to accompany an application to college, the writing skills obviously help the student over the long term as well. The workshop also teaches the students how to fill out an application for college through a specialized software package. The students are also trained as peer leaders so that they can influence other students in their home school to consider the option of attending college.

The College Summit works with high schools to improve their ability to help students as well. High school counselors and other teachers join the students in the essay writing and financial aid trainings sessions, and learn to implement the curriculum with all of their students throughout the school year. The organization also focuses on helping to develop high school guidance counselors who work in schools with high concentrations of low-income students. "What makes the college transition work for middle-class students is the presence of college-experienced parents who keep students on track through the maze of college essays, forms, and choices. College Summit trains teachers to play this management role at school," the organization claims. [43]

The organization partners with more than two dozen colleges, which host the workshops and provide other services to the students. Colleges and universities who have partnered with the College Summit have seen their student bodies enriched by the enrollment of low-income students who likely would not have come to their attention except for this innovative program. "Colleges need a larger pool of diverse talent. And they need a way to distinguish who-among the masses of mid-performing applicants-is most likely to succeed. Institutions receive a cost-effective way for colleges to look at the whole student. In exchange for hosting a College Summit workshop on their campus, College Summit provides Preview Portfolios-application materials, teacher recommendations, high school transcripts, etc.-on pre-screened, low-income students, early in the admissions process." [44]

Since the organization began in 1993, it has worked with more than 4,000 students from 80 high schools in 7 states and the District of Columbia. Of the students who attend a College Summit workshop, 79 percent enroll in college and 80 percent of those students have stayed in college.

Federal Efforts

The federal government has for many years sponsored a number of race-neutral programs designed to help young people excel in college. Educational institutions should be aware of these programs because they could make more and better use of these opportunities. In addition, these programs could serve as models for state and local governments that want to expand their own race-neutral efforts. The following is a brief description of three programs-only a few race-neutral federal programs.

- **Gaining Early Awareness and Readiness for Undergraduate Programs (GEAR UP)**

GEAR UP is a discretionary grant program administered by the U.S. Department of Education. [45] It is designed to increase the number of low-income students who are prepared to enter and succeed in postsecondary education. GEAR UP provides five-year grants to states and partnerships to provide services at high-poverty middle and high schools. GEAR UP grantees serve an entire cohort of students beginning no later than the seventh grade and follow the cohort through high school. GEAR UP funds are also used to provide college scholarships to low-income students.

GEAR UP employs partnerships committed to serving and accelerating the academic achievement of cohorts of students through their high school graduation. GEAR UP partnerships supplement (not supplant) existing reform efforts, offer services that promote academic preparation and the understanding of necessary costs to attend college, provide professional development, and continuously build capacity so that projects can be sustained beyond the term of the grant.

The Department of Education invested $285 million in fiscal year 2002 in the GEAR UP program, and the Department estimates that more than 1.2 million students benefited from the more than 300 grants awarded. For example, the Brookline Housing Authority received a GEAR UP grant to work with students and families who live in the public housing in that city. The National Association of Housing and Redevelopment Officials presented its Award of Excellence to the Housing Authority for the outstanding results its GEAR UP project has achieved. [46] The GEAR UP project in Oklahoma has been credited with vastly increasing the number of students who receive college tuition assistance. Prior to 1999-2000, the average number of students enrolled in Oklahoma's college tuition scholarship program was about 1,350 each year. Because of the GEAR UP initiative and other measures to make the tuition scholarship program more accessible, the enrollment increased by 9,735 students in 2000-2001. Nearly as many students enrolled in the program in 2000-2001 as in the first eight years of the program combined. The college tuition scholarship program pays tuition at any Oklahoma public two-year or four-year university for all students who successfully complete the program. [47]

- **TRIO Programs**

The federal TRIO Programs are educational opportunity outreach programs designed to motivate and support students from disadvantaged backgrounds. [48] The TRIO projects, originally a combination of three projects, now include six outreach and support programs targeted to serve and assist low-income, first-generation college and disabled students to progress through the academic pipeline from middle school to post baccalaureate programs. TRIO includes a training program for directors and staff of TRIO projects and a dissemination partnership program to encourage the replication or adaptation of successful practices of TRIO projects at institutions and agencies that do not have TRIO grants.

The programs include Upward Bound, Upward Bound Math/Science, Talent Search, and Educational Opportunity Centers. Another large component of TRIO is Student Support Services, which provides opportunities for academic development, assists students with basic college requirements, and serves to motivate students toward the successful completion of their postsecondary education. The goal of the Student Support Services (SSS) program is to increase the college retention and graduation rates of its participants and facilitate the process of transition from one level of higher education to the next. Low-income students who are first-generation college students and students with disabilities evidencing academic need are eligible to participate in SSS projects. Two-thirds of the participants in any SSS project must be either disabled or potential first-generation college students from low-income families. One-third of the disabled participants must also be low-income students. The Department of Education spent more than $800 million on the programs in fiscal year 2002.

- **State Scholars Initiative**

The Department's Office of Vocational and Adult Education (OVAE) administers an innovative project that provides high school graduates with the solid academic foundation that is necessary for their future success. Many argue that students who complete a more rigorous course of study increase their likelihood of postsecondary success-measured in terms of persistence and completion. It is also argued that students who enroll in rigorous courses gain greater proficiency in academic areas. For example, in Texas, where efforts have been under way to increase the number of students who complete a rigorous course of study, students who enroll and succeed in a sequence of challenging mathematics courses score more than 100 points higher on the SAT than those who do not. [49]

On August 29, 2002, President Bush launched the State Scholars Initiative to provide support to states that are committed to improving the academic course of study for all students. The Center for State Scholars, in partnership with OVAE, will work initially in seven states. The initiative will ensure that

schools are given support by local businesses and will coordinate efforts among the education officials in that state. The initiative seeks to encourage high school students to take a more challenging high school curriculum, including:

- 4 credits in English
- 3 credits in math (algebra I, geometry, algebra II)
- 3 credits in basic lab science (biology, chemistry, physics)
- 3.5 credits in social studies; and
- 2 credits in a foreign language.

Texas has had a Texas Scholars program since 1991, encouraging students to complete the challenging curriculum referred to as the Recommended High School Program (RHSP). [50] In fact, RHSP is now the presumed curriculum for all high school students. That is, students are automatically enrolled in these classes unless a parent opts the student out of that curriculum. Financial incentives are also given to encourage students to accumulate all of these credit hours. In 1999, the state legislature tied $100 million in college financial aid to students who complete these requirements. In 2001, the legislature increased the financial aid commitment to $330 million. There is an on-going effort to ask each college and university in Texas to make the RHSP a basic minimum requirement for admission.

The federally funded Center for State Scholars will explore the possibility of expanding these requirements into other states. This is another example of a race-neutral program that seeks to develop the skills of young people so that they are prepared to succeed in college without special preferences.

ADMISSIONS APPROACHES

Several state university systems have created race-neutral policies to determine which students are admitted and which are not. Presently there are two new major categories of race-neutral approaches to admissions. The first is a preference based on socioeconomic factors. The second is the class rank approach. Class-rank plans guarantee admission to state universities to high school seniors who graduate within a specified percentage of their school's senior class, and, in certain cases, fulfill certain other basic minimum requirements. Below is a description of these various approaches.

Socioeconomic Approaches

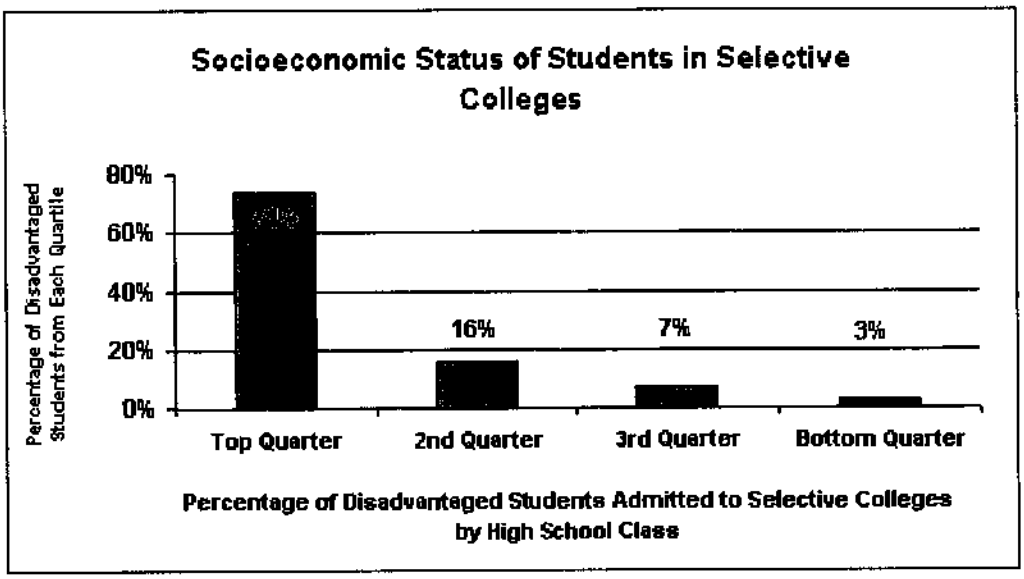
Some educational institutions are replacing preferences based on racial or ethnic category with preferences based on an applicant's socioeconomic status. In other words, university admissions committees might favor students who have performed well despite having faced various social and economic obstacles. Advocates of socioeconomic preferences argue that a student from a single-parent family living in a neighborhood with high concentrations of poverty who has a B+ average and a 1000 score on the SAT is likely to be more resourceful and capable than a student from a wealthy suburban

home who has had access to expensive after-school tutoring programs and has achieved an A- average with a 1200 score on the SAT.

The definition of socioeconomic disadvantage often begins with three key factors: parents' education, family income, and parents' occupation(s). Other factors are also often considered, including a family's net worth, family structure, school quality and neighborhood quality (for example, many argue that a neighborhood of concentrated poverty and high crime rates is not conducive to homework). All of these factors are quantifiable and can be made readily available when students complete their applications for college and for financial aid.

While race is not a factor in socioeconomic preference plans, certain minority students may benefit under many plans of this nature because their racial and ethnic groups are disproportionately disadvantaged according to socio-economic factors. For example, 22.7 percent of African Americans and 21.4 percent of Hispanics live below the poverty line compared with 7.8 percent of non-Hispanic whites. [51] Moreover, poor African Americans are six times as likely to live in concentrated poverty as poor whites. [52] While black income is 60 percent of white income, black net worth is just 9 percent of white net worth. [53] According to a recent RAND study, by the year 2015 Hispanics and African Americans will constitute 78 percent of those students having no parent with a high school diploma. [54]

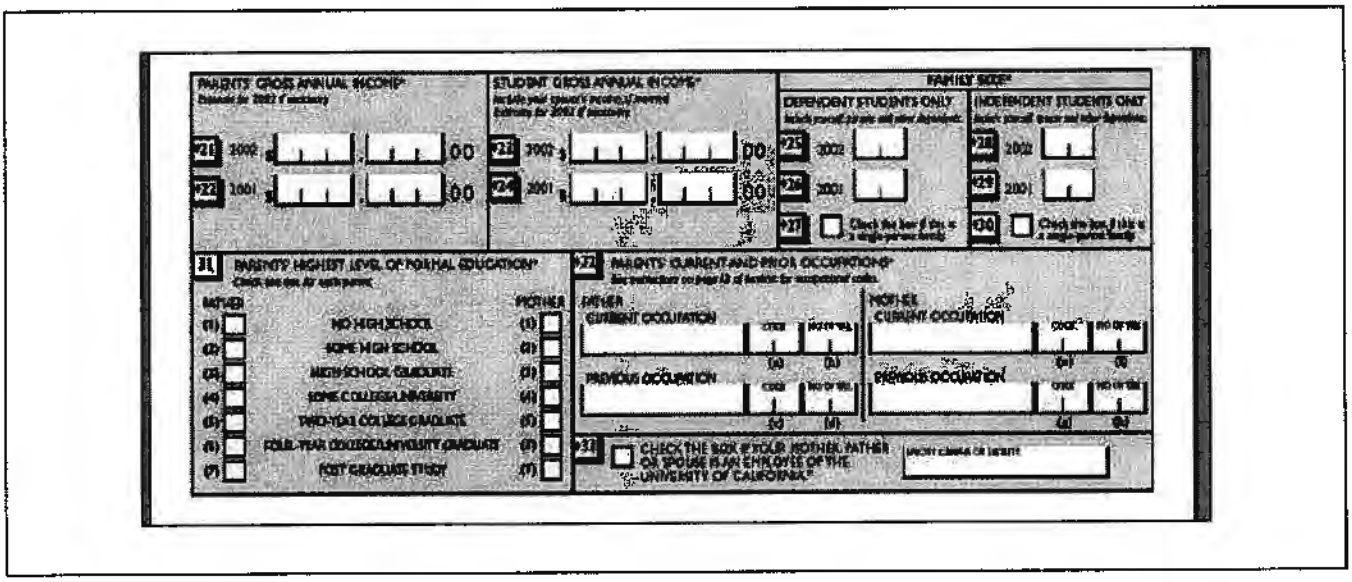
Advocates for preferences based on socioeconomic status argue that the most glaring opportunity gaps in our educational system are between those from low-income families and those from middle-class and upper income families rather than between racial groups. Even with race-based preferences in place at most selective colleges, low-income students are virtually absent. According to one study that examined the nation's most selective 146 colleges, only 3 percent of students come from the bottom socioeconomic quartile, and only 10 percent from the bottom half, while 74 percent come from the top economic quartile. In other words, economically disadvantaged students are 25 times less likely to be found on selective college campuses as economically advantaged students. [55]



Carnevale and Rose, *Socioeconomic Status, Race-Ethnicity, and Selective College Admissions*, Century Foundation (forthcoming, March 2003)

Many believe that, to truly attack the root causes of failure in our educational system, we should focus on socioeconomic status rather than using race as an imperfect proxy for disadvantage. Race is an unreliable indicator of disadvantage. One noted study found that 86 percent of black students at the selective colleges studied were from middle or high socioeconomic backgrounds. [56]

A number of postsecondary institutions are implementing preferences based on socioeconomic status. One prominent example is the University of California system's Comprehensive Review. In November 2001, the University of California Board of Regents adopted this admissions plan to supplement the 4 Percent Plan. While students are admitted to the U.C. system through the 4 Percent Plan (and the other routes described below), Comprehensive Review helps determine which particular campus a student will attend. In addition to looking at grades and test scores, admissions officers now look at a number of factors, including, "[a]cademic accomplishments in light of an applicant's life experiences and special circumstances, such as disabilities, low family income, first generation to attend college, need to work, disadvantaged social or educational environment, difficult personal and family situations, refugee status or veteran status." [57] This excerpt from the U.C. application illustrates how such information is gathered:



University of California, *Introducing the University: Admission as a Freshman* at http://www.ucop.edu/pathway/ucapp_0304_form.pdf

Other specific examples of socioeconomic affirmative action plans include:

University of California at Los Angeles School of Law

After the 1996 elections, when California voters enacted Proposition 209 prohibiting using race as a factor in public university admissions, UCLA Law School adopted a socioeconomic preference program. Most students are now admitted based solely on their academic performance, but some are admitted based on a combination of academic achievements and socioeconomic obstacles overcome. Among the socioeconomic factors considered are: highest level of education attained by parents; parents' primary occupation; number of years spent in a single-parent home; age of applicant at the time of a parent's death (if applicable); total parent income and assets during the previous year; and the number of hours worked per week during the student's years in college.

The University of Texas

Texas supplements the Top 10 Percent plan with a flexible set of criteria to determine which students are admitted. The criteria include many that relate to hardship or obstacles that have been overcome, such

as: whether the applicant would be in the first generation of his or her family to attend or graduate from college; whether the applicant is bilingual; the financial status of the applicant's school district; the quality of the applicant's school (whether it is a low-performing school); and the applicant's responsibilities while attending school, including whether he or she has been employed and whether he or she has helped to raise children or other similar considerations.

The University of Florida system

Florida, like Texas, is best known for its class-rank alternative to racial preferences-the Talented 20 plan. But as in Texas, the class rank approach has been supplemented by consideration of socioeconomic factors. Florida admissions officials look for "holistic information," which allows campuses to admit students on race-neutral grounds. The holistic approach gives an advantage, for example, to students from families with a low gross income, students who attend a low-performing high school or students whose parents did not attend college." [58]

Elementary and Secondary Schools

In recent years, a number of elementary and secondary school districts across the country have also adopted needs-based school integration plans. These plans seek to reduce concentrations of poverty, based on research suggesting that all students do better when there is a core of middle class families in a school. The number of students attending school districts with socioeconomic integration policies has skyrocketed from roughly 20,000 in 1999 to more than 400,000 today. [59]

For example, in 1992 the school board in La Crosse, Wisconsin implemented a policy to better integrate the schools by economic status. The board required that no school have less than 15 percent or more than 45 percent of its students eligible for free lunch (130 percent of the poverty line). The board took this approach largely because teachers said that in their judgment, the driving educational issue has been concentrations of poverty rather than race. Today, despite a relatively high poverty rate, La Crosse reports that it has a low dropout rate and rising test scores.

Texas 10 Percent Plan

In 1996, the Fifth Circuit Court of Appeals issued its ruling in *Hopwood v. State of Texas.* [60] The Court of Appeals ruled that colleges and universities could not use race as a factor in admissions decisions. President Bush, as Governor of Texas, implemented the Texas 10 Percent Plan, which was a bipartisan response to *Hopwood.* Under this admissions plan, the top 10percent of every state accredited public or private high school's graduates are guaranteed admission into the University of Texas campus of their choice.

When a student is admitted, the college or university he or she chooses will review the applicant's record to determine if he or she might require additional college preparatory work. If so, the institution may require the student to participate in appropriate enrichment or orientation programs.

Proponents of the Texas plan argue that class-rank approaches reward students who have worked hardest and achieved the most. In 2000, the U.T.-Austin freshman class included individuals from 135 high schools that were not represented on that campus before the Hopwood decision. [61] Moreover, they argue that class-rank approaches promote diversity of region, economic class and social background. For instance, several previously under-represented schools throughout the state are now sending a significant number of students to U.T.'s flagship school, including students from clusters of inner-city minority high schools in Dallas-Ft. Worth, Houston and San Antonio, as well as from rural white high schools in East and Northeast Texas. [62]

Florida's Talented 20 Program

Florida has created a similar plan, which guarantees all public high school seniors who graduate within the top 20 percent of their class will be admitted to the state university system. [63] The rankings are compiled after the student's seventh semester, but the student must later prove that he or she completed the eighth semester as well. In addition, the student must also complete 19 credits of college preparatory course work required by the state. The student must also have an SAT or ACT score, although there is no minimum score required.

The state of Florida supplements the Talented 20 program with a variety of partnerships, challenges and financial incentives designed to assist students and low-performing schools and to prepare the students for college. Talented 20 students are given priority for certain state needs-based financial assistance grants, which were expanded to accommodate the increased demand that the program has generated.

While the Texas plan allows Top 10 students to attend any of the state's colleges or universities that he or she selects, Florida's plan only guarantees that the student will be accepted into one of the state's schools. In other words, after the student is automatically guaranteed admission into the state system, he or she must still compete to gain a slot at the institution he or she prefers.

California's 4 Percent Plan

In response to a state referendum (Proposition 209) that eliminated race-preferential programs, the

University of California system implemented a complicated and sophisticated admissions process. California's admissions system uses class rank, but in addition uses a number of other methods to determine which students it will admit.

There are three ways for a student to be admitted to the U.C. system. [64] First, the student can be admitted through "Eligibility in the Statewide Context," which involves three elements. The "subject requirement" means that a student must complete 15 specified high school classes. The "scholarship requirement" means that a student must have a grade point average and standardized test score that fits within a sliding scale "eligibility index;" and, the "examination requirement" means that a student must have a sufficient standardized test score. Most students become U.C.-eligible through "Eligibility in the Statewide Context."

The second path for admission is through "Eligibility in the Local Context," which is also known as the "4 Percent Plan." [65] The top 4 percent of students from each California high school's graduating senior class are designated as "UC-eligible." To secure admission, UC-eligible students must also successfully complete 11 specific units of college preparatory coursework by the end of the junior year.

Finally, some students are admitted through "Eligibility by Examination Alone," which allows some to be admitted solely because of an extraordinarily high-standardized test score.

Once a student is admitted into the U.C. system, each U.C. campus evaluates the student and uses a set of criteria to determine which students will be admitted into that school. The factors include grade point average in U.C.-required courses; standardized test scores; number of and performance in honors and AP courses; quality of the senior year program, as measured by the type and number of academic courses in progress or planned; and quality of academic performance relative to educational opportunities available in the applicant's school. The administrators also evaluate the location of the applicant's secondary school and residence to provide for geographic diversity in the student population and to account for the wide variety of educational environments existing in California.

Targeted class-rank approaches

As noted above, the state of Florida guarantees admission to students who finish in the top 20 percent of their graduating class; the state does not, however, guarantee which state institution the student will be admitted to. The University of Florida decided to supplement the Talented 20 Plan by offering admission directly to the top 5 percent of public high school graduates. The University of Florida will also provide financial aid to those students. [66] The University also announced that it will provide full scholarships to the top five students who graduate from the three schools with which it has an Opportunity Alliance partnership. [67]

The University of Texas Law School has also decided to create a targeted class-rank admissions approach. The Law School recognized that it has very few students who are graduates of several colleges located in southern Texas. It therefore created a policy of offering admission to the top 5 percent of graduates at five specified colleges.

Pennsylvania has adopted an admissions program for graduates of its two-year community colleges that guarantees students who successfully complete an associate degree program at one of the community colleges admission into a state system of higher education university. This Academic Passport for such students is extremely beneficial for minority students because historically, a higher percentage of college-bound minority high school graduates in Pennsylvania attend a community college first, rather

than a four-year college. In part because of this admissions preference program, the number of students transferring from schools such as the Community College of Philadelphia to Cheyney University of Pennsylvania (the oldest historically black university in the country) has significantly increased. [68] Florida has a similar program, which it refers to as its 2+2 system. [69] The state has worked to ensure that community colleges courses are easily transferred to state universities for credit (through, in part, a common course numbering system). Florida believes that the 2+2 admission policy ensures that even the most disadvantaged students are able to work toward and ultimately receive a university degree.

RACE-NEUTRAL PROGRAMS – Promising results

The expansion of innovative race-neutral programs has been an important recent development in civil rights law and education policy. Since many race-neutral programs are still in their infancy, conclusive data on their effects are not yet available. Nevertheless, the early results are promising. Race-neutral alternatives have moved from the theoretical to the practical. Colleges and universities, as well as education officials at the federal, state and local levels are implementing concrete new programs that lay the foundation for further progress.

As educational institutions analyze different race-neutral opportunities, the measures of success should be clearly established. Much of the analysis to date has focused on only one factor: what is the "racial dividend" of these policies? In other words, most analysts have looked at whether minorities have been admitted to college in the same numbers as they were under the earlier race-preferential systems.

However, a more complete measure of success is necessary. These programs must be evaluated on several grounds, including whether they:

- allow institutions to meet their educational goals;

- meet legal and constitutional requirements;

- provide social benefits;

- bring broader socioeconomic diversity to our schools, thereby promoting experiential and viewpoint diversity; and

- affect the numbers of low-income individuals, including minorities, who participate in and successfully graduate from higher education.

Educational benefits from these programs are emerging. Many of the developmental approaches are designed to attack root problems in our nation's schools. The expansion of more challenging course work, teacher training seminars and the tutoring of tens of thousands of students can over time transform public schools. The long-term effects will be better-prepared high school and college students and more diverse student bodies.

These race-neutral alternatives are also creating better incentives for students. Class-rank plans send a message to students that if they will study hard and rise to the level of competition within their schools, they will be admitted to a prestigious state university. Better incentives will produce better academic performance.

The reconsideration of race-preferential policies is also fostering an atmosphere of innovation. State government officials and administrators of public educational institutions are now re-thinking traditional policies, searching for new ideas and implementing many of them. The willingness to attempt new approaches is a positive development for our educational system.

The legal and constitutional benefits of race-neutral approaches are also evident. By adopting race-neutral approaches, postsecondary institutions can avoid costly and counterproductive litigation.

It is also evident that there can be significant social benefits from race-neutral policies. College campuses are often divided by bitter debates about the role of race and ethnicity in admissions. If postsecondary institutions aggressively implement race-neutral policies and maintain diversity, the contentious atmosphere could be replaced by constructive efforts to resolve the root causes of inequality. In addition to President Bush's recent statement endorsing race-neutral policies, the Citizens Commission on Civil Rights, a prominent civil rights organization, has also publicly called for further study of these issues and suggested that this could create common ground between those who traditionally oppose one another on these issues. [70]

There is already evidence that socioeconomic approaches, combined with percentage plans, can diversify student bodies in ways that had not previously been achieved. [71] In Texas, before the *Hopwood* decision, students from only about 10 percent of more than 1,500 Texas high schools made up 75 percent of each entering class at the Austin campus. [72] Those "feeder schools," both public and private, were generally in wealthy suburban districts with high per pupil expenditures, state of the art facilities, and many advanced classes. Now students from any school in the state have realistic opportunities to enroll in universities such as UT-Austin and Texas A&M. One specific example is Highlands High School in San Antonio where more than three-quarters of the students are economically disadvantaged, and, prior to the 10 percent plan, had only one graduate attend the University of Texas at Austin. Fourteen Highlands graduates enrolled at UT-Austin in 1992 as a result of the percentage plan and a special scholarship aimed at schools in poor and working class areas. [73]

In California, more students from traditionally low-performing schools are gaining admission. The impact of the University of California's "Eligibility in the Local Context"-the 4 percent plan-is greatest on those high schools that typically sent few students to U.C. campuses. For example, the percentage of students from California's lower-performing schools applying to the U.C. system has increased from 15 percent in 1999 to 16.3 percent in 2002. Of those applicants, the percentage of admissions grew from 15.6 percent to 16.7 percent. The rate of admission for students from low performing schools also rose from 78.7 percent in 1999 to 80.3 percent in 2002. [74]

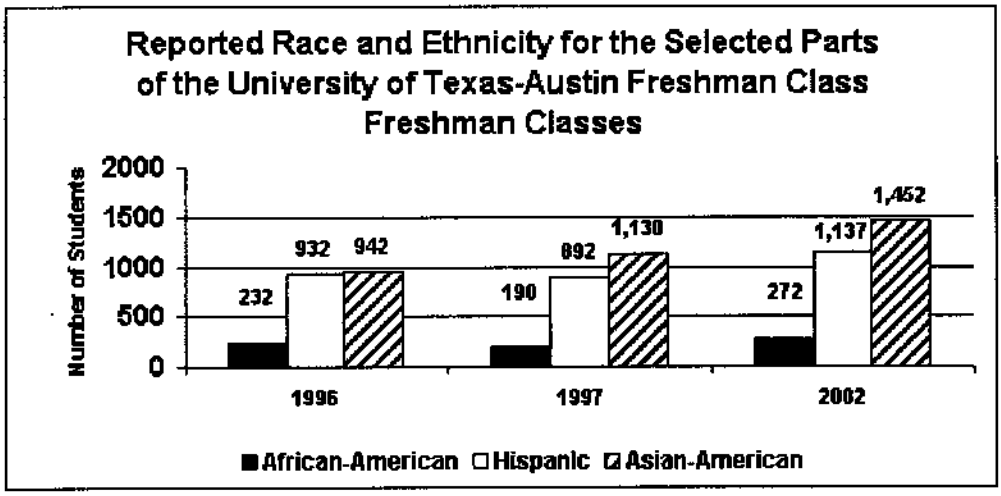
More rural students are also gaining admission in California. A University of California report concluded, "Participation in ELC by schools in urban and rural areas was above 93 percent in the first year and about 97 percent in the second year of the program [2002]. The special process, instituted for 2001, especially helped rural schools raising their participation rate from 76.6 percent to 93.6 percent. Substantial geographic diversity was achieved through ELC participation[.]" [75]

Moreover, U.C.-Berkeley enjoys significantly greater economic diversity than competitive colleges that rely on racial rather than economic admissions approaches. Recipients of Pell grants (roughly the bottom economic third) constitute 30 percent of students at U.C.-Berkeley, levels many times higher than at institutions like the University of Virginia (9 percent), Princeton (7 percent) or Harvard (6 percent). [76]

These race-neutral plans have also resulted in participation rates of minorities comparable to those of

race-based ones. Obviously, any race-neutral program is unlikely to produce racial diversity with the precision that using race will. But current evidence suggests that they can have the incidental benefit of producing a substantial amount of racial diversity.

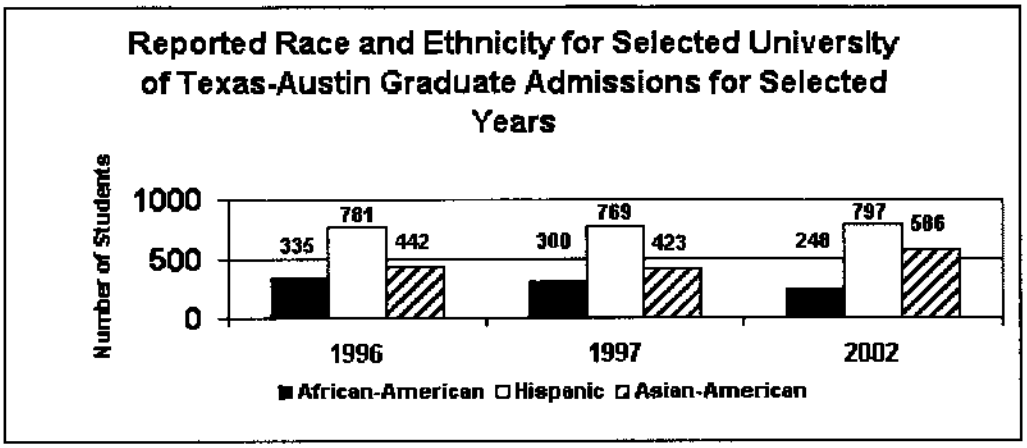
The steps taken by the state of Texas, including but not limited to the 10 Percent Plan, have had the by-product of restoring racial and ethnic diversity across the university system to pre-*Hopwood* levels. [77] Total fall enrollment for all U.T. institutions in 1996 included 6,555 African American students, or 4.4 percent; in 2001, 7,413 African American students were enrolled, or 4.6 percent of the total enrollment. It is a similar story for Hispanic students. They increased from 45,455 (30.9 percent) in 1996 to 53,258 (33.2 percent) in 2001. Asian Americans also increased their representation across the University of Texas system-from 10,584 students (7.2 percent) in 1996 to 13,340 (8.3 percent) in 2001.



University of Texas System, *2002 Key Statistical Report*, January 2002.

The University of Texas at Austin has also seen increased enrollment of racial and ethnic minorities. The number of African Americans, Hispanics and Asian Americans enrolled as freshman at U.T.-Austin in 2002 is now higher than in 1996. [78]

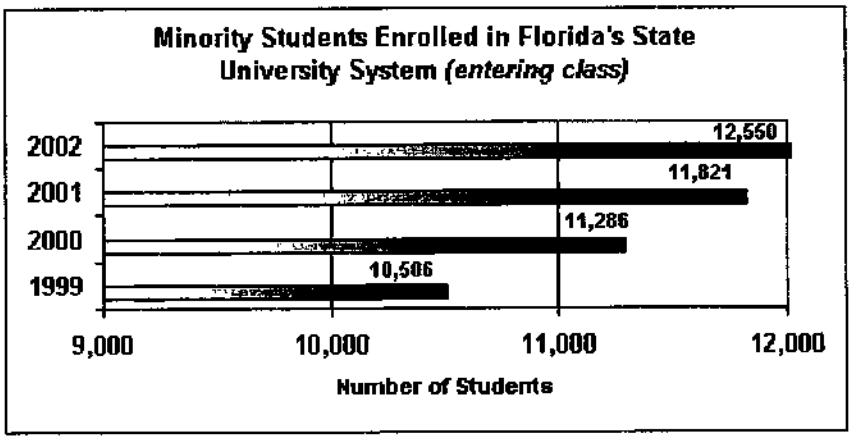
At the graduate level, the U.T. system has again seen positive rates of participation by minority students. [79] Across the entire system, the percentage of African American students has held steady for several years, from 1,305 students in 1996 to 1,307 students in 2001 (3.9 percent of the total enrollment in 1996 to 3.6 percent in 2001). Asian American students have also held steady, at approximately 6.5 percent. Hispanic students have increased notably in graduate school programs across the U.T. system, from 4,765 students (14.2 percent) in 1996 to 6,225 (17.2 percent) in 2001. At U.T.-Austin, substantially more Hispanics and Asian Americans are in graduate school than in 1996. [80] However, the number of African Americans in graduate school has declined (from 335 in 1996 to 248 today). [81]



University of Texas System, *2002 Key Statistical Report*, January 2002.

While the number of African American and Hispanic students admitted to the U.T. Law School has declined, these two minority groups combined still represent approximately 14 percent of the first year class. [82] It is clear that even the Law school continues to reflect significant levels of racial diversity. [83] In 2002, *Hispanic Business* magazine named the Law School the number one law school in the country for Hispanics. [84] The increase in the number of minorities enrolled at U.T.-Austin has been reflected in some of the most coveted majors, such as business, engineering, and the sciences. [85] Most encouragingly, research shows that across all racial groups, the "top 10-percenters" at the University of Texas at Austin have performed as well academically as other students. [86]

Florida has seen similarly positive results. The number of minority students who were enrolled in the 2002 class entering the state's university system was higher than in 1999 (by approximately 2,000 students), the year prior to the elimination of racial preferences, and the percentage of minority students has remained steady (at approximately 36 percent). [87] Every minority group is represented in higher numbers-African Americans (from 5,099 in 1999 to 5,665 in 2002), Hispanics (from 4,059 to 5,106), and Asian Americans (from 1,348 to 1,779). [88] The percentages of Hispanic and Asian American students have increased while the percentage of African American students has decreased. [89] The admission rates in Florida's graduate schools have also held steady. [90]

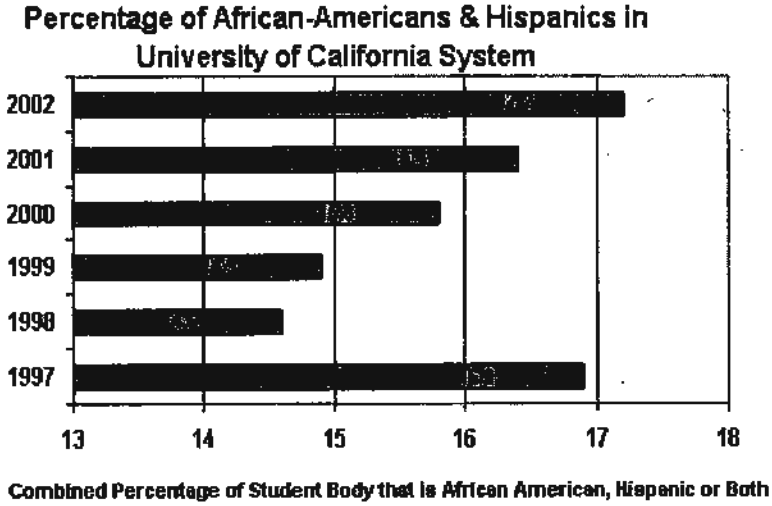


Gov. Jeb Bush, Executive Office of the Governor, "Lt. Governor Brogan Announces Increase in Minority Enrollment at the University of Florida," Press Release, One Florida Initiative, Sept. 6, 2002.

The state's flagship institution, the University of Florida at Gainesville, has seen larger numbers of minorities enrolling as well. For the class entering in the fall 2002, the numbers of first-time-in-college

African American students increased over the previous year by 43.26 percent, from 460 students to 659 students. [91] The number and percentage of African American students at U.F.-Gainesville is now higher than in 1999. Similarly, the number of Hispanic students grew in one year by 13.13 percent (from 716 to 810 students), and the number of Asian American students grew by 6.78 percent (487 to 520). [92]

The University of California system has slightly increased its minority enrollment through race-neutral alternatives. [93] In the freshman classes that accepted offers of admission to the various U.C. campuses in the fall of 2002, black and Hispanic students constituted 17.2 percent of the total student population, a level that exceeded the proportion enrolled under the previous race-based admissions system in 1997 (16.9 percent). [94] The percentage of African American and Hispanic students accepting offers of admission has increased each year since 1998.



University of California, "Distribution of Statement to Register (SIRs) for Admitted Freshman Fall 1997 through 2002," Online at http://www.ucop.edu/news/factsheets/froshsirs97-021.pdf

The picture at the U.C. system's most selective campus, U.C.-Berkeley, is more complicated. One factor is the University's agreement with the City of Berkeley to limit the size of the student body, resulting in a decrease in the number of students admitted. Another factor is a one-time precipitous drop in the number of minority students enrolled. In 1998, the year after race-preferential policies were prohibited, the percentage of African American and Hispanic students admitted dropped sharply from 21.1 percent to 10.1 percent of the student body. Each year subsequently, the numbers of minorities have increased. By 2002, the numbers of students from these under-represented groups is 14.7 percent-still below the rate of admission in 1997, but significantly higher as the new policies are being fully implemented. [95]

While U.C.-Berkeley admits fewer minorities, the admission rates of other institutions within the U.C. system are dramatically higher. For example, at U.C.-Riverside there are more than twice as many African American students as in 1997 and at U.C.-Riverside the numbers are almost double.

There are signs that the statistics on minority participation will improve over time. In all three states, the trend lines for the numbers of minorities being admitted to college-and to the most selective schools within those colleges-are all up, year after year. Moreover, the value of many race-neutral projects may not be experienced for several years, as they gradually transform the educational system through teacher training programs and enhanced preparation of young people.

These encouraging admissions statistics have been achieved even though Texas, California and Florida officials are at a disadvantage because they not playing on a level field. While officials in these states are strictly limited to race-neutral admissions strategies, their competitors around the country are able to employ race-based policies. This no doubt depresses the minority participation rates at these three state university systems.

CONCLUSION

> "I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character."
>
> Dr. Martin Luther King, Jr.

No single race-neutral program is a panacea. What is needed now is more research and discussion about the varieties of race-neutral programs that might be employed in different settings. This research must be unbiased and objective. As Americans, we owe it to our heritage and to our children to meet these educational and civil rights challenges head on, rather than looking for shortcuts that perpetuate poor educational achievement and divide us by race. If we are persistent in implementing race-neutral approaches, the end result will be to fulfill the great words of Dr. Martin Luther King Jr., who dreamed of the day that all children will be judged by the content of their character and not the color of their skin.[96]

---

[1] President George W. Bush, *President Bush Discusses Michigan Affirmative Action Case*, at http://www.whitehouse.gov/news/releases/2003/01/20030115-7.html, (January 15, 2003).

[2] Federal courts in a number of states have struck down admissions procedures that used racial criteria and the question of whether the use of racial criteria is constitutionally permissible in college admissions procedures are now before the Supreme Court. *See, e.g., Johnson v. Board of Regents*, 263 F.2d 1234 (11th Cir. 2001) (a University of Georgia policy to give numerical bonuses to minority applicants' admissions qualification scores, otherwise derived from the admissions test and high school grades, found arbitrary and not narrowly tailored to the purpose of promoting diversity); *Hopwood v. Texas*, 236 F.3d 256 (5th Cir. 2000); *cert. denied*, 533 U.S. 929(2001) (the University of Texas Law School's use of racial criteria in admissions process held unconstitutional); *Grutter v. Bollinger*, 288F.3d 732 (6th Cir. 2001), *cert. granted*, __U.S. __, 123 S. Ct. 617, 71 U.S.L.W. 3387 (2002) (whether the University of Michigan Law School may use admissions procedures now before the Supreme Court); *Gratz v. Bollinger*, 135 F. Supp. 2d 790, *cert. granted* __ U.S. __, 123 S. Ct. 617, 71 U.S.L.W. 3387 (2002). (the University of Michigan's undergraduate admissions procedures now before the Supreme Court).

[3] CAL. CONST. ART.1 & 31(a); WASH. REV. CODE 49.60.400.

[4] *One Florida Initiative: Educating, Improving and Empowering*, at http://www.oneflorida.org (last visited Feb. 21, 2003).

[5] U.S. Department of Education, Office of Educational Research and Improvement, National Center for Educational Statistics, *The Nation's Report Card: Fourth-Grade Reading 2000* at 30-31 (2001).

[6] U.S. Department of Education, Office of Educational Research and Improvement, National Center for Educational Statistics, *The Nation's Report Card:Mathematics 2000* at 60-61 (2001).

[7] U.S. Department of Education, Office of Educational Research and Improvement, National Center for Educational Statistics, *The Science Highlights: The Nation's Report Card* at 81 (2002). *See also,* U.S. Department of Education, Office of Educational Research and Improvement, National Center for Educational Statistics, *The Nation's Report Card: Geography 2001* at 30 (2002).

[8] *Cf.*, John Ogbu, *Black American Students in an Affluent Suburb: A Study of Academic Disengagement* (Lawrence Erlbaum Associates 2003).

[9] National Center for Education Statistics, *The Nation's Report Card: Fourth Grade Reading 2000, supra* note 5 at 40.

[10] National Center for Education Statistics, *The Nation's Report Card: Mathematics 2000, supra* note 6 at 287.

[11] *U.T. System to Promote Advanced Placement Initiative with the Focus on Opportunities for Disadvantaged Students*, at http://www.utsystem.edu/news/1999/APInitiative8-12-99.htm (Aug. 12, 1999)

[12] Dr. Barbara Breier, *Advanced Placement Initiative Update – AP Summer Institute Director's Meeting* (Sept. 19, 2002) (on file with the Office for Civil Rights).

[13] Texas Education Agency, *Advanced Placement/International Baccalaureate Incentive Program – Funded Components for School Year 2002-03*, at http://www.tea.state.tx.us/taa/adv102802.html (last visited Feb. 21, 2003).

[14] *The One Florida Accountability Commission: An Independent Review of Equity in Education and Equity in Contracts Components of One Florida*, at 4 (June 2002), available at http://www.myflorida.com/myflorida/government/otherinfo/documents/executive_summary.doc.

[15] Tampa Tribune, *Bush: Data Shows Increase in Black Students Taking Advance Placement Tests*, (Oct. 23, 2002), available at http://www.oneflorida.org/myflorida/government/governorinitiatives/one_florida/articles/test.html

[16] U.S. Department of Education, *Advanced Placement Incentives*, at http://www.ed.gov/offices/OESE/SIP/programs/apip.html (last visited March 10, 2003).

[17] *Expanding Educational Opportunity: A Status Report on the Educational Outreach and K-12 Improvement Programs of the University of California* (Fall 2001), available at

http://www.ucop.edu/outreach/statusreport2001.pdf.

[18] *Id.* at iii-iv.

[19] *Id.* at 6.

[20] *Id.*

[21] *Id.* at 5.

[22] *Id.* at iv.

[23] James Traub, *The Class of Prop. 209, NEW YORK TIMES MAGAZINE*, May 2, 1999, at 46.

[24] *The Center for Community Partnerships* at www.upenn.edu/ccp (last visited March 10, 2003)

[25] *Christopher Columbus High School: University of Vermont Connection*, at http://www.columbushs.org/vermont.html. (last visited March 10, 2003).

[26] *New York Times*, Dec. 26, 2001, *Id.*

[27] *Id.*

[28] *One Florida Accountability Commission Report, supra* note 16, at 29.

[29] *The College Board: Florida Partnership*, at http://www.collegeboard.com/floridapartnership/about/index000.html (last visited March 10, 2003).

[30] *Governor Bush Applauds Increase in Students taking and Passing Advanced Placement Courses* at http://www.oneflorida.org/myflorida/government/governor/ini.../placement.courses_10-23-02.htm (Oct. 23, 2002).

[31] *One Florida Accountability Commission Report, supra* note 16, at 21.

[32] *Opening Classroom Doors: Strategies for Expanding Access to AP*, at 7 (College Board 2002).

[33] *One Florida Accountability Commission Report, supra* note 16, at 20.

[34] Race-preferential financial aid approaches are not discussed in this report since the purpose here is to describe only race-neutral policies. Race-preferential financial aid approaches still present litigation risks to educational institutions.

[35] Rose Gutfield, *Ten Percent in Texas*, Ford Foundation Report Online, Fall 2002 available at

http://www.fordfound.org/publications/ff_report/view_ff_report_detail.cfm?report_index=355

[36] *Id.*

[37] *One Florida Accountability Commission Report*, *supra* note 16, at 36.

[38] *President Bush to Propose Record $12.7 Billion for Pell Grants, Paige Says*, at http://www.ed.gov/PressReleases/02-2003/02012003.html, (Feb. 1, 2003).

[39] Gutfield, Ford Foundation Report Online, *supra* note 37.

[40] *Lt. Gov. Brogan Announces Increase in Minority Enrollment at the University of Florida*, at http://www.oneflorida.org/myflorida/government/governorinitiatives/one_florida/enrollment-9-6-02.html. (Sept. 6, 2002).

[41] *One Florida Accountability Commission Report*, *supra* note 16, at 18.

[42] *College Summit: Let Talent Shine*, at www.collegesummit.org, (last visited March 1, 2003).

[43] *College Summit: Strengthening High School Guidance*, at www.collegesummit.org/whadis.html (last visited March 10 2003).

[44] *College Summit: Strengthening College Admissions*, at www.collegesummit.org/whacol.html, (last visited March 10, 2003).

[45] *Gaining Early Awareness and Readiness for Undergraduate Programs* (GEAR-UP), at http://www.ed.gov/offices/OPE/gearup/index.html, (Dec. 6, 2002).

[46] *Gaining Early Awareness and Readiness for Undergraduate Programs* (GEAR-UP), *Success Stories*, at http://www.ed.gov/offices/OPE/gearup/gu-success.html, (last visited March 10, 2003).

[47] *Id.*

[48] *Office of Post-Secondary Education - Programs, Federal TRIO Programs*, at http://www.ed.gov/offices/OPE/HEP/trio/index.html, (last visited March 10, 2003).

[49] College Board, *Profiles of College* at 3 (2000).

[50] *Texas Scholars News and Information*, at http://www.texasscholars.org/background.html, (last visited March 10, 2003).

[51] U.S. Census Bureau, *Poverty in the United States: 2001* at 4 (September 2002).

[52] Richard D. Kahlenberg, *The Remedy: Class, Race and Affirmative Action* at 170 (Basic Books, 1996); Richard D. Kahlenberg, *In Search of Fairness*, WASH. MONTHLY, June 1998, at 27 (citing various studies).

[53] Kahlenberg, *The Remedy* at 168; Kahlenberg, *In Search of Fairness*, at 27.

[54] National Task Force on Minority High Achievement, *Reaching the Top*, at 11 (College Board 1999).

[55] Anthony Carnevale and Stephen Rose, *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions*, A White Paper, The Century Foundation, (forthcoming March 2003).

[56] William Bowen and Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* at 49 (1998). While citing statistics demonstrating the socioeconomic gaps, Bowen and Bok lay out the arguments opposing granting preferences based on

socio-economic status. *Id.* at 46-50.

[57] *University of California: Introducing the University: Admission as a Freshman*, at http://www.ucop.edu/pathways/ucapp_0304_form.pdf (last visited Feb. 25, 2003).

[58] *University of Florida, Holistic Information*, at http://www.reg.ufl.edu/pdf/holistic-info-web.pdf, (last visited Mar. 10, 2003).

[59] Richard D. Kahlenberg, *The Century Foundation Issue Brief Series, Economic School Integration: An Update*, (September 2002).

[60] *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *cert denied*, 518 U.S. 1033 (1996).

[61] Rose Gutfield, Ford Foundation Report Online, *supra* note 37.

[62] *Id.*

[63] FLA. ADMIN. CODE ANN. R.C-6.002(5), (2002).

[64] *University of California: Introducing the University: Admission as a Freshman*, at http://www.ucop.edu/pathways/infoctr/introuc/fresh.html, (last visited Feb. 25, 2003).

[65] California has a three-part postsecondary education system that includes the University of California system, the California State University system, and a statewide system of community colleges. The University of California System operates 8 campuses that serve undergraduates, as well as graduate and research institutions. A ninth campus is scheduled to begin admitting full-time undergraduate students in the fall of 2004. This system operates highly selective undergraduate institutions such as the University of California at Berkeley and the University of California at Los Angeles. The California State University System operates 23 campuses, including California State Universities at Bakersfield, Chico and Fresno. Finally, California operates a community college system comprised of 108 two-year colleges. This report discusses only the University of California system because it includes the state's most highly selective undergraduate institutions.

[66] *One Florida Accountability Commission Report*, *supra* note 16, at 3, 29.

[67] *Id.*

[68] Commonwealth of Pennsylvania/U.S. Department of Education, Office for Civil Rights, *Status Report for Year Ending June 30, 2002*, at 13 (on file with the Office for Civil Rights).

[69] FLA. ADMIN. CODE ANN. R. 6A-10.024 (2002).

[70] Arthur L. Coleman, "Diversity in Higher Education: A Continuing Agenda," in *Rights at Risk: Equality in an Age of Terrorism, Report of the Citizens Commission on Civil Rights* at 71-78 (Dianne M. Piché, William L. Taylor, and Robin A. Reed eds., 2002)

[71] The evidence primarily relates to the experiences in Texas, Florida and California, and is a product not just of the class-rank approaches adopted in those states. The statistics outlined below have been achieved as a result of the comprehensive policies these states have implemented, from innovative skills-development programs to class-rank admissions to consideration of socioeconomic factors. As the One Florida Accountability Commission put it, "The key to this race neutral success lies in multiple strategies of expanded recruitment, financial aid, and partnerships to help public schools improve and better prepare students for success in postsecondary education." *supra* note 16, at 3.

[72] Gerald Torres and Penda Hair, *The Texas Test Case: Integrating America's Colleges*, THE CHRON. OF HIGHER EDUCATION, at B20, (October 4, 2002).

[73] *Id.*

[74] *Fall 2002 Freshman Admissions to the University of California,* at www.ucop.edu/news/factsheets/2002admisum.pdf (last visited March 10, 2003).

[75] University of California, *Eligibility in the Local Context Program Evaluation Report, Prepared for the May 2002 Regents Meeting* at 3, at http://www.ucop.edu/sas/elc/LettersAndQA/ELC_Report_for_Regents_May_2002.doc (last visited March 10, 2003).

[76] Donald E. Heller, (report on Pell Enrollment data prepared for the James Irvine Foundation using U.S. Department of Education data from the 1998-99 academic year), at http://www.irvine.org/programs/higher_ed/pell_listing_98_99.htm.

[77] *See The University of Texas System, Key Statistical Repart 2002* at 95, at http://www.utsystem.edu/News/KeyStatisticalReport/2002/Section4-withTOC.pdf and The University of Texas System, Reporting Package for the Board of Regents 2001 at 89 at http://www.utsystem.edu/mis/FEB2001/RRP2001WebEdition.pdf.

[78] *Enrollment of first-time freshman minority students now higher than before Hopwood court decision*, at: http://www.utexas.edu/admin/opa/news/03newsreleases/nr_200301/nr_diversity030129.html (January 29, 2003).

[79] *The University of Texas System, Key Statistical Report 2002* at 98, at http://www.utsystem.edu/News/KeyStatisticalReport/2002/Section4-withTOC.pdf (last visited March 10. 2003).

[80] *Enrollment of first-time freshman minority students now higher than before Hopwood court decision, supra* note 81.

[81] *Id.*

[82] *Id.* In the fall 2002 first year class at the Law School, African Americans represented 3.6% of the class and Hispanics represented 10.1% for a combined total of 13.6%. In 1996, these two groups of students represented 18.2% of the class. The number and percentage of Asian Americans attending the Law School has remained constant – at approximately 90 students, or 6% of the class.

[83] *Id.*

[84] *UT Law Rated #1 By Hispanic Business Magazine for 2nd Year*, at http://www.utexas.edu/law/news/030402_hispanic.html (March 4, 2002).

[85] Gerald Torres and Penda Hair, *supra* note 74.

[86] Rose Gutfield, Ford Foundation Report Online, *supra* note 37.

[87] *Lt. Gov. Brogan Announces Increase in Minority Enrollment at the University of Florida*, at http://www.oneflorida.org/myflorida/government/governorinitiatives/one_florida/enrollment-9-6-02.html (September 6, 2002). *See also*, Vincent Kieman, *Affirmative Action Rollback in Florida Has Not Hurt Minority Admissions, State Figures Indicate*, THE CHRON. OF HIGHER EDUCATION, September 9, 2002.

[88] One Florida, *State University System Enrollment Statistics, 2002*, at http://www.oneflorida.org/myflorida/government/governorinitiatives/one_florida/minority_enrollment.html (last visited March 10, 2003).

[89] *Id.*

[90] *One Florida Accountability Commission Report, supra* note 16, at 3 (using 2001 enrollment figures).

[91] One Florida, *State University System Enrollment Statistics, 2002*, *supra* note 91.

[92] *Id. See also, Lt. Gov. Brogan Announces Increase in Minority Enrollment at the University of Florida*, *supra* note 90.

[93] *University of California Distribution of Statement to Register (SIRs) for Admitted Freshmen Fall 1997 through 2002*, at http://www.ucop.edu/news/factsheets/froshsirs97-021.pdf (last visited March 10, 2003).

[94] *Id.*

[95] *Id.*

[96] Dr. Martin Luther King, Jr., "I Have A Dream," August 28, 1963 available at http://www.stanford.edu/group/King/popular_requests (last visited March 18, 2003).

STEPHEN M. BALCH, EDWARD J. BLUM, AND ROGER B. CLEGG

Behind the Fight Over Race-Conscious Admissions

Advocacy groups—working together—helped shape the legal and political debat

BY PETER SCHMIDT

COLLEGES are not just up against a few rejected white applicants in the national debate over affirmative action on campuses. No, the forces aligned against them are much more formidable.

The attacks on race-conscious admissions policies, which have now reached the U.S. Supreme Court in two cases involving the University of Michigan at Ann Arbor, have been propelled by a network of conservative advocacy groups that share a common belief that such policies are both unconstitutional and morally wrong.

"Organizations drive this debate on both sides," says Ward Connerly, one of the effort's most prominent leaders, who points out that much of the defense of race-conscious admissions has also come from advocacy groups. "This is all a war in the trenches between organizations, and individuals are just selected to further the aims of the organizations. That is the reality."

Most of the groups opposed to race-conscious admissions work closely with one another, and all of them meet, at least occasionally, to share ideas and discuss new avenues of attack. Several have close ties to the Bush administration, which they plan to call upon to force colleges to comply with any Supreme Court decision striking down race-conscious admissions policies.

COVER STORY

Even if the Supreme Court sides with Michigan, the groups plan to continue their attack by promoting legislation and ballot referendums to ban racial and ethnic preferences, and by appealing to their supporters on campuses and in the general public to put pressure on colleges to change.

A Supreme Court decision in favor of Michigan "does not mean that the states cannot prohibit [race-conscious policies]. It does not mean that Congress cannot prohibit them. It does not mean that colleges should not voluntarily get rid of them," says Roger B. Clegg, general counsel for the Center for Equal Opportunity, one of the leading opponents of racial and ethnic preferences.

LEADING THE CHARGE

Three groups are at the forefront of this fight.

The Center for Individual Rights, a Washington-based nonprofit legal organization with an annual budget of about $1.7-million, represents the Michigan plaintiffs and has waged most of the other court battles against colleges' affirmative-action policies.

The American Civil Rights Institute, a Sacramento-based group with an annual budget of more than $1.4-million, successfully led a ballot initiative to amend Washington State's constitution to ban racial and ethnic preferences. Its chairman, Mr. Connerly, led the successful campaign for a similar ballot measure in California and plans to have his group promote similar constitutional amendments in other states if the Supreme Court rules in Michigan's favor.

The Center for Equal Opportunity, which is based in Sterling, Va., and has an annual operating budget of about $1-million, has studied and publicized the use of preferences by colleges in an attempt to pressure the institutions to drop such policies. The group also has been urging sympathetic state and federal officials to crack down on any race-based college policies that they regard as legally questionable.

A fourth organization, the 4,500-member National Association of Scholars, has aided the cause, largely by encouraging opposition to race-conscious policies on campuses and elsewhere, by sponsoring research that seeks to rebut claims that racial diversity has educational value, and by using state freedom-of-information laws to force colleges to disclose how much weight they give to race and ethnicity in admissions decisions.

All four groups have derived a significant share of their financial support from many of the same conservative foundations, including the John M. Olin Foundation, the Lynde and Harry Bradley Foundation, and the Sarah Scaife Foundation. And, to varying degrees, all four have worked with a network of other organizations, both conservative and libertarian, that support their cause.

THE MICHIGAN CASES

Additional articles and documents are at http://chronicle.com/indepth/michigan

Each month, the Center for Equal Opportunity and the Heritage Foundation assemble representatives from many of those organizations for meetings of what is called the Civil Rights Working Group. Modeled after the liberal Leadership Conference on Civil Rights—a well-established coalition of groups involved in advocacy on behalf of women and minority groups—the gathering is intended to bring its participants up to speed on one anothers' activities in regards to affirmative action and other issues.

"There is a lot of task-oriented discussion that goes on," says Mr. Clegg, of the Center for Equal Opportunity. "We talk about who is doing what, and what needs to be done, and who is in a position to do it."

Many prominent opponents of race-conscious admissions—including Mr. Clegg; Clint Bolick, the vice president of the Institute for Justice; and Curt A. Levey, director of legal and public affairs for the Center for Individual Rights—also work together as leading members of the Civil Rights Practice Group of the Federalist Society for Law and Public Policy Studies, a 25,000-member, Washington-based organization for lawyers and law students with conservative or libertarian values.

Several conservative organizations, including the Center for New Black Leadership and the Independent Women's Forum, both based in the Washington area, have sought to help the cause by speaking out against race-conscious admissions policies and by filing *amicus curiae*, or "friend of the court," briefs on behalf of those challenging such policies in court. Like-minded public-interest law outfits, including the Pacific Legal Foundation and the Southeastern Legal Foundation, have pitched in by submitting similar briefs and, in Pacific's case, providing direct legal assistance to defend California's ban on preferences from legal challenge.

GOALS AND ASSISTS

To be sure, not every challenge to race-conscious admissions policies has been the work of some advocacy group.

Most notably, Lee Parks, an Atlanta-based lawyer, worked alone in handling a lawsuit that led to the key August 2001 decision, by the U.S. Court of Appeals for the 11th Circuit, that struck down the University of Georgia's race- and gender-conscious admissions policies as illegally discriminating against white and female applicants.

"A lot of times, when you work with a group that is involved for ideological reasons, the quid pro quo for their support is that they will litigate the ideological issue to fruition," Mr. Parks says. "We weren't out to change the world. We just had 12 women who we wanted to be in school."

And one group leading the charge against racial preferences in admissions, the Center for Individual Rights, maintains that other groups have had little impact on its cases or influence on its work.

Terence J. Pell, the president of the Center for Individual Rights, refused to be interviewed at length for this article because, he said, "it is not appropriate for us to be in a story about a movement against affirmative action. We are not that kind of organization. We are a law firm. We represent clients in lawsuits. And we represent those clients and not some larger cause."

There's no question, however, that several of the other groups opposed to racial and ethnic preferences have worked in tandem.

In 1998, officials of the American Civil Rights Institute, the Center for Equal Opportunity, the Heritage Foundation, and the Institute for Justice undertook the Project for All Deliberate Speed, through which they jointly contacted the attorneys general of all 50 states and urged them to comb through statutes for affirmative-action policies that recent Supreme Court decisions had rendered unconstitutional.

In recent months, the American Civil Rights Institute, the Center for Equal Opportunity, and the National Association of Scholars have jointly worked to rid Michigan and other colleges of programs that completely exclude white and Asian students. The programs—many of them summer programs or fellowships—are much harder to defend than admissions programs that merely consider race. The scholars' group is urging its members to report any such programs on their campuses to the center and the institute, which, in turn, have been sending the colleges warnings that, should they fail to drop the programs, complaints will be filed with the Education Department's Office for Civil Rights.

Lee Cokorinos, research director of the liberal, New York-based Institute for Democracy Studies, has extensively studied the groups opposing affirmative action and their links and common sources of financial support. A book on his findings, *The Assault on Diversity: An Organized Challenge to Racial and Gender Justice* (Rowman and Littlefield), is due out in April.

Mr. Cokorinos characterizes the various challenges to colleges' affirmative-action programs as "a project of the major foundations of the political right," carried out "by a well-funded, nationally based network."

"They are on a mission," Mr. Cokorinos says, and their goal, is "essentially trying to eliminate the gains of the civil-rights movement."

But Mr. Bolick of the Institute for Justice argues that the groups involved in the effort have no choice but to rely on the same philanthropies and to try to coordinate their activities. "Corporate America is emphatically not interested in supporting the fight against racial preferences," Mr. Bolick says.

"Most foundations," he adds, "are liberal to begin with, and, of those who support conservative groups, only a handful have been supportive of this issue."

"I wish there was a vast right-wing conspiracy," he says. "But, in fact, the resources among conservative groups are so finite that we have to specialize."

JUSTICE POWELL'S HANDIWORK

The same man whose words gave rise to today's race-conscious admissions policies also helped plant the seeds of their potential demise.

The late Lewis F. Powell Jr. is well known as the author of the Supreme Court opinion, in the landmark *Regents of the University of California v. Bakke* case of 1978, that held that colleges could not use race-based admissions quotas but could give some consideration to applicants' race to promote educational diversity, which he viewed as a compelling government interest.

What is less well known is that he also played a key role in the birth of the conservative legal-advocacy movement.

In 1971, just months before he was appointed to the Supreme Court, Mr. Powell, a conservative and a lawyer in private practice, wrote a memorandum to the U.S. Chamber of Commerce in which he decried the influence that environmental and consumer-advocacy groups were exerting on the government. He suggested the creation of a nonprofit legal center to promote the interests of business.

The California Chamber of Commerce took his idea and ran with it, working to establish, in 1973, the conservative Pacific Legal Foundation to promote individual rights, property rights, and free enterprise in that region. The new organization had little trouble attracting the financial support of like-minded businesses and philanthropies, and it quickly inspired the creation of other regional centers, such as the Colorado-based Mountain States Legal Foundation and the Atlanta-based Southeastern Legal Foundation, as well as national organizations such as the Washington Legal Foundation, all with similar missions.

Although the Pacific Legal Foundation's primary focus was fighting environmental regulations, it also took interest in issues related to race, filing an *amicus* brief with the Supreme Court on behalf of the plaintiffs in *Bakke*.

Several of the other groups modeled after it also got involved in race-related litigation, and, over the following decades, had a hand in efforts to oppose government set-asides for members of minority groups and to limit the reach and duration of school-desegregation plans.

In a case that was a precursor for the current debate over race-conscious admissions, the Washington Legal Foundation represented Daniel J. Podberesky, who sued the University of Maryland at College Park in 1990, after being denied a scholarship reserved for black students. The U.S. Court of Appeals for the Fourth Circuit struck down the Maryland scholarship program as discriminatory in a 1994 ruling that the Supreme Court subsequently let stand.

LITIGIOUS GADFLIES

The Center for Individual Rights arrived on the legal-advocacy scene in 1988. Founded by Michael S. Greve and Michael P. McDonald, who had worked together at the Washington Legal Foundation, the center's mission was to champion the civil liberties that conservatives valued.

"There is a lot of task-oriented discussion that goes on. We talk about who is doing what, and what needs to be done, and who is in a position to do it."

The center followed a markedly different strategy, however, than other conservative public-interest law groups.

It rejected the filing of briefs as an effective means of expressing its views because it believed that the courts generally gave the briefs little weight, and that it could have more impact if it became directly involved in litigation.

Borrowing a key tactic of the American Civil Liberties Union and other liberal public-interest groups, it chose not to maintain a large, expensive, in-house staff, and instead has turned to outside lawyers, working pro bono, to do much of its advocacy work.

The center quickly got pulled into the higher-education arena by making a name for itself as a leading defender of the free-speech rights of professors who believed that they had been disciplined or denied promotions for espousing "politically incorrect" ideas. Many professors were referred to the center by the National Association of Scholars.

In 1993, the center leaped squarely into the middle of the affirmative-action debate by agreeing to help represent the four white plaintiffs in *Hopwood v. Texas*, a lawsuit challenging the admissions policies of the law school at the University of Texas at Austin.

Ever since then, the organization "has been front and center in the litigation crusade" against race-conscious admissions policies, says Mr. Bolick of the Institute for Justice.

In March 1996, the U.S. Court of Appeals for the Fifth Circuit handed the center a stunning victory, striking down the Texas law school's admissions policies in a ruling that rejected what many had assumed was settled law. Citing Supreme Court decisions dealing with affirmative action in employment and contracting, in which the majority held that racial and ethnic preferences were justified only as remedies for past discrimination, the Fifth Circuit held that the diversity rationale articulated in Justice Powell's opinion in *Bakke* no longer applied.

The *Hopwood* decision was binding only in the Fifth Circuit—the states of Texas, Mississippi, and Louisiana—but the Center for Individual Rights promptly took the battle elsewhere, filing a lawsuit against the law school at the University of Washington at Seattle in March 1997. (The U.S. Court of Appeals for the Ninth Circuit ruled in favor of the University of Washington in December 2000, and the U.S. Supreme Court opted not to hear that case.)

Soon after the Washington lawsuit was filed, several Michigan lawmakers enlisted the center's help in mounting a legal challenge to the admissions policies of the University of Michigan at Ann Arbor. The center selected its plaintiffs from dozens of prospects forwarded to it by lawmakers, and filed two lawsuits against Michigan in the fall of 1997, with one suit opposing the university's law-school admissions policies, the other taking on the undergraduate admissions policies of the College of Literature, Science, and the Arts. Mr. Greve subsequently described both the Michigan and Washington cases as "part of a larger strategy to put the consideration of race beyond the reach of the state."

In January 1999, the center published two "handbooks" for distribution on college campuses. One, meant for college trustees and administrators, advised them on steps they could take to avoid a lawsuit over their admissions policies, and told trustees that they could be held personally liable if their institution was found guilty of discrimination. The other handbook, advertised in student newspapers, instructed students on how they could scrutinize their institution's admissions policies for racial and ethnic bias and file a suit. Publicly, college officials denounced the handbooks as a scare tactic, and disputed the center's interpretation of the law. Privately, at least one, the University of Virginia, began reviewing and tinkering with its admissions policies to limit its legal exposure.

THE POLITICAL ARENA

While the Center for Individual Rights has worked through the courts, Mr. Connerly and his American Civil Rights Institute have sought to use ballot initiatives to ban racial and ethnic preferences.

Mr. Connerly, a Sacramento businessman, undertook his first major assault on preferences as a member of the University of California Board of Regents. Having heard complaints that the university was discriminating against white applicants, he persuaded his fellow board members, in July 1995, to ban the university's use of racial, ethnic, and gender preferences in admissions, hiring, and contracting.

Mr. Connerly's success attracted the attention of two leading members of the California Association of Scholars who had drafted a ballot initiative to ban all state and local agencies, including public colleges, from using racial, ethnic, and gender preferences. Mr. Connerly was recruited in late 1995 to lead the campaign for the amendment to the state's constitution, known as Proposition 209. Although Mr. Connerly is the child of mixed-race parents, many people regard him as black, and his public advocacy of Proposition 209 made it hard for opponents on campuses and elsewhere to characterize the measure as a white man's backlash. It passed in the November 1996 elections, with 54 percent of the vote. Lawyers from the Center for Individual Rights and the Pacific Legal Foundation helped defend it against various legal challenges.

In January 1997, Mr. Connerly announced the establishment of the American Civil Rights Institute and its companion political-action group, the American Civil Rights Coalition. One of the groups' first targets was Washington State, where the American Civil Rights Coalition led a successful campaign on behalf of Initiative 200, a preference ban adopted by the state's voters in November 1998. Like California's Proposition 209, it had been strongly opposed by college presidents and campus groups.

The mere fact that Mr. Connerly was planning a similar ballot campaign in Florida was enough to prompt Gov. Jeb Bush, a Republican, to end the use of racial and ethnic preferences by most state agencies in November 1999, and to persuade the state university system's governing board to drop race-conscious admissions policies in favor of a plan to guarantee a spot at a public university to the top 20 percent of graduates from every state high school.

As chairman of the American Civil Rights Institute—a position for which he is paid more than $260,000 annually—Mr. Connerly continues to barnstorm the nation, speaking out against preferences wherever there is an audience willing to hear his views. He also has mounted a new ballot campaign in California for the Racial Privacy Initiative, a proposed constitutional amendment that would prohibit public colleges and other state agencies from even gathering information on race.

TURNING UP THE HEAT

The third major force in fighting race-conscious admissions, the Center for Equal Opportunity, was established by Linda Chavez, a prominent conservative activist, in 1995.

In an effort to bring public and political pressure to bear on public colleges, the center has sought to use colleges' own admissions data to generate public and political pressure for them to drop affirmative action.

The impact of the center's work is difficult to gauge. But there is no doubt that it spurred Virginia's attorney general's office to advise public colleges there to curtail their use of race-conscious admissions over the past year. And at least two institutions, the University of Virginia and the University of Massachusetts at Amherst, have altered their admissions policies partly in response to the center's scrutiny.

The National Association of Scholars, which emphatically rejects the label "conservative," has been drawn into the fray out of members' belief that racial preferences in admissions erode the academic quality of colleges and foster a campus climate that is racially and ethnically polarized, making it harder for students to transcend their backgrounds and learn new perspectives.

"We have seen, as our special mission in this, making the academic arguments," says the association's president, Stephen H. Balch. "We think our contribution to the debate is to talk about the intellectual and educational side."

The association has helped the Center for Equal Opportunity gather information, published a long list of studies and articles critical of affirmative action, sought to refute assertions by officials at the University of Michigan and elsewhere that race-conscious admissions policies have educational benefits, and spoken out in support of legislative efforts to ban racial and ethnic preferences.

"I think there is much more opposition to preferences today in the academy than there ever would have been had we not been around," Mr. Balch says.

In recent years, the opponents of race-conscious college admissions appear to have gained an especially powerful and well-financed ally: the Bush administration.

Several veterans of the fight against racial and ethnic preferences have been named by President Bush to key leadership posts. They include Brian W. Jones, the Education Department's general counsel, and Gerald A. Reynolds, the head of the Education Department's Office for Civil Rights, each of whom is a former president of the Center for New Black Leadership. (Mr. Reynolds also worked for the Center for Equal Opportunity.) Also in this group is the Justice Department's top lawyer, Solicitor General Theodore B. Olson, who, as a lawyer in private practice, aided the Center for Individual Rights by providing pro bono representation to the plaintiffs in *Hopwood*, the University of Texas law-school case.

The Justice Department has submitted briefs to the Supreme Court urging it strike down Michigan's policies, and Mr. Olson chose to participate in oral arguments in the case. Meanwhile, the Education Department's Office for Civil Rights has signaled, in handling discrimination complaints lodged against race-exclusive college programs, that it intends to take a hard line on bias against white students.

Mr. Connerly says the Bush administration "is looking at the issue of civil rights in a different way" than the Clinton administration, which, he contends, "had an incestuous relationship" with minority-advocacy groups, and obstructed efforts to end racial and ethnic preferences.

"There is an incestuous relationship now—it is just that there are different families involved," Mr. Connerly says.

CONTINGENCY PLANS

Mr. Pell of the Center for Individual Rights says he is confident that the Supreme Court will strike down race-conscious admissions in the Michigan cases, and that the nation's colleges will quickly fall into line.

"We are hopeful, and we think that the Michigan cases will provide the court with an opportunity to settle the admissions issue once and for all," he says.

But lawyers from the American Civil Rights Institute, the Center for Equal Opportunity, and the Pacific Legal Foundation are skeptical that colleges would be in any hurry to comply with such a ruling.

"Many colleges' admissions programs are very tightly tied, philosophically, to the concept of race preferences, and, in some cases, sex preferences," says John H. Findley, a top lawyer for the Pacific Legal Foundation, who predicts that colleges will engage in "massive resistance."

"Will they cheat? Yes, absolutely, they'll cheat. To them, diversity is a religion, it is a way of life. They are committed to it on an emotional and moral level," says Mr. Parks, the lawyer who handled the University of Georgia case.

Nearly seven years after California's passage of Proposition 209, the Pacific Legal Foundation suspects that the university system continues to discriminate against white applicants, only in a less overt manner. The group is seeking university admissions data in an effort to prove such bias.

"Getting the smoking gun is what we are all about right now," says Harold E. Johnson, a lawyer for the group.

Mr. Balch of the National Association of Scholars says that, in the event of a Supreme Court ruling against Michigan, "the role of the NAS would be, first and foremost, to help make sure that institutions comply."

The American Civil Rights Institute, the Center for Equal Opportunity, and the National Association of Scholars believe that the system that they have developed for weeding out race-exclusive programs can be duplicated and used to eliminate race-conscious admissions policies as well.

"It seems like every day we get one or two letters or e-mails asking us to look into the legality of some program," says Edward J. Blum, director of legal affairs for the American Civil Rights Institute. If the Supreme Court rules against Michigan, the three groups also plan to "act as watchdogs for how new admissions standards are crafted."

Mr. Clegg of the Center for Equal Opportunity predicts that such a ruling would embolden more lawyers in private practice to take on similar admissions cases, partly because the losing colleges would be required, under current civil-rights laws, to pay the plaintiffs' fees.

If the Supreme Court issues ambiguous or nuanced rulings in the Michigan cases, or strikes down Michigan's policies on fairly narrow, technical grounds, the likely result will be more lawsuits by conservative groups intended to force the courts to clarify the law.

If the Supreme Court upholds race-conscious admissions, Mr. Connerly says that the American Civil Rights Institute will respond by mounting a series of new ballot campaigns aimed at amending states' constitutions to ban preferences.

"Michigan would be ripe," he says. ■

Center for Equal Opportunity Shines Spotlight on Preferences

STERLING, VA.

THE CENTER for Equal Opportunity's office looks out over racial and ethnic diversity. The restaurants in the local strip malls serve the cuisines of El Salvador, Korea, and Vietnam, a reflection of the large immigrant populations in the sprawling suburbs of Washington. The faces in the parking lots are white, black, and a thousand shades of brown.

Linda Chavez, the center's founder and president, says she welcomes all of this diversity—with certain conditions. Immigrants who don't speak English need to learn it as quickly as possible. People should think of themselves as Americans, and not let their nationality or skin color determine their identity. And no one should expect colleges or government institutions to treat them better than anyone else based on their ethnicity or race.

"We're one nation, and one people, and we shouldn't be divided into racial and ethnic groups," says Ms. Chavez, whose father came to the United States from Mexico.

Hers is a worldview that—in addition to leading her to become a high-profile critic of bilingual education, multicultural education, and Hispanic advocacy groups—has thrust the Center for Equal Opportunity into the front lines in the fight over affirmative action in college admissions.

The center's chief tactic has been to use state freedom-of-information laws to prod public colleges into releasing admissions data, which the center has analyzed for evidence that applicants of certain races or ethnicities stand a better chance than others of being accepted. From the outset, the effort has been helped by the National Association of Scholars, a faculty organization that believes race-conscious college-admissions policies are divisive and hurt educational quality, and has enlisted its members to send out freedom-of-information requests.

UNWRAPPING ADMISSIONS

In the summer of 1996, when the first round of letters went out, few public colleges acknowledged the extent to which they considered race or ethnicity in admissions. "The intent was publicizing what universities have kept under their hats for a long time," says Bradford P. Wilson, the executive director of the scholars' association.

In the following years, the center successfully sued the University of Washington system and the University of Wisconsin System to get them to give up all of their admissions data.

So far, the center has issued 15 reports covering 56 public colleges, two-thirds of which it has accused of using racial or ethnic preferences. Several of the reports covered all of the public universities in particular states, such as Colorado, Maryland, Michigan, Minnesota, North Carolina, and Virginia. Others focused on particular institutions, including the University of California at Berkeley, the U.S. Military Academy, and the U.S. Naval Academy, or looked at the admissions data for particular law or medical schools.

The reports have typically backed their claims of admissions bias by showing differences in the standardized-test scores, grades, and graduation rates of applicants of different races and ethnicities. The group's report on the University of North Carolina, for example, said that the white students admitted in 1995 to the Chapel Hill campus had a median grade-point average of 3.99, compared with 3.6 for the admitted black students, and a median SAT mathematics score of 630, compared with 530 for the black students. Some reports have used odds ratios to prove their point: One dealing with law schools in Virginia, for example, contended that black applicants were 731 times as likely as white applicants with similar grades and test scores to gain acceptance to the University of Virginia's law school in 1999.

Nearly always, the reports have been denounced by the institutions studied as misleading and overly simplistic in their reliance on grades and test scores to compare applicants.

"Substantively, it is hard to take them seriously," says Barmak Nassirian, a policy analyst for the American Association of Collegiate Registrars and Admissions Officers. "This crazy, simplistic, mechanical notion that there is one objective measure by which every applicant ought to be measured is just false on its face, and a very uninspired view of what the business of admissions is all about."

'BLUNT FINDINGS'

Robert Lerner is the president of the company that has performed all of the center's data analyses, Lerner and Nagai Quantitative Consulting, of Rockville, Md. He stands by his company's work, and says that the center's reports have accurately presented his results. "They are pretty brutally blunt findings. It is hard to spin them," he says.

And Clint Bolick, the vice president of the Washington-based Institute for Justice, and a leading libertarian legal advocate, says the center "has played the enormously important and difficult role of ferreting out the racial-preference policies that proliferate among post-secondary institutions."

In addition to studying college admissions, the center routinely contacts state attorneys general and other government officials to urge them to take a hard line against racial and ethnic preferences in higher education. More recently, the center's general counsel, Roger B. Clegg, has helped mount an effort to pressure private and public colleges into abandoning programs that are open only to members of minority groups.

The center is a fairly small outfit. Its advocacy work is handled by Ms. Chavez, who was staff director of the U.S. Commission on Civil Rights under President Ronald Reagan, and Mr. Clegg, who had been deputy assistant attorney general under Presidents Reagan and George H.W. Bush. Two of Ms. Chavez's sons serve as its executive director and director of operations.

"We are not a huge organization, and the nice thing about that is that we are very flexible about what we do," Mr. Clegg says. He says the Supreme Court's rulings in two pending cases involving race-conscious admissions policies "will determine what needs to be done next."

—PETER SCHMIDT

"We're one nation, and one people, and we shouldn't be divided into racial and ethnic groups."

Linda Chavez's group has used admissions data to point out gaps between minority and white applicants.

3 Forces in the Fight Over Affirmative Action

The battle against race-conscious college admissions has been led by three organizations: the American Civil Rights Institute, which has promoted ballot initiatives; the Center for Equal Opportunity, which has sought to bring public and government pressure to bear on colleges; and the Center for Individual Rights, which has pursued litigation. Below are key developments in their campaigns.

- Center for Individual Rights
- American Civil Rights Institute
- Center for Equal Opportunity

September 1992: Four white applicants who were rejected by the University of Texas School of Law file a lawsuit charging that the school's use of different cut-off scores for white and minority applicants violates their right to equal protection under the 14th Amendment. The Center for Individual Rights takes their case the following year.

March 1996: U.S. Court of Appeals for the Fifth Circuit strikes down the University of Texas law school's race-conscious admissions policies.

November 1996: California voters pass Proposition 209, barring public colleges and other state and local agencies from granting preferences based on race, ethnicity, or gender. Mr. Connerly, the campaign's leader, subsequently announces the formation of the American Civil Rights Institute and its companion political-action committee, the American Civil Rights Coalition.

1992 | 1993 | 1994 | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002

July 1995: Ward Connerly, a University of California regent, persuades fellow board members to bar the university system from using racial, ethnic, or gender preferences in admissions, hiring, and contracting.

Summer 1996: The Center for Equal Opportunity begins obtaining admissions data from public colleges around the nation. In the ensuing years, it will issue 15 reports covering 56 colleges and will accuse about two-thirds of them of discriminating against white applicants.

Fall 1997: The Center for Individual Rights files lawsuits challenging admissions policies at the University of Michigan's law school and chief undergraduate college.

November 1998: Washington State voters pass Initiative 200, banning racial and gender preferences by public colleges and other state agencies.

November 1999: Seeking to head off a ballot-initiative campaign by Mr. Connerly, Gov. Jeb Bush of Florida, a Republican, issues an executive order banning state agencies from using preferences. Three months later, he persuades the state's university system to cease using race-conscious college admissions.

February 1999: The University of Massachusetts at Amherst stops giving minority applicants an edge in admissions and financial-aid decisions, partly in response to the Center for Equal Opportunity's scrutiny.

June 1999: The University of Virginia's president, John T. Casteen III, quietly alters its race-conscious admissions policies, largely in response to scrutiny by the Center for Equal Opportunity and fear of a lawsuit by the Center for Individual Rights.

December 2000: The Center for Individual Rights suffers a setback when the U.S. Court of Appeals for the Ninth Circuit upholds the race-conscious admissions policies, formerly used by the University of Washington's law school. The decision is moot in Washington, which remains bound by Initiative 200, but k six other western states keep race-conscious policies.

April 2002: At the urging of t Center for Equal Opportunity, lawyers from the office of Virginia's attorney general begin advising public colleges throughout the state to curtail race-conscious admissions.

Decem... 2002: U.S. Supreme Ct. agrees to hear both Michigan cases.

SOURCE: CHRONICLE REPORTER... CHRONICLE GRAPHI... BY TYLER STOV...

*195 F.3d 698, *; 1999 U.S. App. LEXIS 34589, **

GRACE TUTTLE, a minor by Her Next Friend, Steven Tuttle; RACHEL SECHLER, a minor by Her Next Friend, Charlotte Sechler, Plaintiffs-Appellees, v. ARLINGTON COUNTY SCHOOL BOARD; MARY H. HYNES, individually and in her official capacity as Member, Arlington County School Board; DARLENE MICKEY, individually and in her capacity as Member, Arlington County School Board; ELIZABETH GARVEY, individually and in her official capacity as Member, Arlington County School Board; ELAINE FURLOW, individually and in her official capacity as Member, Arlington County School Board; FRANK WILSON, individually and in his capacity as Member, Arlington County School Board; ROBERT SMITH, individually and in his capacity as Superintendent of Schools, Arlington County, Defendants-Appellants, and DOUGLAS HUFF, Movant. AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS; COUNCIL OF THE GREAT CITY SCHOOLS; MAGNET SCHOOLS OF AMERICA; NATIONAL SCHOOL BOARDS ASSOCIATION; UNITED STATES OF AMERICA; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; THE ARLINGTON COUNTY CHAPTER OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; THE LEAGUE OF UNITED LATIN AMERICAN CITIZENS, Amici Curiae.

No. 98-1604

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

195 F.3d 698; 1999 U.S. App. LEXIS 34589

January 27, 1999, Argued
September 24, 1999, Decided

SUBSEQUENT HISTORY: [1]** As Corrected November 1, 1999.

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., Senior District Judge. (CA-98-418-A).

The Original Opinion of September 24, 1999, Reported at: 1999 U.S. App. LEXIS 23222.

DISPOSITION: AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

CASE SUMMARY

PROCEDURAL POSTURE: Appellants challenged permanent injunction and order of the United States District Court for the Eastern District of Virginia, at Alexandria, which required implementation of double-blind random lottery for admissions, in response to litigation filed under Civil Rights Act, 42 U.S.C.S. §§ 1981, 1983, arguing that permanent injunction required evidentiary hearing.

OVERVIEW: Appellants were enjoined from the use of a school admissions policy based on diversity, and were ordered to use a weighted lottery system in determining admission. Appellees, refused admission based on results of lottery, filed claim under 28 U.S.C.S. §§ 2201, 2202, and the Civil Rights Act (Act), 41 U.S.C.S. §§ 1981, 1983, arguing policy violated due process under U.S. Const. amend. XIV. The court held that the policy violated U.S. Const. amend. XIV, but the lower court abused its discretion when it enjoined appellants and ordered a random lottery system without an evidentiary hearing for alternative policies. No collateral estoppel applied in appeal of conclusion that

diversity was not a compelling governmental interest, because prior litigated issues were not identical to current litigation.

OUTCOME: The court affirmed that the race-based classifications in the diversity admissions policy violated due process, rendering the admissions policy unconstitutional, but vacated the permanent injunction and remanded for an evidentiary hearing to give appellants an opportunity to provide an alternate policy.

CORE TERMS: diversity, lottery, narrowly tailored, injunction, compelling interest, compelling governmental interest, classification, balancing, random, ethnicity, ethnic, permanent injunction, weighted, race-neutral, permanently, remedial, evidentiary hearing, proposed order, Fourteenth Amendment, compelling state interest, student body, probability, educational, sibling, diverse, pool, injunctive relief, numerical goal, third parties, de novo

LexisNexis(TM) HEADNOTES - Core Concepts - ◆ Hide Concepts

Civil Procedure > Appeals > Standards of Review > De Novo Review
Constitutional Law > Equal Protection > Level of Review
Constitutional Law > Civil Rights Enforcement > Civil Rights Generally
HN1 The court reviews the grant or denial of collateral estoppel de novo, and reviews racial classifications under strict scrutiny.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion
HN2 The court reviews a district court's permanent injunction for an abuse of discretion

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders
HN3 The court has appellate jurisdiction pursuant to 28 U.S.C.S. § 1292(a)(1), on an appeal of an interlocutory order granting an injunction.

Civil Procedure > Preclusion & Effect of Judgments > Collateral Estoppel
HN4 Collateral estoppel means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.

Constitutional Law > Equal Protection > Level of Review
Constitutional Law > Equal Protection > Race
HN5 All racial classifications are subject to strict scrutiny. Under strict scrutiny, a racial classification must (1) serve a compelling governmental interest and (2) be narrowly tailored to achieve that interest.

Constitutional Law > Civil Rights Enforcement > Civil Rights Act of 1871 > State Action
Constitutional Law > Civil Rights Enforcement > Civil Rights Generally
HN6 The court has never decided the question of whether diversity is a compelling interest.

Constitutional Law > Equal Protection > Race
Constitutional Law > Civil Rights Enforcement > Civil Rights Act of 1871 > State Action
HN7 The state is not absolutely barred from giving any consideration to race in a nonremedial context.

Constitutional Law > The Judiciary > Case or Controversy > Constitutional Questions
Governments > Courts > Authority to Adjudicate
HN8 A fundamental and longstanding principle of judicial restraint requires that courts

avoid reaching constitutional questions in advance of the necessity of deciding them.

Constitutional Law > Civil Rights Enforcement > Civil Rights Act of 1871 > State Action
Constitutional Law > Civil Rights Enforcement > Civil Rights Generally
HN9 Nonremedial racial balancing is unconstitutional.

Constitutional Law > Civil Rights Enforcement > Civil Rights Act of 1871 > State Action
Constitutional Law > Substantive Due Process > Scope of Protection
HN10 When reviewing whether a state racial classification is narrowly tailored, the court considers factors such as: (1) the efficacy of alternative race-neutral policies, (2) the planned duration of the policy, (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population or work force, (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met, and (5) the burden of the policy on innocent third parties. These factors are particularly difficult to assess where, the policy is not tied to identified past discrimination.

Governments > Courts > Authority to Adjudicate
Governments > Local Governments > Education
HN11 The administration and management of educational institutions are beyond the competence of judges and are within the special competence of educators, provided always that the educators perform within legal and constitutional bounds.

Constitutional Law > Civil Rights Enforcement > Civil Rights Act of 1871 > State Action
Constitutional Law > Substantive Due Process > Scope of Protection
HN12 A racial classification cannot continue in perpetuity but must have a logical stopping point.

Civil Procedure > Injunctions > Permanent Injunctions
HN13 An injunction should be tailored to restrain no more than what is reasonably required to accomplish its ends. Although injunctive relief should be designed to grant the full relief needed to remedy the injury to the prevailing party, it should not go beyond the extent of the established violation.

Civil Procedure > Injunctions > Permanent Injunctions
HN14 An evidentiary hearing is not required before issuing a permanent injunction.

COUNSEL: ARGUED: Steven John Routh, HOGAN & HARTSON, L.L.P., Washington, D.C., for Appellants.

Linda Frances Thome, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amicus Curiae United States.

Philip Andrew Sechler, WILLIAMS & CONNOLLY, Washington, D.C., for Appellees.

ON BRIEF: Audrey J. Anderson, HOGAN & HARTSON, L.L.P., Washington, D.C.; Carol W. McCoskrie, Assistant County Attorney, ARLINGTON COUNTY ATTORNEY'S OFFICE, Arlington, Virginia, for Appellants.

Bill Lann Lee, Acting Assistant Attorney General, Mark L. Gross, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amicus Curiae United States.

Bethany E. Matz, WILLIAMS & CONNOLLY, Washington, D.C.; Steven M. Levine, LAW OFFICE OF STEVEN M. LEVINE, Washington, D.C., for Appellees.

Naomi E. Gittins, Staff Attorney, **[**2]** Julie Underwood, NSBA General Counsel, NATIONAL SCHOOL BOARDS ASSOCIATION, Alexandria, Virginia; AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, Arlington, Virginia; COUNSEL OF THE GREAT CITY SCHOOLS, Washington, D.C.; MAGNET SCHOOLS OF AMERICA, The Woodlands, Texas, for Amici Curiae Association of School Administrators, et al.

Barbara R. Arnwine, Thomas J. Henderson, Robin A. Lenhardt, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, Washington, D.C.; Jeh C. Johnson, PAUL, WEISS, RIFKIND, WHARTON & GARRISON, New York, New York, for Amici Curiae NAACP, et al.

JUDGES: Before ERVIN, LUTTIG, and KING, Circuit Judges.

OPINION: [*700] OPINION

PER CURIAM: n1

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n1 The opinion in this case was prepared by Judge Ervin, who died before it was filed. The remaining members of the panel continue to concur in what Judge Ervin wrote. The opinion is accordingly filed by a quorum of the panel pursuant to 28 U.S.C. § 46(d).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The question before this Court is whether an oversubscribed public school **[**3]** may use a weighted lottery in admissions to promote racial and ethnic diversity in its student body. The current appeal is the latest chapter in the history of this Court's involvement in the Arlington County, Virginia public school system.

Our earlier involvement concerned the desegregation of the Arlington County school system. n2 This preceding chapter was brought to a close in Hart v. County School Bd. of Arlington County, Virginia, where we affirmed the remedial policy of the Arlington County School Board ("School Board") to achieve a unitary school district. 459 F.2d 981, 982 (4th Cir. 1972). The current chapter brings us full circle. In the present case, we examine the admissions policy ("Policy") of the Arlington Traditional School ("ATS"), whose goal was not to remedy past discrimination, but rather to promote racial, ethnic, and socioeconomic diversity.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n2 Our involvement in the desegregation of the Arlington County public school system is summarized in Brooks v. County School Bd. of Arlington County, Virginia, 324 F.2d 303, 304-05 (4th Cir. 1963).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - **[**4]**

Two ATS applicants, Grace Tuttle ("Tuttle") and Rachel Sechler ("Sechler"), filed suit under 28 U.S.C.A. §§ 2201, 2202 (West 1994) and 42 U.S.C.A. §§ 1981, 1983 (West 1994) to enjoin the School Board permanently from implementing its Policy. The district court granted the injunction **[*701]** and ordered the School Board to conduct a double-blind random lottery for future ATS admissions. The School Board appealed the decision.

Today, we hold that the School Board's Policy violated the Equal Protection Clause of the Fourteenth Amendment. Since the Supreme Court has not resolved the question of whether

diversity is a compelling governmental interest, we assume without deciding that diversity may be a compelling interest and find that the Policy was not sufficiently narrowly tailored to pass constitutional muster.

Although we affirm the district court's holding that the Policy was unconstitutional, we find that the district court abused its discretion when it ordered the School Board to adopt a specific admissions policy. We therefore vacate the permanent injunction and remand to allow an evidentiary hearing in which the School Board **[**5]** may present alternative admissions policies for the district court's review.

I.

ATS is an alternative kindergarten, one of three alternative schools operated by the School Board that claims to teach students in a "traditional" format. Admission is not based upon merit but rather solely upon availability.

The currently challenged Policy was created in response to prior litigation. In the earlier case of Tito v. Arlington County School Bd., 1997 U.S. Dist. LEXIS 7932, the district court permanently enjoined ATS from implementing its former admissions policy and ordered the School Board to make "invitations for admissions to the alternative schools[like ATS] in strict order of the lottery selections, for all grade levels, as long as a random lottery procedure continues to be employed." In so doing, the district court concluded that diversity could never constitute a compelling governmental interest and, in the alternative, even if it could, that the earlier program was not sufficiently narrowly tailored to further diversity.

The plaintiff in Tito submitted a proposed Order Granting Declaratory Relief and Permanent Injunction containing a provision that "permanently **[**6]** restrained and enjoined [the School Board] from using race, color or ethnicity as a factor in offering invitations for admission" to ATS. The district court found this provision "overbroad" because "this proposal would go beyond what is necessary to decide the case at hand." The district court added, "the court has ruled that the alternative schools' admissions policy 'as implemented' . . . is unconstitutional. The court declines to anticipate and foreclose any attempt by the School Board to achieve by other means the goals expressed in its admissions policy."

Instead of appealing the Tito decision, the School Board adopted a new Policy in February 1998. This Policy had two goals: (1) "to prepare and educate students to live in a diverse, global society" by "reflecting the diversity of the community" and (2) to help the School Board "serve the diverse groups of students in the district, including those from backgrounds that suggest they may come to school with educational needs that are different from or greater than others." The Policy defined diversity using three equally weighted factors: (1) whether the applicant was from a low-income or special family background, (2) whether **[**7]** English was the applicant's first or second language, and (3) the racial or ethnic group to which the applicant belonged. Through this Policy, ATS sought to obtain a student body "in proportions that approximate the distribution of students from those groups in the district's overall student population."

Under the Policy that ATS implemented in 1998-99 and that is challenged here, ATS accepted applications from the general public without restriction. Because the applicant pool was larger than the number of available positions, ATS offered admission to applicants based on a lottery. In 1998, ATS had 185 applicants for only 69 available positions.

[*702] First, ATS offered admission to applicants who were the siblings of older students already attending ATS. n3 In 1998, there were 23 ATS sibling-applicants, leaving 46 positions available for admission to ATS. Next, because the total ATS applicant pool, including siblings, was not within 15% of the county-wide student population percentages for all three factors, a sequential, weighted random lottery among the 162 non-sibling applicants determined the

remaining 46 offers for admission to ATS. n4 The probabilities associated with **[**8]** each applicant's lottery number were weighted, so that applicants from under-represented groups, as defined by the Policy, had an increased probability of selection. n5

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n3 This sibling preference was not challenged in either Tito or the current case.

n4 The following table summarizes relevant data on offers of admission at ATS for the 1998-99 school year (J.A. 64, 65, 133):

[SEE TABLE IN ORIGINAL]

n5 Each applicant's "lottery weight" was calculated as the product of the individual weights for the three factors. For the relative weights utilized in the lottery for each of the three separate factors, see table supra note 4.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Tuttle and Sechler (the **[**9]** "Applicants") did not have siblings attending ATS. Moreover, they had no increased probability of selection in the lottery based on their diversity factor classifications, and they were not selected for admission in the lottery process. As a result, they did not receive admission offers. The Applicants, by and through their Next Friends, parents Steven Tuttle and Charlotte Sechler, filed a Complaint and a Motion for Preliminary Injunction against the School Board to stop ATS' weighted admission process.

During the preliminary injunction motion hearing, the Applicants moved to consolidate the hearing with a trial on the merits pursuant to Fed. R. Civ. P. 65(a)(2). The School Board objected, arguing that unless the district court accepted as a matter of law that diversity was a compelling state interest, the School Board should be given an opportunity to present evidence on that point. The district court refused to grant the School Board an evidentiary hearing.

On April 14, 1998, without further proceedings, the district court ruled in an **[*703]** unpublished memorandum opinion that the Applicants were entitled to permanent injunctive relief. See Tuttle v. Arlington County School **[**10]** Bd., 1998 U.S. Dist. LEXIS 22578, No. CA-98-418-A, at 11 (E.D. Va. April 14, 1998) (unpublished memorandum opinion). In so ruling, the district court reiterated that as a matter of law, "diversity was not a compelling governmental interest" because the only compelling governmental interest to justify racial classifications was "to remedy the effects of past discrimination." Id. at 8. At the district court's request, the Applicants submitted a proposed order.

The School Board filed two objections to the proposed order. First, the School Board argued that the district court had impermissibly intruded upon the School Board's discretion by ordering it to institute a "double-blind random lottery without the use of any preferences" to admit students to ATS. Second, the School Board objected to being permanently enjoined from not only using race, color, and national origin, but also family income and first language in admitting students to ATS. On April 23, 1998, the district court overruled these objections and entered the proposed order. The next day, the School Board appealed to this Court.

We address three issues on appeal. First, the Applicants argued that the School Board was collaterally estopped from **[**11]** disputing the district court's conclusion of law that

diversity is not a compelling interest. Second, the School Board argued that the Policy does not violate the Equal Protection Clause of the Fourteenth Amendment. Third, the School Board argued that the district court's permanent injunction was overbroad.

II.

HN1 We review the grant or denial of collateral estoppel de novo. See United States v. Fiel, 35 F.3d 997, 1005 (4th Cir. 1994).

We review racial classifications under strict scrutiny. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995).

There is disagreement among the parties concerning our standard of review of the district court's injunction. The School Board argued that since the district court based its injunction solely upon its interpretation of the applicable law, we should review de novo. See Williams v. United States Merit Sys. Protection Bd. , 15 F.3d 46, 48 (4th Cir. 1994) ("This court reviews a decision pertaining to injunctive relief de novo when it rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling **[**12]** relevance.") (citation omitted). Since the School Board does not challenge the district court's authority to grant an injunction but rather the scope of the injunction granted, we believe that Williams is inapposite here and HN2 review the district court's permanent injunction for an abuse of discretion. See Wilson v. Office of Civilian Health and Med. Programs of the Uniformed Servs., 65 F.3d 361, 363 (4th Cir. 1995).

HN3 This Court has appellate jurisdiction pursuant to 28 U.S.C.A. § 1292(a)(1) (West 1993 & Supp. 1998) because the present case is an appeal of an interlocutory order granting an injunction.

III.

As a threshold matter, we must address whether the School Board is collaterally estopped from claiming that diversity is a compelling governmental interest because it never appealed the issue in the district court's earlier Tito decision. HN4 Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Ashe v. Swenson, 397 U.S. 436, 443, 25 L. Ed. 2d 469, 90 S. Ct. 1189 (1970). **[**13]** n6

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n6 "For collateral estoppel to apply, the proponent must establish that: (1) the issue sought to be precluded is identical to one previously litigated; (2) the issue must have been actually determined in the prior proceeding; (3) determination of the issue must have been a critical and necessary part of the decision in the prior proceeding; (4) the prior judgment must be final and valid; and (5) the party against whom estoppel is asserted must have had a full and fair opportunity to litigate the issue in the previous forum." Sedlack v. Braswell Servs. Group, 134 F.3d 219, 224 (4th Cir. 1998).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*704] After analyzing the relevant factors, we find that the School Board is not collaterally estopped from appealing the district court's legal conclusion that diversity is not a compelling governmental interest. Because the admissions policy in Tito was markedly different than the current Policy, the issues decided in Tito were hardly "identical" to the issues currently before this Court. **[**14]** Since the district court also concluded that the Tito policy was not narrowly tailored, the district court's conclusion of law that diversity could never be a

compelling interest was not "necessary" in Tito. Furthermore, the decision in Tito was hardly "final and valid." The Tito injunction was qualified with "as long as [a] random lottery selection procedure continues to be employed," implying that the School Board retained the discretion to choose another random lottery selection procedure. Collateral estoppel, therefore, does not apply in this case.

The second issue is whether the Policy violates the Equal Protection Clause of the Fourteenth Amendment. Although race and ethnicity comprise only one of the Policy's three diversity factors, it is undisputed that the Policy involves a racial classification. HN5 All racial classifications are subject to strict scrutiny. See Adarand, 515 U.S. at 227. Under strict scrutiny, a racial classification must (1) serve a compelling governmental interest and (2) be narrowly tailored to achieve that interest. Id.

The first question is whether diversity is a compelling governmental interest. This question **[**15]** remains unresolved. The only circuit to hold that diversity is not a compelling interest is the Fifth Circuit. See Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996) ("Any consideration of race or ethnicity . . . for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment."), cert. denied, 518 U.S. 1033, 135 L. Ed. 2d 1095, 116 S. Ct. 2581 (1996). In Hopwood, the Fifth Circuit went on to conclude that the only compelling interest to justify racial classifications was remedying past discrimination. 78 F.3d at 944. Other circuits have not resolved the issue. In Lutheran Church-Missouri Synod v. Federal Communications Comm'n, 141 F.3d 344 (D.C. Cir. 1998), the District of Columbia Circuit commented that it did "not think diversity can be elevated to the 'compelling' level," id. at 354, but struck down a challenged regulation as not narrowly tailored. Id. at 356. The Seventh Circuit observed that the question of whether there may be compelling interests other than remedying past discrimination remains "unsettled." McNamara v. City of Chicago, 138 F.3d 1219, 1222 (7th Cir. 1998). **[**16]** The First Circuit is the only court of appeals to have addressed the issue of diversity as a compelling state interest in the context confronting us today -- the use of race-based classifications in an admissions policy in a public elementary or secondary school. Wessmann v. Gittens, 160 F.3d 790, 796 (1st Cir. 1998) (assuming, without deciding, that diversity may be a compelling governmental interest).

HN6 We have never decided the question of whether diversity is a compelling interest. All of our cases cited by the Applicants are distinguishable because they concerned programs to remedy past discrimination, n7 a **[*705]** justification which both sides agree does not apply in the present case. Even in the remedial context, we have explicitly avoided deciding the question of whether diversity is a compelling interest. n8

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n7 See Alexander v. Estepp, 95 F.3d 312, 315 (4th Cir. 1996) (holding a remedial hiring program unconstitutional); Podberesky v. Kirwan, 38 F.3d 147, 151-52 (4th Cir. 1994) (Podberesky II) (holding a remedial race-based scholarship unconstitutional); Maryland Troopers Ass'n. v. Evans, 993 F.2d 1072, 1074 (4th Cir. 1993) (holding a remedial hiring program unconstitutional). **[**17]**

n8 See Alexander, 95 F.3d at 316 (concluding that "even assuming, arguendo, that the asserted interests [which included, among others, diversity] are compelling, the program is not narrowly tailored . . ."); Hayes v. North State Law Enforcement Officers Ass'n , 10 F.3d

207, 213 (4th Cir. 1993) (holding that evidence presented was insufficient to survive summary judgment "without deciding whether achieving a greater racial diversity . . . is a compelling state interest"); Podberesky v. Kirwan, 956 F.2d 52, 56 n.4 (4th Cir. 1992) (Podberesky I) ("The district court did not cite the need for diversity for this program, and it does not appear that . . . [the] Program was established with this goal in mind."). But see Talbert v. City of Richmond, 648 F.2d 925, 929 (4th Cir. 1981) (holding that the attainment of racial diversity was "a legitimate interest").

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Nor has the Supreme Court directly decided this issue. The only applicable Supreme Court precedent is Justice Powell's concurrence in Regents of Univ. of California v. Bakke, **[**18]** where Justice Powell wrote that diversity "furthers a compelling state interest." 438 U.S. 265 at 313, 98 S. Ct. 2733, 57 L. Ed. 2d 750. We have interpreted Bakke as holding that HN7 the state "is not absolutely barred from giving any consideration to race" in a nonremedial context. Talbert, 648 F.2d at 928. Although no other Justice joined the diversity portion of Powell's concurrence, nothing in Bakke or subsequent Supreme Court decisions clearly forecloses the possibility that diversity may be a compelling interest. n9 Until the Supreme Court provides decisive guidance, we will assume, without so holding, that diversity may be a compelling governmental interest and proceed to examine whether the Policy is narrowly tailored to achieve diversity. Since we conclude below that the Policy was not narrowly tailored, we leave the question of whether diversity is a compelling interest unanswered. See Lyng v. Northwest Indian Cemetery Prot. Ass'n, 485 U.S. 439, 445, 99 L. Ed. 2d 534, 108 S. Ct. 1319 (1988) ("A HN8 fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding **[**19]** them.").

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n9 The Supreme Court did not directly address either the question of whether diversity is a compelling interest or the current precedential value of Bakke in its most recent affirmative action equal protection opinion, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995). As Justice Stevens pointed out, the "proposition that fostering diversity may provide a sufficient interest to justify such a program is not inconsistent with the Court's holding today--indeed, the question is not remotely presented in this case . . . ." Id. at 258 (Stevens, J., dissenting) (citation omitted).

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

B.

The second question to address is whether the Policy was narrowly tailored to achieve diversity. Before we can address that question, we first must determine if we can examine the race/ethnicity factor separately from the income and language factors. The School Board argued that the race/ethnicity factor cannot be divorced from the income and first **[**20]** language factors. We disagree. Although the Policy is indeed composed of not one but three factors, each factor works independently of the other. We therefore limit our inquiry to the race/ethnicity factor and do not reach the income and language factors.

Examining the race/ethnicity factor, we conclude that even under Bakke it was not narrowly tailored because it relies upon racial balancing. Such HN9 nonremedial racial balancing is unconstitutional. n10

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n10 See Freeman v. Pitts, 503 U.S. 467, 494, 118 L. Ed. 2d 108, 112 S. Ct. 1430 (1992) ("Racial balance is not to be achieved for its own sake."); Bakke, 438 U.S. at 315 ("In a most fundamental sense the argument misconceives the nature of the state interest . . . . It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups . . ."); Wessman, 160 F.3d at 799 ("The Policy is, at bottom, a mechanism for racial balancing--and placing our imprimatur on racial balancing risks setting a precedent that is both dangerous to our democratic ideals and almost always constitutionally forbidden."); Podberesky II, 38 F.3d at 160 ("The program more resembles outright racial balancing . . . and as such, it is not narrowly tailored . . .").

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - HN10 **[**21]**

[*706] When reviewing whether a state racial classification is narrowly tailored, we consider factors such as: "(1) the efficacy of alternative race-neutral policies, (2) the planned duration of the policy, (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population or work force, (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met, and (5) the burden of the policy on innocent third parties." Hayes, 10 F.3d at 216, citing United States v. Paradise, 480 U.S. 149, 171, 94 L. Ed. 2d 203, 107 S. Ct. 1053 (1987). We acknowledge "that these factors are particularly difficult to assess where, as here, the Policy is not tied to identified past discrimination." Hayes, 10 F.3d at 216 n.8.

First, we consider whether there are alternative race-neutral policies to promote diversity. With regard to judicial policymaking in the educational context, we agree with Justice Blackmun that "the judiciary is ill-equipped and poorly trained for this." Bakke, 438 U.S. at 404 (Blackmun, J., concurring in part and dissenting in part). **[**22]** As Justice Blackmun noted, "The HN11 administration and management of educational institutions are beyond the competence of judges and are within the special competence of educators, provided always that the educators perform within legal and constitutional bounds." Id. Fortunately, we need not engage in judicial policymaking today because the School Board's own Alternative Schools Admission Study Committee offered one or more alternative race-neutral policies in its Report to the Superintendent. n11 While the Committee ultimately recommended the currently challenged Policy, the fact that the Committee also proposed one or more race-neutral alternatives demonstrates that the School Board has race-neutral means to promote diversity.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n11 These three alternatives were:

> 1. Assign a small geographic area to identified alternative schools as the home school for that area, and fill the remaining spaces in the entering class by means of an unweighted random lottery from a self-selected applicant pool. The geographic area would presumably be selected so that its residents would positively effect the diversity of the school
>
> * * *
>
> 2. An additional option was to have all names of an entering class in the county automatically put into the lottery. All students are then selected at random and offered admission until the class is full. Another method would be to offer randomly selected families the opportunity to have their child's name placed in a second lottery from which those students selected would be offered admission. This method would require all families, even those not interested in alternative schools, to make an active choice

* * *

3. Each neighborhood school would be allotted a certain number of slots at each alternative school. The number of slots per school would be determined either by the percentage of that school's population relative to ATS student population or by the extent of overcrowding at the school . . . .

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - **[**23]**

Second, we consider the planned duration of the Policy. The Policy states that the weighted lottery will be conducted "for the 1999-2000 school year and thereafter." Because HN12 a racial classification cannot continue in perpetuity but must have a "logical stopping point," the Policy is not narrowly tailored. City of Richmond v. Croson, 488 U.S. 469, 498, 102 L. Ed. 2d 854, 109 S. Ct. 706 (1989).

[*707] Third, we consider the relationship between the numerical goal and the percentage of minority group members in the relevant population or work force. The Policy seeks to achieve racial and ethnic diversity in its classes "in proportions that approximate the distribution of students from [racial] groups in the district's overall student population." The means employed by the Policy to achieve such numerical racial and ethnic diversity is racial balancing.

It is clear that the Policy engages in racial balancing. The School Board attempted to distinguish its Policy by arguing that, unlike other programs where a percentage of spots is reserved solely for minorities, this program allows every applicant, regardless of race, to compete for every available spot. The **[**24]** School Board also argued that it was not engaging in straight racial balancing because of the deviation inherent in the lottery.

We conclude that these are distinctions without differences. Although the Policy does not explicitly set aside spots solely for certain minorities, it has practically the same result by skewing the odds of selection in favor of certain minorities. Even if the final results may have some statistical variation, what drives the entire weighted lottery process--the determination of whether it applies and the values of its weights--is racial balancing. The Policy's two goals, to provide students with the educational benefits of diversity and to help the School Board better serve the diverse groups of students in its district, do not require racial balancing.

Fourth, we consider the flexibility of the Policy. The School Board argued that the Policy was extremely flexible because instead of a set numerical goal, the final random results of the weighted lottery ultimately determined admissions. We disagree. Since ATS admissions are based on availability, if the applicant pool does not reflect the required 15% racial and ethnic diversity, each child's probability **[**25]** of selection in the lottery is adjusted corresponding to his or her stated race. In Bakke, Justice Powell explained that constitutionally permissible programs such as the Harvard College admissions program promote diversity by "treating each applicant as an individual in the admissions process." 438 U.S. at 318. The Policy, like the Davis admissions program in Bakke, does not treat applicants as individuals. The race/ethnicity factor grants preferential treatment to certain applicants solely because of their race.

Fifth, we consider the burden of the Policy on innocent third parties. The innocent third parties in this case are young kindergarten-age children like the Applicants who do not meet any of the Policy's diversity criteria. We find it ironic that a Policy that seeks to teach young children to view people as individuals rather than members of certain racial and ethnic

groups classifies those same children as members of certain racial and ethnic groups. n12

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n12 The district court concurred during the earlier Tito case:

> The court finds it both unfortunate and potentially pernicious that four year old children are directed by the state to identify themselves for admissions purposes as African American, Asian, Caucasian, [or] Hispanic . . . Although presumably the children's parents complete the applications, and most likely the children themselves do not fully understand the significance and consequences of their self-designation, it is not unreasonable to view the process as the first step in the state-sponsored perpetuation of an educational system which continues to rely upon racial distinctions. If it is true that the Equal Protection Clause seeks ultimately to render the issue of race irrelevant in governmental decisionmaking . . ., it might not be overly utopian to begin by abandoning the insistence that young children categorize them selves according to race in a manner that will follow them throughout their education and, often, professional life.

(Citations omitted.)

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - **[**26]**

On balance, we conclude that the Policy was not narrowly tailored to further diversity and thereby find it unconstitutional.

[*708] V.

In the alternative, the School Board argued that the district court abused its discretion with its permanent injunction. We have previously held:

> *HN13*An injunction should be tailored to restrain no more than what is reasonably required to accomplish its ends ... Although injunctive relief should be designed to grant the full relief needed to remedy the injury to the prevailing party, it should not go beyond the extent of the established violation.

Hayes, 10 F.3d at 217 (citations omitted).

In Hayes, we held that the district court's injunction, enjoining the use of racially based criteria by the City of Charlotte in its employment decisions, was overbroad. Id. We conclude that the district court's injunction in the current case suffers the same infirmity.

Although the Applicants were entitled to an injunction, they were not entitled to a permanent injunction ordering the School Board to adopt a particular admissions policy. The district court should have taken the less intrusive step of continuing to monitor **[**27]** and review alternative programs proposed by the School Board. Although the district court was apparently unsettled by what it characterized as the School Board's attempt "to achieve the same end that was held unconstitutional in Tito, merely by a different process," Tuttle, No. CA-98-418-A, at 1, there was no reason to suspect bad faith or abdication of responsibility by the School Board that might warrant such an extreme measure. The district court did not give the School Board an opportunity to explain how the new Policy was different from the

one struck down in Tito. In Tito, the district court deleted a provision from the proposed order "permanently restraining [the School Board] from using race, color or ethnicity as a factor" in admissions. In so doing, the district court stated that it declined "to anticipate and foreclose any attempt by the School Board to achieve by other means the goals expressed in its admissions policy." Given these facts, it is understandable that the School Board read the Tito order as not foreclosing the School Board's discretion to create a new admissions policy.

Although we have held that HN14 an evidentiary hearing is not required **[**28]** before issuing a permanent injunction, see Lone Star Steakhouse & Saloon, Inc. v. Alpha of Virginia, Inc., 43 F.3d 922, 938 (4th Cir. 1995), we conclude that the district court should have allowed an evidentiary hearing in this case to give the School Board an opportunity to present alternative admissions policies.

VI.

We affirm the district court's holding that the Policy was unconstitutional, vacate the district court's permanent injunction, and remand for an evidentiary hearing.

AFFIRMED IN PART, VACATED IN PART,

AND REMANDED

Service: **Get by LEXSEE®**
Citation: **195 f 3d 705**
View: Full
Date/Time: Friday, March 28, 2003 - 2:25 PM EST

Attachment D

President Steger

Statement to the Board of Visitors

April 6, 2003

Good afternoon to the members of the Board and all the others who are inspired by their commitment to this university to assemble here on a Sunday afternoon. The crowd gathered here today demonstrates the university community's unwavering commitment to diversity, to inclusiveness, to academic freedom, and to shared governance.

Several actions by the Board of Visitors on March 10 have generated a tremendous amount of controversy in our university community. Further, these actions cast a shadow over Virginia Tech in the eyes of other universities across the country. The turmoil on our own campus and the negative national publicity has been a major distraction, diverting the attention of the administration, faculty, staff, and students away from our main missions of educating our students, generating new knowledge, and applying that knowledge for the betterment of society. Moreover, our reputation has been damaged severely. If the situation is left unaltered, there will be lost opportunities to partner with other universities, an exodus of faculty, and declining enrollments of students from majority as well as minority groups.

Regrettably, the distraction will continue for some time to come as those of us in this room struggle to plot a reasonable course of action through these difficult times. I trust that the Board's actions today will set the stage for Virginia Tech to begin its recovery.

As stewards of a public institution, each member of the Board and the administration must strike a balance between his or her personal beliefs and what is in the best interests of our broad-based community, recognizing the tremendous diversity of perspectives that are present at a major university. It is from this diversity that we draw our greatest strength.

During the past year, we have gone through and managed the largest budget reduction in the history of our university, and how well this process has been accomplished is a great credit to the faculty, staff, students, and administrators.

One of the key resources that we draw upon in times when we are dealing with such complex issues is a spirit of openness and trust that each of us will do what is right for the university. Trust is more fragile than glass, easily shattered nearly impossible to repair.

So, I want to acknowledge that the Board's decision to meet today in a special session demonstrates their good faith effort to make sure that they understand

the implications of the actions that were taken on March 10 and their willingness to reconsider those actions in light of this information.

As you know, legal advice in the form of a confidential letter from the State Solicitor to the Boards of Virginia's public colleges and universities dated November 26, 2002, precipitated a special meeting of our Board on December 15, at which time the Board also revisited the proposal for a commission on diversity that it had tabled at its regular meeting on November 11, 2002, and ultimately passed on March 10, 2003. As I will explain in a moment, even before the Board passed a resolution on December 15 instructing me to do so, I directed the university's two legal counsel, who also serve as special assistant attorneys general, and a third attorney from our Office for Equal Opportunity to conduct a comprehensive review of programs at the university that might have a race-conscious component in order to obtain an objective, expert assessment of whether these programs are in compliance with the law. Subsequently, the three lawyers gathered materials from across campus and spent several weeks reviewing the materials. At that point, the Attorney General's office requested that the "raw" data be sent to Richmond for review, and our university's legal counsel—who, as you recall, are special assistant attorneys general—were advised by the Attorney General's office <u>not</u> to give me a report on their findings.

Our staff and the Attorney General's office will continue working together in good faith to resolve a very complex problem. If supplemental information is needed by the Attorney General's office, it will certainly be provided. We trust and expect that the staff in the Attorney General's office will work with our staff in reviewing the materials and any concerns with our programs.

Further, one may question whether the university administration should have acted sooner, upon the signing of the Accord between the Commonwealth of Virginia and the United States Office of Civil Rights in November of 2001. Let me clarify that Virginia Tech was not a party to the Accord. Prior to signing the Accord, the Office of Civil Rights evaluated Virginia's institutions of higher education as a single, statewide system. The Accord addressed the progress that Virginia had made in implementing the Virginia Plan for Equal Opportunity in State-Supported Institutions of Higher Education that was developed at the request of the OCR in 1978 to dismantle any dual system of higher education and eliminate any vestiges of de jure segregation. The conclusion of the Accord was that the only remaining commitment unfulfilled as of November 2001 related to an accreditation issue at one of Virginia's historically black colleges and universities.

On April 22, 2002, the State Solicitor, William Hurd, wrote a memorandum advising the presidents and boards of Virginia's public colleges and universities that the Accord had been signed. On April 29, I sent a copy of Mr. Hurd's memo, along with a memorandum of transmittal from me summarizing the key points of the Hurd memo, to our Provost, Executive Vice President, Vice President for

Multicultural Affairs, Director of the Office for Equal Opportunity, and legal counsel. We handled this in the same manner as the dozens of communications we receive each year from various offices in Richmond—the Governor's office, the secretariats, and SCHEV, among others—relative to the university's operations that the administration handles within the scope of its authority without elevating those matters to the level of the Board. Moreover, in May 2002, the Executive Director of SCHEV sent a memo to the rectors and presidents of all of Virginia's public universities transmitting a copy of House Joint Resolution 169 passed by the 2002 General Assembly that acknowledged and supported the Accord signed between the Commonwealth of Virginia and the U.S. Department of Education Office of Civil Rights. In her memo of May 20, Ms. Palmiero indicated that she planned to include this topic for discussion at the Fall 2002 Board of Visitors' Conference, and she encouraged the rectors and presidents in the meantime to disseminate the resolution to the campus community so they could be apprised of the sense of the General Assembly. The universities were not directed to take any specific actions at that time. Although I did not attend SCHEV's conference for Boards of Visitors on October 10-11, 2002, upon learning of the discussion, the next week I asked the university's legal counsel to begin preparing an inventory of programs that might possibly be race-conscious. After receiving the confidential letter of November 26 from State Solicitor Hurd, I clarified my request to our legal counsel on December 5 in a written memorandum that I copied to the Board. That was ten days prior to the passage of the Board's resolution of December 15 directing me to do so. The point is that the university administration took prompt and appropriate actions to comply with the guidance provided by the Attorney General's office.

Virginia Tech's intention to comply with the law has never been an issue. It is important to note that we have hundreds of programs and many hundreds of scholarships. Those suggested not to be in compliance are a tiny fraction of the overall number. Any problematic programs will be fixed. As advised by the Attorney General's office, we will ensure that, when appropriate, our programs meet the criteria for being narrowly tailored.

Yet, however the laws may change, Virginia Tech's commitment to diversity will remain constant. The university's strategic plan passed by the Board two years ago includes a vision statement affirming that a diverse learning community leads to a richer learning experience, and states our goal of increasing underrepresented groups on campus, thereby reaffirming the statements that I made in my inaugural speech three years ago.
I am encouraged that so many students, faculty, staff, and alumni—of all races—have expressed their commitment in recent weeks to increasing campus diversity. If we pool our collective energies, and work both creatively and strategically within the bounds of the law, I am confident we will be successful.

Now, let us return to the question of how, specifically, is the March 10 resolution on non-discrimination superior to the resolution of December 15? Just because

the March 10 resolution came later does not mean that it provides greater protection from personal liability for the Board members or the administration. The core issue is not the risk of being sued, but rather whether the Attorney General will permit state resources to be used to provide a defense in the event of a lawsuit.

Further, if one believes that greater protection does not result from the March 10 resolution, the key point that stands out from that resolution is the exclusion of sexual orientation from Virginia Tech's non-discrimination statement. Based on my understanding of what has been said by experts in higher education law, the content of a university's non-discrimination statement is the prerogative of each individual university. If our current Attorney General provides a formal, written opinion that including sexual orientation in a university's non-discrimination statement is illegal, and if all Virginia public universities are directed to change their non-discrimination statements accordingly, then Virginia Tech will do so. How can the inclusion of sexual orientation be illegal at Virginia Tech and legal at other universities?

Within the university, we have students and faculty from across the United States and 130 countries. We have over 10 major religions represented on campus. We cannot and will not tolerate any form of discrimination.

I urge the Board to rescind the March 10 resolution, and allow the university to proceed under the guidelines of the Board's December 15 resolution.

Whatever the outcome of today's meeting, these matters must be resolved. They have caused great harm to this university. Let us get back to moving Virginia Tech forward in our teaching, research, and outreach.

Set aside for a moment the complex legal landscape. The goal of all this is to create opportunity to participate in the mainstream of American life and hope for each generation of young people from whatever walk of life. Institutions of higher education can and do have great impact in realizing this goal.

In a few moments, I will introduce five representatives from the university who I have invited to speak on the various implications of the resolutions passed by the Board on March 10. With all of the information that the Board will then have, I call upon the members to act in the best interests of this university that we all love by approving each of the three resolutions that are on the agenda for today.

Attachment E

Presentation to the Board of Visitors
April 6, 2003
By: Mr. Sterling Daniel, President,
Virginia Tech Student Government Association

Good afternoon,

I rise today to speak on behalf of the nearly 26,000 individuals currently enrolled as students at Virginia Tech.

And on behalf of every student, I want to thank the members of the Board for agreeing to revisit the resolutions that were passed on March 10th.

This is a necessary first step in the long process of healing that needs to take place on this campus.

These past few weeks have been difficult here.

Our University has been cast into the national spotlight as one that does not welcome freedom of speech, nor does it welcome minorities, gays or lesbians.

Virginia Tech has always prided itself on being a leader in the fields of education and technology.

However, culturally, we have stayed behind our peers and if your March 10th decisions stand; we will only fall further behind.

Virginia Tech is a place of higher learning that enables us to grow not just as students, but as citizens of the commonwealth and the country, and most importantly, as human beings.

How will this University prepare students for success in the world if we do not reflect it?

Thankfully, today we have gathered to discuss these issues and, today, you have a choice.

On a personal note, I have a good friend named George Flynn, an alumnus of Virginia Tech, fighting on the front line in Iraq right now.

As we gather in the security of an academic setting, he risks his own life to provide the people of Iraq a basic freedom – the right to an opinion – a right you have tried to restrict.

As a proud Hokie I am often forced to defend against the ignorance of our detractors.

Statements such as “all dirt roads lead to Tech”, are made by envious rivals to suggest that Tech is a backwoods haven of dimwitted rednecks.

It is with great pride that I point out the error in such statements.

But, it is one thing to defend against the ignorance of our detractors, it is quite another to be forced to defend against the poor actions of our own Board of Visitors.

Actions that not only create irreparable and continuing harm, but also paint us in a light that proves our critics point.

Today you have an opportunity to show our rivals that we, and our Board, are not dimwitted rednecks.

In the past, the Board has done what was right, in spite of the political pressures at that time.

In the early 1950's, the Board of Visitors had the courage to admit the first black student, in the face of a brewing battle over segregation.

In the early 1990's, the Board decided to include sexual orientation into the non-discrimination policy.

Over the past 10 years, African American students have seen only a .4 percentage change in enrollment at Virginia Tech.

This statistic is embarrassing.

Will you choose to diminish diversity further or will you have the courage of earlier boards? Today, you have a choice.

Virginia Tech now stands at a crossroads.

One direction will lead us further down a path of division and intolerance.

Whereas, the other will keep us in line with our peer institutions and most importantly, make a definitive statement that every student is valued at Virginia Tech and will be protected from discrimination.

I commend the Board for holding this meeting in a place that can accommodate a large number of people so that these decisions can be reviewed in an open arena with input from members of this community.

These decisions affect us all and it is imperative that we work together to reach the proper resolve.

As a University, we can rise from this and state in one all-encompassing voice that Virginia Tech reaffirms its commitment to diversity.

On behalf of the student body, I urge you to reinstate the previous non-discrimination policy, pending a ruling in the Supreme Court on the Michigan case.

Members of the Board, right now, you can show the Virginia Tech community that our voice is more important than that of flawed partisan legal advice.

Today, ladies and gentlemen, you have a choice.

Presentation to the Board of Visitors
April 6, 2003
By: Rosemary Blieszner, Ph.D.[1]
Alumni Distinguished Professor
(Director of Strategic Planning, 2000-2001)

Mr. Rector and members of the Board of Visitors:

I am speaking today on behalf of more than 5,000 faculty and staff at Virginia Tech.

In 1873, one year after the founding of this institution, the British statesman Benjamin Disraeli said, “A university should be a place of light, of liberty, and of learning.” Today, I join with other members of the University community in asking you to acknowledge, formally recognize, and continue our heritage and tradition in pursuit of these goals.

I use the term “community” because a community is what we are and want to be—a richly diverse group of people of differing racial, ethnic, and national heritage, varying socioeconomic backgrounds, and a wide range of ages.

The heart and soul of a university is a community that champions a diversity of people and ideas. Our University community has been a place of light, liberty, and learning because of its varying expressions of culture, religious and political beliefs, sexual orientations, analytical perspectives and contributions, and ways of putting knowledge to work.

Unfortunately, many members of this community have been greatly distressed and demoralized of late, sharing a sense of shock, confusion, and dismay about what has seemed to be a growing separation between the University community and its leadership.

As the former President of Yale University, Kingman Brewster, said in his inaugural address in 1964, “Universities should be safe havens where ruthless examination of realities will not be distorted by the aim to please or inhibited by the risk of displeasure.” At this University, a broad cross-section of faculty and staff have regularly joined together with their leaders in undistorted examinations of realities by devoting many hours to university governance. This widely representative system was designed to affirm the free and open deliberation of all policy issues, which is essential to preserving the university as an institution. All who participate come to understand that the process through which policy development takes place is an integral part of the content of that policy, and a determining feature of its legitimacy.

You will recall, for example, the revised University Strategic Plan that the Visitors approved in 2001. The steering committee that helped create that document included administrators, faculty, staff, students, and alumni, all consulting with their constituent groups, to work toward establishing guidelines for achieving President Steger’s vision for Virginia Tech. That process was wholly inclusive and resulted in goals and objectives that the University community pursues together. Likewise, the Board approved updated mission, vision, and values statements that emerged from the same kind of collaborative process, and guide our actions today.

---

[1] With appreciation to Gary Downey for editorial assistance.

You have already seen the resolution passed recently by University Council, which includes members from the entire community, asking the Board to rescind the March 10 resolutions and reinstate the prior University policies on non-discrimination, admissions, hiring, and free speech. In addition, in just the past few days, more than 1,100 faculty, students, staff, and alumni[2] have signed a petition asking for the same reconsideration, and for involvement of the entire University community in any future discussion of these policies.

On behalf of faculty and staff, I echo these petitions and ask you to rescind the resolutions. At the same time, in the spirit of the statements by both Disraeli and Brewster, I ask you to go one step further. On behalf of the University community as a whole, I request that Board members actively, openly, and straightforwardly rejoin us, rejoin the University community, by renewing your commitment to the ethic of openness and the practice of positive collaboration that has for so long characterized this University's pursuit of light, liberty, and learning.

Thank you.

[2] As of 4/5/03, the petition had garnered 1,116 signatures, including 237 faculty, 766 students, 56 staff,
30 alumni, and 20 others.

Attachment E

Presentation to the Board of Visitors
April 6, 2003
By: Ms. Meredith Katz, Graduate Student Assembly

Mr. Rector, Members of the Board of Visitors, students, faculty, and friends,
Throughout the recent weeks the graduate community, along with the university community, has been contemplating how the Board of Visitors resolutions passed on March 10 would affect our education at Virginia Tech. One conclusion we have arrived at is that graduate student life is distinctly different from that of undergraduate. Much of graduate education is aimed towards preparing the future professorette or corporate leader, both of which involve interacting and functioning in diverse environments

The students at Virginia Tech recognize the increasingly diverse and multicultural world in which we live. Many understand and embrace diversity as a central aspect of our lives. Diversity is also at the core of modern universities and must remain a top priority in order to ensure the best and most holistic education possible. Recognizing and embracing the need for diversity, the Graduate Student Assembly *unanimously* passed a resolution at our March 27th meeting stating our concern that Virginia Tech remain a university in which diversity, of all races and all sexual orientations, is encouraged and welcomed. Members of the Board, I would also encourage you to revisit the resolution to address the specific concerns of the graduate community.

Diversity remains a central facet of life for the graduate community at Virginia Tech beyond the classroom. Of the 4400 graduate students at the Blacksburg campus of Virginia Tech, 1446 of them are international students. The invaluable perspectives, life experiences, differing cultures and views these individuals contribute to our education is immeasurable.

Being able to interact with diverse individuals has become a central and invaluable aspect of life. Virginia Tech's goal to provide it's students with a competitive and comprehensive education is commendable, but this goal cannot be met without a curriculum, Board of Visitors, university community, and individuals that embrace and interact within a diverse environment. We fully recognize the impact and severity of the budget cuts Virginia Tech is facing, however, we feel that the university should continue to support and increase diversity programs and initiatives.

While graduate student education has distinctly different goals than undergraduate, we share one commonality and that is our need to be educated in an environment that prepares us for the diverse world we *will* encounter upon leaving Virginia Tech. Diversity in education is not only beneficial, it is essential. I hope we all, undergraduate students, graduate students, faculty, staff, administration, and Board of Visitors, do recognize the invaluable contributions of maintaining and further encouraging Virginia Tech as an openly inclusive, welcoming, and diverse environment. Thank you.

Meredith Katz
April 6, 2003

Presentation to the Board of Visitors
April 6, 2003
By: Dr. Bevlee Watford, Associate Dean, Academic Affairs, College of Engineering

Board of Visitors, faculty, staff, students and friends of Virginia Tech. I have two perspectives that I will present today: as a member of the Committee for Diversity in the Engineering Workforce reporting to the National Academy of Engineering and as the Associate Dean for Academic Affairs in the College of Engineering. Both perspectives will address the need for a diverse learning environment at Virginia Tech. Both present compelling arguments in favor of our institution creating this environment utilizing means that do not ignore existing federal and state laws.

The goal of the Committee for Diversity in the Engineering Workforce is increasing the participation of underrepresented groups in the engineering profession. The National Academy is arguably the most prestigious engineering association in our country. As stated by William Wulf, president of the National Academy:

"The subject is the absolute necessity for diversity in the engineering work force. A lot of people argue for diversity in terms of fairness. Others argue in terms of simple numerics: that to meet the need for engineers we will have to attract women and underrepresented minorities. There is a far deeper reason why we require a diverse work force. Engineering is profoundly creative. As in any creative profession, what comes out is a function of the life experiences of the people who do it. Sans diversity, we limit the set of life experiences that are applied, and as a result, we pay an opportunity cost - a cost in products not built, in designs not considered, in constraints not understood, in processes not invented."

Now for my own words. To educate our students, we must be cognizant of the need for a diverse environment. We prepare young minds to enter the workforce; an incredible responsibility. We acknowledge that these students will largely determine the quality of life that each of us and our children will experience. By limiting the participation of all students in addressing the technological challenges of the future, we run the risk of limited solutions. Furthermore, if we are not able to provide students with practice opportunities to create solutions that consider all aspects of our society, simply because all aspects are not fully represented here - this is a disservice to our students.

As Associate Dean for Academic Affairs in the College of Engineering, I have responsibility for many aspects of undergraduate education. Shortly after I began working here, a representative of Procter and Gamble visited Virginia Tech to inform us of why they would no longer be seeking to employ our graduates. His message was chilling. He stated that the pool of graduating students was not diverse enough to warrant his attention. Let me repeat this message – our pool of academically talented engineering graduates would no longer have the opportunity to seek entry level positions with Proctor and Gamble because Virginia Tech had failed to provide the diverse educational environment they deemed essential to producing outstanding engineers. We lost a vital link with a large corporation, one that represented jobs for our students and support for our engineering programs, because we failed to produce a sufficiently diverse pool of engineering graduates.

Since that time, we have successfully restored that relationship through proactive university and college efforts. Corporations have noted our efforts and success in

increasing diversity, and now support our educational programs and hire our students. But we have an uphill battle here. The Engineering Workforce Commission states that in 2002, 68,648 students earned engineering degrees. Of these, 11.4 % are Asian, 6.3% are Hispanic, 4.9% are African American and 0.5% are Native American. Corporations know that it is our responsibility to improve these numbers. They expect it to happen.

I am distressed that recent actions have sent a disturbing message to the future employers of our students. Conversations with General Electric, Honeywell International, Lockheed Martin, (and I could go on) indicate deep concern about our ability to continue providing a diverse pool of students from which to hire. Company representatives, many of whom are VT alumni working diligently to keep our university on the "A" list of their companies, are concerned that they will no longer be able to recruit here. This is not just a personal opinion; this is what senior company administrators are telling them.

In a brief filed before the Supreme Court, the corporate perspective of IBM (as one example) is as follows: "IBM's success is a direct result of its diverse and talented workforce. Diversity is a business imperative. IBM depends upon institutions of higher learning to train the scientists and engineers whom it employs. The ability to identify and hire well-qualified candidates to meet its needs is critical to success. IBM relies on these institutions to provide a diverse pool of technical talent."

I hope you will appreciate how essential it is for Virginia Tech to create, and maintain a diverse environment, one which does not compromise academic standards as the cost of diversity. WE ARE Virginia Tech, the home of the Commonwealth's leading College of Engineering; and striving to be a top 30 University**.** We will not <u>ever</u> compromise our academic standards. We do not have to. Again, quoting William Wulf;

- Conscious attention to race as a factor in admissions does not compromise the principle of merit in the selection of students or the high standards for academic excellence to which our colleges and universities aspire.

The future of our nation's technological success depends on the availability of a diverse group of bright minds to address increasingly difficult problems of our time. Virginia Tech must step forward and address this issue, setting the standard for others to follow.

Thank you for your time.

Bevlee Watford

Attachment E

Presentation to the Board of Visitors
April 6, 2003
By: Major General Jerrold Allen, Commandant, Corps of Cadets

Good afternoon.

My perspective on affirmative action is based on my 32 years of active duty as an Air Force officer.

The armed forces of our nation have integrated with great success. Affirmative action is the key reason the percentage of African American officers increased by nearly 500% during the time I was on active duty.

Why is this important? Our enlisted forces are very diverse racially. For our force to be cohesive, we need a diverse officer corps. And we need our officers to be educated and trained in diverse settings. This isn't just my opinion. Recently two former secretaries of defense, three chairmen of the Joint Chiefs, and some 20 other generals and admirals made this argument in a brief submitted to the Supreme Court. They argue that to properly provide for our national defense, the Nation needs affirmative action policies at our colleges and universities.

Fortune 500 corporations agree. Microsoft, Coca-Cola, General Electric, and 60 more corporations have told the Supreme Court that they support affirmative action because racial and ethnic diversity on university campuses is vital to the companies' abilities to maintain a diverse work force… and to succeed in the global marketplace.

The Army, Navy, Marines and Air Force pour about $6M per year into Virginia Tech for scholarships, stipends, and ROTC instructor salaries. The services expect that their ROTC cadets will learn and train in a diverse setting at Virginia Tech. Those Secretaries of Defense, Chairmen of the Joint Chiefs, Generals and Admirals I mentioned just a minute ago support my view that affirmative action is needed to make the expectation of diversity a reality-- right here on our campus.

Thank you.

General Jerry Allen
Commandant of Cadets

April 6, 2003

Virginia Tech
VIRGINIA POLYTECHNIC INSTITUTE
AND STATE UNIVERSITY

Christian J. Rieser
Graduate Student Representative to the Board of Visitors

E-mail: cjrieser@vt.edu

March 28, 2003

Dear Fellow Members of the Virginia Tech Board of Visitors,

In my position as the Graduate Student Representative to the Virginia Tech Board of Visitors the Graduate Student Assembly (GSA) has requested that I pass on the following letter and resolution from the GSA. The GSA serves as the central voice and representative body of graduate students on campus with representatives from every department and college.

Sincerely yours,

Christian Rieser
Graduate Student Representative to the Board of Visitors

CC: President Steger, Provost McNamee, Kim O'Rourke, Minnis Ridenour

Graduate Student Assembly

Virginia Polytechnic Institute and State University

309 Squires Student Center - 0546
Blacksburg, Virginia 24061
http://gsa.uusa.vt.edu/
(540) 231-7919

March 28, 2003

Dear Ladies and Gentlemen of the Virginia Tech Board of Visitors,

REGARDING: GSA RESOLUTION TO THE BOV ON AFFIRMATIVE ACTION AND SEXUAL ORIENTATION

The Graduate Student Assembly (GSA) of Virginia Tech respectfully brings before you a resolution passed by the Delegate Body of the GSA during the March 27, 2003 meeting. GSA Resolution 2003.3 deals specifically with the recent BOV resolution regarding the discontinuation of affirmative action at Virginia Tech and the removal of the "sexual-orientation" clause from the university's diversity/mission statement. The GSA urges the BOV to reconsider the recent removal of affirmative action and the "sexual-orientation" clause. The GSA Delegate Body feels that reinserting these items into Virginia Tech's official mission and diversity statements, and other related documents, as well as implementation of affirmative action and an all inclusive non-discrimination policy will lead to a stronger, healthier university community.

This resolution was initiated, discussed, and passed unanimously by the graduate students within the GSA, with no initiation from outside the organization. I would hereby request that the BOV consider the request from the GSA, as stated in the resolution, and would rather let the document act as a statement of graduate student opinions and concerns, as opposed to further discussion from my side which might cloud these issues.

Your consideration in these matters are appreciated and valued.

Sincerely,

Jan A.N. van Aardt

President 2002-2003: Graduate Student Assembly of Virginia Tech

Cc: President Charles Steger, Provost Mark McNamee

GSA Resolution 2003.3
Resolution Charging the Graduate Student Assembly to Respond to the Board of Visitors' Non-Discrimination Resolution

WHEREAS, on March 10, 2003 the Board of Visitors of Virginia Polytechnic Institute and State University (Virginia Tech) passed a resolution titled, "Resolution Commending the President, Senior Administrators, and Legal Counsel of Virginia Polytechnic Institute and State University and Articulating the University's Policy Against Discrimination;" and

WHEREAS, this resolution stated that:

> "RESOLVED that Virginia Polytechnic Institute and State University shall not discriminate against, grant preferences in favor of, or otherwise weigh or consider a student's disability, age, veteran status, political affiliation, race, color, national origin, ethnicity, religious belief, or gender in awarding scholarships or other financial aid, or at any other point in the financial aid process. This prohibition includes, but is not limited to, the use of any quotas, goals, timetables, guidelines, or other devices that permit, encourage, or require such discrimination, preference, weighing or consideration (unless otherwise required by law, rule or regulation);" and

WHEREAS, the previous non-discrimination statement, replaced by this resolution, read:

> "Virginia Tech does not discriminate against employees, students, or applicants on the basis of race, sex, disability, age, veteran status, national origin, religion, political affiliation, or sexual orientation. The university is subject to Titles VI and VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Sections 503 and 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, the Age Discrimination Act in Employment Act, the Vietnam Era Veterans' Readjustment Assistant Act of 1974, the Federal Executive Order 11246, Governor Gilmore's State Executive Order Number Two, and all other rules and regulations that are applicable;" and

WHEREAS, these changes were made without public discussion in the regular channels of University Governance among students, faculty, staff, administrators and the Board; and

WHEREAS, the Graduate Student Assembly (GSA) of Virginia Tech is responsible for representing the graduate student body to the University, the Commonwealth of Virginia and the larger public and protecting their interests; and

WHEREAS the GSA supports measures which maximize the value, safety, and protection of all members of our graduate student body and community; and

WHEREAS the GSA, in compliance with the University's Strategic Plan for Diversity, supports race and gender conscious admissions programs; and

WHEREAS the GSA supports the upholding of free speech in the university community.

NOW, THEREFORE, BE IT RESOLVED that the GSA urges the Board of Visitors to revisit and reconsider the resolutions passed at the March 10, 2003 Board of Visitors meeting; and

BE IT FURTHER RESOLVED that the GSA urges the Board of Visitors to engage in public discourse with the university community regarding resolutions affecting the student body, faculty, staff, and university community; and

BE IT FURTHER RESOLVED that the GSA encourages the Board of Visitors to include sexual orientation in non-discrimination policies; and

BE IT FURTHER RESOLVED that the GSA encourages the Board to explicitly recruit, support, and welcome students, faculty, staff, and perspectives of diverse backgrounds.

Approved: 3/27/2003; GSA Delegate Body meeting
Unanimously (30 votes *For*; 0 *Against*; 0 *Abstentions*)

Attachment E.3

UNIVERSITY COUNCIL RESOLUTION 2002-03C
University Council Statement Regarding Board of Visitors Actions

First Reading, University Council: March 24, 2003
Approved by the University Council: March 24, 2003

WHEREAS, Virginia Tech has a long-standing culture of shared governance that involves faculty, staff, students, administration, and the Board of Visitors; and

WHEREAS, the university's shared governance consists of an array of committees, commissions, advisory councils and senates that originate resolutions to affect or change university policy, and that pass along these policy resolutions to University Council, which consists of a broad representation of administration, faculty, staff, and students, and serves as an advisory body to the president of the university; and

WHEREAS, resolutions passed by University Council are forwarded for consideration to the university president, who then presents to the Board of Visitors those resolutions that carry his endorsement and require Board approval; and

WHEREAS, the University community shares with the board a commitment to advancing the University and wishes to restate our desire to share ideas and work with the board; and

WHEREAS, on March 10, 2003, Virginia Tech's Board of Visitors introduced two resolutions during its meeting without prior notice, and proceeded to vote on these two resolutions without any public discussion or input whatsoever from the university community, thereby deviating from the Board's own established procedures, disregarding the university's shared governance system, and precluding any opportunity for input from members of the university who would be directly affected by those policies;

NOW, THEREFORE, BE IT RESOLVED that the University Council of Virginia Tech hereby formally expresses to the Board of Visitors its concerns as to the manner in which the following two resolutions were presented and passed by the Board, specifically: 1) the resolution establishing a policy for the approval of speakers/meetings within university facilities; and 2) the "Resolution Commending the President, Senior Administrators, and Legal Counsel of Virginia Polytechnic Institute and State University and Articulating the University's Policy Against Discrimination; and

BE IT FURTHER RESOLVED that the University Council requests the Board of Visitors reconsider the second resolution.

Attachment F

COMMONWEALTH of VIRGINIA

Office of the Attorney General
Richmond 23219

Jerry W. Kilgore
Attorney General

900 East Main Street
Richmond, Virginia 23219
804 - 786 - 2071
804 - 371 - 8946 TDD

April 3, 2003

CONFIDENTIAL – ATTORNEY-CLIENT COMMUNICATION

John G. Rocovich, Jr., Rector
Board of Visitors, Virginia Tech
Blacksburg, Virginia

Dear Mr. Rector and Members of the Board of Visitors:

On December 15, 2002, in response to advice from this Office, the Virginia Tech Board of Visitors adopted a resolution directing that the university be in compliance with federal and state laws, regulations, rules, and opinions of the Office of Attorney General with regard to the recruitment, admission, and support of students. In response to that directive, many administrators and department heads have provided us with information about their recruitment, admission, scholarship, and other support programs. While we have not yet received information from all programs, we have reviewed the information provided thus far.

We have evaluated the lawfulness of racial preferences in the reported programs as well as the legal risks associated with continuing such preferences. In conducting this review, we have examined the facts reported to us in light of the law as explained in our legal memorandum issued to you on April 22, 2002 ("April 2002 Memo") and the follow-up advice letter issued to you on November 26, 2002 ("November 2002 Letter"). The purpose of this letter is to advise you of our conclusions to date.

1. Some Programs Have Not Provided the Requested Information.

Some programs did not provide us with the information requested by the Board. For example:

- The Office of Undergraduate Admissions provided no information on whether – or how – it considers race in determining admission to Virginia Tech. This omission is of particular concern because, according to published news reports, Virginia Tech has previously used race as a factor in admissions. *See* K. Miller, "Race Won't Factor Into Admissions, Tech Says Ruling Will Bring

Changes," *Roanoke Times* (March 13, 2003) (quoting Karen Torgensen, director of undergraduate admissions, as saying, "We have a lot of different factors we use in making admission decisions, and certainly race and gender are two of the factors we consider.")

- The Office of Financial Aid also provided no information. This is a concern because other university-related offices administer scholarship programs that are racially exclusive or that use different criteria for different races. These include, for example, the Alfred Knobler Scholarship (set aside for African-Americans) and the C.B. Lin Memorial Scholarship (states a preference for applicants of Chinese descent), administered by the Virginia Tech Foundation.

- Similarly, the University Development Office acknowledged that it needed to report "all Virginia Tech Foundation endowments/accounts that have race-based components in the guidelines for usage." *See* Memo to Office of the General Counsel from R. Arsenault, Jan. 30, 2003. However, no such listing has been provided.

- We have seen references to "minority fellowships and assistantships" administered by the Graduate School; however, we have not received any information from the Graduate School reporting these programs.

Without the requested information, we have no basis for assuring you that these programs are lawful.[1]

---

[1] Additionally, we received no information from the Registrar's Office, the Office of Interdisciplinary Studies; from the Departments of Agricultural Engineering, Agronomy, Animal Science, Biochemistry & Nutrition, Crop & Soil Development, Dairy Science, Entomology, Forestry & Wildlife, Poultry Science; from any of the departments within Architecture & Life Sciences; from the Departments of Art & Art History, Communications Studies, Humanities, International Studies, Religion; from most of the departments within the College of Engineering; on from Planning, Public Service, and Research.

2. Some Programs Use Racial Set Asides or Racial Quotas.

Some of the programs we examined use racial set asides or racial quotas. That is to say, participation in the program is limited to members of particular racial group(s), or certain seats or spaces in the program are reserved for members of particular racial group(s), or the selection criteria varies, depending on whether the applicants are members of particular racial group(s). Persons outside of the favored racial group(s) need not apply for the programs; or they will not be allowed to compete for some seats or spaces; or, they will be subjected to more stringent selection criteria than persons in the favored group(s).

As we explained in the April 2002 Memo, the Fourth Circuit has struck down racial preferences in program admissions where "[t]he race/ethnicity factor grants preferential treatment to certain applicants based *solely* on race." April 2002 Memo at 18 (emphasis added) (quoting *Tuttle v. Arlington County School Board*, 195 F.3d 698, 707 (4th Cir. 1999)). Moreover, such racial quotas and set asides were clearly rejected in *University of California v. Bakke*, 438 U.S. 265 (1978). Even though *Bakke* is considered the leading case supporting the use of race in the context of higher education, the Court explicitly held that a state university could not reserve spaces in a particular program for particular racial groups. As Justice Powell explained:

> [I]t is evident that the Davis special admissions program involves the use of an explicit racial classification never before countenanced by this Court. It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats. At the same time, the preferred applicants have the opportunity to compete for every seat in the class.

Bakke, 438 U.S. at 319-20 (Powell, J., announcing the judgment of the Court). In other words, a public university may not say that some residency positions, some

assistantships, or some spaces in a particular class must go to members of particular racial groups.[2]

3. Some Programs Use Race as "One Factor" But Are Not "Narrowly-Tailored" to Achieve a "Compelling Interest".

Some of the programs we examined appear to be based on the mistaken belief that racial preferences are permissible so long as race is only "one factor" used in program decision-making. This is not the law. As we explained in the April 2002 Memo, a racial preference cannot survive constitutional challenge unless it (a) serves a compelling state interest, and (b) is narrowly tailored to further that interest. *See* April 2002 Memo at 2. Some of the programs at Virginia Tech fail one or both parts of this test.

Compelling Interest: In the absence of controlling legal authority to the contrary, we have followed the lead of the Fourth Circuit and have simply assumed that "diversity" is a compelling state interest. *See* April 2002 Memo at 14. But we have also been clear about what diversity is – and what it is not. Diversity means a student body composed of persons drawn from a variety of different backgrounds, life experiences and qualities so as to enhance the exchange of ideas. April 2002 Memo at 15 (citing opinion of Justice Powell in *Bakke*). Diversity does *not* mean "racial balancing" nor does it mean "compensating for present or past discrimination by society at large." *See* April 2002 Memo at 15 (quoting *Freeman v. Pitts*, 503 U.S. 467, 494 (1992); *Tuttle*, 195 F.3d at 705). Moreover, diversity is not solely a question of racial or ethnic diversity. As Justice Powell explained, "a program focused *solely* on ethnic diversity... would hinder rather than further attainment of true diversity." *Bakke*, 438 U.S. 315 (emphasis added).

While some Virginia Tech administrators used the word "diversity" in explaining their programs, they do not use the word in the sense that is assumed to be a compelling interest. Instead, they aim at "diversity" in a sense that the courts have already ruled is *not* a compelling interest. That is to say, their aim is achieving racial balance for its own sake, or changing the racial mix of persons going into particular professions or fields of study, or ameliorating perceived past or present discrimination by society at large. Moreover, rather than focus on diversity in the broad sense, some programs have focused

---

[2] The university conducts several communication programs directed at persuading minority students to apply or to accept admission. So long as these programs do not provide an advantage in terms of admissions or financial aid or other tangible benefits, they *may* constitute an exception to the general rule banning racial set asides

solely – or almost solely – on racial or ethnic diversity. None of these purposes represents a compelling interest, and none can justify the use of racial preferences.

Narrowly Tailored: Even where a program aims at diversity in the true sense, the use of racial preferences still must be narrowly tailored. As we noted in our previous memoranda, the Fourth Circuit has adopted a five-part test for determining whether race-conscious measures are narrowly tailored to achieve diversity. *See* April 2002 Memo at 16 (quoting *Tuttle*, 195 F.3d at 706). The first and, we believe, most important of these five factors is "the efficacy of alternative race-neutral policies." *Id.*[3] In other words, are racial preferences really necessary to achieve diversity, or can diversity be achieved in some other way? If a program has no experience with race-neutral measures – and no reliable study about their likely effects – it will likely be difficult to persuade a court that racial preferences are necessary. The problem is compounded by the fact that there seem to be race-neutral measures available that would benefit many minority applicants – along with some non-minority applicants – and that would be perfectly constitutional. *See* April 2002 Memo at 22-23. Many of the programs we examined that use racial preferences would likely be hold unconstitutional because no effort has been made to use or study race neutral measures.

4. Some Programs Fail to Comply with State Law.

As previously explained, in addition to surviving constitutional scrutiny, any race-conscious program administered by a public college or university must also conform to state law. Virginia Code § 23-7.1:02 provides:

> Participation in and eligibility for state-supported financial aid or other higher education programs designed to promote greater racial diversity in state-supported institutions of higher education shall not be restricted on the basis of race or ethnic origin and any person who is a member of any federally recognized minority shall be eligible for and may participate in

---

[3] The five factors are: (1) the efficacy of alternative race-neutral policies, (2) the planned duration of the policy, (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population or work force, including the provision of waivers if the goal cannot be met, (4) the flexibility of the policy, and (5) the burden of the policy on innocent third parties. *See Tuttle*, 195 F.3d at 707.

> such programs, if all other qualifications for admission to the relevant institution and the specific programs are met.

Therefore, any diversity program that involves classifications on the basis of race must be open to all federally recognized minorities.[4] Even where discrimination among minorities might be *constitutionally* permissible, this statutory provision limits the discrimination that may be employed. *See* April 2002 Memo at 20-21.

5. Constitutionally Problematic Programs.

Based on the information provided, we have identified several programs at Virginia Tech where we believe the reported racial preferences are unconstitutional. In some cases, the racial preference takes the form of a set aside or quota. In other cases, the program fails to use narrow tailoring to pursue a compelling interest. In still other cases, the information is insufficient to permit a conclusion that the racial preference overcomes the presumption of unconstitutionality. Some of the programs also appear to violate Virginia Code § 23-7.1:02. The programs thus far identified are as follows:[5]

- Admission to the MBA Program in the College of Business: In the information provided, the College states, "we consider race in reviewing an application for admission to the MBA program." The College further states that "in recent years, African-American and Hispanic students have been underrepresented and therefore given preference." The law is clear that correcting such "underrepresentation" (*i.e.* racial balancing) is not a compelling governmental interest. Additionally, the College reports that no effort has been made to obtain diversity through race-neutral measures. Finally, the limited scope of minorities favored in admission violates Virginia Code § 23-7.1:02.

- Minority Study Abroad Scholarships within the College of Business: This program provides $1,000 scholarships to minority students. In our view, it is an unconstitutional racial set aside. That the source of program funding and racial

---

[4] The U.S. Department of Education, Office of Post Secondary Education, recognizes seven minority groups. *See, e.g.*, 34 C.F.R. 364.4 ("Minority student means a student who is Alaskan Native, American Indian, Asian American, Black (African American), Hispanic American, Native Hawaiian, or Pacific Islander.").

[5] The omission of programs from this list does not imply a conclusion that they are lawful.

preference may originate with private sources is irrelevant as long as the institution is engaged in administration of the program.

- Minority Internship in Small Animal Medicine and Surgery within the College of Veterinary Medicine: Now suspended, this was a one-year clinical training program "with one position designated for ethnic minority candidates" to prevent "underrepresentation" in the pool of veterinary specialists. This is an unconstitutional racial set aside.[6]

- The Alfred Knobler Scholarship is set aside for African-American students; and the C.B. Lin Memorial Scholarship states a preference for applicants of Chinese descent. While it may be possible to use financial aid as a means of enhancing diversity, the use of racial set asides in the realm of scholarships is likely to be unconstitutional, just as set asides are unlawful in the realm of admissions.[7] Moreover, the information provided to us thus far does not permit the conclusion that any racially preferential scholarships at Virginia Tech would pass the narrow tailoring test. Both of these scholarships are funded from private sources and are administered by the Virginia Tech Foundation; however, their connection with the university appears close enough to implicate constitutional equal protection concerns and, potentially, Virginia Code § 23-7.1:02.

- 4-H Scholarships: The Extension office advises that up to four 4-H scholarships have been awarded per year for students who are "racial or ethnic minorities, economically disadvantaged, or first generation college students." While little information has been provided about these programs, it appears that *all* racial or ethnic minorities may be eligible, but that whites are eligible only if they are "economically disadvantaged or first generation college." This use of different criteria for different races also raises constitutional concerns. And, again, the information provided to us thus far does not permit the conclusion that any racially preferential scholarships at Virginia Tech would pass the narrow tailoring test.

---

[6] Another program in the school of veterinary medicine – Diversity Scholarships – was more difficult to assess and we have not reached a clear conclusion regarding its legality.

[7] *See e.g., Podberesky v. Kirwan*, 38 F.3d 146 (4th Cir. 1994) (invalidating a "remedial" scholarship at the University of Maryland that was limited to African-American students).

- Minority Academic Opportunities Program (MAOP): This program has several components, including an undergraduate program, a graduate assistant program, and a summer internship program.[8] All components are either race exclusive or exclude whites who are not economically disadvantaged, first generation college, or from Appalachia. In all components of MAOP, the racial preferences are based on the fact that the rates at which minority groups enroll in Virginia Tech (and in certain Virginia Tech fields of study) have historically been much lower than their representation in the general population or among high school graduates (or in other Virginia Tech fields of study). That is to say, the purpose of the racial preferences is to promote racial balancing, which is not a compelling governmental interest. Some aspects of MAOP (*e.g.* MAOP Graduate Program and MAOP Alliance for Minority Participation) appear to exclude Asian-Americans and thus violate Va. Code § 23-7.1:02.

- Graduate Admissions in the Department of Biology: The only sort of diversity addressed in the program's admissions policy is racial and ethnic diversity. Thus, it does not aim at attaining "true diversity" as described by Justice Powell in *Bakke*. If challenged, it is likely to be held unconstitutional. By excluding Asian-Americans, this program also appears to run afoul of Va. Code § 23-7.1:02.

- Virginia Bioinformatics Institute: Several grants awarded to this Institute within the last two years dictate participation by "underrepresented groups, including minorities." Such racial set asides are not permissible even where funded and demanded by outside sources.

- The BRIDGE Program: This program includes a one-week summer residential experience for new students and on-going tutoring support and academic enrichment during the academic year. It is limited to "underrepresented" racial groups and, as such, constitutes a racial set aside.

---

[8] Another component involves participation in federally-funded research programs. To the extent that these federal programs may require racial preferences, they raise questions under the equal protection component of the Fifth Amendment. *See Adarand Constructor's Inc. v. Peña*, 515 U.S. 200 (1995).

6. Some Programs Appear to be Race-Neutral.

Based on the information reported to us, many departments apparently do not use racial preferences. Such a race-neutral policy is manifestly lawful, and we have not undertaken any further inquiry with respect to these programs.[9]

One reported race-neutral program merits comment. Virginia Tech's Talent Search Program focuses its efforts on ensuring that low-income and potential first-generation college students receive assistance to prepare them for post-secondary-education. Selection for participation is entirely race neutral. All eligible students showing a need have an equal chance of being accepted into the program. Although race-neutral, the program succeeds in attracting a racially diverse group of participants. In the last three years, the Talent Search has served, *inter alia*, 499 white students and 286 African-American students. The program reports that it has succeeded in recruiting 70% of its participants to Virginia Tech. These results underscore the viability of race-neutral measures to achieve the institution's diversity goals and belie the need to rely on racial preferences to attract a diverse student body. *See also* April 2002 Memo at 22-23 (suggesting use of race-neutral alternatives, such as first generation college applicant or graduation from low performing high school).

Conclusion

In sum, our review of the information submitted to us reveals an array of racial preferences that likely – and, in some cases, clearly – violate applicable legal standards. Other problems may be found in the materials not yet provided to us. The Board's March 10, 2003 resolution mandating racial neutrality – once implemented by the administration

---

[9] The Departments or programs that report they do not use race-conscious measures are as follows: The Departments of Plant Pathology, Physiology, and Weed Science; Agricultural and Applied Economics; Horticulture; Chemistry; Economics; Geography; Geological Science; History; Music; Philosophy; Political Science; Psychology; Sociology; Statistics; Theatre Arts; the Corps of Cadets; the Virginia Water Resources Research Center; the Institute for Distance and Distributed Learning; the Departments of Biological System Engineering, Aerospace & Ocean Engineering, and Engineering Science & Mechanics; Student Affairs, including housing, residence life, dining, Judicial Affairs, Fraternities, and Sororities; the Admission program of the College of Veterinary Medicine; and the Office of University Relations.

– would cure the problems we have described as well as any similar problems that may exist. On the other hand, rescinding that resolution – without more – could be perceived as ratifying and reviving these unlawful practices, thereby exposing Virginia Tech – and possibly individual Board members – to liability.

Please be assured that our Office stands ready to assist the Board in developing lawful strategies to accomplish its academic objectives.

Sincerely,

William H. Hurd
State Solicitor

cc: Charles W. Steger, President
Honorable Belle S. Wheelan, Secretary of Education

Virginia Tech
VIRGINIA POLYTECHNIC INSTITUTE
AND STATE UNIVERSITY

Office of Undergraduate Admissions

201 Burruss Hall, Blacksburg, Virginia 24061
(540) 231-6267 Fax: (540) 231-3242
E-mail: vtadmiss@vt.edu; Web: www.admiss.vt.edu

December 10, 2002

Admissions Requirements Overview

Admission to Virginia Tech is considered to be competitive. This past year 17,800 freshman applications were received for a class of 4675.

The most important factor considered in the admissions process is a student's academic performance. Applicants are looked at within the context of their own school; we do not compare students across school systems. It is important that students challenge themselves with the courses available to them in their high schools. If Advance Placement, International Baccalaureate, or Honors courses are available, then it is expected that the applicant has taken those challenging courses commensurate with their academic ability. It is also expected that the student will be successful with their coursework. Applicants who are offered admission tend to be solid B+ students in their academic courses. The average unweighted high school GPA for this year's freshman class was a 3.60.

Standardized test scores are also taken into consideration. Virginia Tech accepts either the SAT or ACT. Strong academic performance can compensate for weak standardized test scores. However, strong test scores **will not** compensate for a weak academic performance. The average SAT for this year's freshman class was an 1191. The middle 50% of the class had scores of 1110 to 1290.

The application does allow for an optional personal statement. The applicant may use this opportunity to tell the admissions committee something about themselves, achievements to date, or their goals for the future. If there is something that may have impacted their academic performance in a negative way, then they are encouraged to take this opportunity to explain that situation.

The admissions committee also looks for what completes the student outside of the classroom. This could be in the form of participation in clubs and organizations, athletics, a job, community service, or work within the home.

There are additional factors that may be taken into consideration. These include but are not limited to:

Legacy
Intended major
Ethnicity
Geographic location
Athletic talents
Corps of Cadets
Talent in the Arts
First generation college attendee

Virginia Tech
VIRGINIA POLYTECHNIC INSTITUTE
AND STATE UNIVERSITY

Office of Undergraduate Admissions
201 Burruss Hall, Blacksburg, Virginia 24061
(540) 231-6267 Fax: (540) 231-2737
Web: http://www.vt.edu Email: vtadmiss@vt.edu

MEMORANDUM

January 20, 2003

TO Jerry Cain
General Counsel

FROM: Karen Torgersen, Director
Undergraduate Admissions

SUBJECT: Race-Conscious Programs

In accordance with a resolution adopted by the Board of Visitors on December 15, 2002, the following is information about programs administered by the Office of Undergraduate Admissions that have a race conscious component.

1) Virginia Tech's Presence at Specific College Fairs

2) Karen Torgersen, Director of Undergraduate Admissions
201 Burruss Hall
231-6267
torg@vt.edu

3) Karen Torgersen, Director of Undergraduate Admissions
201 Burruss Hall
231-6267
torg@vt.edu

4) Virginia Tech participates in college fairs that target specific minority populations. We pay a registration fee and send a representative to these programs to meet with prospective students. We participate in three fairs sponsored by the National Scholarship Service (NSSFNS) that target Black students. These fairs were in Richmond, VA, Washington DC, and Baltimore MD. We also participate in ALCANZA at George Mason University, which targets Hispanic students.

5) Does Not Apply

6) Does Not Apply

7) Does Not Apply

8) Does Not Apply

9) We measure success with this program by the number of successful contacts made with prospective students.

10) Does Not Apply

11) Does Not Apply

1) Phonathon

2) Karen Torgersen, Director of Undergraduate Admissions
201 Burruss Hall
231-6267
torg@vt.edu

3) Karen Torgersen, Director of Undergraduate Admissions
201 Burruss Hall
231-6267
torg@vt.edu

4) After the offers of admission have been mailed, current Virginia Tech students spend several evenings in the admissions office, phoning those minority students who have received an offer of admission. The prospective student populations targeted include Black, Hispanic, and American Indian.

5) With the limited amount of time available during the yield cycle, it is impractical to consider phoning all students who have been offered admission. It was decided that calls to our minority offers could have the biggest impact on their admissions decisions and the freshman class. Current Virginia Tech students gather in the admissions office during the week for about two weeks in late March, in the evenings. They are given lists of students who have been offered admission, along with phone numbers, major, and home address. Our volunteers then call these students between the hours of 6:00 and 9:00 and attempt to answer any questions the prospective students may have. If the students are not available a conversation with the student's parents often follows.

6) Does Not Apply

7) Does Not Apply

8) The Phonathon is conducted each spring, during the time we are attempting to bring in our freshman class.

9) Does Not Apply

10) Does Not Apply

11) Not Available

1) Gateway to Virginia Tech

2) Ray Williams, Assistant Director
201 Burruss Hall
231-6267
cwilliams@vt.edu

3) Karen Torgersen, Director of Undergraduate Admissions
201 Burruss Hall
231-6267
torg@vt.edu

4) The Gateway concept was developed during the 1980's as a way to make it easier for minority students and their parents to visit the Virginia Tech campus, after the students had been offered admission. It gives the students a taste of campus life by having them attend classes and spend the night in residence halls. The program then ties into the Senior Focus weekend program where all students who have been offered admission are invited. Originally this program only targeted Black students, but was expanded four years ago to also include Hispanic and American Indian students.

5) Students who have been offered admission are invited to campus. In some instances we provide them with transportation by having buses available in the Northern Virginia, Hampton Roads, and Richmond area. Or, many students come to the program with their parents. We provide the students with housing by having them stay with a current Virginia Tech student in a residence hall and we also provide them with some meals.

6) The admissions office is not in a position to be able to provide a program of this magnitude to all students offered admission. So, instead we focus on a population that the University is interested in growing. A similar visitation program is conducted by the Virginia Tech Corps of Cadets.

7) Does Not Apply

8) Does Not Apply

9) Does Not Apply

10) Does Not Apply

11) For each of the last two years, we have had about 110 students participate. Of those students participating, approximately 15 were Hispanic and 4 were American Indian. The rest of the students were Black. This program is open to all minority students who have been offered admission.

1) Push Mailing for Open House

2) Ray Williams, Assistant Director
201 Burruss Hall
231-6267
cwilliams@vt.edu

3) Karen Torgersen, Director of Undergraduate Admissions
201 Burruss Hall
231-6267
torg@vt.edu

4) Black students who's names were in the admissions data base were sent a letter prior to each of the Fall's Open House weekend programs reminding them of the program and encouraging them to attend. The university wanted to see an increase in Black attendance at the fall open house programs.

5) All prospective students in the admissions database who were Black, were sent a reminder for the Fall Open House programs.

6) With additional encouragement, it was felt that more Black students, along with their families, would attend Virginia Tech's open house programs. Experience has been that there are some misconceptions about the community of Blacksburg and Virginia Tech among Black students and that the best way to put aside those fears is to actually have the families visit. The extra mailings were enough to have many additional families pay the campus a visit.

7) Does Not Apply

8) Does Not Apply

9) Does Not Apply

10) Does Not Apply

11) Does Not Apply

1) Video Mailings

2) Karen Torgersen, Director of Undergraduate Admissions
201 Burruss Hall
231-6267
torg@vt.edu

3) Karen Torgersen, Director of Undergraduate Admissions
201 Burruss Hall
231-6267
torg@vt.edu

4) Four years ago, the Office of Undergraduate Admissions received a grant to develop a video to send to Black students who had been offered admission. The video "Virginia Tech Direct" was completed three years ago and is now sent to every Black student once they have been offered admission. The video "Picture Yourself at Virginia Tech" is mailed to all out-of-state students who have been offered admission.

5) Does Not Apply

6) Does Not Apply

7) Does Not Apply

8) Does Not Apply

9) Does Not Apply

10) Does Not Apply

11) Does Not Apply

Attachment H: Non-Discrimination Statement

Policy Memorandum No. 112

Recommended by the Commission on Undergraduate Studies
Approved by University Council: February 4, 1991
Approved by the President: February 4, 1991
Effective: Immediately

The University Council, on recommendation of the Commission for Student Affairs, approved a resolution that adds the phrase "sexual orientation" to the university's non-discrimination statement. This action reflects the university's commitment to nondiscrimination in its admissions and employment practices. The revised statement will appear in the undergraduate and graduate catalogs, in UNIVERSITY POLICIES FOR STUDENT LIFE, and in appropriate materials given to new employees at the time they are hired. Any individual who feels he or she has suffered discrimination for this, or any reason, is urged to contact the Office of Equal Opportunity/Affirmative Action.

Following is the text of the resolution as adopted by Council.

WHEREAS the current Equal Opportunity/Affirmative Action policy, in compliance with federal and state civil rights legislation, provides protection against employment, admissions, and housing discrimination on the basis of race, national origin, sex, handicap, age, veteran status, religion or political affiliation, and

WHEREAS recent statistics have shown that gay, lesbian, and bisexual students, faculty and staff are the subject of frequent and overt harassment and discrimination at universities nationwide, and

WHEREAS in recognition of the "University of the 21st Century" programs, such discrimination and harassment is not permissible at an institution of higher learning,

LET IT THEREFORE BE RESOLVED that the current Equal Opportunity/Affirmative Action policy, which reads:

> *Virginia Tech does not discriminate against employees, students or applicants on the basis of race, sex, handicap, age, veteran status, national origin, religion, or political affiliation. . .*

Be revised to read:

> *Virginia Tech does not discriminate against employees, students or applicants on the basis of race, sex, handicap, age, veteran status, national origin, religion, political affiliation or sexual orientation.*

AND, BE IT FURTHER RESOLVED that in matters of conflicting jurisdiction with agencies of the United States government that this policy not be binding.

JDM:lsg

President's Policy Memorandum

Attachment I

RESOLUTION RESCINDING THE "RESOLUTION … ARTICULATING THE UNIVERSITY'S POLICY AGAINST DISCRIMINATION" ADOPTED BY THE BOARD OF VISITORS ON MARCH 10, 2003

WHEREAS, Virginia Tech's Strategic Plan 2001-06, approved unanimously by the Board of Visitors in August 2001, includes goals of increasing the diversity of the student population and welcoming and nurturing diversity of people and ideas at the University; and

WHEREAS, Virginia Tech is now and always has been committed to a policy that prohibits discrimination by Virginia Tech or any of its officers, employees, or students; and

WHEREAS, the Board of Visitors re-affirmed its resolve in a Resolution adopted December 15, 2002, on "University Policies Pertaining to the Recruitment, Admission, and Support of Students; Employment Practices; and the Involvement of all Segments of the University Community in the Operation of the University"; and

WHEREAS, the Board of Visitors approved the creation of a Commission on Equal Opportunity and Diversity at its March 10, 2003, meeting thereby demonstrating its commitment to inclusiveness; and

WHEREAS, at its March 10, 2003 meeting, the Board of Visitors also approved a "Resolution … Articulating the University's Policy Against Discrimination"; and

WHEREAS, the Office of the Attorney General of Virginia has since provided further clarification that the Fourth Circuit Court of Appeals has identified a "narrow tailoring" requirement in the event race is considered in the administration of University programs; other Circuits are split on whether race is a permissible factor to consider under the law; and it is expected that the United States Supreme Court will shed light on this issue when it rules on the pending cases on the University of Michigan student admission policy;

NOW, THEREFORE, BE IT RESOLVED that, in light of this further clarification received from the Office of the Attorney General of Virginia, the Board of Visitors hereby rescinds its "Resolution…Articulating the University's Policy Against Discrimination" adopted March 10, 2003; and

FURTHER, BE IT RESOLVED that the Board of Visitors re-affirms its commitment to the Resolution adopted December 15, 2002, on "University Policies Pertaining to the Recruitment, Admission, and Support of Students, Employment Practices; and the Involvement of All Segments of the University Community in the Operation of the University"; and

FURTHER, BE IT RESOLVED that, consistent with the spirit of the Board's resolution adopted on December 15, 2002, and the "Resolution to Establish the Commission on Equal Opportunity and Diversity" adopted on March 10, 2003, which demonstrate the Board's support for the inclusion of individuals from all segments of the university community, nothing in this action shall prohibit the university from issuing policies and procedures that further ensure diversity, provided such policies and procedures are in accordance with Federal and state laws and court rulings on these matters; and

FURTHER, BE IT RESOLVED that an ad hoc committee of the Board will be appointed and charged with reviewing recommendations developed by the university administration regarding the narrow tailoring legal requirement applicable to race-conscious programs and acceptable steps for achieving diversity in accordance with Federal and state laws and rulings of the United States Supreme Court, and for presenting these recommendations to the full Board at a future meeting.

RECOMMENDATION: THAT THIS POLICY BE ADOPTED.