

Diversity in College Admissions:

ISSUES FOR TRUSTEES



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Institute for Effective Governance



Diversity in College Admissions: ISSUES FOR TRUSTEES

by George R. La Noue

Efforts to achieve racial and ethnic diversity are commonplace on American college campuses. The Supreme Court has in turn approved limited consideration of race in college admissions. It behooves trustees, therefore, to acquaint themselves with the laws, issues, and policy options in this sensitive area. Trustees can help ensure that their colleges and universities adopt policies that foster sound educational objectives, while avoiding governmental intervention, negative media, ill will and litigation.

To assist trustees, the *Institute for Effective Governance* offers this booklet by Professor George R. La Noue, University of Maryland, Baltimore County.

In addition to teaching civil rights law and educational policy for over thirty years, La Noue has been a frequent trial expert in civil rights cases and a researcher on the race-neutral series in higher education published by the Office for Civil Rights of the United States Department of Education. The opinions expressed here are his own.

Defining Diversity

On most campuses, aside from a few that serve specific racial, ethnic or religious groups, there is a vigorous new commitment to achieving “diversity.” This goal is often reflected in mission statements, campus publications, new programs, and increasingly, in special administrative offices. Understanding the



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financial, political, and legal consequences of the diversity movement presents a formidable challenge for trustees.

For decades, there has been a consensus that exposing members of the campus community to diverse ideas and life experiences adds value to an education. For that reason, universities are organized around diverse disciplines whose topics and methodology for study vary greatly. Even within a discipline, specialists are hired in different areas and offer courses that cover a range of approaches. Interdisciplinary programs abound. Students are encouraged to take internships or study abroad or in other off-campus locations in order to bring them into contact with different cultures and give them a variety of experiences. Student organizations often reflect a spectrum of interests, and participation is considered an important supplement to formal classroom education.

These arrangements reflect the traditional commitment of American higher education to a diverse educational experience. What is different about the new diversity movement is its emphasis on seeking students, and to some extent faculty and staff, from diverse backgrounds. The theory is that campus community members learn from one another by interacting, and thus various groups should be singled out for admission into the community. Implementing this diversity goal is complex and sometimes controversial. It is important that trustees understand what is at stake.

An initial difficulty involves the choice of characteristics included within the definition of diversity. What human characteristics should be

considered worthy of special consideration and representation? On some campuses, the definition of diversity simply encompasses racial and ethnic affirmative action categories. That affirmative action definition is reflected in the diversity statistics the campus chooses to report. One consequence of this approach is that many groups worthy of campus representation are ignored. For example, “Vietnam-era veterans” is a protected category in federal law but rarely is included in campus diversity statistics because veterans are not a racial or ethnic group.

Other campuses have more expansive definitions of diversity and are overtly concerned with representing geography, socio-economic class, unusual life experiences and talents. Despite the educational rationale of linking diversity to contact with new ideas, religious, philosophical and political diversity seldom are explicitly sought. International students, faculty and staff might also add to a diverse campus community, but they too are not usually recognized as doing so. These are matters trustees might profitably review.

Once an acceptable definition of campus diversity is developed, trustees should be concerned with measurement and trade-offs. If, for example, having students from a widespread geographical area is thought to be an important part of diversity, then gathering and reporting only race/ethnic statistics is insufficient.

Policy trade-offs are always a concern and should be addressed candidly even where sensitive issues are involved. On some campuses, diversity is given so great an emphasis that normal budgetary priorities, academic standards,

and personnel goals are overridden. Re-examining traditional procedures may be a useful enterprise, but any trade-offs between normal academic standards and diversity should be carefully acknowledged and monitored. Admitting students with inferior preparation and ability who may not be able to graduate harms the students and may undermine the broader sense of fairness on the campus. Hiring faculty to achieve diversity, particularly if they are not well qualified, may create problems at tenure decision time and lead to cynicism about the campus commitment to merit. In a community in which members are repeatedly evaluated—students by grades and staff by annual assessments—decision-making on grounds unrelated to merit is problematic. Once academic standards are bent, it becomes hard to avoid a variety of requests for special treatment.

The diversity issue has somewhat different characteristics at each institution. Large public flagship universities have different opportunities and responsibilities than small liberal arts colleges. Urban campuses usually will have fewer or different diversity problems than rural campuses. It may be up to trustees to bring a dose of realism to the campus strategy. It may be no more possible for some colleges to compete consistently for the best and brightest African-American and Hispanic students than to recruit the most elite high school athletes. In both cases, success requires resources, reputation, and a sustained effort. Achieving diversity may require tough-minded evaluation of the actual character and status of the institution. For example, a Presbyterian liberal arts college interested in Asians may do better recruiting

Koreans, many of whom are Presbyterians, than Pakistanis, whose Muslim faith may make them uncomfortable at a Christian institution.

In fashioning a diversity policy, trustees need to be aware of the political agendas of the various stakeholders who seek to influence their decision. In some states, legislative caucuses or prominent politicians will be very clear about the specific diversity outcomes they seek. Campus officials may be hauled before legislative committees to explain why some specific numerical goal was not met. Community organizations may take it upon themselves to hold campuses “accountable” for ensuring that particular groups are represented. Accrediting associations often impose standards that require efforts to recruit racial and ethnic minorities in the name of diversity or in order to meet professional responsibilities. Campus student organizations may pressure to have the numbers of certain groups increased. Ethnic studies programs may have an interest in giving priority to diversity goals. Ambitious administrators may conclude that an increase in minority enrollment or staffing will be an asset in seeking their next job.

In short, on many campuses, the diversity question will be one of the most complex problems trustees face, and they cannot depend on receiving disinterested advice from the various constituencies.

Understanding the Law

If diversity is defined essentially or partly in racial/ethnic terms, the issue has important legal implications. In 2003, the United States Supreme Court, in two cases from the University of Michigan, considered the use of race as a factor in admissions, and badly split on the issue. Many boards, in anticipation or in the aftermath of *Gratz v. Bollinger*, 539 U.S. 244, and *Grutter v. Bollinger*, 539 U.S. 306, have already been briefed or have discussed some of the legal implications, but many questions remain. Federal guidance about the application of the decisions to institutions that receive federal funds and are thus bound by Title VI of the Civil Rights Act (which prohibits discrimination on the basis of race by recipients of federal assistance) has not been comprehensive.

Since it is unlikely that the Supreme Court will rule again in this area soon, institutions will need to proceed carefully before all the ground rules are known. Nevertheless, some implications of the *Michigan* cases are clear. There may also be some significant lower court rulings that will have to be taken into account.

The central holding in both cases is that there can be a “compelling interest” for an academic institution to consider race in making admissions decisions, provided the institution demonstrates a tangible educational benefit in doing so. What that demonstration must consist of, how institution-specific the proof must be, and how significant the particular education benefit must be may be fleshed out in future decisions.

Even if the institution can show it has a compelling interest, it still must convince courts that it has chosen a “narrowly tailored means” to achieve that interest. That means it must correctly define the affected groups, appropriately specify the size of the critical mass of students from those groups it wishes to admit, create an admissions process that makes decisions based on individual characteristics rather than on group-based characteristics, and, finally, seriously consider whether race-neutral policies can achieve its educational goals without resorting to racial preferences. In short, the Supreme Court’s narrow (*Gratz*, 6-3 and *Grutter*, 5-4) majorities resisted the litigants’ pleas for either an unqualified red light or green light for using race in admissions, instead providing a yellow light with lots of cautions.

If an institution chooses to increase access and diversity *without* using racial preferences, its program must only meet the so-called “rational basis” test. Only a good educational reason is required, for example, to create a partnership with inner city high schools or offer more financial aid to low income students, even if racial minorities disproportionately benefit. As a practical matter, given the standard of deference to academic judgments announced in the *Michigan* cases, such race-neutral programs are unlikely to face legal challenges.

Many campuses have provided special recruitment activities, orientations, academic services or even scholarships to minority students. These programs are questionable, if they create an exclusive benefit based on race. After talking to the Office for Civil Rights of the U.S. Department of Education or receiving com-

plaints from groups opposed to race-preference, several institutions, including Princeton and MIT, redesigned their programs to include students who are not racial or ethnic minorities. After public campuses in California, Florida, and Washington were required by state law to be race-neutral in their treatment of students, many programs were successfully restructured to create benefits for all students who needed them, such as all economically disadvantaged students.

The *Michigan* cases directly concerned admissions and that is where trustees will have to make difficult decisions. If race and ethnicity are to be involved in seeking diversity, then a number of questions will have to be answered.

1. First, each institution has to decide which specific groups will receive special consideration. There is an unresolved paradox in the *Michigan* cases between the concept of “under-representation” and a diversity of the kind of opinions, perspectives, and experiences relevant to education.

Depending on the population pool used as a reference point, a group might be present in large numbers on a campus, but still be underrepresented in community terms. On the other hand, a relatively small group could be overrepresented in population terms, but still not have a large enough on-campus presence to affect the campus dialogue.

There is also an issue of how group categories are defined. At the University of Michigan, for example, Asian-Americans were considered overrepresented and not

given preferences, but that is only because they were treated as a single category. If the Asian-American aggregate were broken up into separate groups, then Cambodians, Vietnamese, Samoans, etc., would each surely be entitled to preference in admissions.

2. Each campus has to decide what its diversity goal is in percentage terms and how much of a preference will be required to achieve that goal. The answer to both questions will probably be different for different groups. The Supreme Court apparently is willing to permit campuses to seek, loosely defined, a “critical mass” of minority students, but not to establish specific quotas. Drawing that fine a line may be difficult. Since the critical mass will be different at different institutions, trustees will need to ask how campus officials came up with the critical mass target number and whether it is defensible and practical for that campus.
3. Each institution should determine what combination of objective factors makes academic success, including graduation, probable. High disparities between admission rates and graduation rates for any group should raise a red flag.

Even if agreement can be reached on the above questions, campuses must still consider whether they can achieve diversity with race-neutral programs. Using race-neutral means before resorting to race preferences has been standard civil rights law for several decades. This concept was reflected in the *Gutter* decision where Justice O’Connor’s majority opinion said:

Universities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law, are currently engaged with experimenting with a wide variety of alternative approaches. Universities in other States can and should draw on the most promising of these race-neutral alternatives as they develop. *Grutter*, 123 S.Ct. at 2345.

In some lower federal courts, the requirement to consider race-neutral solutions first is quite unambiguous. For example, the Eleventh Circuit has declared: “If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem.” (*Engineering Contractors Association of South Florida v. Metropolitan Dade County*, 122 F.3d 895, 927 (11th Cir. 1997)).

In a case involving university admissions, that same circuit court wrote: “Race-based decision-making is at odds with the Constitution in any context, and before injecting race into the admissions process, a university should explore seriously and in good faith the wide variety of race-neutral measures that may enhance not only the overall diversity of the student body, but also racial diversity itself.” (*Johnson v. Board of Regents of the University of Georgia*, 263 F.3d 1234, 1254 (11th Cir. 2001)).

The Fifth Circuit, in Texas, likewise has found that: “A ‘race conscious remedy will not be deemed narrowly tailored until less sweeping alternatives—particularly race-neutral ones—have been considered and tried.” (*Walker v. City*

of Mesquite, 169 F.3d 973, 983 (5th Cir. 1999), quoting *Williams v. Babbitt*, 115 F.3d 657, 666 (9th Cir. 1997)).

The mid-Atlantic Fourth Circuit struck down a University of Maryland race-conscious scholarship program in part because the University “has not made any attempt to show that it has tried, without success, any race-neutral solutions to the retention problem.” (*Podberesky v. Kirwan*, 38 F.3d 147, 161 (4th Cir. 1994)).

In a post-*Michigan* case that accepts diversity as a legitimate interest for high school student assignments, the Ninth Circuit, nevertheless, invalidated the Seattle race-conscious assignment plan in part because the school board failed to take seriously race-neutral alternatives. The west coast court placed a specific responsibility on board members, saying there is a “constitutional requirement that the government earnestly appraise race-minimal alternatives prior to adopting race-conscious policies.” And such appraisal—whether with regard to the need for race-based action, or to the shape such action should take—must be taken on the record. (*Parents Involved in Community Schools v. Seattle School District*, 377 F.3d 949, 972 (9th Cir. 2004)).

In short, the lower federal courts prefer race-neutral policies where they are effective in achieving diversity.

If campuses or university systems are going to consider race-neutral means first, what policy tools are available? The Office for Civil Rights in the U.S. Department of Education has produced two very useful catalogues of race-neutral

programs called “Race-Neutral Alternatives in Post Secondary Education: Innovative Approaches to Diversity” (2003) and “Achieving Diversity: Race-Neutral Alternatives in American Education” (2004). They are available online at the U.S. Department of Education website, www.ed.gov. Forthcoming publications in this series will cover private undergraduate institutions and public and private graduate and professional schools. Trustees particularly interested in these issues would do well to read these publications. They contain many examples of successful programs and far more detail than can be provided here.

The two major race-neutral alternatives—increasing the pool of diverse students and selecting diverse applicants—are explored in the next two sections.

Race-Neutral Expansion of the Pool of Diverse Students

The major problem facing the diversity movement in higher education is the limited supply of well-prepared African-American and Hispanic undergraduate and graduate students. The reverse is true for Asian-American and international students, and they are often ignored or penalized in race-conscious diversity plans despite the different perspectives they might bring to a campus.

The reasons for the paucity of competitive black and Hispanic students are complex and multi-faceted. No individual campus can solve the problem, but there are many initiatives that may be helpful. Institutions can join together to diagnose the problem as it affects students

potentially in their recruiting pool. Is it caused by the lack of qualified teachers and guidance counselors, appropriate curriculums, testing preparation, and familiarity with academic pathways, or by families that are ill informed, unsupportive or financially limited? Depending on the diagnosis, most institutions will have the resources to address at least some parts of the problem.

Many colleges have formed partnerships with underperforming high schools, providing useful training, counseling, and curricular assistance. Sometimes these partnerships will lead directly to new admissions; sometimes they will just increase the admissible pool for everyone.

Minority students often do not take the most challenging courses necessary to be admitted to selective colleges. Institutions need to be clear about what kind of preparation is necessary and then communicate that message to high schools. Stanford University’s Bridge Report found a substantial misalignment between high school preparations and college admissions requirements.

The State of Florida writes to all sophomores in the top 25% of their high school class to inform them about college opportunities and urges them to take the right courses. Although the programs are open to all, Florida and other states have placed special emphasis on increasing minority participation in SAT prep courses, AP (Advance Placement) courses, and pre-SAT and SAT examinations.

The University of Texas at Austin has been particularly successful in training new AP teach-

ers and expanding AP offerings at inner city and rural schools where such opportunities have not existed. In three years, Texas increased the number of AP test takers by 57%, while minority AP candidates grew by 74%.

Expanded AP courses offer the most efficient way to prepare and identify students who will fare well in academic competition. Trustees should inquire about their institution's AP policies and what could be done to expand AP work in target high schools where courses do not exist. Additional federal funding for AP programs is now available.

Campuses should ask why students from high schools with graduates who would create more diversity are not applying. Texas A&M has been so successful in outreach and sponsoring visits to its campus from inner city and rural schools, that it recently announced it would remain race-neutral in admissions, though no longer legally required to do so. The University of California, Berkeley, has staffed college counseling centers in Oakland, a high minority area.

Without effective programs to improve the qualifications of minority applicants, the backgrounds of admissible students will not change very much. Individual campuses will find themselves in unsatisfactory expensive competition for the same limited number of students. Consequently, it becomes part of the responsibility of both public and private institutions to address the pipeline problem.

Race-Neutral Diversity Selection Procedures

Changing the overall admissions pool will take some time. In the interim, one might ask, what race-neutral selection procedures from existing pools are available to make a student body more diverse? Three major alternatives have been used—class rank policies, socio-economic criteria, and individualized assessment.

Class rank programs have been the most visible and controversial. The details vary, but if a student has taken a college prep curriculum, any Texas high school graduate in the top 10% must be admitted to *any* state public campus; any Florida student in the top 20% must be admitted to *some* University of Florida system campus; and a top 4% student in California must be admitted to *some* University of California campus.

Class-rank programs are not so radical as they first might appear. Most students who graduate at the top of their classes are admissible anyway. Most campuses already consider class rank and the only question is how that factor is weighted compared to standardized test scores and other criteria. The detractors of the class rank system point out that it penalizes bright students from private prep schools or suburban high schools whose test scores are high, but who are not at the very top of their competitive classes. UT Austin is also concerned that about 70% of its freshman admits now come through the top 10% route, leaving less flexibility in admissions than it might like to have. But overall, the response from institutions affected by class rank programs has been positive. The clear message about admissibility seems to motivate high

school students and parents. Class rank-admitted students perform as well as others. The policies increase the racial, socio-economic, and geographical diversity of freshman classes, which may have political as well as educational benefits for the institution.

Students from underrepresented groups generally have fewer financial and family resources to complete higher education. Thus, race-neutral policies that level existing social class advantages tend to have greater impact on these students. Consequently, some campuses consider parental income, the lack of opportunity in some high schools, and whether a student had to work or had other family responsibilities during the school year, in evaluating the student's grades and test scores. If this weighting process is based on objective considerations rather than ideology, it can identify students whose talent and motivation have been handicapped by external factors but will flourish when admitted.

Of course, without an adequate financial aid system, admitting these students will not lead to graduating them. Student indebtedness is growing and 20% of full-time students work 35 or more hours a week. Thus, each campus needs to debate whether the relative allocation of need-based and merit-based financial aid serves the overall campus goals, including diversity. To supplement their race-neutral admissions plans, UT Austin and Texas A&M created special scholarships for needy students from high schools that had low college attendance rates. The presidents of these universities sometimes attend award ceremonies at the affected high

schools to an enthusiastic reception. Other universities have created special scholarships for students from urban public high schools who have often overcome obstacles to achieve success.

One reason Michigan lost the undergraduate case (*Gratz*) and won the law school case (*Grutter*) was that the former used a numerical race-based admissions formula, while the latter only considered race as part of an individualized admissions process. The debate within the Court was about what the word "consider" in the law school process actually meant, and the record is susceptible of more than one interpretation. Individualized admissions decisions have existed in most private and some public institutions for many years. After the *Michigan* cases, almost every selective campus has moved in that direction. In theory, in an individualized system, belonging to a minority group would only be one type of diversity factor of no more or less value than belonging to a small religious sect, overcoming a physical disability or fractured family, coming from a remote region, or having an unusual skill or intellectual interest. Thus, the child of a Portuguese fishing family from Cape Cod might provide more diversity at the University of Texas than the child of a Mexican farming family, while the reverse might be true at the University of Massachusetts.

To make individualized assessment work, trustees should insist that policies be clear, that adequate resources be made available for the labor intensive work required, and that the evaluators be well trained and their decisions reviewed. Without those steps, individualized

assessment can become idiosyncratic assessment subject to the whims of the assessors, and applicants with superior academic credentials may be bypassed.

Large scale race-neutral individualized assessments have been in place for some time at University of California campuses, some of which process over 40,000 applications a year. Recently, however, the Chairman of the University of California Board of Regents publicly questioned the fairness of the admissions process. Invoking the mantra of individualized assessment for admissions should not necessarily assure trustees that the process is fair or legal. Thus, trustees may need to obtain detailed data about admissions results to assure themselves that their policies are carried out.

The Need for Transparency

While the *Michigan* cases affirmed substantial autonomy for institutional admission decisions, they also declared some constitutional limits. To ensure that the proper balance between autonomy and limits in admissions is observed, trustees need to make certain that policy and process become more transparent. Admissions criteria, including academic and non-academic factors, the weighting system for these factors, and the goals of the admissions process should be available to all interested parties. Trustees should regularly ask for evaluations that will determine whether the admission process meets institutional goals and applicable legal standards.

Transparency serves several goals. First, selective institutions often reject more students than they admit, and they owe those admitted and rejected

clarity about admission criteria. Without this transparency, suspicion about the fairness of the process and the qualifications of some members of the campus community will fester.

Second, college costs are rising faster than inflation. Government support is lagging, and there is fierce competition for private grants. A loss of public confidence in the integrity and fairness of the admissions process can only undermine the community financial support universities desire. Admissions transparency can assure the public that the access to scarce resources it provides for students has been fair.

Third, the core principle of the academic community is that all decisions should be based on academic criteria. Transparency is a necessary check to see that these decisions are not influenced by politics or ideology.

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

Despite the solid reasons for institutional transparency regarding admission policies, universities have historically been protective and secretive about the process. Trustees have a key, if difficult, role in protecting the institution's reputation. They have the right to know and the ability to ask the questions and to evaluate the

data on admissions policies. They can, and should, guarantee transparency and public confidence.

Conclusion: The Role of Trustees

In light of the foregoing discussion, it is clear that diversity in admissions raises issues of policy and practice that must be reviewed by boards of trustees who are responsible for oversight and for making the final policy decisions. These responsibilities include asking such as questions as:

1. What types of diversity are relevant to the educational goals of our institution?
2. What measures will most adequately reflect these types of diversity?
3. Are admissions criteria, processes and outcomes clearly stated and accessible?
4. If race conscious means are proposed, are they necessary in light of race-neutral alternatives? What data have been produced to document this necessity?
5. What impact is meeting diversity goals having on graduation rates and other measures of educational progress?

There is a natural tendency to avoid contentious issues like diversity. But avoidance in this case may prove fatal. Unheeded concerns about admissions fairness—whether from proponents or opponents of diversity policies—can be harmful to the institution, undermining public, political and financial support, and providing a breeding ground for costly litigation. Trustees have the responsibility to make the sensitive but vital inquiries that can shed light on this important area of higher education policy.

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