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A Qualitative Analysis of *Grutter v. Bollinger*: Implications for Use in Professional Programs Conducted Under *Geier v. Bredesen*

A Dissertation
Presented for the
Doctor of Philosophy Degree
The University of Tennessee, Knoxville

Marva Lane Rudolph
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ABSTRACT

This study represents an analysis of the public policy mandated in *Grutter v. Bollinger* and the public policies and procedures administered through *Geier v. Bredesen* at professional schools in the State of Tennessee. To gather information and ensure objectivity, a multiple information-gathering approach was used, which included administering a written questionnaire, reviewing court documents, conducting elite interviews, and participating in various University of Tennessee-based committees. Both *Grutter* and *Geier* used affirmative action policies to help achieve student body diversity in public higher education institutions. *Grutter* used affirmative action as a voluntary means to support the argument that diversity is a compelling governmental interest. Diversity included, but was not limited to, racial diversity. In *Geier*, Tennessee professional higher educational institutions were court-ordered to use affirmative action policies to remove the legacy of de jure segregation. In *Geier*, diversity was the desired goal but was limited primarily to racial diversity of two racial groups, Blacks and Whites. Through the admissions processes they examined, *Grutter* and *Geier* dealt with both applications of affirmative action policies—non-remedial (diversity) and remedial (correcting past discrimination). In 2003, the *Grutter* case became the national standard for all colleges and universities, public and private, in the use of race-conscious admissions policies in undergraduate, graduate, and professional programs. In 2006, a Final Order of Dismissal was issued on the *Geier* lawsuit. As a result, public higher education institutions in the State of Tennessee must now abide by the standard laid out in *Grutter*.

The central question posed in this study was whether *Geier's* admissions policies comply with the current *Grutter* standard. The findings indicate that, as originally written and applied, *Geier* admissions policies do not meet the current *Grutter* standard. Under *Geier*, race was the only type of diversity sought, and race was limited only to Blacks and Whites. Therefore, *Geier*, as originally written, is not narrowly tailored and does not pass the strict scrutiny test.

Under *Geier*, much progress was made to increase student body diversity, particularly of historically underrepresented groups. As Tennessee moves into the post-*Geier* era, administrators of the state public colleges and universities continue to assert that diversity is a compelling governmental interest. Future efforts must demonstrate the ability to maintain the progress made under *Geier* while complying with the *Grutter* standards. This must be done while recognizing that *Grutter*, the current law of the land, is still being scrutinized and challenged.

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CHAPTER ONE

INTRODUCTION

The nation is at a critical juncture regarding the debate over the use of affirmative action policies in higher education admissions. In the 2003 decisions rendered in *Grutter v. Bollinger,* 539 U.S. 982 (2003) and *Gratz v. Bollinger,* 539 U.S. 244 (2003), the U.S. Supreme Court attempted to provide guidance and direction regarding the myriad of questions surrounding this debate. In both decisions, the Court recognized that diversity is a compelling governmental interest and that race-conscious admissions policies could be used to help achieve this interest. However, in *Gratz,* the Court found that the undergraduate admissions process used at the University of Michigan College of Literature, Science, and the Arts (LSA) was unconstitutional because points were automatically awarded to applicants on the basis of race and ethnicity. In *Grutter,* the admissions procedures used by the University of Michigan Law School, a professional program, were found to be constitutional because all applicants were submitted to a holistic review process. Race was considered in the process but was one of many factors taken into account. Ultimately, race did not serve as a controlling factor in the decision-making process.

The *Grutter* decision was received with mixed reviews by public and private colleges and universities as well as by other American groups. *Grutter* seems to have answered some, but not all, of the questions regarding the role of affirmative action in the admissions process. At this writing, the U.S. Supreme Court, in its 2006-2007 term, has reviewed the cases of *Parents Involved in*

Community Schools v. Seattle School District No. I, No. 05-0908, and *Meredith v. Jefferson County Public Schools,* No. 05-915. Both cases involve the use of race-conscious admissions policies in public K-12 schools. Defendants in both cases have alleged that, as in *Grutter*, race-conscious admissions policies were used to diversify the student bodies and represented a compelling governmental interest. Plaintiffs in both cases have alleged that, as in *Gratz*, the race-conscious admissions policies violated the Equal Protection Clause of the Fourteenth Amendment and failed to meet the strict scrutiny test of review. Like *Grutter* and *Gratz*, *Meredith v. Jefferson County Public Schools*, from Louisville, Kentucky, is a Sixth Circuit Court of Appeals case. Tennessee also lies within the Sixth Circuit. Decisions in both cases will be anxiously awaited to see whether the standard of review found in *Grutter* and applied to higher education will be the same standard applied at the primary and secondary levels.

Administrators of Tennessee public colleges and universities were very interested in the *Grutter* decision. Since the signing of the 1984 Stipulation of Settlement, *Geier v. Alexander*, 593 F Supp 1263 (MD Tenn. 1984), Tennessee public colleges and universities have been legally sanctioned to use affirmative action policies in their admissions processes to correct de jure segregation. The Stipulation addressed the lawsuit filed by Rita (Sanders) Geier, *Sanders v. Ellington*, 288 F Supp 937 (MD Tenn. 1968), which focused exclusively on the question of racial diversity. On September 11, 2006, Tennessee Governor, Phil Bredesen, announced that all parties had agreed to end the *Geier* Consent Decree (see Appendix C). Governor Bredesen also asserted that he, and the

administrators of Tennessee public colleges and universities, recognized the value of student body diversity for higher education. He vowed that Tennessee would remain committed to maintaining and expanding the many strides toward diversity made under *Geier*. On September 21, 2006, Judge Thomas A. Wiseman, Jr., Senior U.S. District Court Judge, signed the Final Order of Dismissal of the *Geier* Consent Decree (see Appendix D). According to the Order of Dismissal, Tennessee has fully complied with the requirements of the 2001 *Geier* Consent Decree and has removed any vestiges of segregation from the Tennessee public higher education system as required by *United States v. Fordice,* 505 U.S. 717 (1992). The Dismissal Order also states that the State of Tennessee now operates a unitary system of public higher education (Final Order of Dismissal, No 5077, 2006). This relates to such things as quality of education, student assignment, facilities and resources, and workforce.

Like *Grutter*, the *Geier* Dismissal Order has been received with mixed emotions. Under *Geier*, legal protection and financial resources existed to help Tennessee colleges and universities develop programs and procedures needed to recruit and retain a diverse student body. In *Geier*, student body diversity was based on race, and Blacks and Whites were the only racial groups addressed. Now that *Geier* has been dismissed, Tennessee public colleges and universities must decide what courses of action to take to pursue their newly avowed and broadened definition of diversity.

Grutter and *Geier* used affirmative action policies to help achieve student body diversity in public higher education institutions. The debate over the use of

affirmative action policies is alive in America and becomes particularly intense when such policies are implemented in public education. We cannot anticipate what the Supreme Court will say in the upcoming term this year. However, we can concentrate on what the Court has already done. This dissertation will focus on the *Grutter* decision and its potential impact on professional programs in Tennessee public colleges and universities.

One of the first questions that any reader should ask about this research is *Why is the issue of using affirmative action policies for admissions in higher education so important?* Access to higher learning is one of the most esteemed opportunities in our society. Admissions decisions made at colleges and universities are important because they represent access to the intellectual and economic potentials of a better way of life. At selective institutions of higher education, admissions decisions have a special political impact, such as rationing access to societal influence and power and training leaders for public office and public life (Guinier, 2003, p. 115). Many of the students admitted to these elite institutions graduate to become citizens who shape business, education, the arts, and the law for future generations (Guinier, p. 115).

Education in the United States has long been regarded as the key to integration and to social, political, and economic mobility. Despite the American ideal of equal opportunity in education, access to public education has historically been limited on the basis of race and ethnicity (Chapa & Lazaro, 1998. p. 52-53). Colleges and universities across the United States have tried to reverse the historic exclusion of racial minorities from predominantly White institutions by applying affirmative action policies, initially developed for use in the employment sector, to the higher education arena. As a result,

substantial growth has occurred in both the number and percentage of students of color obtaining masters, doctoral, and professional degrees. However, there is still notable under-representation among Blacks, Hispanics, and American Indians at the doctoral and professional ranks (Borden & Brown, 2006, p. 34). Asian Americans continue to obtain disproportionately higher numbers of advanced degrees in the fields of science, technology, engineering, and mathematics; Blacks have earned increasing numbers of degrees in education and human service fields like public administration and criminal justice; and Hispanics have made notable strides in obtaining masters and doctoral degrees, but not first professional degrees (Borden & Brown, p. 34).

Historically, higher education in the United States was reserved for wealthy, White males. For decades, racial minorities were excluded from or severely limited as participants in education, particularly in higher education. Government involvement in higher education began during the Colonial era. Before the Civil War, northeastern states relied exclusively on private colleges and southern states assumed leadership in public higher education. The first state university chartered by a state legislature was the University of Georgia in 1785 (Dye, 1984, p. 174). Today, the majority of all persons who obtain a college degree do so at publicly financed colleges and universities. Southern public colleges and universities, like elementary and secondary schools, desegregated very slowly before 1964. With the concerted efforts of the Congress, the executive branch, and the courts, token progress in desegregating public colleges and universities in the South emerged after passage of the Civil Rights Act of 1964 (Davis & Graham, 1995, p. 361).

Today institutions of public higher education enroll three-quarters of the college and university students in the United States. Perhaps more importantly, leading state universities can challenge the best private institutions in academic excellence. The University of California at Berkeley, the University of Michigan, and the University of Wisconsin are consistently ranked alongside Harvard, Yale, Princeton, Stanford, and Chicago (Dye, 1984, p. 175). Southern universities, such as the University of North Carolina and the University of Virginia, have also entered into this competitive arena.

The profile of students in higher education has changed by race, sex, age, and socioeconomic background. Passage of the G.I. Bill after World War II, the Civil Rights Act of 1964, and the Immigration (Hart-Cellar) Act of 1965, allowed working class and non-White students to enter into higher education (Musil, Garcia, Hudgins, Nettles, Sedlacek, & Smith, 1999, p. 2-3). Enrollment in higher education grew from 156,756 in 1880, to more than 14 million by 1999. Of those students enrolled in 1999, approximately 28 percent were non-White, 55 percent were female, and 43 percent were over the age of twenty-five (Musil et al., 1999, p. 3). From an economic standpoint, in general, college graduates earn more than persons with less than a college degree. Graduates with higher degrees earn more than those with lower degrees. Among graduates who work full-time, those with a doctoral or first-professional degree earn an average of $80,900 annually compared to $61,600 for those with a master's degree and $58,800 for persons with bachelor's degrees (*National Center for Education Statistics*, 2006, p. 14). As changes in the labor market drive up the value of a college education and competition for admission at the most selective institutions becomes more keen, it is not surprising that the use of affirmative action policies in expanding access to higher education has become

increasingly controversial, particularly in public higher education institutions (Kane, 1998, p. 17) and, more importantly, in southern colleges and universities.

Affirmative action practices and policies have had a major impact on public higher education and its changing student body demographics, but affirmative action polices did not begin in education. As a broad public policy concept, affirmative action can be traced to the labor-management conflicts that helped define the New Deal politics of the 1930s. American employers, workers, and labor organizations have a long history of perpetuating racially segregated and unequal workforces and unions (Lenz & Stetson, 1991, p. 236). Until passage of the National Labor Relations Act (NLRA) of 1935, business interests had seriously impeded the growth of the labor movement. The NLRA provided labor unions with a federal statutory right to organize and engage in collective bargaining. It outlawed such notorious devices as the "yellow dog contract," an employee's agreement not to join a labor union as a condition of employment. The NLRA required, among other things, that employers act affirmatively by informing their employees that such anti-labor practices were no longer permitted (Lenz & Stetson, p. 236).

The federal government's recognition of the rights of organized labor did not remove the barriers confronting Blacks in the field of employment. Not only did Blacks continue to face problems in obtaining jobs, they also encountered great difficulty in gaining membership in labor unions. Despite government regulations prohibiting companies that received federal contracts from discriminating against Blacks, most jobs continued to go to White workers. In 1961, President John F. Kennedy issued Executive Order 10925 requiring federal contractors to take those actions necessary to "ensure that

applicants are employed, and that employees are treated during employment without regard to their race, creed, color or national origin" (*Affirmative Action Today: A Legal and Practical Analysis*, 1986, p. 7). The Executive Order also established the President's Committee on Equal Employment Opportunity, chaired by the Vice President and comprised of representatives of major federal contractors (*Affirmative Action Today: A Legal and Practical Analysis*, p. 7). Later, in 1965, President Lyndon B. Johnson, through Executive Order 11246, expanded this commitment to include a racially integrated work force. This eventually resulted in the inclusion of the Title VII employment provisions in the 1964 Civil Rights Act (Lenz & Stetson, 1991, p. 236). Goals, timetables, and representation of race became a matter of public policy used in both employment and education. Today, for many people:

> Affirmative action is a term of general application referring to government policies that directly or indirectly award jobs, admission to university and professional schools, and other social goods and resources to individuals on the basis of membership in designated protected groups, in order to compensate those groups for past discrimination caused by society as a whole. (Hall, Ely, Grossman, & Wiecek, 1992, p. 18)

Applying affirmative action to the admissions process in colleges, universities, and professional schools has only enhanced the controversies surrounding this policy. For some members of the public, such practices have meant the use of preferential treatment toward a particular segment of the population that was neither qualified for nor entitled to such employment or educational opportunities. In actuality, affirmative action policies were designed to help encourage the representation of qualified women and minorities into areas (employment, business, education) where they had been historically excluded. In situations where public institutions have been court-ordered, as in *Geier*, affirmative

action policies have been used to correct the effects of past de jure segregation. Despite the controversy, colleges and universities have continued to attempt to diversify their student bodies, in part, as a response to the larger political movements of the sixties and seventies, which called on the nation to honor its democratic principles of equality, opportunity, and mutual well being (Musil et al., 1999, p. 5). In part, they have done so because colleges and universities realize that they must prepare their students from ever-changing demographic populations to communicate and work with one another so that they may compete in the modern world. A majority of colleges and universities have developed institutional mission statements that refer to a commitment to serving diverse students.

The persisting controversy over the use of affirmative action policies in higher education has centered on the question of whether such policies should be limited to correcting the historical harms caused by de jure segregation or become more expansive and address the broader issues of inclusion. Specifically, should affirmative action policies in higher education be limited to a remedial purpose, which would correct the effects of past discrimination, or should these policies be used in a more proactive, non-remedial, way to promote the inclusion of diverse population groups?

Scholars representing many viewpoints are actively engaged in debating these issues. Not only do they differ on the value and direction of affirmative action, they often disagree on its relevant starting point. For some, affirmative action policies began in the 1960s with the passage of various anti-discrimination laws and the eventual issuance of Executive Order 11246. Others trace

affirmative action back much further, to Reconstruction Era attempts by the government to address post–Civil War issues resulting from the abolition of slavery in 1865. Both perspectives are correct in some respects as will be seen further into this research. For now, it is important to focus on the date June 23, 2003, when the U. S. Supreme Court decided the case of *Grutter v. Bollinger,* 539 U.S. 306 (2003). In a 5-to-4 opinion delivered by Justice Sandra Day O'Connor, the Supreme Court affirmed the decision rendered May 14, 2002, by the U.S. Court of Appeals for the Sixth Circuit. The Sixth Circuit, reversing the district court, ruled that the University of Michigan Law School had appropriately considered and applied its race-conscious admissions policies and had a compelling governmental interest in diversifying its student body (*Grutter v. Bollinger,* 288 F. 3d 732, 2002).

Prior to *Grutter*, the *Bakke* (*Regents of the University of California v. Bakke,* 438 U.S. 265, 1978) decision served as the benchmark by which race-conscious higher education admissions programs had been judged. While this decision declared the University of California's use of racial classifications in admissions unconstitutional, it created the proverbial "carrot and stick" situation for admissions directors across the country (Leonardi, 2001, p. 153). On one hand, *Bakke* affirmed that the desire to diversify student bodies at colleges and universities was an acceptable goal. On the other hand, *Bakke* did not explain how institutions were to meet this goal. Since *Bakke*, institutions have found themselves constantly testing methods to diversify their campuses in ways that pass constitutional muster.

In *Regents of the University of California v. Bakke,* Alan Bakke, a White male, brought suit against the Medical School of the University of California at Davis because it had two admission programs for its entering class of 100 students. Eighty-four slots were filled through the regular admissions program; 16 were filled through a separate process established in 1970 to address the faculty's concern over the paucity of African-American, Asian, Latino, and Native American students (Hall et al., 1992, p. 714). The U.S. Supreme Court's 1978 decision permitted colleges to consider race as one of a variety of factors in admissions, but forbade the use of racial quotas. The key opinion, written by Justice Lewis Powell, cited Harvard University's multidimensional admission process as an acceptable model for the use of race-conscious admissions processes. According to Powell:

> In recent years Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. When the Committee on Admissions reviews the large middle group of applicants who are 'admissible' and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. In Harvard College admissions, the Committee has not set target-quotas for the number of Blacks, or of musicians, football players, physicists or Californians to be admitted in a given year. (Leonardi, 2001, p. 165)

Justice Powell concluded that race or ethnic background might be deemed a "plus" factor but could not insulate the individual from comparison with other candidates for the available seats (Leonardi, p. 165). Rather than provide clear-cut answers regarding the use of race-conscious remedies in higher education, the *Bakke* decision simply raised more questions about their applicability in other contexts. The Black community was uncertain about the use of voluntary affirmative action efforts and many

Whites viewed affirmative action programs as a threat to their chances of gaining admission to the nation's law and medical schools (Davis & Graham, 1995, p. 247).

This uncertainty continued and was tested again in the case of *United States v. Fordice*, 505 U.S. 717 (1992), where the state of Mississippi, through the use of de jure segregation, maintained five all-White universities and three universities that were almost 100% Black (Davis & Graham, 1995, p. 362). Writing for the 8-to-1 majority, Justice White examined four policies (admissions standards, duplication of programs, institutional mission statements, and the continued operation of all-White universities) and concluded that the policies were the relics of the state's de jure system of segregated higher education (Davis & Graham, 1995, p. 363). The majority deemed such practices to be unconstitutional. The *Fordice* case has had a major impact on the State of Tennessee. Like Mississippi, Tennessee previously maintained a de jure segregated higher education system. Also, like Mississippi, as a result of a lawsuit filed in 1968, Tennessee was state-mandated to correct the harms caused by de jure segregation.

Until recently, *Fordice* stood as the standard of review that guided the use of race-conscious admissions practices in Tennessee public colleges and universities. As previously noted, on June 23, 2003, the U.S. Supreme Court issued its decision on two challenges to the consideration of race as a factor in the admissions process at the University of Michigan. The Court held that race is one of many factors that can contribute to a diverse student body that produces educational benefits for all students. However, the way in which race is considered and weighed as a factor must not be rigid or mechanical (Alger & Snyder, 2004, p. 1). The Supreme Court affirmed the court of appeal's decision in *Grutter*, concluding that the Michigan Law School's use of race as a

factor in student admissions was not prohibited by the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, or 42 U.S.C.§ 1981 (*Grutter v. Bollinger et al.*, 539 U.S. 306, 2003). In addition to Justice O'Connor's majority opinion, several concurring and dissenting opinions were filed in this case. Justices O'Connor, Stevens, Souter, Ginsburg, and Breyer voted to uphold the Law School admissions policies and Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas voted to strike down the process as unconstitutional.

In the companion case of *Gratz v. Bollinger,* the Court declared that the standards used in the undergraduate admission program were unconstitutional. The undergraduate admission policy used by the University of Michigan and examined in *Gratz* allowed each applicant to receive points based on several factors, including high school grades, standardized test scores, high school quality, strength of high school curriculum, in-state residency, alumni relationships, a personal essay, and personal achievement or leadership. In addition, as a means to diversify its student body, members of underrepresented racial or ethnic groups automatically received points, which were not available to members of non-minority groups.

To some, the value of these two cases confirms that student body diversity is an acceptable goal for public colleges and universities to seek (Grier, 2006, p. 1). To others, the effect or implications of *Grutter* and *Gratz* are not so clear. What is clear is that *Grutter* and *Gratz* set the requirements for using race as a factor in admissions considerations. The two cases provided insight, but not necessarily guidance, regarding the use of race in other programs, such as financial aid, cultural, and academic support programs (Grier, 2006, p. 1).

The State of Tennessee, like the State of Michigan, is located in the Sixth Circuit. Like Michigan, Tennessee operates race-conscious admissions programs in its professional, graduate, and undergraduate public colleges and universities. For more than two decades, under the state-mandated *Geier* Stipulation of Settlement, Tennessee operated race-conscious policies and programs as a means to correct past harms. As stated in *Geier*:

> The primary purpose of this Stipulation of Settlement is the elimination of Tennessee's dual system of higher education. This purpose includes the maximization of educational opportunities for Black citizens of the State of Tennessee and the improvement of educational opportunities for Black citizens of the State of Tennessee…It is the intention of the parties that the dismantling of the dual system shall be accomplished in such a way as to increase access for Black students and increase the presence of Black faculty and administrators statewide and at the historically white institutions. (Stipulation of Settlement, 1984, p. 2)

> Further:

> Defendants agree that no institution will be identified as a one-race institution or a predominantly one-race institution in any official university publication or in any public statement made in an official capacity by any administrator of that institution. Each institution mission statement shall refer to its mission as an institution committed to education of a non-racially identifiable student body. (Stipulation of Settlement, 1984, p. 19)

Effective January 2001, Tennessee moved into the Consent Decree phase of the *Geier* agreement. This phase was time-limited, in that by the end of fiscal year 2005, the State of Tennessee was to have evaluated the progress made toward achieving its stated goals and determine what, if any, future courses of action to take toward maintaining racially non-identifiable public colleges and universities. The emphasis seemingly shifted from a remedial to a non-remedial purpose, since:

> …In dismantling the vestiges of the former dual system, it is the parties' intention to create an educational system that enhances the increased enrollment of Black students at the predominantly white institutions and that likewise enhances the enrollment of white students at the State's predominantly Black institution. *To achieve this goal, the parties are committed to desegregation and to reaching out to all residents of this State regardless of race*…. (*Geier* Consent Decree, 2001, p. 5) [Italics added]

At the same time, the intent was to remedy past acts of discrimination and attempt to create a diverse student body:

> Each institution and governing board shall reaffirm its non-discrimination policies in all aspects of university and college life, including financial aid, extracurricular activities, hiring and retention of employees, and recruitment and enrollment of students. (*Geier* Consent Decree, 2001, p. 22)

As of this writing, fall 2006, *Grutter v. Bollinger* is the most recent case to stimulate the continuing debate over the use of race-conscious policies by public colleges and universities. However, the U.S. Supreme Court is scheduled to hear the companion cases of *Parents Involved in Community Schools v. Seattle School District I* and *Meredith v. Jefferson County Public Schools* during its 2006-2007 term. Neither *Grutter* nor *Gratz* were based on correcting past harms of discrimination; rather, diversity was acknowledged to be a compelling state interest. The sole purpose of *Geier* was to correct the effects of de jure segregation. The remedy was to provide equal access for Blacks and Whites to Tennessee public colleges and universities. Diversity was the desired goal, but it was limited primarily to racial diversity of these two racial groups.

Statement of the Problem

As a general rule, to withstand legal scrutiny, race-conscious admission programs operated by universities must be narrowly tailored to serve a compelling justification (White, 2006, p. 4). If unlawful discrimination against an identified minority group

actually occurred, then a remedial affirmative action program serves the compelling institutional interest in removing the lingering vestiges of past discrimination (White, p. 2). If the goal is diversity, an affirmative action program serves a compelling purpose if it is designed to foster racial diversity in the student body (White, p. 2).

Both *Grutter* and *Gratz* relied on the argument that diversity is a compelling governmental interest and neither presented the argument of past discrimination. Under the standard of review approved in *Grutter v. Bollinger*, race-conscious admission programs must be narrowly tailored and flexible enough to ensure that each applicant is evaluated as an individual and not as a member of a racial group. Race can only be one of the many factors used to make admissions decisions. The race-conscious admissions program must be limited to a reasonable duration of time, that is, there must be a specification of a reasonable period for completion. Also, and probably most importantly, the program shall not be unduly harmful to non-minority applicants. This is the standard by which public colleges and universities that include race as a factor in their admissions processes, including those operated under *Geier*, must be evaluated.

Tennessee relied upon the use of race-conscious programs as a means to remove the vestiges of past discrimination. The decision rendered in *Fordice* served as a comparative model and standard to follow. *Geier* requirements provided the legal protection needed to develop and implement targeted policies and programs that helped identify, recruit, and retain underrepresented racial groups at its public higher education institutions. Like *Fordice*, Blacks and Whites were the racial groups addressed in *Geier*. In light of the ending of the *Geier* Consent Decree, Tennessee must now re-evaluate the *Geier* policies and programs and bring them into compliance with the *Grutter* standard.

Tennessee must also bring those policies or programs into the view of the state's multiracial reality, which transcends the earlier Black-White polarity**.**

Purpose of the Study

This dissertation is a comparative case study of the public policy mandated in *Grutter* and the public policies and procedures administered through *Geier* at professional schools in the State of Tennessee. The professional schools included in this study are the University of Tennessee (Law and Veterinary Medicine), University of Tennessee Health Science Center (Medicine, Dentistry, and Pharmacy), University of Memphis (Law), and East Tennessee State University (Medicine). A Board of Trustees governs the University of Tennessee (UT). The Tennessee Board of Regents (TBR) governs the University of Memphis and East Tennessee State University. Both boards report to the Tennessee Higher Education Commission (THEC).

From this analysis and the use of information gathered through the review of court documents, written surveys, elite interviews, and participation as a member of campus-based organizations associated with evaluating *Geier* programs, this research was designed to provide a basis for:

1) Comparing the types of race-conscious policies used by professional programs in public colleges and universities in Tennessee with the constitutionally approved admission policy administered by the University of Michigan College of Law;
2) Determining who administers, monitors, and reviews such programs and which criteria are used;

3) Examining the measures used to determine the effects of such programs to remedy past acts of discrimination and diversify student body composition;
4) Determining whether the Court applies a single standard of review across the board to higher education institutions regardless of type or level; and
5) Providing an objective review of the use of such policies and practices in Tennessee in order to ascertain whether they meet constitutional requirements articulated in *Grutter***.**

Significance of the Study

This study has a significant impact on future administration of professional programs in Tennessee's public colleges and universities. Through their race-conscious admissions process, the universities involved in *Grutter* and *Geier* have dealt with both applications of affirmative action policies—non-remedial (diversity) and remedial (correcting past discrimination). Because *Grutter* dictates national standards, Tennessee is obligated to identify diversity as a compelling governmental interest.

In *Geier*, the term "other" racial group is used in the Stipulation of Settlement and Consent Decree; this term has referred to the school's total racial make-up, but it still implies that the problem is limited to the two racial groups of Blacks and Whites. Diversity, as demonstrated in *Grutter*, goes far beyond addressing the effects of past discrimination of one particular underrepresented racial group. It includes the creation of an environment that recognizes the existence of "other" underrepresented groups—racial (such as Latinos, Native Americans, and Asians) as well as non-racial (females, non-traditional age students, or persons with disabilities, from different socio-economic groups and/or geographic areas, or of different sexual orientations) segments of the

population. Tennessee must now be prepared to define and deal with an expanded definition of diversity. The application of the *Grutter* standard could present a new arena of interests, programs, fiscal expenditures, and groups that must be addressed.

Brian Noland, in his dissertation research, "The Fruits of Judicial Decision: An Analysis of *Geier v. Sundquist*," stated:

> There is a critical need in higher education to create diverse and multicultural institutions of higher education. Yet there may be no idea, strategy, or right way for all institutions to proceed; there is no universal policy cookbook to remedy the many problems created by the implementation of diversity initiatives. Although centralized planning and organization at the state and board level will facilitate diversity, it is the campus that will ultimately prove to be the determinant element of a diversity effort. Campuses should be given broad latitude to shape the implementation of diversity policies so that they are congruent with each of their own unique personalities. (2001, p. 11)

Noland's dissertation expressed two concerns. His first concern was with the lack of an established method that all higher education institutions could use to address diversity initiatives. That concern has now been addressed in *Grutter*. His second concern was the need for campuses to create individual policies that reflect their unique situations, a concern that continues to exist. The State of Tennessee, and its respective public colleges and universities, must ensure that progress made for racial groups harmed by de jure segregation are not minimized or hindered through policies and programs expanded to address ever-changing, ever-growing, diverse population groups.

The present dissertation has significance for the discipline of political science. It contributes to the body of knowledge regarding the politics of affirmative action, race-conscious admissions policies and programs, and the role of courts, particularly the U.S. Supreme Court, in interpreting laws and thereby contributing to the formulation of public

policy. Public policy is studied because understanding the causes and consequences of policy decisions improves our knowledge about society, permits us to apply social science knowledge to the solution of practical problems, and helps insure that the nation adopts the "right" polices to achieve the "right" goals (Dye, 1984, p. 3-5).

Providing a foundation for that understanding requires some discussion of the court system. Based on the U.S. Constitution, the legislative body enacts laws, the judicial body interprets laws, and the executive body ensures that such laws are carried forth. In reality, sometimes these lines of division overlap and blur so that the courts take the role of judicial policymaker. Hence:

> …Whatever the other branches of government do, the Court cannot help being involved in administering the legal doctrine it enunciates. Charged with the responsibility of interpreting a "living" Constitution, the Court is no ordinary body of judges but, rather, is a special court among the world's tribunals. Through its power of judicial review, the Supreme Court of the United States can and does attempt to ensure compliance with the Constitution. It necessarily interprets the Constitution in light of present-day circumstances and engages in the political task of safeguarding this "living Constitution" in all walks of American life. (Wasby, D'Amato, & Metrailer, 1977, p. 6)

Because the Constitution is a "living document" that must be interpreted in terms of present-day circumstances, this research will use a policy analysis approach. Programs, procedures, and policies of *Geier* and *Grutter* will be compared to provide important information that will add to the body of knowledge relevant to the discipline of political science. This research will seek to explain the importance of diversity in public higher education institutions as well as how the needs of removing the vestiges of past discrimination should not be minimized as we strive to embrace the needs of an ever-

expanding global society. It will demonstrate how the judicial system not only interprets the laws but also occasionally creates public policy.

This dissertation is a qualitative study that represents a normative approach, thus recognizing the dynamic nature of the discipline of political science. David M. Ricci opined that political science is an enterprise constantly moving in a circle among three poles of concern (1984, p. 24-25). First, there is the intrinsic importance of politics, which practitioners seek to study because an understanding of public life is presumably desirable when people live together. Second, there are the imperatives of scholarship, which demand that politics be studied scientifically in accordance with certain standards of precision and reliability. Third, there is the objective of a democratic society and political scientists' shared determination to help maintain the democracy and the institutions characteristic of a free people. Ricci states that political scholars do not perform scientific experiments in the commonly understood method because their work cannot be checked for accuracy and validity according to usual scientific methods. Therefore, political science operates on the basis of scholarly, rather than scientific, authority (Ricci, 1984, p. 310).

Finally, this research is important to the State of Tennessee and its citizens at a major point in history. The dismissal of *Geier* should indicate that Tennessee has moved from an era of de jure segregation into an era of inclusion. Only time will tell whether the state has indeed made that move.

Limitations of the Study

As stated, this research is limited to a qualitative analysis of race-conscious admission policies used at the University of Michigan Law School (*Grutter v. Bollinger*)

and by the professional programs of public colleges and universities in the State of Tennessee (*Geier v. Bredesen*). A historical perspective will be provided on relevant court decisions that have led to the current status, but such cases will not serve as the focus for this study. The purpose of this research is neither to defend nor to attack the moral claims regarding the use of race-conscious admissions policies in higher education institutions. Rather, the purpose is to provide an objective review of the use of such policies and practices in Tennessee in order to ascertain whether they meet the constitutional requirements articulated in *Grutter.*

The decision rendered in *Grutter* dealt with the importance of diversity in education and the use of the admissions process to achieve diversity. *Grutter* may also have implications regarding the constitutionality of other race-conscious programs within higher education (such as financial aid) as well as outside of higher education (such as employment). However, those programs will not be directly addressed within this study.

Finally, many may wonder why the U.S. Supreme Court chose to review *Grutter* and *Gratz* rather than other recent, equally viable cases, such as *Hopwood v. State of Texas*, 236 F. 3d 256 (5th Cir., 2000), *Smith v. University of Washington Law School*, 392 F 3d 367 (9th Cir., 2004), or *Johnson v. Board of Regents of the University of Georgia*, 263 F 3d 1234 (11th Cir., 2001). All of these cases dealt with race-conscious admissions policies. They all originated in states that were attempting to rectify the continuing effects of past discrimination while trying to diversify the college environment. Each of these cases led to decisions at the court of appeals level, and two of the losing litigants sought Supreme Court review. The fact that the U.S. Supreme Court chose the Michigan

cases presents interesting questions for further research. Such inquiries, however, are beyond the scope of the present study.

Proposed Methodology

This research presents a comparative case study of the public policy mandated in *Grutter* and the public policies and procedures administered through *Geier* at professional schools in the State of Tennessee. As defined, a case study is an empirical inquiry that investigates a contemporary phenomenon within a real-life context, especially when the boundaries between phenomenon and context are not clearly evident and multiple sources of evidence are used (Johnson & Joslyn, 1995, p. 143; Yin, 1994, p. 13; and Babbie, 1990, p. 32). Case studies provide a systematic way of looking at events, collecting data, analyzing information, and reporting results. Although the case study methodology has gained much acceptance for the study of the social sciences, including political science, some debate continues regarding its value to theory building and objectivity. The criticisms against the use of the case study approach include the following:

- General theoretical knowledge is more important than concrete, practical knowledge;
- One cannot generalize on the basis of an individual case; therefore the case study cannot contribute to scientific knowledge;
- The case study is most useful for generating hypothesis whereas other methods are more suitable for hypotheses testing and theory building;
- The case study contains a bias toward verification, i.e., a tendency to confirm the researcher's preconceived notions; and

- It is often difficult to summarize and develop general propositions and theories on the basis of specific case studies. (Flyvberg, 2001, p. 66-67)

However, while the case study is useful for both generating and testing hypotheses, it is not limited to these research activities alone. Further, the case study approach can more effectively focus on real-life situations and test views directly in relation to phenomenon as they unfold in practice (Flyvberg, 2001, p. 72). The case study is recognized as a distinct form of empirical inquiry and an important design to use for developing and evaluating public policies as well as for developing explanations for and testing theories of political phenomena (Johnson & Joslyn, 1995, p. 143). As a research endeavor, the case study contributes uniquely to our knowledge of individual, social, and political phenomena and has been a common research strategy in psychology, sociology, political science, business, social work, and planning (Yin, 1994, p. 2). The public policies and programs promulgated by *Geier* and *Grutter* represent the cases compared within this research and lend themselves to the case study methodology.

Court documents were reviewed and analyzed to help identify and understand the types of public policies covered in both *Grutter* and *Geier*. A written survey consisting of 15 open-ended questions was developed and mailed to administrators at each subject institution who have direct knowledge of the programs and policies associated with *Geier* mandates (see Appendix E for copy of survey instrument). In addition, using a common set of questions, face-to-face interviews (known as the elite interview process) were conducted with administrators at the University of Tennessee who are directly involved with interpreting, evaluating, and monitoring the progress of *Geier* programs. Interviews, as a general rule, are important because well-informed respondents can provide important

insights into a situation, provide shortcuts to the prior history of the situation, and help a researcher identify other relevant sources of evidence (Yin, 1994, p. 83).

Interviews may also be limited. For example, respondents may have certain biases about the subject matter. In addition, cost and time are involved in identifying and attaining the cooperation of needed interviewees. Therefore, a fourth approach of information gathering was also used, i.e., participatory-observation. This researcher participated as a member of campus-based committees, located at the University of Tennessee, involved in planning and evaluating *Geier* programs and progress made toward the attainment of diversity at the University of Tennessee. These groups included the Commission for Blacks, Enrollment Management Committee, *Geier* Planning Taskforce, and UT Knoxville Diversity Council. As a research tool, the participant-observation approach is one where the researcher may function, during certain times, as a passive observer and, at other times, as an active participant. The participant-observation technique has been most frequently used in anthropological studies of different cultural or subculture groups, but it can be used in everyday settings, such as an organization or other small group (Yin, 1994, p. 87-88). To maintain the integrity of this approach, the researcher must always be aware of the changing roles played as a member of the studied group. The combination of the techniques and methods cited above helped to ensure that this research provides an objective discussion of the information gathered and the perspectives gained.

Outline of Dissertation

Chapter One of this study provides an introduction to the research, including the problem, purpose, methodology, and significance of the research to political science and

public policy. Chapter Two presents a literature review of existing relevant court cases that help place in historical context school desegregation mandates and affirmative action initiatives in higher education. The literature review includes scholarly analyses by social scientists, particularly political scientists, as well as legal analyses on which courts have relied in addressing this issue. Chapter Three analyzes the *Geier* Stipulation of Settlement and Consent Decree. It includes a detailed discussion of the professional programs sponsored under *Geier* at schools governed by the University of Tennessee and the Tennessee Board of Regents. Chapter Three also provides a detailed explanation of the admission process used within these professional programs. Chapter Four provides a detailed analysis of *Grutter v. Bollinger* by identifying and discussing each element of the standard of review, including the Court's discussion of why such factors are important. Chapter Five presents data received through the use of the written survey, elite interviews, and participatory observation, along with supplemental data gathered from the Tennessee Higher Education Commission. This supplemental data show changes in student body makeup by race and programs during the pre- and post-*Geier* Consent Decree period. Chapter Six compares the constitutional requirements of the *Grutter* decision to those of the *Geier* decree, particularly identifying the similarities, differences, and problem areas in *Geier.* It also summarizes data received, conclusions reached, and policy recommendations made for professional programs preparing for transition into the post-*Geier* era. Chapter Six also presents some implications for possible future research.

CHAPTER TWO

HISTORICAL OVERVIEW: RELEVANT EQUAL RIGHTS LAWS AND ENSUING SUPREME COURT DECISIONS

Few issues have aroused more contentious debate over the past decade than those surrounding the importance of diversity in higher education and the related use of affirmative action in admissions decisions (Rudenstine, 2001). Diversity is most often associated with race and, from an American historical standpoint, no issue has seemingly been more divisive and disruptive than race. The social, political, and legal consequences of race are evident in almost every American city and town, in such examples as residential segregation, income disparities, and the return of "separate but equal" education in the resegregation of American schools (Irons, 2005, p. 254). Since the Civil War, the United States Congress, the Supreme Court, and several presidents have led sporadic efforts to erase the grim legacy of racial discrimination. At the center of the ongoing struggle for racial justice are two core American values—the need to preserve individual rights and the commitment to equal opportunity for all persons.

The need for equal protection laws has always been a part of American culture. The Declaration of Independence (1776) paved the way for the development of "unalienable rights" in our nation and ascribed to government the role of "secur[ing] these rights" (Kaplin, 2004, p. 253). Rights were then added to the Constitution in three steps: the original Constitution in 1787-88, the Bill of Rights in 1791, and the Civil War amendments in 1865, 1868, and 1870. These dates represent three historical stages of constitutional rights development. The third stage eventually led to the famous case of *Brown v. Board of Education,* 347 U.S. 483 (1954*),* which changed the meaning and

thrust of the Civil War amendments (Kaplin, 2004, p. 253). Relevant to this research is the first section of the Fourteenth Amendment (1868), a Civil War amendment that states:

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

The intention of the Fourteenth Amendment was to address the 1857 Dred Scott decision barring citizenship to Blacks[1] and to make it illegal for states to deny equal civil rights to Blacks (Schwartz, 1970, p. 30). Although the focus of the concern for equality was on the rights of Blacks, the framers of the equal protection clause deliberately drafted it to provide protection for the equal rights of all persons (Hall et al., 1992, p. 257). As such, the Equal Protection Clause of the Fourteenth Amendment has been interpreted to apply to and beyond racial issues (Kaplin, 2004, p. 262). During the 1860s, equal rights could be categorized into civil, political, and social rights. Equality with respect to civil rights meant equal status in the legal relations of the private economy, coupled with the right to enforce that equal status. Equality with respect to political rights referred to equal voting rights for Blacks. Equal social rights were understood to mean the personal and non-economic interactions among people of different races (Hall et al., 1992, p. 257).

During the late nineteenth century, these distinctions began to blur as the Supreme Court made decisions that both advanced and limited the equal rights of Blacks. For instance, in *Strauder v. West Virginia,* 100 U.S. 303 (1880), the Supreme Court held that statutes explicitly denying Blacks the right to sit on juries because of their race violated

[1]Herein the terms Blacks and African Americans are used interchangeably.

the Constitution's promise of equality. The case involved a Black male who was indicted, tried, convicted, and sentenced to prison for the crime of murder. An all-White jury convicted Strauder since, at the time, West Virginia had a law denying Blacks the right to serve on juries. After losing appeals in the lower courts, Strauder appealed to the Supreme Court, alleging that the West Virginia law violated his civil rights under the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court held that the West Virginia law was unconstitutional.

Sixteen years later, in *Plessy v. Ferguson,* 163 U.S. 537 (1896), the Court upheld a statute requiring railroads to segregate their passengers by race. At the time, the State of Louisiana, in its Separate Car Act, mandated that all railway companies had to provide separate passenger cars for Whites and for Blacks. Homer Plessy, a Black male, attempted to take a seat in the passenger coach reserved for Whites. Plessy, who was one-eighth Black with no discernible Black features, was ejected and charged with violating the Louisiana Separate Car Act. After losing his case in the lower courts in Louisiana, Plessy appealed to the Supreme Court. In *Plessy v. Ferguson,* 163 US 537 (1896), the Supreme Court, in a 7-to-1 decision, found Louisiana's Separate Car Act constitutional. The doctrine of separate but equal was established in *Plessy*, which dealt with public transportation in the State of Louisiana. It was eventually broadly applied to all forms of public accommodation, including public education (Davis & Graham, 1995, p. 24).

In subsequent cases, the Court's extension of the separate but equal doctrine gave strength to the development and application of what commonly became known as Jim Crow Laws. These laws enforced racial segregation, particularly in the U.S. South,

between the end of the formal Reconstruction period (1877) and the beginning of a strong civil-rights movement (1950s). The Jim Crow Laws were preceded by the infamous Black Codes., Adopted after 1877, the Black Codes prohibited Black freedmen and freedwomen from voting, sitting on juries, testifying against Whites, carrying weapons in public places, and working in certain occupations (Anderson & Byrne, 2004, p. 179).

Under Jim Crow education laws, historically Black colleges and universities (HBCUs) were developed. In comparison to schools designated for White students, HBCUs were under-financed, under-staffed, and poorly maintained. While they offered Blacks an opportunity to receive a college education, public HBCUs were often established by states to maintain segregation in higher education. Southern state governments created them in order to get federal funds for the development of White land-grant universities, limit Black education to vocational training, and prevent Blacks from attending White land-grant colleges (Rai & Critzer, 2000, p. 35). Lacking in resources, HBCUs provided the rudiments of literacy and training for manual labor and domestic service but little to no education in the areas of literature, foreign languages, or advanced mathematics (Irons, 2005, p. 296).

However, the period 1938-1950 witnessed a series of court cases that challenged prevailing policies in graduate and professional programs at state universities in Missouri, Oklahoma, and Texas. The dual public education policy, supported by the separate but equal doctrine of *Plessy,* stood as the benchmark for racially based civil litigation until *Brown v. Board of Education,* 347 U.S. 483 (1954*).*

In the first of these cases, *Missouri ex rel v. Gaines v. Canada,* 305 U.S. 337 (1938), the Court had to decide whether funds provided by the State of Missouri for its

Black residents to attend law school in another state (rather than allowing Blacks admission to its own law school), met the requirements of the Equal Protection Clause of the Fourteenth Amendment (Noland, 2001, p. 20). The plaintiff, Lloyd Lionel Gaines, was a twenty-five year old Black male who, in June 1935, graduated from Lincoln University, Missouri's state-supported historically Black college. Gaines applied to and was rejected by the law school at the University of Missouri, a Jim Crow institution. He was instructed to apply either to Lincoln University or to an out-of-state law school (Kluger, 2004, p. 201).[2] If he chose to attend an out-of-state institution in the adjacent states of Kansas, Iowa, Nebraska, or Illinois, the State of Missouri would pay all tuition charges in excess of what Gaines would have paid if he had enrolled at the Missouri Law School. The state did not offer to pay Gaines for extra traveling and living expenses that would be necessitated by his attending an out-of-state law school (Kluger, p. 201). Gaines sought only to attend the University of Missouri Law School.

In a 6-to-2 decision, the Court found that the separate but equal doctrine required Missouri to provide its Black citizens with an educational opportunity equal to that of its White citizens and that the use of the availability of services in the adjacent states did not meet that obligation (*Gaines v. Canada*, 305 U.S. 337, 1938). In *Gaines*, the Court examined the "equal" part of the separate but equal formula. Fundamental consideration was given to what opportunities the state furnished to White citizens that it denied to Blacks solely upon the basis of membership in their racial group (Davis & Graham, 1995, p. 79).

[2]Lincoln University had no law school. It was, in fact, not a university at all but had merely been empowered to become one by the state legislature, should the need ever arise among the state's Black population (Kluger, 2004, p. 201).

The Court stressed Missouri's obligation to furnish equal protection to its citizens within its own borders rather than passing this obligation on to other states. Among the cases cited to support this rationale was that of *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). This racial discrimination case involved Asian laundry operators. It was not a higher education case but rather a race-based civil rights case. Yick Wo was born in China, came to California in 1861, and operated a laundry in downtown San Francisco. In 1885, the fire marshal (Hopkins) denied his application to renew his license. Five years earlier, the San Francisco Board of Supervisors had passed an ordinance requiring all laundries that were not located in brick or stone-constructed buildings to obtain consent or a license to operate from the city board of supervisors. Out of over 320 laundries in San Francisco, only ten were housed in brick or stone structures. The rest, such as the one operated by Yick Wo, were in wooden buildings. More than two hundred Chinese laundrymen, including Yick Wo, applied for licenses, which required a safety inspection. Every Chinese applicant, along with the only White female applicant, was denied a license. Every other applicant was granted a license. Yick Wo was jailed for refusing to obey the ordinance and refusing to pay the associated fine for violating the ordinance. He petitioned the California Supreme Court for a writ of habeas corpus, alleging that he was illegally deprived of his personal liberty by the fire marshal, who represented the city and county. The California Supreme Court upheld the board of supervisors. Yick Wo appealed to the U.S. Supreme Court, which ruled that illegal discrimination existed in violation of the Fourteenth Amendment (Irons, 2005, p. 272-275). This ruling was important because it emphasized that an ordinance, appearing neutral on its face, was

discriminatory if it had a disparately adverse impact on persons simply because of their membership in a given racial group.

After World War II, colleges were flooded with returning veterans, including Black veterans, able to pay tuition with their GI Bill benefits. There were too few spots available at HBCUs to meet the tremendous demand by Black returning veterans for graduate and undergraduate study. Howard University, possibly the biggest and best-known HBCU, had to turn away applicants to its professional (medical, pharmacy, law, and dentistry) schools. One solution for this overall problem was to open up all-White universities, at least at the graduate level, or insist that the southern states build separate and equal facilities (Kluger, 2004, p. 256). This need, coupled with the need to address the overall national problem regarding racial discrimination, provided the impetus for the National Association for the Advancement of Colored People (NAACP) to challenge the separate but equal policy.

While *Gaines* became the first of many cases led by the NAACP and aimed at overturning the separate but equal standard, it was not the only one. Other cases included *Sipuel v. Board of Regents of the University of Oklahoma,* 332 U.S. 631 (1948), *Sweatt v. Painter,* 339 U.S. 629 (1950), and *McLaurin v. Oklahoma State Regents,* 339 U.S. 637 (1950). *Sipuel* and *Sweatt* concerned law school admission. *McLaurin* applied to graduate programs other than law. The common element in all three cases was the Court's rationale regarding state obligation to provide, within its own boundaries, equal protection for its own citizens regardless of race.

The first of these cases involved Ada Lois Sipuel, a twenty-one year old, Black female who graduated from the State College of Negroes in Langston, Oklahoma. Ms.

Sipuel applied for admission to the University of Oklahoma Law School, the only law school in the state. She was denied admission on the basis that a separate law school for Negroes with "substantially equal" facilities would soon open (Kluger, 2004, p. 257).

The lower court ruled that the university did not have to open a Black law school until it had enough applicants to make one practicable. In April 1947, the Oklahoma Supreme Court upheld the decision rendered by the trial court. The case was argued before the Supreme Court on January 7-8, 1948, and on January 12, 1948, the justices handed down a unanimous, unsigned *per curiam* decision. The decision confirmed that the State of Oklahoma was obligated to provide an education for Sipuel in conformance with the Equal Protection Clause of the Fourteenth Amendment and to provide it as soon as it did for applicants of any other group (*Sipuel v. Board of Regents of the University of Oklahoma,* 332 U.S. 631, 1948).

The Oklahoma Supreme Court directed officials to either admit Ms. Sipuel to the White law school, open up a separate one for her, or suspend the White law school until it saw fit to open one for Blacks (Kluger, 2004, p. 258). The Oklahoma Board of Regents promptly created a separate law school for Blacks in three rooms of the state capitol. Students had access to the state law library, and the state officially hired three White attorneys as faculty to the law school (Davis & Graham, 1995, p. 79; Kluger, 2004, p. 258). The NAACP returned to the U.S. Supreme Court to argue that a separate law school did not comply with any reasonable definition of equality, since the essence of a law school was more than the mere physical facilities. A legal education included the free exchange of ideas and attitudes of representatives of all groups (Kluger, 2004, p. 259). Of the three types of equal rights (civil, political, and social) discussed earlier, this line of

reasoning dealt with the social rights that involved the personal and non-economic interactions among people of different races.

In a 7-to-2 decision, the Court ruled that neither the Oklahoma courts nor the University of Oklahoma had defied the earlier decision. Not surprisingly, the NAACP considered this to be a major setback. *Sipuel* established that the state had a duty to provide a school that met the separate but equal test. However, the decision did not embody what Marshall considered to be the spirit of the law, which would have permitted Black students to have equal access to the same publicly supported schools attended by their White peers.

The case of *Sweatt v. Painter,* 339 U.S. 629 (1950) was argued on April 4, 1950, and decided June 5, 1950. By a vote of 9-to-0, the justices made clear that the separate but equal standard established in *Plessy v. Ferguson* (1896) was unattainable, at least in state-supported higher education (Hall et al., 1992, p. 851). The plaintiff was Herman M. Sweatt, a Black male from Houston, Texas, who, in 1946, was denied admission to the University of Texas Law School. He was offered, but refused, enrollment in a separate law school newly established for Blacks by the state. The Court looked at the make-up of both institutions, noting that the University of Texas Law School had 16 full-time and three part-time professors, 850 students, a library of 65,000 volumes, a law review, moot court facilities, scholarship funds, an Order of the Coif affiliation, distinguished alumni, and an established history of tradition and prestige. The newly created law school for Blacks, on the other hand, had five full-time professors, 23 students, a library of 16,500 volumes, a practice court, a legal aid association, and one alumnus admitted to the Texas Bar. The Court further cited that the newly created law school excluded Whites, which

represented approximately 85% of the State's population and represented the lawyers, witnesses, jurors, judges, and other officials that the Black students would have to relate to as members of the Texas Bar (*Sweatt v. Painter,* 339 U.S. 629, 631-636 [1950]).

Under Chief Justice Fred M. Vinson, the Court concluded that a newly created state law school for Blacks in Texas was in no objective way equal to the University of Texas Law School. A newly created law school would lack the non-measurable elements that made a distinguished law school, which included faculty reputation, alumni prestige, tradition, and history (Davis & Graham, 1995, p. 80). The decision required the University of Texas Law School to admit Mr. Sweatt, thus representing the first time that the Court had compelled the admission of a Black student to a traditionally White institution (Noland, 2001, p. 23).

In *McLaurin v. Oklahoma State Regents for Higher Education,* 339 U.S. 637 (1950), the Court found that the State of Oklahoma was under the same obligation to meet the Equal Protection Clause of the Fourteenth Amendment for students in graduate school as for students in professional schools. The case was argued on April 3-4, 1950, and decided on June 5, 1950. A federal district court had ordered McLaurin's admission to the law school, but Oklahoma law required de jure graduate instruction. Oklahoma changed its laws, allowing the admission of Blacks to state institutions with the restrictions that segregation within the institution would still exist. McLaurin, who was interested in working toward a Ph.D. in education, sat in a separate row reserved for Blacks, studied at a separate desk in the library, ate at a separate table in the cafeteria (Hall et al., 1992, p. 541), and was prohibited from visiting his professors during their regular office hours in order to minimize his interactions with White students (Stephens

& Scheb, 1999, p. 745). In *McLaurin*, a unanimous Court held that the segregated graduate instruction deprived McLaurin of "his personal and present right to the equal protection of the laws" (Davis & Graham, 1995, p. 80).

McLaurin and *Sweatt* were decided on the same day. In both cases, the Court ordered an end to the separate treatment because the practice denied the plaintiffs their personal rights to equal protection as required by the Fourteenth Amendment. In both cases, the Court recognized that education requires more than physical facilities. Education includes discourse with fellow students and faculty, participation in the classroom, and social interactions that afford learning and networking. It also requires the opportunity to be attached to the historical traditions and reputation of the institution itself. *McLaurin* and *Sweatt* made it clear that, where a state provides opportunities to study within its borders for one racial group, it must provide the same opportunities for all its citizens. To do otherwise violates the Equal Protection Clause of the Fourteenth Amendment. The same standard of review applies to both professional and graduate programs.

Each of the above decisions added important factors to the foundation of case law related to race-conscious admissions policies. All recognized the need for equal protection of individuals based on their personal rights to equal protection under the Fourteenth Amendment. The need for equal access to buildings, facilities, and resources was a common theme in all cases. Even more important was the Court's recognition that education includes the need for social interaction among students, teachers, peers, and mentors because such interaction allows for the type of discourse by which we learn. Blacks filed these court cases

on the basis that their civil rights, as members within a certain racial group, had been violated. Decisions rendered by the Court addressed the effects segregation had upon Blacks as members of a certain racial group. However, one must recognize that the educational benefits gained from equal access to higher educational opportunities accrue to and beyond the primary complaining parties. As stated by Noland:

> In the Sweatt and McLaurin rulings, the court framed the value of racial integration in terms of what Black students could learn through interaction with their white peers, without also mentioning the benefits that accrue to white students through interactions with other race students and exposure to diverse learning environments…The Court committed itself to the position that equality could not be achieved in separate graduate and professional schools. (2001, p. 24)

The NAACP continued to challenge the separate but equal concept but moved from public higher education, which affected an elite few, to primary and secondary public education, which affected the masses. In 1951, the NAACP initiated the most well known Supreme Court case dealing with race and public schools, *Brown v. Board of Education of Topeka,* 347 U.S. 483 (1954). *Brown* was actually several separate cases with dozens of plaintiffs consolidated under a single name, all dealing with racial segregation in public education. These cases, filed at different times in different parts of the country (Kansas, South Carolina, Delaware, Virginia, and the District of Columbia), included *Davis v. Prince Edward County, Virginia, Harry Briggs et al v. R. W. Elliott,* the combined Delaware cases of *Gebhart v. Belton* and *Gebhart v. Beulah, Brown v. Board of Education of Topeka,* and *Bolling v. Sharpe.*

Brown v. Board of Education of Topeka was filed in the U.S. District Court in Topeka, Kansas, on February 28, 1951. A panel of three federal judges, headed by Walter

Huxman, heard the *Brown* case. The defense argued that the school system had furnished adequate facilities for Black students in the local public school system. The plaintiffs argued that, while the facilities might be adequate, the impact of a segregated school system itself was detrimental to Black students (Irons, 2005, p. 306). Both sides used expert witnesses. The plaintiff's side consisted of several expert witnesses, including the famous educator and psychologist Dr. Kenneth Clark, who argued the social impacts of segregation. The testimony of one plaintiff witness, Louisa Holt, was appended to the written federal court opinion and would later be re-stated in the Supreme Court opinion on *Brown I.* Per Holt:

> The fact that it [segregation] is enforced, that it is legal has more importance than the mere fact of segregation by itself does because this gives legal and official sanction to a policy which is inevitably interpreted both by white people and by Negroes as denoting the inferiority of the Negro group. (Irons, 2005, p. 308)

On August 3, 1951, the three-judge panel, concluding that the physical facilities, curricular, course of study, and teacher quality and qualifications were comparable, issued its opinion, upholding Topeka's dual public education system. However, relying on opinions in *Sweatt* and *McLaurin*, Huxman also opined in *Brown v. Board of Education of Topeka,* 28 U.S.C. 2281 and 2284 (1951):

> If segregation within a school as in the McLaurin case is a denial of due process, it is difficult to see why segregation in separate schools would not result in the same denial. Or if the denial of the right to commingle with the majority group in higher institutions of learning in the Sweatt case and gain the educational advantages resulting there from, is a lack of due process, it is difficult to see why such denial would not result in the same lack of due process of practices in the lower grades.

In *Harry Briggs et al. v. R.W. Elliott*, Briggs' personal fight was for his daughters, who lacked public transportation to travel to an all-Black school located miles from their home because they could not attend the nearby all-White school. The case of *Davis v. Prince Edward County, Virginia,* the only one that was initiated by students themselves rather than by parents on behalf of the affected students, was ignited by the students' desire to have schools that offered strong curricula as well as suitable facilities. The two *Gebhart* cases involved admitting Black students to attend all-White high schools and elementary public schools. In all, the NAACP argued that separating Blacks from Whites in the public school system was unconstitutional. In the *Gebhart* cases, a Delaware court ruled that the plaintiffs were being denied equal protection of the laws and that they were entitled to immediate admission to the local White public schools. However, the decision did not strike down the segregation laws of the state of Delaware, and the state Board of Education appealed the decision (Anderson & Byrne, 2004, p. 18). Finally, *Bolling v. Sharpe*, 347 U.S. 497 (1954) was argued on December 10-11, 1952, and reargued on December 8-9, 1953. Like the *Gebhart* cases, the plaintiff, Thomas Bolling, Jr., was one of twelve students who had been denied admission to the newly built all-White John Philip Sousa Junior High School, a public school in southeast Washington.

On September 9-11, 1952, the first round of arguments in the cases officially bundled together as *Brown v. Board of Education* was held. The grouping of the above-cited cases was very significant because it showed that the problem of school segregation was more than just a southern issue and more than the matter of desegregation, busing, or even equal access. The issue of school segregation was very complex, geographically widespread, and, therefore, of national concern. The effects of Jim Crow Laws and Black

Codes were long-reaching in terms of both time and distance. Oral arguments in *Brown I* began on December 9, 1952. The basic argument for the *Brown* plaintiffs was that where public funds are used to provide public education, such funds should be used to provide equal access to all citizens regardless of race. Because the Court was unable to reach a consensus on the cases, Justice Felix Frankfurter suggested that the Court prepare questions for re-argument and that the cases be held over until the next term (David & Graham, 1995, p. 118). The Court also invited the Attorney General of the United States to take part in the oral argument and to file an additional brief (David & Graham, p. 119). Prior to re-argument, on September 8, 1953, Chief Justice Fred Vinson, Jr., died of a heart attack, and President Dwight D. Eisenhower appointed California Governor Earl Warren, age 62, as his replacement.

The second round of arguments in the *Brown I* case was held in December 1953. Recognizing the importance of the decision and using his skills as a consensus-builder, Chief Justice Warren summoned the justices to present a united front on *Brown I*. As a result, on May 17, 1954, the Supreme Court handed down its historic unanimous ruling that state-sanctioned segregation of public schools was a violation of the Equal Protection Clause of the Fourteenth Amendment and was, therefore, unconstitutional. It is significant that in the decision, Chief Justice Warren referred back to the opinion rendered earlier by Judge Huxman (and based on the statement made by the witness, Louisa Holt) in *Brown v. Board of Education of Topeka*:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with

> the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system. (1954)

The Court rendered a separate opinion on *Bolling* because the Fourteenth Amendment was not applicable in the District of Columbia (Anderson & Byrne, 2004, p. 19). In *Bolling*, Chief Justice Warren held, however, that the Due Process Clause of the Fifth Amendment implicitly forbade most racial discrimination by the federal government just as the Equal Protection Clause of the Fourteenth Amendment restricted state action.

After the decision, some of the school districts in the border states began to desegregate their schools voluntarily. However, state legislatures in Alabama, Georgia, Mississippi, South Carolina, and Virginia adopted resolutions of "interposition and nullification" that declared the Court's decision to be "null, void, and [of] no effect" (Anderson & Byrne, 2004, p. 20). The Court was to reconvene and issue the determination of how schools should implement the ruling but, in October 1954, Associate Justice Robert H. Jackson suddenly died. President Eisenhower, making his second appointment to the Court, chose John Marshall Harlan, the grandson of the lone dissenter in *Plessy*, as the Court's newest member. Harlan was sworn in amid much debate just two months before the Court handed down its opinion in *Brown II,* 349 U.S. 294 (1955). The decision required states to make prompt and reasonable efforts to fulfill the decision rendered in the *Brown I* ruling. The Court also ruled, however, that additional time might be necessary to carry out the ruling in an effective manner and that the states had the burden to establish that such time was necessary. According to the

Brown II ruling, states could consider such needs as those associated with the physical conditions of their existing and/or planned schools, transportation requirements, personnel and administration needs, as well as making any revisions to local laws and regulations needed to solve the existing de jure problems. Even in light of these allowances, the Court instructed the states to fulfill the Court's order with "all deliberate speed" (*Brown II,* 348 U.S. 294, 1955).

To the NAACP, the phrase "with all deliberate speed" meant "slow"; any apparent victory gained from the decision itself was compromised because resisters were allowed to end segregation on their own timetable (Ogletree, 2004, p. 11). Those words appeared to be prophetic, as state and local governments, intent on avoiding desegregation, adopted a strategy of "legislate and litigate" that delayed universal compliance with *Brown II* for well over a decade (Stephens & Scheb, 1999, p. 746). In the Congress, 19 senators and 77 members of the House of Representatives signed the Southern Manifesto. The Manifesto charged the Supreme Court with abusing its power and encroaching on the rights reserved to the states. It also requested that the people in the affected states use all lawful means at their disposal to oppose integration. This resistance took the form of newly created pupil placement laws, freedom of choice plans, school closing laws, Whites transferring to private schools, and very weak enforcement efforts (Graham & Davis, 1995, p. 126).

During the late 1960s and mid-1970s, the Supreme Court continued to wrestle with the issue of public school desegregation as seen in decisions rendered in *Alexander v. Holmes County Board of Education* (1969), *Swann v. Board of Education of Charlotte-Mecklenburg County, North Carolina* (1971), and *Milliken v. Bradley* (1974). These

cases dealt with the tough and continual issues of busing, racial balance versus quotas, and one-race/unitary school systems at the primary and secondary educational levels. Two Supreme Court cases decided in the late 1960s and early 1970s affected court decisions rendered in post-secondary cases. One was the case of *Charles C. Green et al. v. County School Board of New Kent County et a*l., 391 U.S. 430 (1968); the other was *Adams v. Richardson,* 356 F. Supp. 92, 94, D.D.C. (1973). *Green* dealt specifically with primary and secondary education. *Adams* dealt with higher education.

In *Green v. New Kent County,* rendered in 1968, the county school system had made efforts to address *Brown II*. Since public transportation was provided to all students, busing was not at issue. The residential patterns were not racially segregated, and Blacks resided throughout the county. The system instituted a plan referred to as the "freedom of choice" plan, wherein all students, except those in grades 1 and 8, were allowed to annually choose which schools they wanted to attend. On its face, this plan appeared to be race neutral. However, vestiges of the de jure segregation system continued to have negative effects on racial integration. After three years of using the "freedom of choice" plan, no White students attended the historically all-Black school and only a small number of Blacks attended the historically all-White school. This left virtually intact the dual de jure segregated educational system.

The Court ruled that the "freedom of choice plan" had proven to be unacceptable in creating a unitary system and that the county had an affirmative duty to promptly institute a process that would lead to the type of unitary system envisioned in *Brown I*. That meant the public school system had a duty to (1) remove the vestiges of past de jure segregation—"root and branch," and (2) to create a system that prevented future

discrimination (*Green v. New Kent County*). Even though *Green* dealt with primary and secondary public schools, these sentiments would appear over and over in cases addressing racial desegregation in public higher education, such as *Geier*.

In *Adams v. Richardson,* 356 F. Supp. 92 D.D.D. (1973), plaintiffs accused the federal Department of Health, Education, and Welfare (DHEW) of failing to enforce Title VI of the 1964 Civil Rights Act in ten states[3] (Kaplin & Lee, 1995, p. 842). With Title VI of the 1964 Civil Rights Act, the federal government had the ability to withhold federal funds administered through the DHEW to any institution that did not take affirmative steps to ensure equal access to its public institutions for all citizens. The DHEW found that the higher education systems in the ten states were not in compliance with Title VI and requested that each state submit desegregation plans within a designated (four-month) period with proposed corrective action. States were required to re-evaluate their programs and procedures, take affirmative steps to eliminate the vestiges of past discrimination, and create a unitary educational system so that all citizens, regardless of race, would have equal access to the same schools and resources. Three years later, after the lawsuit had been filed and the court was ready to rule, five states (Oklahoma, North Carolina, Mississippi, Louisiana, and Florida) still had not submitted any plans, and five states (Virginia, Pennsylvania, Maryland, Georgia, and Arkansas) had submitted plans that did not remedy the violations. The DHEW, under Elliott Richardson, had not commenced administrative enforcement efforts within the DHEW and had not referred the cases to the Justice Department for prosecution. No action had been taken in the ten cases. The U.S. district court ordered the DHEW (*Adams v.*

[3]Arkansas, Georgia, Maryland, Pennsylvania, Virginia, Florida, Louisiana, Mississippi, North Carolina, and Oklahoma.

Richardson, 356 F. Supp. 92 D.D.C., 1973) to initiate enforcement proceedings against the ten states; the U.S. court of appeals affirmed the decision in 480 F. 2d 1159 (D.C. Cir. 1973) but provided more time to initiate enforcement proceedings (Kaplin & Lee, 1995, p. 843). In 1977, the district court revoked DHEW's approval of several states' higher education desegregation plans and ordered DHEW to devise criteria by which it would evaluate new plans to be submitted by these states (Kaplin & Lee, 1995, p. 843). In 1979, under the Department of Education Organization Act, a separate Department of Education was formed. The DHEW became the Department of Health and Human Services and lost its standing in the case. Both newly created departments became offices on May 4, 1980. In 1987, after no additional action was taken by the Department of Education, the case was dismissed.

The 1990s brought litigation against state public higher education institutions in Georgia, Texas, and Washington. To correct the effects of past discrimination and achieve their commitment to diversify their student populations, Georgia and Texas used admissions policies that included a point indexing system (*Johnson v. Board of Regents of the University System of Georgia,* 263 F. 3d 1234 (11th Cir., 2001) and/or review of applicants along a dual admissions track system (*Hopwood v. State of Texas,* 236 F. 3d 256 (5th Cir., 2000). Non-minority applicants denied admission to state public higher education institutions in Georgia and Texas filed lawsuits alleging violation of the Equal Protection Clause of the Fourteenth Amendment.

In 1995, the University of Georgia (UGA) developed a three-stage admissions process. The initial stage ("first notice") evaluated the applicant based on objective academic criteria without regard to race or gender. During stage two, UGA assessed the

applicant's total student index (TSI). Candidates were awarded points based on a variety of factors, including race (.05), gender (0.25), extracurricular activities, state residency, and academic achievement. At the first stage of review, candidates with a TSI score of 4.93 out of a possible 8.15 rating were automatically accepted. Applicants with a TSI score between 4.66 and 4.92 moved into the second stage of review, where the extra points for gender or race could be applied. Those applicants who had less than a 4.66 overall rating were reviewed at a third stage, known as the "edge read" stage. At the "edge read" stage, neither race nor gender was considered as a factor, and applicants received a thorough, individual review.

Three White female applicants were denied admission to the UGA 1999 class and filed lawsuits alleging violation of the Equal Protection Clause and Title VI, as well as gender discrimination in violation of the Equal Protection Clause and Title IX. None met the automatic acceptance criteria at the "first notice" stage. None received any extra points at the second review stage because their TSI was outside the range of consideration at that stage. After a thorough individual review, all were eventually rejected at the third review stage. The lower court held for the female applicants and UGA appealed. The federal district court rejected UGA's diversity argument because the process did not meet the strict scrutiny standard (Center for Education & Employment Law, 2006, p. 89-90). The process was not tailored narrowly enough to justify a compelling governmental interest. Specifically, in the UGA process, points were assigned on the basis of race and gender, and the point value for an applicant's race was greater than the point value of any other non-academic factor. During the overall process, UGA did not conduct individual evaluations for each applicant, nor did UGA consider any

race-neutral alternatives. Race became a deciding factor in the admissions review process.

Hopwood v. Texas proved to be more complex and controversial. In *Hopwood,* four White students applied for admission to the University of Texas School of Law and were denied admission. The applicants sued under Title VI of the Civil Rights Act of 1964 and 42 U.S.C §§ 1981 and 1983. The district court found that the law school's interest in educational diversity could justify race conscious admission but held that the two-track admissions process used was not tailored narrowly enough to further that interest (Coleman, 2001, p. 36). The admissions process applied one track for minority students and another track for non-minority students. The court also ruled that the students had failed to prove that, absent the unconstitutional admissions process, they would have been admitted to the law school. They appealed to the Fifth Circuit and prevailed. The Fifth Circuit, upon appeal, ruled that this admissions process violated the rights of plaintiffs and held that the *Bakke* decision was no longer good law (Stephens & Scheb, 1999, p. 754). The use of racial preferences served no compelling state interests. On December 21, 2000, upon appeal by plaintiffs regarding damages, the Fifth Circuit reversed the injunction, which had barred the law school from taking race into consideration in admissions, concluding that "racial preferences are constitutional in some circumstances" (Coleman, 2001, p. 36). Both the district court and the court of appeals affirmed that the plaintiffs would not have been admitted to the law school even if a race-blind system had been used. *Hopwood* demonstrated the widespread differences of opinion, within the same state and nationwide, regarding how the *Bakke* standard should be interpreted and applied. As a result, the Clinton administration, the District of

Columbia, and nine states filed amicus curiae briefs in support of Texas's cert petition (Stephens & Scheb, 1999, p. 754). Many wanted this case to be heard by the U.S. Supreme Court. However, the Court chose not to review the case.

In *Smith v. University of Washington Law School*, 392 F.3d 367 (9th Cir., 2004), several White students who were denied admission to the University of Washington Law School sued, alleging racial discrimination. The law school proved that the process did not use racial quotas, targets, or goals for admission or enrollment. The law school did consider race and ethnicity as "plus factors" but demonstrated that other non-racial diversity factors were also considered as "plus factors" in admissions decisions. The applicants lost the suit and appealed to the Ninth Circuit Court of Appeals, which allowed the use of race in college admissions decisions. However, state public institutions in Washington are banned from using race-sensitive admissions policies because of a state proposition, which prohibits this practice.

The above-cited cases dealt with race conscious admissions processes used in the higher education setting. None of these cases (neither *Johnson* nor *Smith* nor *Hopwood*), however, went before the Supreme Court. As a result of the different interpretations rendered by the lower courts, the nation was left in limbo in determining how race-conscious admissions programs could be developed and used to correct the effects of past discrimination as well as to diversify the student bodies.

The U.S. Supreme Court decisions in *Grutter* and *Gratz*, therefore, represent the most recent attempts by the Court to address the problem of racial inequality in public higher educational institutions. Amid much publicity and fanfare, *Grutter* and *Gratz* were welcomed by supporters of affirmative action and criticized by opponents. The

Court took into consideration the use of numerical goals, the effect of race on society, and, to some extent, the need to remove the vestiges of de jure segregation. In both *Grutter* and *Gratz*, the U.S. Supreme Court found that achieving a diverse student body could represent a compelling governmental interest. However, the process used to achieve this worthy goal must comply with the Equal Protection Clause of the Fourteenth Amendment. The use of race must meet the strict scrutiny standard. The decision rendered in *Grutter* confirmed that *Bakke* was no longer the standard for the nation. It also established that *Fordice*, which had been used as the standard of review for Tennessee, was no longer applicable to *Geier*.

CHAPTER THREE

THE EVOLUTION OF PUBLIC EDUCATION IN TENNESEE: FROM RACIAL SEGREGATION TO THE *GEIER* LITIGATION

The State of Tennessee, in recognition of the importance of public education to its citizenry and political structure, has made a constitutional commitment to finance public education in perpetuity. According to the Tennessee Constitution:

> Knowledge, learning, and virtue, being essential to the preservation of republic institutions, and the diffusion of the opportunities and advantages of education throughout the different portions of the State, being highly conducive to the promotion of this end, it shall be the duty of the General Assembly in all future periods of this Government, to cherish literature and science. And the fund called common school fund, and all the lands and proceeds thereof...heretofore by law appropriated by the General Assembly of this State for the use of common schools…shall be inviolably appropriated to the support and encouragement of common schools throughout the State, and the equal benefit of all the people thereof. (Constitution of the State of Tennessee, 1835, Article XII)

Like many other southern states, Tennessee operated a dual system of public education for decades. Blacks and Whites attended state-mandated, racially segregated public primary and secondary schools, colleges, and universities. Public funds were used to maintain a de jure segregated system. According to the amended Tennessee Constitution, "No school established or aided under this section shall allow white and Negro children to be received as scholars together in the same school" (Tennessee Constitution of 1870, as amended, Article XI, Section 12).

Education for Blacks was provided primarily through missionaries and the Bureau of Refugees, Freedmen, and Abandoned Lands (Freedmen's Bureau). Established in March 1865, the purpose of the Freedman's Bureau was to assist and protect the rights of newly freed southern Blacks after the Civil War. The Bureau was initially legislated to

last for one year. It continued its work until 1869, with projects lasting through 1872 (Bureau of Refugees, Freedmen and Abandoned Lands, 2003-2006, ¶6). In Tennessee, with the help of northern missionaries and the Freedmen's Bureau, schools were established in Knoxville, Nashville, Memphis, and other Tennessee communities where large numbers of fugitive slaves resided in contraband camps protected by the Union army. Missionary societies converted some freedmen's schools into pre-collegiate and then college-level programs (Lovett, 2005, p. 335-336).[4] None of the freedmen's colleges had Black presidents, and there were very few Black faculty members at these institutions (Lovett, p. 336).

Northern states had public colleges, partly because of the Morrill Land Grant Act. Commonly referred to as the Land Grant Act, the Morrill Act was passed in 1862 under the sponsorship of Congressman Justin Morrill of Vermont. The Act gave every state that had remained in the Union a grant of 30,000 acres of public land for each senator (at least two) and representative (at least one). The states were to sell the land and use the proceeds to establish colleges in engineering, agriculture, and military science. More than seventy land grant colleges were established under the original Morrill Act (U.S. Dept. of State, n.d., ¶4).

In 1869, East Tennessee University (a private institution) was designated as the federal land-grant institution for the State of Tennessee and became the University of Tennessee (UT) in 1879. Because Tennessee was a de jure state that forbade Blacks and

[4]These institutions included: Nashville Normal and Theological Institute or Roger Williams University (1866-1929), Fisk Free School or Fisk University (1866-present), Central Tennessee College or Walden University (1868-1922), and Tennessee Manual Labor University (1868-1874)—all located in Nashville. Other Tennessee freedmen schools included Lemoyne Institute or Lemoyne-Owen College (1872-present) in Memphis, Knoxville College (1875-present) in Knoxville, Meharry Medical College (1876-present) in Nashville, and Lane College (1882-present) in Jackson. Fisk and Roger William produced college degrees by 1874; Knoxville College and LeMoyne did so much later.

Whites from attending the same public schools, UT made arrangements with Fisk University to educate Black applicants (Lovett, 2005, p. 336). In 1881-82, ten Black students enrolled at Fisk. In 1884, the contract was changed from Fisk University to Knoxville College, but those already attending Fisk (fourteen students at the time) were able to finish at Fisk if they chose (Creekmore, 2006).

On August 30, 1890, Congress amended the 1862 Morrill Land Grant Act and added language to the legislation to advocate equal access to public higher education for Black citizens. During this same year, a new contract was negotiated with Knoxville College, creating the Industrial Department of the University of Tennessee. Under the contract, the university would provide teachers, apparatus, tools, machinery, and all the other equipment needed for an industrial college for Blacks. This contract continued until the Tennessee Agricultural and Industrial College (Tennessee A & I) opened in 1912 as a land-grant college for Blacks (Creekmore, 2006; Lovett, 2005, p. 336-337). Tennessee A & I gained university status in 1951 and in 1968 became known as Tennessee State University.

To provide an education for Black students interested in entering the professional fields, Tennessee officials began making arrangements in 1941 with Meharry Medical College, a private institution, to educate its Black citizens to become doctors, nurses, and dentists (Lovett, 2005, p. 341). In 1948, Tennessee took a leadership role in organizing the Southern Regional Education Board (SREB). The purpose of the SREB[5] was to

[5]Today, the SREB has evolved into a regional agency that handles access to educational programs regardless of race and provides educational programs for primary to postsecondary education levels. Sixteen states are members. The SREB Academic Common Market Program is a tuition-savings program for college students in the 16 SREB member states who want to pursue degrees in fields that are not offered by their in-state institutions. These students enroll in out-of-state universities that offer the specialized

contract with various graduate and professional schools, especially those in the medical and health fields, to accept Tennessee Black citizens who qualified for such programs. Member states paid a set cost per student who entered their institution. In exchange, member states could meet the "separate but equal" requirements of *Plessy* (Lovett, p. 341).

Public laws and policies in Tennessee have changed over time. There is no longer any mention of separation of the races in publicly financed educational institutions. Currently, Article XI, Section 12 of the Tennessee Constitution states:

> The State of Tennessee recognizes the inherent value of education and encourages its support. The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools. The General Assembly may establish and support such post-secondary educational institutions including public institutions of higher learning, as it determines.

The effects of a de jure segregated public school system, however, continued to prevail beyond such legislative changes. Currently, in Tennessee, there are eleven public universities, twelve special purpose institutes, thirteen two-year institutions, and twenty-seven technology centers. The publicly financed four-year educational institutions include Austin Peay University, East Tennessee State University, Middle Tennessee State University, Tennessee State University, Tennessee Technological University, University of Memphis (formerly Memphis State University), and the University of Tennessee, which includes campuses in Knoxville (including the Institute of Agriculture), Chattanooga, Martin, Tullahoma, and Memphis. Six of these institutions operate under

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degree programs, and they pay only the in-state tuition rates. The sixteen member states include Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia.

policies and procedures promulgated by the Tennessee Board of Regents. The University of Tennessee operates under policies and procedures promulgated by a separate UT Board of Trustees. The Tennessee Higher Education Commission, formed in 1967, coordinates and monitors both educational boards.

Tennessee State University (TSU) is the only publicly financed four-year historically Black college and university (HBCU) in Tennessee. The University of Tennessee, designated as a land-grant institution in 1879, was originally founded as a historically White institution (HWI). Professional educational degrees in law, dentistry, medicine, pharmacy, and veterinary sciences can be obtained from programs offered at the University of Memphis, East Tennessee State University, and the University of Tennessee (to include the Medical Health Science Center in Memphis and the College of Law and the Institute of Agriculture in Knoxville). TSU does not offer professional degree programs.

This historical background is important to the discussion of *Geier,* the lawsuit that changed public higher education in Tennessee. In 1968, Rita Sanders, a Black female, several other Blacks, and additional partners, including the United States, sued the Governor of Tennessee, the University of Tennessee, TSU (Tennessee A & I State University at the time), and various educational agencies and officials. The purpose of the lawsuit was to prevent UT from creating a degree-granting program for the College of Social Work in Nashville, where TSU was located and also offered a program in Social Work (*Sanders v. Ellington,* 288 F. Supp. 937 M.D. Tenn., 1968). Challenges to the proposed expansion soon erupted.

Rita (Sanders) Geier, born in Memphis in 1944, decided to legally challenge the proposed expansion. She was accepted as an undergraduate at Fisk University in Nashville at age 16 and entered Fisk at age 17. After graduating from Fisk, with an interest in graduate school, Ms. Geier enrolled at the University of Chicago. By the time she completed her studies at the University of Chicago, she had discovered that she wanted to teach. From Chicago she returned to Nashville to accept a temporary teaching position in the History Department at TSU.[6] Young and idealistic, Ms. Geier was ready to make a difference in the lives of her students at TSU, just as her Fisk advisor, John Hope Franklin, had made a difference in her life. Ms. Geier noticed that resources available to faculty and students at TSU were "on a shoe string" in comparison to those she had been accustomed to having at her previous graduate institution (R. S. Geier, personal communication, May 20, 2006). During her first two years of teaching at TSU, two things happened that seemed to change her life. First, Ms. Geier became aware of the proposed plans by the University of Tennessee to develop a campus in the Nashville area. She imagined that the newly expanded school would have access to resources that had been denied to TSU and would become a permanent fixture in the Nashville area. To her, the proposed expansion could have long-term effects on the existing TSU. Secondly, Ms. Geier realized that she wanted to pursue a law degree. She applied to and was accepted at Vanderbilt Law School as a full-time student and continued to teach part-time at TSU. During this time, Ms. Geier met two women who would have lifelong effects on her. One was Marian Wright Edelman, a civil rights activist doing great things in the State of Mississippi. The other was Ruth Robinson, a classmate at the Vanderbilt Law School

[6]Although the institution was known as Tennessee A & I at the time of her hire, the name was later changed to Tennessee State University. It will be referred to TSU throughout the remainder of this dissertation.

and law clerk to George Barrette, a Nashville attorney (R. S. Geier, personal communication).

Amid the UT expansion plans, the City of Nashville was involved in a major urban renewal effort, which was being opposed by a Nashville lawyer named Avon Williams, as well as others. Surrounded by unrest over the urban renewal project and concerns for the UT expansion, the twenty-three year old Ms. Geier decided to file a lawsuit to stop the UT expansion. Her support base became Avon Williams, George Barrette, and the local people involved in opposing the urban renewal efforts (R. S. Geier, personal communication, May 20, 2006).

Geier,[7] along with Patrick J. Gilpin, a White professor at TSU, Harold Sweatt, a senior at nearby Wilson County High School planning to enroll at TSU, and Harold Sweatt, Sr., chose George Barrette to serve as legal counsel for their lawsuit (Lovett, 2005, p. 350-351; R. S. Geier, personal communication, May 20, 2006). The lawsuit argued that with the expansion of the proposed University of Tennessee, the state would continue to operate a dual system of higher education in violation of the Equal Protection Clause of the Fourteenth Amendment as argued in *Brown v. Board of Education*. The plaintiffs alleged that the proposed facility would become a predominantly White school in the same city as predominantly Black TSU. Such expansion would continue to perpetuate the vestiges of Tennessee's de jure segregation, which had been declared illegal by federal law and eliminated from Tennessee public law during the 1950s. The

[7]The original lawsuit was filed as *Sanders v. Ellington*. As the lawsuit involving TSU and UT Nashville wound through the legal system, it would assume different names after the chief plaintiff, Rita Sanders, married and became Rita Sanders Geier, and after new governors took office. Between 1968 and 1983, the United States government, parent groups, students, faculty, alumni, and other petitioners became involved in the growing debate.

United States Justice Department eventually joined as a plaintiff in support of the *Geier* position.

Defendants alleged that the proposed UT expansion would provide an evening school program that would address a different population, i.e., professionals in the field, than the population that attended the program offered by TSU. Plaintiffs alleged that any expansion by UT of its Nashville-based non-degree higher educational program into a degree program would negatively affect any efforts by TSU to desegregate its student body and faculty. The lawsuit called for an injunction to stop the proposed program expansion.

On August 21, 1968, Judge Frank Gray, Jr. of the district court denied an injunction to stop the construction of the UT Nashville campus. However, he found that failing to make TSU a viable, desegregated institution would lead to its continued deterioration as a viable public state university. Judge Gray ruled that, because of the effects of past de jure segregation policies, the state had an affirmative duty, imposed by the Equal Protection Clause of the Fourteenth Amendment, to dismantle the dual de jure higher education system.[8] Tennessee had established an open door admissions policy allowing desegregation of public higher education programs. However, more was required to eliminate the identifiable effects of the racially separated White and Black state institutions.

The state and its parties were ordered to develop and submit by 1970 a statewide plan to remove the vestiges of past segregation. The order further requested the parties to place special emphasis on the issue of desegregating the TSU campus. Between 1972 and

[8]Rita Sanders *Geier, et al. Plaintiffs-Appellants v. Don Sundquist, et al., Defendants-Appellees* (No. 02-6400) on Appeal from the US District Fourth for the M.D. of Tennessee at Nashville No. 68-05077.

1983, the defendants submitted several plans, all of which were questioned by the plaintiffs. During this time, the Tennessee Board of Regents (TBR) was created by the General Assembly to govern those institutions not governed by the University of Tennessee, including TSU and five community colleges. In 1983, the General Assembly transferred the technical institutes and area vocational schools (now called Tennessee Technology Centers) to the Tennessee Board of Regents (Tennessee Board of Regents, n.d., ¶1).

Dissatisfied with the results of the progress of the lawsuit, a plaintiffs-intervener petition, known as the Adams-Richardson petition, was submitted to the court in June 1972. The petition was signed by Sterlin Adams and Raymond Richardson, two TSU faculty leaders, and by more than a hundred Black Tennesseans. Representing the petitioners were Avon Williams and lawyers from the NAACP Legal Defense Fund. The petition read, in part:

> Permanent injunction to restrain and enjoin the defendants from continuing to operate the public institutions of higher education of the State of Tennessee on a racially dual and discriminatory basis…. The class action suit is on behalf of the intervening plaintiffs and all others similarly situated in Tennessee, including Black minor children that will attend public institutions of higher education in Tennessee.... The defendants' proposals are purportedly only intended as possible temporary steps to deal with what defendants see as the problem: Tennessee State University (rather than the entire racially oriented higher education system). Their implementation will in fact largely determine the content and direction of any further steps, which defendants might propose in accordance with the order of this Court, and they almost inevitably foreshadow an unwarranted attempt to abolish Tennessee State University as a Tennessee institution by assimilation into the campus of the University of Tennessee. (Lovett, 2005, p. 360-361)

While efforts began to coordinate programs and facilities, the court continued to deliberate. On January 21, 1977, Judge Gray ruled for the merger of the UT Nashville

campus into TSU. The University of Tennessee, the State of Tennessee, and the Tennessee Higher Education Commission appealed this ruling in April 1977 but to no avail. In 1979, the Sixth Circuit Court of Appeals upheld the district court's merger order. In 1982, plaintiffs filed a complaint alleging that the merger plan was not being instituted in a manner intended by the court. It was noted that, despite some progress made in the employment of underrepresented faculty and staff at the two main institutions, the White student population at TSU was beginning to re-segregate to pre-merger levels. In 1983, the court allowed another group of TSU affiliated faculty and students, Black and White, and led by H. Cooley McGinnis, to intervene.

Judge Thomas A. Wiseman inherited the *Geier* case from retiring Judge Frank Gray in 1978. He urged all parties to move toward development of a Stipulation of Settlement as a means to settle the lawsuit and, in 1984, after much debate, all parties except the United States signed the *Geier* Stipulation of Settlement. The purpose of the settlement was to bring about a just resolution of the issues, without further litigation, that would achieve a unitary, desegregated system of public higher education in the State of Tennessee (Stipulation of Settlement No. 5077, August 31, 1984). The Department of Justice objected to the settlement because it had urged an evidentiary hearing regarding the issue of admissions standards before such a decree was approved. Further, the Department of Justice did not believe that efforts went far enough to ensure equal educational opportunity, eliminate the remaining vestiges of the state-imposed dual system of higher education, increase racial diversity at all state colleges, and ensure equitable distribution of Blacks and Whites in all institutions (Lovett, 2005, p. 380-381).

Under the Stipulation of Settlement, a Desegregation Monitoring Committee (DMC) was created to identify problem areas, report on progress annually, and provide recommendations for needed changes. The DMC consisted of twelve members, to include the Executive Director of the Tennessee Higher Education Commission, the Chancellor of the Tennessee Board of Regents, and the President of the University of Tennessee System. The remaining nine members were lay board members from the Higher Education Commission, State Board of Regents, and University of Tennessee System (Desegregation Monitoring Committee, 1990). The Stipulation of Settlement required the Tennessee Board of Regents and UT Board of Trustees to develop programs for recruiting and retaining underrepresented faculty, students, and staff, particularly administrators, to their respective institutions. To ensure that TSU, the only Tennessee HBCU, would become a viable institution, special measures and funds needed to improve the campus infrastructure and curriculum were put into place. Recruitment goals were established for all institutions, particularly TSU, goals that by today's standards still may seem unattainable. For instance, as an interim goal, TSU was to attempt to achieve a White undergraduate student body, faculty, and administrative staff equivalent to its Black campus population by 1993. That meant that 50% of TSU's undergraduate population would need to be White. On a long-term basis, TSU was to strive for a White student population equivalent to that of other Tennessee institutions. For the HWIs, recruitment goals were basically to reflect the Black population of the state, which, then and now, would represent a goal of less than 15% Black enrollment. Cooperative programs were to be developed that would help increase the number of Black students enrolled in and graduated from professional programs (law, veterinary medicine,

dentistry, pharmacy, and medicine). Finally, both boards were to evaluate their educational policies, programs, and materials to ensure that they served all citizens of Tennessee on a non-racial basis. Public colleges and universities in the State of Tennessee were to become racially non-identifiable (*Geier* Stipulation of Settlement No. 5077, 1984; see Appendix A). By 1989, in compliance with *Geier*, both the TBR and UT Board had revised their institutional mission statements to reflect that no institution was identified as a one-race or predominantly one-race institution (Desegregation Monitoring Committee, 1990; see Appendix B).

In 1994, the State moved to vacate the 1984 Settlement and to terminate the litigation, arguing that the Supreme Court decision in *U.S. v. Fordice*, 505 U. S. 717 (1992) had significantly changed the law in higher education desegregation cases. Like the *Fordice* case in Mississippi, the *Geier* case was based on removing the vestiges of a de jure dual public higher education system. Like *Geier*, *Fordice* resulted in a Stipulation of Settlement, which required the State of Mississippi to implement specific programs to make state institutions racially non-identifiable. The State of Tennessee argued that, according to *Fordice*, states were not required to create a given racial balance in higher education because, unlike primary and secondary education, student choice played a greater role in the type and location of the institution a student selected to attend. The Supreme Court disagreed, stating that the state's duty to eliminate the dual system continues until it has eliminated all policies and practices traceable to the prior de jure segregated system, which still had effects on current status. In 1996, again relying on *Fordice*, *Geier* defendants moved for a judgment on the pleadings. The district court did not rule on the defendant's motion to vacate and eventually denied their motion for

judgment on the pleadings. It is important to note that in Mississippi efforts to dismiss the Stipulation of Settlement were just as intense as were efforts to dismiss the *Geier* Stipulation of Settlement in Tennessee. For example, in 1995, upon appeal by the *Fordice* defendants to the mandated remedies, the U.S. district court reiterated that the purpose of the court's efforts was not to enhance Mississippi's HBCUs so that Blacks would have a better segregated Black college to attend. The purpose was to desegregate the dual higher education system. The court stressed that it is as much a violation of the Constitution to build up an HBCU with the sole purpose that Blacks would have a better school to attend as it would be a violation of the Constitution to build up an HWI solely so that White students would have a better university to attend (*Ayers v. Fordice,* 879 F Supp 1419-30, N.D. Miss, 1995). Although not addressed within this dissertation, issues surrounding the preservation of HBCUs, for their historical value as well as for special purposes in the lives of Blacks, represent concern and contention that deserves further attention.

In 2000, the *Geier* parties entered into voluntary mediation, and on January 4, 2001, a *Geier* Consent Decree (see Appendix C) was reached with the purpose of establishing a five-year wind-down process that would conclude Tennessee's efforts to eliminate the vestiges of its prior racially segregated dual system of public higher education. Accordingly, at its conclusion, Tennessee would no longer need to be mandated to provide equal public education for all its citizens and would have created a system of higher education that preserves and enhances access to educational experiences for all students in Tennessee's public colleges and universities. At its conclusion, Tennessee would have desegregated its public colleges and universities.

The Consent Decree removed all numerical goals and timetables outlined in the Stipulation of Settlement. It continued to provide financial support to campuses to help recruit for and retain racial diversity at the respective campuses and to develop a strategic plan for maintaining diversity when all *Geier* efforts were dismissed. Dismissal would mean that equal access for all persons qualified to attend Tennessee public colleges and universities existed. Further, dismissal of the Consent Decree would indicate, in accordance with *Fordice*, that Tennessee had removed the vestiges of past de jure segregation and that a unitary system of public higher education had been created. Post-*Geier*, Tennessee would move from the era of removing the vestiges of past discrimination against one race, Blacks, to developing and maintaining an inclusive environment for a more broadly defined, diverse population, which includes but goes beyond race.

The *Geier* mandates placed special emphasis on the recruitment and retention of students in the professional and pre-professional programs. In Tennessee, the professional programs of dentistry, pharmacy, medicine, veterinary medicine, and law are offered at the University of Tennessee (to include the Institute of Agriculture), University of Tennessee Health Science Center, University of Memphis, and East Tennessee State University. Both the University of Memphis and East Tennessee State University are Tennessee Board of Regents' (TBR) Institutions. The University of Memphis (UM) has a professional law school; East Tennessee State University has a professional medical program. In 2005, the UM School of Law had approximately 460 students, with twenty-three full-time professors and approximately twenty adjunct professors. The two most significant factors in making admissions decisions are the LSAT (Law School

Admissions Test) scores and undergraduate grade point average. The median LSAT score for students entering the 2009 class was 155; the average undergraduate grade point average was 3.36 (University of Memphis Cecil C. Humphreys School of Law, 2006). East Tennessee State University (ETSU), located in Johnson City, Tennessee, enrolls nearly 12,000 students. The Division of Health Science includes the James H. Quillen College of Medicine, College of Nursing, College of Public and Allied Health, and the proposed College of Pharmacy. The College has been ranked among the top eight medical schools in the country for rural medicine. It enrolls an average class size of 60 medical students per year and offers degrees of Doctor of Medicine, Master of Science, and Doctor of Philosophy (East Tennessee State University, Quillen College of Medicine, 2006). On March 17, 2005, Governor Bredesen endorsed the development of a new ETSU College of Pharmacy. The proposed College of Pharmacy will initially enroll 65 students per year, potentially increasing over time to as many as 100-125 students per year. Like the Quillen College of Medicine, the College of Pharmacy will train pharmacists for placement in community pharmacies and rural hospital settings (East Tennessee State University, College of Pharmacy, 2006).

Professional programs of law, veterinary medicine, and medicine are offered at the University of Tennessee: the University of Tennessee College of Law (Knoxville), the University of Tennessee College of Veterinary Medicine (Knoxville), and the University of Tennessee Health Science Center (Memphis). Established in 1890, the UT College of Law received 1231 applications for admission in 2003 and 1622 in 2005. The number of offers made for the same period of time ranged from 307 in 2003 to 322 in 2005. The actual number of students enrolled was 160 in 2003 and 158 in 2005

(enrollment data for Tennessee professional programs from fall 2002 to fall 2004 is located in Appendix F). Like the University of Memphis, the two most significant admissions factors used include the undergraduate grade point average and the LSAT scores. In 2003, the median undergraduate grade point average for all students was 3.50; in 2005, the median grade point average was 3.63. The median LSAT score for the same years was 158 and 160, respectively. The College has more than forty full-time, part-time, and adjunct professors (University of Tennessee, College of Law, 2006).

The College of Veterinary Medicine was established by an act of the Tennessee Legislature in 1974. It is part of the University of Tennessee statewide system and is located on the Agricultural Campus at the University of Tennessee in Knoxville. The Institute of Agriculture provides instruction, research, veterinary clinical, and extension services to students, clients, farmers, and families in Tennessee as well as citizens around the world. The four-year professional program offers a doctorate in veterinary medicine. Students prepare for the professional veterinary curriculum by taking three to four years of pre-veterinary course requirements as undergraduates. In 2005, 765 persons applied for admission into the College of Veterinary Medicine, 214 were invited to interview, and 70 received offers of admission. Students are evaluated based on their grade point average (GPA), scores on the Graduate Record Examination (GRE), scores on the Veterinary College of Admission Test (VACT), and information gained from a personal interview with an admissions committee. Of the 2005 class, the overall GPA was 3.59 and the average GRE score was 1142 (University of Tennessee, College of Veterinary Medicine, 2006).

The University of Tennessee Health Science Center is part of the statewide, multi-campus University of Tennessee. As the University's academic health science center, its mission is to improve human health through education, research, and public service, with an emphasis on improving the health of Tennesseans. Located on the campus of the UT Health Science Center are the College of Health Science Engineering and Colleges of Allied Health Sciences, Dentistry, Graduate Health Sciences, Medicine, Nursing, and Pharmacy. The UT Health Science Center includes the Graduate School of Medicine in Knoxville, as well as graduate medical education programs in Knoxville, Chattanooga, and Nashville; Family Medicine Centers in Knoxville, Jackson, Covington, and Memphis; and public and continuing education programs across the state. The Center has formal affiliations with seven teaching hospitals in Memphis and other hospitals or clinical facilities across the state. The UT Health Science Center awards baccalaureate, master, and doctoral degrees. Approximately 2,000 students are enrolled in degree programs at the Center and admission is highly competitive (University of Tennessee, Health Science Center, 2003).

TSU does not presently have a professional program. However, in accordance with the *Geier* Consent Decree, if a public law school is established in Middle Tennessee, it must be established at TSU. As such, TSU would be required to enter into negotiations with the Nashville School of Law (NSL) and, if negotiations proved successful, NSL would merge with TSU under the following conditions: the law school would be established on the TSU Williams Campus or in a downtown location of Nashville that was approved by the American Bar Association (ABA); the law school would secure ABA accreditation; and the state would provide support for the start-up phase at the

amount of $10 million in capital funding and $5 million in start-up funding. In addition, the state would provide financial resources, not to exceed $2 million, to match any funds raised by the NSL or TSU that are dedicated to cover start-up costs for the law school (*Geier* Consent Decree, Civil Action 5077, p. 14).

The number of Black students enrolled in Tennessee professional programs during the academic periods commencing in 2000 varies by program. Looking at the medical programs only, data indicates that at ETSU, enrollment of Blacks declined from 11.57% (28 Black students) in 2000 to 7.69% (18 Black students) in 2004. At the UT Medical Health Science Center (UTMHSC), the number of students declined from 14.16% (96 Black students) in 2000 to 10.34% (63 Black students) in 2004.

ETSU does not currently offer programs in dentistry and pharmacy but recently received state approval to develop a program in pharmacy. At UTMHSC, increases were shown in the number and percentages of Black students enrolled in both the dentistry and pharmacy programs. For dentistry, there was a change from 8.71% (27 students) in 2000 to 11.36% (35 students) in 2004. For pharmacy, the actual number of Black students enrolled in the program increased over the reporting period from 63 to 76 students. However, their representative percentage to the total number of students enrolled in the program declined from 16.41% in 2000 to 10.34%. The pattern of change of Black students attending UTMHSC followed the same pattern of change of White students. That is, when the total number of students enrolled increased, so did the number of Black students. When the total number of students enrolled decreased, so did the total number of Black students.

In Tennessee, Veterinary Medicine is offered only at the University of Tennessee. For the 2000-2004 reporting periods, representation ranged from 1.17% (3 Black students) to 0.74% (2 Black students). Veterinary Medicine has the lowest number and percentage of Black students enrolled in any of the *Geier*–supported professional programs.

Both the University of Memphis and the University of Tennessee (Knoxville) offer programs in Law. At Memphis, Black students represented 12.71% (54 students) of the total number of students enrolled in the program in 2000 and 10.55 % (46 students) in 2004. For the same reporting period, at the University of Tennessee, Black students represented 9.87% (45 students) of the total number of students enrolled in the Law School in 2000 and 10.89 % (49 students) in 2004.

The Consent Decree, like the Stipulation of Settlement, provided financial resources to help Tennessee public colleges and universities implement necessary programs to address the elimination of de jure segregation and to create and maintain a system of inclusion. Approximately $19 million was allocated annually through the Tennessee Legislature to public colleges and universities under the *Geier* mandates**.** Approximately $8 million of the total amount was disbursed jointly between TSU, governed by the Tennessee Board of Regents, and the University of Tennessee, governed by the University of Tennessee Board of Trustees. TSU received 60% of this disbursal to help improve its curricula, physical buildings, and infrastructure. The University of Tennessee (all campuses) received a 40% disbursal, which was used to assist in faculty recruitment and retention efforts and student recruitment and retention (pre-university summer programs, pre-doctoral fellowships, minority scholarships), and in developing

and expanding collaborative efforts between UT Extension (Agriculture) and TSU. The remaining $11 million allocated by the Legislature was to be disbursed to the remaining individual TBR public colleges and universities. In addition to the $19 million annual apportionment by the legislature, a reserve fund of $15 million existed. According to Section IV:A of the Joint Motion to dismiss the Consent Decree, recommendations are made to continue the annual allocation funding, referred to as "Access, Equity and Diversity Funding," at the same level that has been historically provided. The motion also recognizes that the Governor will retain complete discretion to increase, decrease, or not include such funding in future budget recommendations to the legislature.

Under *Geier*, it was permissible for Tennessee public colleges and universities to provide race-based scholarships for underrepresented populations (Black students at predominantly historically White institutions and Caucasian students at TSU), develop enrichment programs to help recruit and retain underrepresented students, supplement salary requirements for recruiting and retaining underrepresented faculty, and help institutions provide curricula and infrastructure improvements. As a result of such mandates, Black student enrollment grew at predominantly White institutions, as did White student enrollment at the historically Black university, TSU. However, Tennessee institutions have not achieved the expected enrollment sought in the Stipulation of Settlement.

Under both the *Geier* Stipulation of Settlement and the *Geier* Consent Decree, legal protection existed that allowed Tennessee public colleges and universities to:

> …Authorize institutions to enroll a percentage of new entering classes under alternative admissions standards, said percentage to be determined periodically by the appropriate governing board and to be consistent with

> the objectives of this [agreement]. (*Geier* Stipulation of Settlement, 1984, pp. 6-7)

Under the Consent Decree, the district court for the Middle District of Tennessee was to retain jurisdiction of the *Geier* case for a period of five years or for a period of time sufficient to ensure compliance with the terms of the agreement. At the end of the period of court supervision, the Decree would terminate unless extended by the court upon appropriate motion (*Geier* Consent Decree, 2000). Also, in accordance with the Consent Decree, the state would file a motion declaring that the state had created a unitary public higher education system. That happened on September 11, 2006, when the governor of Tennessee publicly announced that all parties involved in the *Geier* lawsuit had reached agreement to request dismissal of the pending Consent Decree. On September 21, 2006, Judge Wiseman, Jr., of the United States District Court for the Middle District of Tennessee, agreed. The Final Order for the Dismissal of the *Geier* lawsuit was approved and signed. Any party wishing to oppose the Dismissal Order must now provide information showing that the state has not complied with the Consent Decree.

The public response to the dismissal has been as expected. There has been a public outcry from Blacks that the State has not lived up to the spirit of the mandates and that a unitary system does not exist. Supporters of the dismissal have stated that all requirements have been met and that progress made under *Geier* will be maintained as the state moves forward to maintain a more inclusive public higher education system that seeks diversity to include, but not be limited upon, racial diversity. Like Mississippi, Tennessee and the nation must now abide by the *Grutter* standard**.**

CHAPTER FOUR

BALANCING THE GOAL OF DIVERSITY AND THE REQUIREMENT OF EQUAL PROTECTION: COMPARING THE *GRUTTER* AND *GEIER* DECISIONS

On July 20, 1995, the University of California became the first major institution of higher education in the United States to eliminate affirmative action. At the same time, the Regents called for a population at the university that reflected the state's diverse population (Karabel, 1998, p. 33). Eight years later, in July 2003, the U.S. Supreme Court rendered a decision in *Grutter v. Bollinger*, 539 U.S. 982 (2003), stating that diversity in public colleges and universities is a compelling governmental interest. The decision provided guidelines for public colleges and universities to follow when considering race-conscious admissions processes to help achieve their diversity goals.

Grutter is the most recent case decided by the U.S. Supreme Court addressing the issue of the use of race-conscious admissions policies in higher education. Although the lawsuit was filed against the University of Michigan Law School, a number of political and military organizations, other universities, businesses, labor unions, and civil rights organizations submitted *amicus* briefs supporting the policies used by the University. Interestingly, the supporting briefs, from a historical perspective, represented the same types of sentiments presented fifty years earlier in *Brown v. Board of Education*, 347 U.S. 483 (1954). In *Brown*, the Court unanimously held that de jure racial segregation in public schools violated the Equal Protection Clause of the Fourteenth Amendment by depriving African Americans of equal opportunities in education (Russo, 2004, p. 183). *Grutter*, on the other hand, provides higher educational institutions, both public and private, the means to identify, apply, and measure progress toward providing education to

a racially and ethnically diverse student body (Grier, 2006, p. 1-2)[9]. Since *Brown*, the nation's largest city school systems have remained, without exception, overwhelmingly non-White. White students, on average, attend schools where eighty percent of the student body is White (NAACP Brief, 2003, p. 16). *Brown* lacked the implementation tools needed to eliminate racial segregation in public education. As posited by Russo:

> In mandating desegregation, the Court never ordered the positive step of integration, perhaps because the judiciary has the authority to demand that wrongdoers stop breaking the law but lacks the [per]suasion to direct individuals to do what is right. (2004, p. 185)

The plaintiff in the *Grutter* case, Barbara Grutter, a White Michigan resident, applied for admission to the University of Michigan Law School in 1996 with a 3.8 grade point average and 161 Law School Admissions Test (LSAT) score. The Law School initially placed her on a waiting list but eventually rejected her application. In December 1997, she filed a lawsuit in the United States District Court for the Eastern District of Michigan against the Law School, the Regents of the University of Michigan, Lee Bollinger, Jeffrey Lehman, and Dennis Shields.[10] Grutter alleged that the Michigan Law School discriminated against her in denying her admission based on race in violation of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and 42 U.S.C. §1981 and 2000(d). Grutter alleged that the Michigan Law School used race as a "predominant" factor, which provided members of underrepresented racial groups with a

[9]*Grutter* & *Gratz* apply to admissions procedures at private colleges and universities as well as public colleges and universities. Although the U.S. Supreme Court considered the programs in light of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, it confirmed that the same analysis would apply under Title VI of the 1964 Civil Rights Act and 42 U.S.C. § 1981, both of which also apply to private colleges and universities.

[10]Lee Bollinger was the former Dean of the Law School before Ms. Grutter applied for admission and President of the University of Michigan from 1996-2002; Jeffrey Lehman was Dean of the Michigan Law School at time of the lawsuit; Dennis Shields was Director of Admissions at the Law School from 1991-1998

significantly greater chance of admission over applicants with similar credentials but who were not from historically under-represented groups. Further, she alleged that there was no compelling interest to justify the use of race as a factor in the admissions process (White, 2006, p. 5). Barbara Grutter requested compensatory and punitive damages, an order requiring the law school to offer her admission, and an injunction prohibiting the law school from continuing to discriminate on the basis of race (White, p. 5-6).

Since there was no history of de jure segregation, the University of Michigan Law School could not rely on a defense of removing the vestiges of past discrimination. Instead, the Law School sought to demonstrate the educational benefits of having a diverse student body as a defense. The Law School attempted to implement this goal by evaluating all students based on a combination of factors. These factors included a personal statement, letters of recommendation, an essay describing how the applicant would contribute to law school life and diversity, the applicant's undergraduate grade-point average, rigor of courses taken, quality of undergraduate institution, and the applicant's LSAT score. Some of these factors, such as the applicant's personal statement, were considered to be "soft variables." The Law School emphasized that each student was evaluated individually in comparison to other applicants and that race represented only one type of diversity (*Grutter,* 539 U.S. 982, 2003).

The district court agreed with the plaintiff, stating that the Law School's use of race as a factor in the admissions process was unlawful, that its interest in attracting a diverse student body was not a sufficiently compelling reason for the use of race, and even if it were, that the process was not tailored narrowly enough to use race as a factor. The process used by the Law School failed to meet the strict scrutiny standard of

review.[11] The Law School appealed. The district court had relied upon the *Bakke* decision, in which two committees were assigned to review the applicants. In the *Bakke* case, the University of California Medical School at Davis used one committee to review applicants considered for regular admission, while another committee reviewed applicants considered for special admission. Although the regular admissions committee rejected some special applicants for failure to meet course requirements or other specific deficiencies, special applicants were reviewed by the special committee and were never compared to the regular applicants (Leonardi, 2001, p. 156). Alan Bakke, plaintiff in the case, was twice rejected for admission and alleged that candidates with lower grade point averages and lower test scores were being admitted under the special admissions program. Both the trial court and Superior Court of California agreed that the process used by the Medical School violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act because applicants were segregated from comparison to each other. In *Bakke*, the deciding issue became whether or not he would have been admitted to the Medical School were it not for the process used. Both the trial court and appeals court ruled that the burden of proving this issue rested with the plaintiff, Bakke.

The University of Michigan Law School was able to prove that the process used at the University of California Medical School at Davis (Bakke) differed from that used

[11]Strict scrutiny is the standard under the Equal Protection Clause that federal courts use to assess the constitutionality of governmental classifications based on race as well as those that impinge on fundamental constitutional rights. To pass muster, a challenged governmental action must be closely related to a compelling governmental interest. Strict scrutiny is the most rigorous of the three levels of scrutiny that courts have formulated. Strict scrutiny assumes that the action in question is unconstitutional and the government has the burden of demonstrating its compelling interest. Courts must focus on the government's purpose rather than merely on the effect of governmental action to determine the validity of a challenged law or regulation (Hall, Ely, Grossman, & Wiecek, 1992, p. 845).

by the Michigan Law School. Sitting *en banc*, the court of appeals reversed the district court's judgment. Citing Justice Powell's opinion in *Bakke,* 438 U.S. 265 (1978), the court of appeals found that the Law School could use race as a potential "plus" factor to attract a diverse student body. They found diversity to be an acceptable compelling interest, and that the admissions review process used by the Law School was narrowly tailored. This decision was not unanimous. Four dissenting judges maintained that the Law School's use of race was unconstitutional; three of the dissenters rejected the compelling interest argument, and the fourth dissenter questioned whether the process was narrowly tailored to achieve the state's compelling interest.

The U.S. Supreme Court granted *certiorari* on what it considered to be a question of national importance: whether diversity is a compelling interest that justifies the narrowly tailored use of race as a criterion in selecting applicants for admission to public universities (*Grutter,* 539 U.S. 982, 2003). In a 5-to-4 split decision, the Court held that the Law School's admissions policy was not prohibited by the Equal Protection Clause of the Fourteenth Amendment, that the policy represented a compelling state interest that was narrowly tailored, and that the Law School was not obligated to exhaust the use of other race-neutral alternatives in order to achieve the same goal of a diverse student body. Agreeing with the court of appeals, Justice O'Connor wrote:

> We last addressed the use of race in public higher education over 25 years ago. In the landmark Bakke case…The only holding for the Court in Bakke was that a "State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." (*Grutter*, 589 U.S. 982, 2003).

In *Grutter*, the Court, recognizing Justice Powell's lone opinion in *Bakke*, decided that his view regarding student body diversity as a compelling state interest still justified the use of race in university admissions. The Court also recognized that public and private universities across the nation had modeled their own admissions programs on Powell's opinion.

The *Grutter* Court, relying on *Sweatt,* 339 U.S. 629 (1950), also recognized that a law school is more than facilities or curriculum. Rather, a law school includes its historical background, the prestige of its faculty and alumni, and the interaction and legal discourse among students and between students and faculty. Such discourse is important because it allows all participants the opportunity to hear and present different perspectives on important legal issues, thus resulting in the broadening of learning for all involved. Racial and ethnic diversity is valuable not for its own sake, but because it contributes significantly to the overall quality of education afforded to all students (Amicus Brief of the Law School Admission Council [LSAC] for *Grutter v. Bollinger*, 2003, p. 4)

By contrast with *Brown*, in *Grutter,* the interest in correcting past harms was not relevant because neither the state nor the Law School had a history of de jure segregation. In fact, the University of Michigan had a history of serving Black students who were not able to attend de jure segregated institutions within their own state of residence. This did not mean, however, that the institution was free of racial strife nor that efforts had not been attempted to address racial issues. To illustrate, in 1988, Provost James Duderstadt announced plans for a new initiative, the "Michigan Mandate," which was:

> …an effort that sought to increase the number of students and faculty of color, to provide 'equal opportunity' and 'equal access to all educational resources to students from underrepresented racial and ethnic groups', to remedy institutional racism on campus, and to promote a more racially and ethnically diverse campus to prepare students for an increasing multicultural world. (Patterson Brief, *Gratz v Bollinger*, 539 U.S.244, 2003, p. 13)

Still, the Law School relied on the diversity argument by seeking to prove that diversity was a compelling interest of the Law School, the University, the State of Michigan, and the nation as a whole. The University of Michigan Law School is regarded as highly selective. The Law School receives more than 3,500 applications each year, offers admission to an estimated 1,000 applicants, and enrolls approximately 350 students each year. The Law School stated that it wanted to admit a group of students who were capable of matriculating through its highly competitive law school, succeeding in the practice of law, and contributing to other students as well as to society.

The Supreme Court approved the Law School's purpose and selection process. The selection process used in *Grutter* met the strict scrutiny standard by demonstrating that the purpose of the process had a compelling state interest. In addition, the process met four other important measures: (1) it was narrowly tailored and flexible enough to ensure that each applicant was evaluated as an individual and not as a member of a racial group; (2) race was only one of many factors used in the decision-making process; (3) the institution could envision a durational end in time when the process would no longer be necessary; and (4) the process did not cause undue harm to non-minority applicants. Each of these factors is summarized below.

Narrowly Tailored: The use of racial classifications passes constitutional muster only if the use is narrowly tailored to further a compelling governmental interest. All

applicants must be given individualized attention and review. An individual applicant cannot be insulated from comparison with all other similarly situated applicants. In essence, each student similarly situated must be treated in a similar manner.

The admissions policy used by the University of Michigan Law School focuses on academic ability coupled with a flexible assessment of the applicant's talents, experiences, and potential to contribute to the learning of others (*Grutter*, 2003, p. 2). In addition, officials must consider the applicant's undergraduate GPA and LSAT scores, which serve as predictors of academic success in law school. The review process allows reviewers to consider "soft variables," such as the enthusiasm of recommenders, the quality of the applicant's undergraduate institution, and the rigor of courses taken at the undergraduate level (*Grutter*, p. 2). These factors seem to parallel factors considered by the LSAC, which include such general categories as academics, demographic and diversity, work experience, leadership and extracurricular activities, personal accomplishments, evidence supporting character and fitness, and special skills and abilities (LSAC Amicus Brief, 2003, p. 19-20, footnote 8).

Race as One of Many Factors: Under *Grutter*, race cannot be the only or deciding factor in the admissions process, nor can any one particular type of diversity, especially racial, have more substantial weight than any other factor.

The Law School provided several expert reports to support the argument that diversity was a compelling interest.[12] These reports were used to demonstrate that some racial groups (Blacks, Hispanics, and Native Americans) had been historically discriminated against across the nation, within the profession, and within the state. These

[12]See the University of Michigan: Supporting Research (http://www.umich.edu/~urel/admissions/research/) for these reports.

same racial groups were underrepresented in the general university student body and in the Law School. Finally, the Law School and the various *amicus* briefs filed on its behalf demonstrated that students from underrepresented racial groups, as well as from the overall student body, would benefit from greater diversity.

The Supreme Court and the petitioners vigorously questioned the Law School regarding the hard-to-define concept of "critical mass." The purpose of the questioning was to ensure that the process did not use numeral percentages that lend themselves to a quota system. They sought specific answers to the following queries:

1) How would the existence of a critical mass be determined?
2) How long would it take to achieve a critical mass?
3) Would the process of achieving a critical mass establish racial quotas in violation of the Constitution?
4) Are alternative selection processes available for achieving a critical mass?
5) Was their selection process the only process available to achieve racial diversity?

The Law School specifically stated that it could not affix a number or percentage to what it considered to be a critical mass. Nevertheless, the University of Michigan maintained that a critical mass would accomplish at least two goals. First, critical mass would embody a sufficient number of persons from underrepresented groups, thus providing a visible presence and educational opportunity to the total student body. Second, a critical mass would reduce the undue pressure placed on individual students to represent the perspective of an entire specific minority group.

The Law School and Supreme Court both recognized that there is as much diversity (backgrounds, experiences, philosophies, and beliefs) *within* individual groups as there is *among* different groups. This thought was also stressed in the *amicus* brief submitted by the LSAC on behalf of the Law School:

> Law schools recognize that no two individuals are influenced in the precisely same way even by a shared experience, such as common membership in an identifiable racial or ethnic group. Each individual's experiences and perspectives, even within a given racial or ethnic group, will be unique. What racial diversity therefore fosters is not an exchange of group perspectives, but a greater multiplicity of individual perspectives. Including a variety of students, each with different backgrounds and perspectives, increases the likelihood that the aggregate range of experiences and perspectives within the student body will be broader—and the educational experience of all students correspondingly richer. (LSAC Brief, 2003, p. 6)

The Supreme Court determined that the Law School's admission process established good faith and flexible goals rather than strict racial quotas. As time progressed, the types of diverse groups would change and the Law School's admissions process was flexible enough to allow consideration of such changes.

Petitioners claimed that there were other race-neutral alternatives available for the Law School to use that would achieve the same goal and that the Law School was obligated to exhaust those other alternatives. Such alternatives would include easing admissions requirements or using a percentage plan, like that used by Texas,[13] where ten percent of the top high school graduates would automatically qualify for admission into the state university. The University of Michigan, however, asserted that such alternatives had been considered but judged unsuccessful in reaching the critical mass desired. The LSAC supported this stance, citing:

[13]In the states of California, Florida, and Texas, automatic admission to public higher education institutions is offered to all high school seniors who graduate within a certain top percentage of their high school class.

> Such [percent-type] policies make no sense for law school admissions…At the undergraduate level, the idea is that the state college or university attains diversity by offering admission to the top *x* percent of the class (on the basis of grade point average alone) at all state high schools. If such a plan promotes diversity at all, it is only because it depends on de facto racial segregation in state high schools. But the nation's colleges and universities are not racially segregated the way high schools in Texas evidently are. Even if it were wise to adopt a diversity policy that depends for its success on continued racial segregation, it is impossible to see how such a plan would work to enhance diversity where there is no pool of racially segregated institutions from which to draw. (LSAC Brief, p. 14)

The Court inquired about the alternative of easing admissions requirements for all students. The Law School disagreed with this suggestion, not only because it desired to maintain its selective status, but also because academic grades and LSAT scores are important and reliable indicators of a person's cognitive skills, which are crucial to succeeding in law school. The limitations of using only undergraduate grades and LSAT scores, however, create problems because such factors cannot measure writing ability, effectiveness of advocacy, negotiating ability, leadership potential, or a number of other skills and attributes necessary to succeeding in both law school and the legal profession (LSAC Brief, p. 20). The Court agreed that the Law School was not obligated to exhaust all race-neutral alternatives before using its current selection process.

Finally, the Law School demonstrated that its idea of diversity was not limited to racial diversity. Diversity, as used by the Law School, included students from a broad array of backgrounds and experiences: those who had lived or traveled abroad, were fluent in several languages, had overcome personal adversity and family hardship, had exceptional records of extensive community service, or had successful careers in other fields. The Law School was also able to demonstrate that minority applicants with higher

academic grade point averages (GPAs) and scores on the Law School Admission Test (LSAT) were rejected for other minority and non-minority applicants with lower GPA and LSAT scores, thus showing that race was not the only factor considered in making admissions decisions.

Limited in Time: Under the strict scrutiny standard, the categorical use of race must have a logical end point, with "reasonable durational limits," to ensure that any deviation from the norm of equal treatment of all racial and ethnic groups is a temporary measure. In the context of higher education, sunset provisions and periodic reviews can be used to determine the continual need for race-conscious measures used to achieve student body diversity. In the words of Justice O'Connor:

> It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today. (*Grutter v. Bollinger*, 539 U.S. 982, 2003)

Many have wondered if this was an indication that race conscious admissions criteria would have a 25-year time limit of acceptability. While that has yet to be determined, it would certainly appear that from this point forward, academic institutions will need to have acceptable procedures in place to identify goals and measure progress regarding their student body diversity. Institutions must conduct some form of periodic review system to determine progress.

Does Not Unduly Harm Non-Minority Applicants: The University of Michigan Law School maintains a highly selective program. Through the admissions process in general, the Law School must select and admit few applicants from the many

that apply; approximately one in ten applicants is selected for admission. To address the requirement not to unduly harm non-minority applicants, the Law School was able to demonstrate that: (1) different types of diversity are desired; (2) all applicants are considered using an individualized, holistic assessment; (3) each applicant is given the opportunity to identify the type of diversity he/she can bring to the school; (4) the Law School selected non-minority applicants who had greater potential to enhance the student body diversity over minority applicants; and (5) all persons selected for admission were qualified. Based on all information provided, the Court was able to conclude:

> …the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body. Consequently, petitioner's statutory claims on Title VI and 42 U.S.C. §1981 also fail. (*Grutter v. Bollinger*, 539 U.S. 982, 2003)

Applying the above standard, the Supreme Court heard the case of *Gratz,* 539 U.S. 244 (2003). In *Gratz*, the Court, decided that the University of Michigan's selection index policy for undergraduate admissions violated the Equal Protection Clause of the Fourteenth Amendment and 42 USCS §1981 and 2000(d). The University of Michigan's College of Literature, Science, and the Arts (LSA) used an undergraduate admissions policy under which an applicant could be awarded a maximum of 150 points and generally was automatically admitted if awarded a minimum of 100 points. Each applicant could receive points based on high school grades, standardized test scores, high school quality, strength of high school curriculum, in-state residency, alumni relationships, a personal essay, personal achievement or leadership, and membership in an "underrepresented" racial or ethnic minority group. The University of Michigan, which considered Blacks, Hispanics, and Native Americans as underrepresented

minorities, automatically distributed 20 points to every applicant who was a member of such a group and admitted virtually every qualified applicant from these racial groups.

Patrick Hamacher, a White male, and Jennifer Gratz, a White female, applied to the University of Michigan's College of Literature, Science, and the Arts in 1995 and 1997 respectively. Application of the admissions policy described above began in 1998. Hamacher and Gratz were denied admission to the college and joined to file a class action lawsuit in October 1997 in the United States District Court for the Eastern District of Michigan against the University, the College, and the two University presidents (Dr. Dudertadt and Dr. Bollinger) in office when they applied for admission. After being denied admission to the University of Michigan, Gratz and Hamacher applied and were admitted to other state public institutions.

Both Gratz and Hamacher sought remedies, including compensatory and punitive damages, declaratory and injunctive relief, and an order requiring the College to admit Hamacher as a transfer student. The district court granted plaintiffs' motion to certify their suit as a class action suit consisting of individuals who applied for and were denied admission to the LSA for the 1995 academic year forward and who were members of racial or ethnic groups that respondents treated less favorably on the basis of race. Hamacher was designated as the class representative. On cross-motions for summary judgment, defendants relied on the argument that race was a compelling government interest. The court agreed with defendants that the LSA's current admissions guidelines represented a compelling government interest and granted them summary judgment in that respect. However, the court also found that the LSA's admissions guidelines from 1995 through 1998 operated as a functional equivalent of a quota. Plaintiffs were granted

summary judgment with respect to the LSA's admissions programs for that time period (*Gratz v Bollinger,* 539 U.S. 244, 2003).

While appeals for *Gratz* were pending in the United States Court of Appeals for the Sixth Circuit, the court of appeals issued an opinion in *Grutter v. Bollinger,* upholding the race-conscious admissions policy of the University of Michigan Law School (288 F3d 732). The United States Supreme Court then granted *certiorari* in both the *Grutter* and *Gratz* cases.

On *certiorari*, the Supreme Court reversed in part and remanded, holding that the admissions policy did not meet the strict scrutiny standard. The automatic distribution of 20 points to every member of an underrepresented minority violated the Equal Protection Clause. It was not narrowly tailored to achieve the asserted compelling interest in educational diversity that the university claimed justified the program. The undergraduate admissions process did not allow individualized consideration of the characteristics of a particular applicant. Race was viewed as a deciding factor in the process used to make undergraduate admissions decisions.

It is important to note that the University of Michigan raised the argument that a holistic review of the type desired by the Court would represent an administrative and resource hardship. This argument was not regarded as a valid rationale in support of the process as designed. As a general rule, the Court has not looked favorably on the arguments of administrative inconvenience or fiscal burdens as acceptable defenses against the strict scrutiny standard. Based on *Gratz*, individualized attention must be provided to each particular applicant so as to assess all of the qualities that an individual possesses, and in turn, evaluate that individual's ability to contribute to the unique setting

of higher education. Race cannot be the only or deciding factor in the selection process (Irons, 2005, p. 371).

From *Grutter* and *Gratz* it is established that universities cannot use quotas for members of certain groups or put members of those groups on separate admissions tracks. Universities also cannot insulate applicants who belong to certain racial or ethnic groups from the competition for admission. Universities can, however, consider race or ethnicity more flexibly as a "plus" factor in the context of individualized consideration of each applicant (Irons, 2005, p. 373).

From *Grutter* and *Gratz* it becomes clear that preserving individual rights while diversifying our colleges and universities represents a precarious balancing act. Individual applicants, state laws, and the court system become involved when the process(es) used do not appear to be objective, fair, and purposeful. The University of Michigan argued that diversity was a compelling interest for its university, the state of Michigan, and the nation. The U.S. Supreme Court agreed. Tennessee, through the *Geier* mandates, has tried to meet the legal obligations required to remove the vestiges of a de jure system of segregation and provide access to its public colleges and universities to all its citizens, regardless of race. Tennessee, like Michigan, believes that diversity is a compelling state interest. The state must now balance the need to preserve improvements made because of *Geier* with expanding its programs and policies to address a more diverse population base, which includes, but goes beyond, the consideration of race. In summary, Tennessee, which has been allowed to consider applicants based on their membership within a specific racial group, must now stop and ensure that applicants are considered and admitted based on their individual qualifications.

CHAPTER FIVE

PRESENTATION, ANALYSIS, AND DISCUSSION OF DATA

For almost forty years, the State of Tennessee and its public colleges and universities have been involved in a lawsuit (*Geier v. Bredesen*, 372 F. 3d. 784, 796, 6th Cir., 2004) that required the removal of the vestiges of a de jure segregated public education system. After several years of debate, a Stipulation of Settlement was signed in 1984, which identified specific actions the State of Tennessee was required to take in order to remove the effects of that de jure system. In 2001, Tennessee moved into the Consent Decree phase of the lawsuit, a five-year wind-down period, which called for an evaluation of progress made toward attainment of the Stipulation requirements. On September 11, 2006, all parties[14] related to the lawsuit petitioned the state district court to issue a Final Order of Dismissal, and on September 21, 2006, Judge Thomas J. Wiseman, Jr., signed the Final Order of Dismissal (see Appendix D). The Final Order of Dismissal certified that the historical de jure public education system formerly maintained by Tennessee had been eliminated. As part of the Final Order, admissions policies and programs previously used by Tennessee public colleges and universities are now required to ensure that all qualified Tennessee citizens, current and future, will have equal access to admission to Tennessee institutions. Dismissal of the lawsuit also means that Tennessee public colleges and universities, which have continued to assert an interest in maintaining a diverse student body and workforce, must abide by the 2003 decision rendered in the U.S. Supreme Court case of *Grutter v. Bollinger,* 539 U.S. 982 (2003),

[14]These parties included Rita Sanders Geier (plaintiff and representative of a class action suit), Plaintiff-Intervenors (Raymond E. Richardson, Jr. and H. Coleman McGinnis and the parties they represent), Governor Phil Bredesen, the Tennessee Board of Regents, the University of Tennessee Board of Trustees, the Tennessee Commission on Higher Education, and the United States of America.

which establishes the constitutional guidelines that colleges and universities, with race as part of their diversity goals, must follow.

As a means to correct the vestiges of de jure segregation, both the *Geier* Stipulation of Settlement and Consent Decree required the State of Tennessee to develop and coordinate a cooperative program that helps increase the number of Black students who enroll in and graduate from state-assisted health professions and law schools. At the undergraduate level, *Geier* mandates also support pre-professional programs for the same areas of study at these same institutions. Students who successfully complete the pre-professional programs are guaranteed admission to the state-assisted professional programs. Successful completion means that students meet the minimum admission criteria regarding grade point average and competitive scores on the professional admission examinations. Both the *Geier* Stipulation of Settlement and Consent Decree also call for public colleges and universities in Tennessee to become racially non-identifiable. To become racially non-identifiable, *Geier* seeks to ensure that state higher education institutions are accessible to all qualified Tennessee residents interested in admission to such institutions without regard to race.

The purpose of this dissertation research was to determine whether current *Geier* admissions policies, formerly based on the correction of a de jure segregated system, have met the standard of review identified in *Grutter*, which emphasizes the diversity goal. For this dissertation, the programs of dentistry, pharmacy, medicine, veterinary medicine, and law offered at the University of Tennessee, University of Tennessee Health Science Center, University of Memphis, and East Tennessee State University were examined.

The methodology used consisted of the case study approach, which was complemented by the use of a written questionnaire, elite interviews, and participant-observation. As stated in Chapter One, a case study is an extensive description and intensive examination of a single case, whether that case is a single action, decision, individual, organization, or system (Everson & Paine, 1973, p. 119). In the past, the case study approach was considered to be a less-favored research strategy because case studies do not lend themselves to rejecting statistical hypotheses (Everson & Paine, p. 119) or because case studies are usually based on the personal preferences or special interests of the researcher (Hesler, 1992, p. 196). Such criticisms have been replaced by the recognition that the case study, as a distinctive form of empirical inquiry and research design, lends itself to the development and evaluation of public policies (Johnson & Joslyn, 1991, p. 121). The strength of a case study is the opportunity for in-depth viewing of social life (Hesler, p. 195) and the ability to describe some phenomenon with a view to understanding how it works (Hesler, p. 163). Case study analysis helps answer the questions of how and why we do certain things (Everson & Paine, p. 121) and allows us to develop and evaluate public policy (Johnson & Joslyn, p. 121). Implicit in case study analysis is the idea that the objects of investigation are similar and separate enough to permit treating them as comparable instances of the same phenomenon or issue (Ragin, 1992. p. 1). Case study analysis is done to determine what these similarities and differences are**.**

Case studies can be classified as intrinsic, instrumental, and collective (Stake, 1995, p. 2-4). The intrinsic case study involves a pre-selected single subject or issue. The researcher studies the case primarily for the intrinsic interest in that particular situation.

The instrumental case study allows the researcher to understand the pre-selected case study in comparison to something else. The primary purpose of the instrumental case study, therefore, is to understand the issue when applied to another similar situation. Using several individual cases to understand a common issue or subject represents the collective case study approach (Stake, p. 3-4). Both the instrumental and collective case study approaches imply that comparisons can be made on issues when applied to similar situations. This dissertation uses the instrumental case study approach. At issue is the use of race-conscious admissions policies in public colleges and universities. *Geier v. Bredesen*, *Grutter v. Bollinger,* and *Gratz v. Bollinger* are the specific cases under review.

Because researchers are encouraged to use multiple means of gathering information and/or multiple cases when using the case study approach, this dissertation employed the use of multiple information techniques, including a written questionnaire, elite interviews, and participatory-observation. The doctoral committee and Internal Review Board Committee in the Department of Political Science approved the process and all University Internal Review Board policies were followed regarding the collection of data for this research (see Appendix E for copy of Informed Consent form).

The written questionnaire used in this dissertation consisted of fifteen short-answer and close-ended questions (Appendix E). The questionnaire was mailed to 20 university officials at the five subject institutions. These officials were identified as having decision-making responsibilities concerning *Geier* campus initiatives. A stamped return envelope was provided with the written questionnaire in an effort to encourage participation. Nine of the twenty administrators contacted responded, yielding a 45%

return rate. The response rate, although not as high as desired, is representative of the small group contacted. Even though all institutions were not represented in the response rate, all professional programs under study (law, veterinary medicine, medicine, pharmacy, and dentistry) were. Information is presented in the aggregate so that no one individual or institution can be identified.

Elite interviewing is a special form of the personal interview process. Just as with the persons selected for the written questionnaire, the number of elite interviewees selected for this dissertation was limited. Eleven persons who have direct knowledge of the Tennessee *Geier* mandates and programs were selected. These individuals included the primary litigant in the *Geier* lawsuit, the Court-appointed Monitor/Special Assistant of the *Geier* lawsuit, and various administrators from the Tennessee Higher Education Commission, Tennessee Board of Regents, University of Tennessee System-wide Administration, and University of Tennessee, Knoxville campus. Interviews consisted of a common set of questions administered by this researcher to the interviewees. As with the written survey, information gathered through the elite interview process is presented without direct attribution to any one individual.

The participant-observation method represents the final methodology used in this research. This is a method of data collection in which the researcher assumes, and is aware of, functioning in two roles within a social event or group. As a participant, the researcher must maintain a level of objectivity and professionalism so as not to hinder the process of gathering and deciphering the information acquired (Babbie, 1990, p. 32). The researcher also functions as an active member of the group, providing information while still maintaining objectivity to identify and assess the actions of the total group. Used

alone, each role has its own unique value in scientific research. Combined, the roles of participant-observer or observer-participant are much more likely to yield methodologically solid research findings (Hesler, 1992, p. 204). This researcher participated as a member of four committees located at the University of Tennessee (UT), all of which are involved in evaluating and studying the progress of *Geier* mandates as applied at UT. These committees included the Commission for Blacks (CFB), Enrollment Management Committee (EM), *Geier* Planning Taskforce (GPT), and Diversity Council (DC). Because this researcher served on the committees and is a person of color, other objective measures have been employed to help maintain a bias-free research effort.

Through a combination of means, information was acquired regarding the types of *Geier* admissions policies and programs used by the subject institutions, offices, and administrators involved in the various aspects of administering such policies and programs. Perspectives were gained about the effects and impacts of *Geier* policies and programs at the respective institutions, and predictions were made regarding the future of such programs after the *Geier* Consent Decree is dismissed.

Analysis and Discussion of Data: Responses from Written Questionnaire

Geier programs were designed to correct the effects of de jure segregation; *Grutter* was based on the premise of inclusion. In *Geier*, affirmative action policies were used as means of compliance. In *Grutter*, affirmative action policies were used as proactive means to diversify the student body. In *Geier*, race was the only factor considered; in *Grutter*, race was one of many factors considered. To help determine whether respondents understood these distinct uses of affirmative action policies,

Questions 1 and 2 of the survey specifically asked them to define the terms *affirmative action* and *diversity*.

Respondents were equally divided on Question 1. Approximately one-third of the respondents referred to affirmative action policies as actions or initiatives aimed at assisting persons based on their group membership as underrepresented minorities (race, ethnicity, and gender). One-third stated that affirmative action policies are actions or initiatives used to eliminate or correct the effects of past and present discrimination or remedy the underutilization of members of previously discriminated groups. The final one-third indicated that affirmative action policies were actions or initiatives used to ensure equity and fairness and create a culture of diversity.

In Question 2, diversity was referred to as a "broad array of backgrounds and experiences." Race, ethnicity, color, gender, age, physical abilities, sexual orientation, economic status, geographic origin, religious beliefs, creed, life experiences, work experiences, veteran status, national origin, heritage, and intellectual views were included in the respondents' definitions of diversity. As stated by one respondent, diversity is a forward way of thinking, a way of "moving beyond simply tolerance to acceptance, respect, and a celebration of individual differences in a nurturing environment." Others also saw diversity as a proactive measure that allows members of groups to learn about and from others, strengthen the organization, and, through interaction, lead to improvement. Respondents identified race as an example in their definitions of both *affirmative action* and *diversity*.

In Question 3, respondents were asked whether their institutions had a specific institutional mission statement regarding diversity. If they responded "Yes," they were

asked to identify what groups were covered in their institutional mission statement. If they responded "No," they were asked to explain why their university lacked a mission statement. Eight of the nine respondents said that their institution had a current institutional mission statement regarding diversity. One respondent replied "No" but stated that diversity was one of the core values of their particular college program.

For respondents who answered "Yes" to Question 3, the policy was most often reflected in the institution's Affirmative Action/Equal Employment Opportunity Statement, which provides legal protection to persons based on their membership in the following groups: race, gender, age, color, national origin, religion, disability, and veteran status. Two of the eight respondents indicated that their diversity policies extended beyond legally protected groups identified above to include individuals based on their sexual orientation, economic status, cultural background, life experiences, work experiences, and intellectual curiosity.

Questions 4, 5, and 6 related to each other and asked respondents whether their institutions had specific race-conscious admissions programs. If respondents stated "Yes," they were asked to identify the types of programs provided. If respondents stated "No," they were asked to explain why their institution did not. Three of the respondents either stated "No" (their institution did not provide race-conscious admissions programs), were "Unsure," or responded "Not as Such." The "Unsure" response was followed with, "…There is some leeway in admitting African American students in determining admissions. I suppose the answer is Yes." The respondent who answered "Not as Such" added, "But we monitor and encourage participation in all educational programs."

The remaining six respondents stated that their institutions did have race-conscious admissions programs. These respondents interpreted this question as asking what types of efforts are used. The most common types of efforts included: (1) targeted recruitment; (2) providing financial aid at all levels (undergraduate, graduate, and professional schools); and (3) a review process that included such factors as classroom performance, the rigor of curriculum, grade point average (high school and/or undergraduate level), and test scores on college entrance examinations.

Question 7 of the written questionnaire asked respondents to identify the professional position or office that (1) administered, recruited, and selected applicants (2) developed the criterion or criteria for selection; and (3) monitored any race-conscious programs at their respective institutions. All respondents indicated that top-level administrators, working in consortium with identified committees and designated campus offices, administer race-conscious admissions programs. Among the administrative titles identified were the highest-level administrator for the institution. These included the president, vice president, chancellor, and/or his/her appointed designee, the college dean or designated associate and/or assistant dean, and/or program directors. Campus-based offices involved in administering *Geier* programs included the graduate office, affirmative action office, and/or college admissions committee.

The responsibilities for recruiting participants into *Geier* programs are assigned primarily to campus-based admissions offices and/or appointed departmental/college-level admissions committees. Departmental faculty, admissions committees, campus-based admissions offices, and college deans (to include the assistant to the dean and assistant/associate dean) develop the criterion or criteria used to review and select

participants for the respective professional programs. This means that students must meet university admissions requirements as well as those established by the department and college of study.

The administrative positions and offices involved in administering, recruiting, and selecting participants are also involved in monitoring the admissions process and progress of students. These positions and offices included the dean of the professional programs, the graduate admissions offices, and the campus-wide or system-wide administrator charged with implementing the *Geier* mandates.

In Questions 8, 9, and 10, respondents were asked to identify the specific types of professional programs provided at their respective institutions and to identify any procedures used to recruit and select students, monitor student progress, compensate participants, and help secure employment for graduates of the *Geier* programs. Respondents indicated that their institutions provide professional programs in the fields of law, veterinary medicine, dentistry, medicine, and pharmacy, along with pre-professional enrichment programs for law, medicine, and agriculture. This means that all professional programs offered in Tennessee were represented in this dissertation research.

As shown in their responses to Question 7, institutions use a variety of means and collaborative efforts to recruit and select students. To recruit potential students, institutions use financial aid, students currently enrolled in their programs, and publicity efforts targeted primarily in geographic areas where large racial minority populations exist. In Tennessee, the geographic areas with large minority populations include the metropolitan cities of Memphis, Nashville, Chattanooga, and Knoxville. The types of publicity used included printed promotional materials, telephone contacts, visits to local

schools, and mailings disseminated to minority students who have registered on listservs and websites and earned competitive scores on the professional examinations. Administrative offices, individual administrators, and admissions committees review the applications to ensure that students meet both the campus and college admissions standards. Three of the respondents stated that they compensate their students, and four indicated that their institutions help secure employment for their graduates. No specific information regarding the type of compensation or means used to secure employment for graduates was provided.

Questions 11 and 12 queried respondents about their perceptions regarding both the strengths and weaknesses of the *Geier* programs at their institutions. Six respondents identified the number of diverse students admitted into their programs as the strength of *Geier* programs. One respondent specifically stated that the efforts led to an increase in the number of "good students/strong academic students." Looking beyond the classroom, three of these respondents stated that the *Geier* programs had allowed them to recruit good future employees and had increased the number of minority professionals, which led to a positive overall effect on their profession.

Some respondents referred to the social impacts of *Geier* mandates regarding attitude changes at their institutions. The following types of responses were received:

1) *Geier* "strictures, structures, and dollars" have desegregated the predominantly white state public higher education institutions in terms of students, faculty, and professionals and changes in attitude by minorities and non-minorities have been slowly altering exclusive campus cultures to be inclusive.

2) *Geier* mandates have provided an opportunity for African American students who might not have been able to afford an education at a flagship, land-grant institution to do so.

3) The process of trying to recruit and select students has meant that admissions and scholarship decision-makers must be mindful of the broad array of factors that should be considered in making these [admissions] decisions.

4) Having admissions programs that are "race-conscious" but not "race-driven" has been [a] strength in itself because it enabled admissions offices and institutions to explore holistic admissions policies.

The implied distinction between race-conscious policies and race-driven policies is worth noting. Race, per *Grutter*, can be considered as only one of many factors used in the admissions process; race cannot be used as a deciding factor in determining the type of diversity sought. The purpose of *Geier* mandates, on the other hand, was to correct and eliminate the vestiges of historical de jure segregation between Blacks and Whites in Tennessee public higher education institutions where segregation was based solely on race. In *Grutter*, the policies are race-conscious. In *Geier*, the policies were seemingly race-driven. Response number 4 above illustrates that, at one institution at least, *Geier* mandates may already be aligned with *Grutter* concepts.

Eight of the participants responded to Question 12, which asked them to identify areas of concern regarding the *Geier* programs used at their institutions. Two respondents stated that they had not perceived any concerns. Only one respondent indicated that the potential loss of *Geier* resources could mean the loss of funding for their summer enrichment programs and scholarships and a loss of concern for sustaining and improving diversity at their institutions. The remaining respondents voiced concerns about the social impacts of the loss of *Geier* mandates. The following comments exemplify their responses:

1) ...if the university employed race in the admissions process in a narrow context that led to the admission of marginally qualified students, there would be a concern as to their capacity to succeed and the ethos of the process.

2) …the societal perception [about the programs] is that standards were lowered or that the students unfairly received benefits that others did not receive.

3) Geier programs have been well received by minority and non-minority [persons] inside the institution. But people outside the academy have felt that some provisions and results had created 'reverse discrimination.'

Questions 13 through 15 asked: (a) How would their programs be affected if the *Geier* mandates were dismissed? (b) Would their institutions continue to use race-conscious admissions programs if *Geier* mandates were eliminated? and (c) Would their institutional mission statement regarding diversity change if *Geier* programs were dismissed? Six interviewees responded that their programs could be eliminated or drastically cut. One respondent noted:

> The impact would be greatest on the university's capacity to attract African American students through the provision of financial aid. Colleges and universities compete for the best students and the best students would be less likely to enroll in our schools without the offer of financial aid. One of two results would then likely occur: Both the numbers and the percentages of African American students enrolled on our campuses would decline and our schools would admit more marginally qualified students to maintain their numbers. Neither result is attractive.

Three of the respondents either did not answer this question or stated that their programs would not be affected because "Our programs are not attached to *Geier*." Six respondents stated that their institutions would continue to try to recruit a diverse student body, would not change their admissions requirements, or would continue their efforts but redefine what is meant by diversity. For some institutions, diversity might be

expanded to include the economically disadvantaged (need-based population diversity), students based on geographic origin, and/or first-generation college students. One respondent specifically indicated that his/her institutional mission statement might change if it wanted to enroll a student body that was more reflective of state demographics. Three respondents who did not answer this question indicated that they were "Unsure" or responded that their programs were not tied to *Geier* funding.

Based on information derived from responses to the written questions, the following points can be made:

- Persons directly involved in administering *Geier* programs are aware of the distinction between the concepts of *affirmative action* and *diversity*. However, these distinctions are not as clear as one would imagine. Respondents are aware that affirmative action policies, as applied to Tennessee public higher education institutions, have been used to remedy the effects of de jure segregation and have been developed to comply with the legal mandates of the *Geier* Stipulation of Settlement and Consent Decree. They considered diversity policies to be proactive measures that will help their institutions prepare for many different types of students. In addition to racial minorities, institutions have realized that diversity of student body can mean differences based on socio-economic status, geographic region of residence, life experiences, work experiences, sexual orientation, and intellectual thought.

- At Tennessee public colleges and universities, diversity has become a core value for the institutions and professional programs. That core value will remain even if the *Geier* mandates are dismissed.
- *Geier* financial resources have been used to recruit for and retain racial diversity in Tennessee professional programs. *Geier* financial resources have been used effectively in the following ways: scholarships, academic support and summer enrichment programs, public information and recruitment campaigns, and internships that help students prepare for the work environment and entry into professional schools.
- There are both strengths and weaknesses associated with *Geier* programs. Through the use of *Geier*-sponsored programs, Tennessee public colleges and universities have been able to compete for qualified racially underrepresented students. This is regarded as a strength. However, *Geier* programs have also had an inherent weakness. They have not been able to eliminate society's perception that race-conscious admissions programs recruit unqualified or marginally prepared students and/or offer benefits to minority students that might not be available to students from non-minority racial backgrounds.
- If *Geier*-sponsored resources are eliminated, the ability to continue to retain a diverse student body and to compete for qualified students might be hampered.

Analysis and Discussion of Data: Elite Interviews

Interviews were conducted with eleven individuals, including a *Geier* litigant, a *Geier* Court Monitor, and various administrators from the Tennessee Higher Education Commission, Tennessee Board of Regents, and University of Tennessee. Interviewees were asked to:

1) Speculate whether the *Geier* Consent Decree would be dismissed.
2) Assess the general impact(s) of *Geier* mandates on Tennessee public higher education institutions.
3) Identify the strength(s) of *Geier* mandates to Tennessee public colleges and universities. That is, what will be the loss to Tennessee public higher education institutions if *Geier* mandates are dismissed?
4) Comment on whether diversity is an important aspect of the institutional mission at Tennessee public colleges and universities. If "Yes," in light of the *Grutter* standard of review and possible dismissal of *Geier* mandates, speculate whether diversity at Tennessee public colleges and universities would continue to remain an important mission. If "Yes," how would the diversity mission be accomplished?
5) Speculate as to whether Tennessee public colleges and universities are prepared to meet all the aspects of the *Grutter* standard of review. If not, what must be done to meet such standards?

There was consensus, but no unanimity, of responses to the first question posed to interviewees. All but one of the interviewees believed that the *Geier* Consent Decree would be dismissed. The one interviewee who was unsure whether *Geier* would be

dismissed indicated that, on one hand, there was cause to think the Consent Decree might be dismissed because of the longevity of the litigation. From its first litigation to the present, *Geier* has lasted almost forty years and has cost the State of Tennessee millions of dollars. *Geier* has been the longest case of its kind in the nation that has addressed the issue of race in public higher education. On the other hand, this interviewee also stated that Judge Wiseman, who litigated the original *Geier* Stipulation of Settlement, still retained jurisdiction to review the arguments regarding dismissing the Consent Decree. The interviewee was uncertain of Judge Wiseman's assessment of progress made toward achieving the original requirements of the Stipulation of Settlement and current Consent Decree.

There was no consensus from the elite interviewees about whether the *Geier* Consent Decree should be dismissed. For some, questions still linger regarding whether enough progress had been made to declare that Tennessee has created a unitary state-supported public higher education system, which was cited as the purpose of the *Geier* Stipulation of Settlement. One interviewee indicated that the change from the Stipulation of Settlement phase into the Consent Decree phase implied that Tennessee had complied with the Stipulation of Settlement regarding removal of the vestiges of past discrimination and, therefore, had developed the means to ensure the existence of a unitary system. The interviewee's opinion held that a unitary system is not based or dependent on the numerical racial composition of students or faculty at Tennessee public colleges and universities. Rather, a unitary system only requires admissions standards and procedures at the individual institutions that allow all persons equal consideration for admission into such institutions. Accordingly, to this same interviewee, admissions

policies and processes at Tennessee public colleges and universities have been created to "inculcate a culture of inclusion," and such policies and processes will help prevent Tennessee from reverting back to the previous de jure segregation system. To another interviewee, the only way to assess the social impact of *Geier* on the State of Tennessee is to test it empirically. Empirical testing would entail monitoring what happens at institutions in the wake of *Geier*. To sustain progress and move forward, administrators must be committed and willing to strive to meet the goals of *Geier*.

When asked to identify the impact of *Geier* mandates on Tennessee public colleges and universities, interviewees spoke of both financial and social ramifications. From the financial standpoint, on an annual basis, approximately $19 million is disbursed through the Tennessee Higher Education Commission (THEC) for use by Tennessee public colleges and universities for *Geier* programs. It is uncertain whether such financial resources will be provided post-*Geier*. If such resources are not available, there could be major setbacks in the ability to recruit and retain a diverse student population. To emphasize progress made because of *Geier* resources, one interviewee indicated that:

1) During the period of 1995-2005,[15],a thirty percent (30%) increase was shown in the number of African American students enrolled in Tennessee public colleges and universities;
2) Approximately fourteen percent (14%) of the total number of African American high school students from Tennessee, between the ages of 18-24, enrolled in Tennessee public colleges and universities. This compared to

[15]This period represents the last 5 years of the Stipulation of Settlement and five years since the Consent Decree was signed

19% of the total number of students, in the same age group, who enrolled in Tennessee colleges and universities; and

3) The percentage of non-minority students enrolled at Tennessee State University, the only State HBCU, was at approximately 25%, making TSU one of the more diverse HBCUs in the nation.

The social impacts of *Geier* mandates were harder to quantify. Interviewees indicated that the primary social impacts of *Geier* have been the increased awareness by Tennessee public colleges and universities of the need to prepare for and adjust to a changing population base; a change in attitude regarding diversity as an accepted institutional goal; and improvements in the retention rates of students, for both the overall population and for underrepresented population groups.

Every interviewee indicated that *Geier* provided both the legal protection and the financial resources needed by Tennessee colleges and universities to develop innovative approaches to recruit for and retain racial diversity at their respective institutions. These factors represent the strengths of *Geier*. The loss of both Geier legal protection and financial resources would hinder Tennessee public colleges and universities in competing with other out-of-state public colleges and universities also interested in diversifying their student bodies. This remains true even in light of the educational scholarships funded by the Tennessee Lottery (*HOPE* Scholarships), which provide scholarships to all Tennessee students who graduate from high school with a 3.0 grade point average or better.

Despite the progress made and in light of the potential loss of legal protection and financial resources, some interviewees were concerned about the level of commitment to

and capability of sustaining diversity efforts at Tennessee public colleges and universities. As noted by one interviewee, race and class are two drivers of American society, and attitudes toward these factors constantly change. Currently, *Geier* mandates provide a monitoring system that holds institutions accountable for their action. Without that monitoring system and unless institutions create a coordinated plan that allows them to self-monitor their efforts and progress, there is concern that attention to diversity efforts might not remain at the current level.

One of the most troublesome questions posed to the interviewees was whether Tennessee public colleges and universities are prepared to meet the requirements of the *Grutter* standard and, if not, what must be done to meet such a standard? All interviewees stated that Tennessee institutions are aware of the *Grutter* standard and are working toward addressing the requirements. However, there was concern about a lack of coordination between institutions within the same board of governance and between the two boards of governance. Coordination is needed to ensure that awareness translates into preparation and preparation into action. One interviewee suggested that the TBR schools and those under the UT system should work more closely together to develop a coordinated plan of priorities regarding future courses of action related to financial assistance, recruiting and retention efforts, and changing overall campus environments. Coordination is also needed to help redesign and expand the definition of diversity to include not only race, but also other "disadvantaged" or "underrepresented" groups. All interviewees voiced the need for some type of monitoring system to help track changes that might occur after the *Geier* Consent Decree is dismissed. At the campus level, administrators must be willing to objectively assess recruiting and retention programs,

provide support to those programs that demonstrate effectiveness, and change or eliminate those that are not effective.

One interviewee expressed concern that the Consent Decree emphasized efforts for recruiting and retaining a diverse student body but did not, like the Stipulation of Settlement, place the same emphasis on recruiting and retaining a diverse faculty. Other interviewees agreed that the emphasis on faculty recruitment was not as much of a priority in the Consent Decree as in the Stipulation of Settlement and stated that it should have been. All recognized, however, that recruiting a diverse workforce, particularly African American faculty, was more difficult than recruiting a diverse student body. As noted in national statistics, there are a limited number of qualified African Americans in the higher education field. In addition, there is intense competition among higher education institutions competing for that limited number of faculty from underrepresented populations. Recognizing these limitations, all interviewees still agreed that efforts to try to recruit and retain a diverse faculty must continue.

Analysis and Discussion of Data: Participant-Observation Results

This researcher functioned as a member of four *Geier*-related committees located at the University of Tennessee Knoxville campus: the Commission for Blacks, Enrollment Management Committee, *Geier* Planning Taskforce, and UT Diversity Council. Each committee has its own unique purpose(s) and membership make-up. A brief summary of each committee is provided below.

Commission for Blacks (CFB): The Commission for Blacks was created more than twenty years ago as a direct outgrowth of the perceived dissatisfaction and concerns over the working conditions and progress of Black faculty and staff at the University of

Tennessee, Knoxville. Members to the CFB are appointed by the UT Chancellor and consist of faculty, staff, and students representing the various colleges, schools, and administrative units of UT, as well as the Knoxville community. Ex-officio members include the Vice Chancellor for Administration and Student Affairs (or his/her designee), the Executive Director of Human Resources, the Director of the Office of Equity and Diversity, the Chair of the Faculty Senate, and the Chair of the Commission for Women. According to its charter and by-laws, the CFB advises on planning, implementing, and evaluating UT programs, policies, and services as they relate to Black students, faculty, and staff.

Enrollment Management Committee: The Enrollment Management Committee (EMC), currently chaired by the Provost and Vice Chancellor of Academic Affairs,[16] was formed in the late 1990s to explore the issue of student recruitment. The EMC has expanded its role to look at the issues of student recruitment, retention, and diversity. Membership includes administrators from such entities as the Office of the Chancellor, Office of Enrollment Services (Administration, Financial Aid, and Admissions Counseling), Student Affairs (Administration, Orientation, and Housing), College of Arts and Sciences[17] (Administration and Advising), Office of Graduate Studies, UT Student Success Center, Faculty Senate, Institutional Research and Assessment, and Office of Equity and Diversity. The EMC has been instrumental in conducting in-depth research and data analysis regarding the various aspects of student recruitment and retention (persistency rates, financial aid issues, student availability and

[16]The former Chair, Vice Chancellor of Academic Affairs and Dean of Graduate Studies, recently retired. The position was redefined and is now entitled Provost and Vice Chancellor of Academic Affairs.
[17]The College of Arts and Sciences represents the largest college in terms of disciplines and student enrollment at the University of Tennessee.

diversity in the State of Tennessee). More importantly, this group, aware of the *Grutter* standard and requirements, has taken the lead role in developing and testing a holistic admissions review process to help the University of Tennessee, Knoxville, continue to recruit and retain a diverse student body.

***Geier* Planning Committee:** Chaired by the Senior Associate Vice Chancellor of Academic Affairs, this ad hoc committee was formed specifically to explore the different issues of the *Geier* Consent Decree, to monitor expenditure of *Geier* funds, and to explore the means to recruit and retain both a diverse student body and workforce. Membership includes representatives from the Office of the General Counsel, Chair of the Faculty Senate, Vice Chancellor of Business and Finance, Assistant Vice Chancellor of Student Affairs, Dean of Enrollment Services, Executive Director of Human Resources, and Associate Director and Director of Equity and Diversity. The *Geier* Planning Committee has been instrumental in maintaining ongoing communication and coordination with the *Geier*-appointed Court Monitor, the UT Vice President of Equity and Diversity, and the UT Vice President of Business and Finance.

Diversity Council: Co-chaired by the Executive Director of Human Resources and Director of Equity and Diversity, the Diversity Council was formed in 2005 as a Chancellor's Initiative to develop a strategic diversity plan for the University of Tennessee, Knoxville, campus. Membership includes faculty, staff, and students representing the areas of academic affairs, student affairs, campus special commissions (Commission for Blacks and Commission for Women), and the Office of the Chancellor. The committee was charged with developing a planning framework that would help all campus units identify their specific diversity goals and means of working toward

achieving such goals. Seventy-four individual plans were submitted to the Diversity Council by units representing every aspect of the UT community (student affairs, academic affairs, and support programs.) Each plan was reviewed by the Council and compiled into an overall diversity plan for the UT Knoxville campus (see Appendix H).

These four committees overlap in membership. Individually and working together, these committees address the same types of questions that were posed to the elite interviewees. All groups assumed that the *Geier* Consent Decree would be dismissed and have worked to prepare for such action. There is consensus that diversity of the student body and workforce is a valued goal and is needed if UT is to become, and remain, an institution that prepares its students to function in a diverse future. All recognize that progress has been made toward attainment of the *Geier* goals but believe more progress is needed. There is debate as to whether or not Tennessee has met the *Geier* requirement of creating a unitary public higher education system. However, there is recognition that genuine efforts have been made to do so. These commissions continue to try and define and achieve a critical mass of Black students and employees at UT. A letter submitted by the Commission of Blacks to the UT Chancellor reflects the general sentiments of the four campus organizations (Appendix G).

Like responses received to the written questionnaire and from the elite interviews, feedback from the four campus committees has identified the strength of *Geier* as the legal protection and financial resources that helped the university correct the effects of de jure segregation. Each committee has stated that financial resources as well as legal protections are still needed. Each committee voiced concerns that the gains made under *Geier* will decline when the Consent Decree is dismissed. There is also concern

that, as UT moves toward complying with the *Grutter* standard of review, gains made in recruiting Black students and employees, particularly faculty and administrators, will be minimized. This concern is sparked by the fear that, as UT tries, with limited resources, to address the needs of a broader-based, diverse population, less attention will be made to the population group specifically covered under the *Geier* mandates.

In preparation for the post-*Geier* era, UT instituted two related initiatives: the *Ready for the World* (*Quality Enhancement Plan*) and the *Diversity Plan: Framework for Action (Diversity Plan)*. Together these initiatives represent goals, objectives, and strategies that UT will use to prepare faculty, staff, and students to address the various international and intercultural issues that affect the campus and to prepare for life in a changing world. As stated in the UTK *Diversity Plan: A Framework for Action* (Appendix H):

> …The University aspires to be an institution that celebrates diversity by welcoming all students, staff, and faculty as respected and valued participants in the University's education mission. In furtherance of these goals, the University welcomes people of different races, ethnicities, religions, creeds, national origin, genders, sexual orientations, physical abilities, age, veteran status, and social, economic, or educational backgrounds. The University is particularly committed to welcoming groups who have been historically underrepresented, discriminated against or excluded. The University also supports and encourages the promotion of diversity in its curricular, programs, faculty research, scholarship, and creative activities. (University of Tennessee Diversity Council, 2005, p. 2)

The *Diversity Plan* included six specific goals aimed at achieving the diversity objective identified above:

- Create and sustain a welcoming, supportive and inclusive campus climate;

- Attract and retain greater numbers of individuals from underrepresented populations into faculty, staff, and administrative positions (particularly department heads, directors, deans, and vice chancellors);
- Attract, retain, and graduate increasing numbers of students from historically underrepresented populations and international students;
- Develop and strengthen partnerships with diverse communities in Tennessee and globally;
- Ensure that undergraduate curricular requirements include significant intercultural perspectives; and
- Prepare graduate students to become teachers, researchers, and professionals in a diverse world. (University of Tennessee Diversity Council, 2005, p. 2)

These six goals parallel the goals identified in the *Geier* Stipulation and Consent Decree. To help ensure that these goals will become an ongoing part of the UT culture, the *Diversity Plan* states that all administrators will be held accountable for developing, implementing, and assessing diversity plans for their respective units. To accomplish this goal, the Chancellor has informed all administrators that diversity efforts will become an ongoing part of their annual evaluations. By the same token, annual evaluations conducted by college deans, department heads, directors, and program administrators will also include a diversity factor for their direct reports.

CHAPTER SIX

SUMMARY, FINDINGS, AND IMPLICATIONS FOR FUTURE ACTIONS

This dissertation is a comparative case study of the public policy mandated in *Grutter v. Bollinger* and the public policies and procedures administered through *Geier v. Bredesen*, 288 F. Supp. 937 M.D. Tenn. (1968). Both cases involved the application of race-conscious admissions policies to professional programs at public universities located in the Sixth Circuit Court of Appeals. The professional program in *Grutter* was the Law School at the University of Michigan. *Geier* mandates were applied to the professional programs of law, medicine, veterinary medicine, dentistry, and pharmacy at Tennessee public colleges and universities. Although these two cases served as the focus of this dissertation, other cases were reviewed, including the *Grutter* companion case of *Gratz v. Bollinger* and the *Geier*-related case of *United States v. Fordice*, 505 U.S. 717 (1992). In *Gratz*, 539 U.S. 244 (2003), which also examined race-conscious admissions policies at the University of Michigan, the admissions policies used were found by the U.S. Supreme Court to be unconstitutional. The *Geier*-related case of *United States v. Fordice* served as the Tennessee model for correcting the effects of de jure segregation.

In 2003, the *Grutter* case became the national standard for all colleges and universities, public and private, to follow in the use of race-conscious admissions policies in undergraduate, graduate, or professional programs. However, the *Grutter* standard continues to be scrutinized. During the 2006-2007 term, the U.S. Supreme Court heard the cases of *Parents Involved in Community Schools v. Seattle School District I* and *Meredith v. Jefferson County Public Schools*. These cases involve the use of race-conscious admissions policies in K-12 public school systems located in Seattle,

Washington, and Louisville, Kentucky. The decisions in these two cases may determine whether *Grutter* is applicable to K-12 education. Like *Geier* and *Grutter*, *Meredith* was a Sixth Circuit Court of Appeals case.

On November 7, 2006, Michigan voters, by a margin of 58% to 42%, approved Proposition 2, an amendment to the state's constitution banning the use of affirmative action policies that would provide preferences on the basis of race and gender at public universities and in governmental hiring and contracting. The proposal was pushed by the organization known as By Any Means Necessary (BAMN) and led by Ms. Jennifer Gratz, the plaintiff in *Gratz v. Bollinger*. While administrators at the University of Michigan realize that compliance with the law is necessary, they also remain committed to diversity programs at the University of Michigan. Groups opposing the constitutional ban have already begun to gear up for eventual court battles.

This dissertation research used the case study model as its primary research technique. As defined, the case study is an empirical inquiry that investigates a contemporary phenomenon within a real-life context, especially when the boundaries between the phenomenon and context are not clearly evident and multiple sources of evidence are used. The use of affirmative action policies and practices represented the phenomenon studied. The context was the admissions process in higher education, and specifically, admissions processes used for professional programs in higher education. Additional research techniques used included:

- A written questionnaire, consisting of fifteen open-ended questions, mailed to twenty officials administering *Geier* mandates at the Tennessee professional schools (University of Memphis, East Tennessee State

University, University of Tennessee College of Law, University of Tennessee Institute of Agriculture, and University of Tennessee Health Science Center).

- Elite interviews conducted with eleven persons directly involved with *Geier* mandates and programs. Such interviews included the primary litigant in the *Geier* lawsuit, the Court-appointed Court Monitor/Special Assistant of the *Geier* lawsuit, and various administrators from the Tennessee Higher Education Commission, Tennessee Board of Regents, University of Tennessee System-wide Administration, and University of Tennessee, Knoxville, campus.
- The participant-observation method, which allowed this researcher to gather data while serving as a member of four campus-based committees located at the University of Tennessee, Knoxville.

Grutter and *Geier* represented the two-prong uses of affirmative action practices. For the University of Michigan Law School, affirmative action practices were used as voluntary, non-remedial means to achieve a diverse student body. Diversity represented a compelling governmental interest; race was one of many diversity factors sought. The University of Michigan asserted that student body diversity provides educational benefits that positively affect the total student body. Students learn in an environment that presents diversity of background, perspectives, and experiences. More importantly, the educational benefits derived in such an environment help prepare students to function in a diverse society.

Public colleges and universities in Tennessee were court-ordered to use affirmative action practices to remedy the effects of de jure segregation. Student body diversity represented a compelling governmental interest. However, diversity was limited to racial diversity, and only Blacks and Whites were affected.

On September 21, 2006, the U.S. District Court signed the Final Order of Dismissal (Order) regarding *Geier*. This Order (*Geier v. Bredesen*, No 5077) asserts in part:

> The Defendants have fully complied with the requirements of the 2001 Consent Decree, Geier v. Sundquist 128 F. Supp. 2d 519 (M.D. Tenn. 2001), and any remaining vestiges of segregation have been removed from the Tennessee system of public higher education, to the extent practicable and as required by United States v. Fordice 505 U.S. 717 (1992). The State is operating a unitary system of public higher education and the Defendants have represented to the Court that they will continue to do so (2006, p. 1-2).

The U.S. District Court and all relevant parties have agreed that the vestiges of Tennessee's previous de jure segregated public higher education system have been removed and that Tennessee now operates a "unitary system." Programs and policies legally required under *Geier* from 1984-2006, which followed the legal standards set out in *Fordice*, no longer apply. *Geier* was dismissed with prejudice, meaning no further action can be brought forth on the specific claims alleged in the *Geier* lawsuit, Stipulation of Settlement, and Consent Decree. However, the finality of the Order is conditional on the implementation of the enumerated commitments set out in the Order. Should the State of Tennessee renege on any commitment identified within the Order, Judge Thomas A. Wiseman, Jr., or his successor, can entertain a motion to re-open the case and seek further relief.

Findings

The central question posed in this dissertation was whether *Geier* admissions policies comply with the *Grutter* standards. Information gathered through this research indicates that, although *Geier* mandates are closely aligned with the *Grutter* standards, they do not meet the *Grutter* standards. Under *Geier*, race was the only type of diversity sought, and race was limited only to Blacks and Whites. Therefore, *Geier*, as originally written, is not narrowly tailored and does not pass the strict scrutiny test.

Based on information gathered through this research, administrators and other persons directly involved in administering *Geier* programs and mandates are well aware that affirmative action policies in Tennessee have been used to remedy the effects of de jure segregation. They are also involved in working toward making the transition from the *Geier* past to the *Grutter* present. At the University of Tennessee, Knoxville, campus, for instance, campus-based committees (Commission for Blacks, Enrollment Management Committee, Diversity Council, and the *Geier* Planning Committee) have filled leadership roles to ensure that gains made under *Geier* will not be diminished as the University of Tennessee moves to broaden its base of diversity interests.

Participants in this dissertation research assert that diversity has become a core value at Tennessee public colleges and universities and will remain as such, even post-*Geier*. Campus mission statements have been changed to reflect that diversity is an institutional value, and institutions are redefining the term "diversity" to include, but not be limited to, race. Other diversity factors include socio-economic status, geographic region of residence, life experiences, work experiences, sexual orientation, disability, and intellectual thought.

Geier financial resources were used to recruit for and retain racial diversity in Tennessee professional programs. Some of the effective ways financial resources were used included scholarships, academic support and summer enrichment programs, targeted public information and recruitment campaigns, and internships. There is a visible presence of Blacks at Tennessee's Historically White Institutions (HWI) as well as Whites at Tennessee State University, the only Historically Black College and University (HBCU) in the state.

Participants in this research stated that there were inherent strengths and weaknesses associated with the *Geier* mandates. The major strengths of the *Geier* mandates were the financial resources and legal protection that helped institutions recruit and retain a diverse student body. Progress was made toward meeting the goals set in the *Geier* Stipulation of Settlement. Progress referred to both developing a racially diverse student body and changing attitudes about the value of having a diverse student body. Participants stated that the weakness of *Geier* was the inability to eliminate society's perceptions that race-conscious admissions programs recruit unqualified or marginally prepared students and offer benefits to minority students that might not be available to students from non-minority racial backgrounds. This is the national perception about affirmative action policies and practices. The perception began with the creation of affirmative action policies in the 1960s and prevails today. It will continue as long as race remains both a divisive and political issue in the United States. Responses to the questionnaire indicated that all students admitted into Tennessee professional programs must meet requirements of the institution, requirements imposed by the individual professional program, and requirements imposed by the professional accreditation board

that establishes national qualifying norms. The concern voiced by research participants was that institutions might try to maintain the number of historically under-represented students enrolled during the approved *Geier* era by recruiting marginally prepared students in the post-*Geier* era. They stated that such actions would be detrimental to the students and to the professional programs and would add to the negative perceptions that already exist about the use of affirmative action policies and programs.

Participants were uncertain that Tennessee has indeed created a unitary higher education system. They acknowledged that, because of *Geier* mandates, all Tennessee public colleges and universities have created a racially diverse student body and that admissions policies and practices have been developed to assure equal access for all qualified Tennessee residents seeking a college education. They acknowledged that no institution is viewed as a single-race institution. However, participants noted that no Tennessee public college or university achieved the numerical goals outlined in the *Geier* Stipulation of Settlement. These goals were removed or eliminated when the parties entered into the *Geier* Consent Decree. Even though much progress has been made, participants were still concerned about what was perceived to be the lack of a critical mass of students reflecting racial diversity at Tennessee's public colleges and universities. Current data indicate that racial minorities, and Blacks in particular, represent less than 15% of the total student population base at Tennessee's HWIs. Whites represent less than 25% of the student population at the only HBCU in Tennessee. No public college or university in Tennessee is considered a single-race institution. However, in Tennessee, historically White public colleges and universities have remained

predominantly White, and Tennessee State University, the only HBCU, has remained predominantly Black.

In accordance with *Grutter*, critical mass cannot be determined in percentages or specific numbers. Critical mass represents a visible presence of persons from under-represented groups so that all students can interact with and learn from members of such groups. In addition, persons from under-represented groups will not feel as if they must serve as the only spokespersons of their respective groups. Neither *Geier* (Consent Decree) nor *Fordice* defined the existence of a unitary system with reference to specific numbers. Instead, both cases used the phrase "to the extent practicable" to address this issue. Both cases have also defined a unitary system as the existence and application of educational policies and practices that allow equal access to all qualified applicants; are applied in a consistent, non-discriminatory manner; and prevent the re-establishment of a de jure segregated system. Tennessee meets the *Fordice* and *Geier* definitions of a unitary educational system.

A problem identified by participants in this research was the lack of emphasis placed on recruiting and retaining a diverse faculty. During the *Geier* Stipulation of Settlement phase (1984-2000), funds and programs were identified for recruiting and retaining under-represented faculty and upper-level administrators. During the *Geier* Consent phase (2001-2006), recognizing the difficulties associated with recruiting faculty and administrators of color, the emphasis on recruiting and retaining a diverse faculty and administrative presence was minimized. Participants saw this as a major problem that has negative consequences on recruiting and retaining a diverse student body. From their perspective, this lack of emphasis minimized the possibility of having a diverse faculty

capable of serving as role models for Black students. More importantly, this de-emphasis minimized the importance of the educational benefits that could accrue to the total student body from being exposed to faculty members who present different backgrounds and perspectives on classroom issues.

Finally, participants voiced concern about the lack of a monitoring system that Tennessee institutions would be required to use to evaluate progress made and problems encountered post-*Geier*. The *Geier* Dismissal Order allows for and encourages each college and university to identify its respective diversity goals, programs, and methods of measuring progress. Participants, however, feared that progress made under *Geier* might be eliminated, commitments by administrators might disappear, and practices that have proven to be effective in recruiting and retaining a diverse student body might be abandoned without some form of mandated monitoring and evaluative process to hold campuses accountable for diversity efforts.

Tennessee, like Michigan, must now demonstrate that any race-conscious admissions policies and programs used to recruit and retain a diverse student body represent a compelling governmental interest. Policies and programs that consider race as one type of diversity factor must be narrowly tailored to withstand the strict scrutiny test. Therefore, race-conscious policies and processes must demonstrate that: (1) different types of diversity, including race, are desired; (2) all applicants are considered on the basis of an individualized, holistic assessment; (3) each applicant is given the opportunity to identify the type of diversity he/she can bring to the institution; (4) non-minority applicants have the opportunity to be selected over minority applicants because of the diversity they can bring; and (5) all persons selected for admission are qualified

according to the institution's standards. It is clear that Tennessee institutions are aware of this standard and have made an effort to address these requirements.

Tennessee Governor Phil Bredesen asserts that diversity remains a compelling governmental interest. Both the governor and the *Geier* Final Dismissal Order have indicated that ongoing financial support will be provided to further the objectives of the two *Geier* goals: equal access and diversity. Administrators at Tennessee colleges and universities have pledged to continue efforts to recruit a diverse student body. Institutional mission statements, campus websites, and campus publications have been expanded to reflect a broadened definition of diversity, which includes, but is not limit to, racial diversity. At the University of Tennessee, under the leadership of Chancellor Loren Crabtree, two diversity initiatives are underway. Known as *Ready for the World* and the *Diversity Plan: Framework for Action (Diversity Plan)*, these initiatives have established mechanisms that help define the campus' definition of diversity and identify operational programs that individual departments will use to achieve their diversity goals. The *Diversity Plan* identifies opportunities for faculty, staff, students, and campus guests to learn from and experience the many aspects of international and intercultural diversity. According to the *Diversity Plan*:

> …The University aspires to be an institution that celebrates diversity by welcoming all students, staff, and faculty as respected and valued participants in the University's educational mission. In furtherance of these goals, the University welcomes people of different races, ethnicities, religions, creeds, national origin, genders, sexual orientation, physical abilities, age, veteran status, and social, economic, or educational backgrounds. The University is particularly committed to welcoming groups who have been historically underrepresented, discriminated against or excluded. The University also supports and encourages the promotion of diversity in its curricula, programs, faculty research, scholarship, and creative activities. (University of Tennessee Diversity Council, 2006, p. 2)

The University of Tennessee has also developed and tested a holistic review process, which allows UT Enrollment Services (Office of Admissions) to assess students on common criteria, such as high school grade point average, high school curriculum, scores on standardized exams, and responses to a written essay. The holistic review process currently applies to undergraduate admissions, but it could have future applications for graduate and professional programs. As already stated, applicants to Tennessee professional programs must meet institutional admissions standards and must be qualified to compete against national student norms. Admissions offices, college faculty, program committees, and program administrators help develop standards, review applications, and monitor the progress of students admitted to the institutional programs. This review process helps serve as a bar to ensure that no student is insulated from competition with other applicants.

Implications for Future Actions

This research was limited in its purpose and scope. However, it does present opportunities for areas of future research. For instance, *Grutter* currently applies to admissions policies and programs in private and public colleges and universities that use race-conscious policies. Because the U.S. Supreme Court, during the 2006-2007 term, will decide two cases that involve race-conscious admissions policies used at the K-12 level, *Grutter* has the potential of being applied to elementary and secondary schools as well. In any event, research regarding the outcomes of *Meredith v. Jefferson County Public Schools* and *Parents Involved in Community Schools v. Seattle School District I* will be important to Tennessee public schools.

It is expected that decisions rendered in *Grutter* will have a direct effect on the types of scholarships, grants, and loans institutions will sponsor and provide. The University of Tennessee has already developed two new scholarship programs—Tennessee Promise and Tennessee Pledge—to help in its diversity efforts. The Tennessee Promise Scholarship will be available to academically eligible students from a specific group of high schools starting in fall 2007. Thirty-five high schools statewide, many in the Memphis and Nashville metropolitan areas, where there is a large racial minority population, have been selected for the first year of the Tennessee Promise Scholarship program. These thirty-five schools represent students who face barriers (e.g., financial) to college enrollment and traditionally have not enrolled at the University of Tennessee. The list of selected high schools may vary from year to year and may be expanded if funding is increased. The Tennessee Pledge Scholarship, which began in the fall of 2005, is based solely on financial need. Students who qualify for the Tennessee Pledge Scholarship are from families whose annual income falls below the 150 percent poverty level as defined by the federal government. The University of Tennessee must establish means to monitor the effects of these scholarship programsto ensure their compliance with *Grutter* standards and to assess their recruiting effectiveness.

Colleges and universities understand that in order to recruit and retain students and employees, particularly those from under-represented, diverse population groups, financial resources must be available and at competitive levels. The percentage of state funding for higher education has been on a downward trend for several years, with no indication that the trend will change in the near future. Institutions have been forced to seek private funding sources as the means to provide money for scholarships, to support

their academic programs, and to help with construction costs. Research into the type of data needed by Tennessee legislators to make informed decisions—political and financial—regarding the value of higher education and ways to support higher education is a must.

Another important area of inquiry deals with the future of HBCUs. In light of *Grutter* and because some believe that the case of *Adams v. Richardson* was never clarified, the role of the traditionally single-race HBCUs will need to be addressed. With limited resources and academic curricula that sometimes do not compare to those offered by Historically White Institutions (HWIs), can and should HBCUs continue to compete with HWIs for high caliber students from their historically under-represented population base?

This research acknowledged that the issue of diversity in higher education is a national issue. At least two other publicly financed flagship institutions in Texas and Georgia wanted the U.S. Supreme Court to review lawsuits filed on the issue of race-based admissions policies. The Court chose not to review such cases. Why did the U.S. Supreme Court choose instead to hear *Grutter* and *Gratz* but not these other cases? One might speculate that there are several reasons: (1) the University of Michigan is a public institution of great prominence. The institution used two different approaches to get to the same goal. One approach was applied at the undergraduate level, while the other approach was used within a professional school, which has implications for graduate admissions. The University of Michigan modeled the process used at the professional school after the process used at Harvard and described by Justice Powell in *Bakke*. The

case allowed the Court, as a unit, to address Powell's assessment regarding the value of diversity in higher education. This question is worth further research.

Lastly, as recently as November 7, 2006, challenges to the *Grutter* standard made national news. Michigan voters, by a margin of 58% to 42%, voted to ban the use of affirmative action policies and practices in public universities and in governmental contracts and hiring practices. What does this referendum mean to the application of *Grutter*?

Grutter, currently the legal guidepost of the land regarding the use of race in admissions, may not remain so. Diversity, particularly racial diversity, will remain a divisive issue in our nation. Race matters now and will continue to do so. How will public higher education institutions deal with this issue? The answer lies in the type and level of commitment to diversity exhibited by the university—administrators, faculty, and students—and the general populace.

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APPENDICES

APPENDIX A
***GEIER* STIPULATION OF SETTLEMENT NO. 5077, AUGUST 1984**

...OR ENTRY
11:00 A M

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

SEP 25 1984
CLERK
BY D. Tipton
DEPUTY CLERK

RECEIVED
SEP 26 1984
Accounting & Program
Budget Control
and Statistics

FILED
AUG 31 1984
CLERK
BY D. Tipton
DEPUTY CLERK

RITA SANDERS GEIER, et al., Plaintiffs, UNITED STATES OF AMERICA, Plaintiff-Intervenor, RAYMOND RICHARDSON, JR., et al., Plaintiff-Intervenors, H. COLEMAN McGINNIS, et al., Plaintiff-Intervenors, vs. LAMAR ALEXANDER, et al., Defendants.	No. 5077 Judge Thomas A. Wiseman, Jr. STIPULATION OF SETTLEMENT

Plaintiffs RITA SANDERS GEIER, et al., and Plaintiffs-Intervenors RAYMOND RICHARDSON, JR., et al., and Plaintiff-Intervenors H. COLEMAN MCGINNIS, et al., having sought further injunctive relief to effectuate statewide desegregation of all Tennessee institutions of public higher education, and having conducted extensive negotiations with all parties to this lawsuit in an effort to bring about a just resolution of the issues, without further litigation, that will achieve a unitary[1], desegregated system of public higher education in the State of Tennessee,

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[1]It is the purpose of this order to achieve a unitary desegregated system and not to achieve a merger of the

IT IS HEREBY STIPULATED by and between the undersigned, and subject to this Court's approval, as follows:

I. INTRODUCTION

A. The primary purpose of this Stipulation of Settlement is the elimination of Tennessee's dual system of higher education. This purpose includes the maximization of educational opportunities for black citizens of the State of Tennessee and the improvement of educational opportunities for black citizens of the State of Tennessee. The parties agree that statewide access to public higher education in the State of Tennessee by black students and the degree of black presence in faculty and administrative positions statewide will not be decreased as a result of the implementation of the provisions of this Stipulation. It is the intention of the parties that the dismantling of the dual system shall be accomplished in such a way as to increase access for black students and increase the presence of black faculty and administrators statewide and at the historically white institutions.

B. Defendants commit to continue efforts to achieve their current desegregation objectives and to revision of those objectives as necessary after the pertinent studies

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existing systems of higher education in Tennessee.

referenced herein are completed. It is the intention of defendants through implementation of this plan to achieve desegregation of all institutions of higher education in the state.

C. Each defendant agrees to include a proposed budget for their part of any plan or program developed hereunder and to request adequate funding for each plan or program at their respective stages of the normal budgetary process and the Governor will make every effort within the budgetary process to secure adequate funding from the General Assembly. Prior to finalization of this stipulation of settlement, and no later than October 1, 1984, defendants University of Tennessee (UT) and the State Board of Regents (SBR) shall submit to all parties an estimated total amount necessary to implement the plans and programs to be developed hereunder.

D. Defendants agree to begin collecting selected data in accordance with the reporting forms of the Office of Civil Rights (OCR) of the United States Department of Education, but will continue to monitor progress by means of established reporting methods in order to preserve historical comparisons. The data to be utilized will be selected by mutual agreement of all parties prior to finalization of this Stipulation of Settlement, and no later than October 1, 1984.

E. The Desegregation Monitoring Committee will establish a procedure for monitoring and reporting progress to the Court on the desegregation of all institutions. The Committee will identify problem areas and make recommendations to the defendants concerning research and actions that should be undertaken and new programs that should be developed to address problem areas.

F. Progress toward desegregation at Tennessee State University (TSU) shall be placed under the Desegregation Monitoring Committee and shall be monitored in the same manner as is progress in desegregation at the other institutions.

G. Each Monitoring Committee report shall include a description of specific steps taken to implement each provision in this settlement agreement. In areas where sufficient progress has not been made, the Desegregation Monitoring Committee shall include in the monitoring committee report further steps to be taken by the boards to assure progress in this area.

H. Each Desegregation Monitoring Committee report shall include a listing of each presidential/chancellor, vice presidential/vice chancellor and dean position filled during the reporting period at each university, with the number and race of applicants for each position and the race of the person selected.

I. All plans to be developed pursuant to this Stipulation of Settlement shall run for a period of five years and shall contain benchmark objectives to be achieved by the end of each year.

II. STUDENT DESEGREGATION

A. Interim objectives and methodologies for setting long range objectives shall insure the achievement of non-racially identifiable institutions of higher education in Tennessee.

B. Defendants agree that as soon as necessary data are available, and no later than one (1) year from the date of this Stipulation of Settlement, a study will be conducted to ascertain whether there is a statewide disparity in college-going rates among black and white high school graduates in Tennessee, and long-range and interim desegregation objectives will be modified if necessary in an effort to eliminate any statewide disparity. Said study shall be completed no more than 180 days from the date the necessary data are available.

C. Defendants will conduct a study within 180 days to ascertain whether there is a statewide disparity by race in the ratio of graduates of public institutions in Tennessee who enter graduate or professional programs in public insti-

tutions in Tennessee, and long-range and interim desegregation objectives will be modified if necessary in an effort to eliminate any statewide disparity.

D. SBR shall immediately establish a 1993 interim objective for Tennessee State University (TSU) of 50% white undergraduate full-time equivalent enrollment. The parties agree that the ultimate long range objectives for the racial composition of the students at TSU will be set on the same basis as the objectives are set at all other institutions in the State.

E. SBR commits to retain such admission policies at its 2-year institutions for the foreseeable future and for at least five years as will insure educational access to any high school graduate.

F. Defendants will provide within 90 days a statewide survey of admissions and retention requirements for 4-year public institutions. If either governing board should take any steps in the next five years to increase admissions and/or retention requirements and to establish minimum requirements statewide, the Board will:

1. Conduct a desegregation impact analysis prior to the implementation of the new requirements, to ascertain whether these new requirements will have an adverse impact on black students;

2. Authorize institutions to enroll a percentage of new entering classes under alternative

admissions standards, said percentage to be determined periodically by the appropriate governing board and to be consistent with the objectives of this Stipulation of Settlement. The rate of alternative admissions at TSU shall in no event be increased beyond the rate for the 1984-85 academic year;

3. Provide for the phasing in of these new requirements;

4. Provide developmental education programs consistent with any master plan as provided in T.C.A. §49-7-202(c)(1) as approved by the governing board(s) available to students throughout the state to promote retention of those students entering under alternative admissions standards. The funding and standards for these programs will be developed as needed, in accordance with the implementation of parts 1 through 3 of this paragraph II (F); and

5. Each institution, through its respective governing board, will advise the Desegregation Monitoring Committee of the expected impact of increased admission and/or retention standards and will report on its desegregation objectives in light of the new standards, and also will report on alternative means of achieving its desegregation objectives.

6. SBR agrees that the admission standards at TSU will be raised over a period of 5 years. The admission standards shall include a minimum GPA and minimum ACT neither of which shall be lower than those established for MTSU. TSU minimum GPA shall increase to no less than a 2.25 over the next five years.

G. The defendants shall conduct a study within 120 days to determine the feasibility of a plan whereby other-race[2] students shall be accorded tuition discounts, loans, scholarships and/or other incentives for purposes of

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[2] "Other-race or minority students" and "other-race or minority faculty" refer to white persons with respect to predominantly black institutions and black persons with respect to predominantly white institutions.

desegregation. These incentives will also be studied for the purpose of encouraging the retention of other-race students. The plan shall be implemented by the fall semester of 1985 if and to the extent feasible.

H. Within 180 days defendants will identify graduate programs where blacks are underrepresented; defendants will develop a scholarship program for Tennessee residents to achieve graduate desegregation objectives and defendants will request adequate funding for this program pursuant to paragraph I (C) hereinabove; and universities will submit projections for increasing the number of blacks appointed as teaching and research assistants.

I. No public institution of higher education in Tennessee shall actively engage in racial discrimination or practices which discourage enrollment or involvement of other-race persons.

J. UT and SBR shall conduct a study of each of their respective institutions to determine whether any public institution of higher education in Tennessee projects an image as being racially identifiable. UT and SBR each shall appoint members of a bi-racial committee to conduct this study. Each committee shall consult with a broad spectrum of residents in the service area, as well as the faculty, students and administration of each institution and shall

report its findings and recommendations to the appropriate governing board within 120 days. SBR and UT Boards shall implement changes necessary to create in each institution the image of an institution that serves the citizens of Tennessee on a non-racial basis.

/ K. Defendants will review various postsecondary developmental education programs and develop within one year a plan designed to address the retention, performance and progression of students at all public institutions.

/ L. SBR and UT will within 180 days review their financial aid programs to identify any inequities in the awarding of public or private financial aid and, if inequities are identified, implement appropriate measures to eliminate such disparities. The award of merit scholarships shall be reviewed to determine if they are made on any basis other than merit.

/ M. SBR and UT will monitor, develop and/or coordinate a statewide other-race recruiting program, utilizing biracial recruiting teams, for the institutions within the respective systems. This program shall be fully operational within 180 days from the date of this Stipulation of Settlement, and shall contain the following elements:

1. Each predominantly white institution shall utilize a black and each predominantly black institution shall utilize a white for recruiting other-race students. By fall semester, 1985, 50% as an objective of the recruiters used by TSU shall be white.

2. To assist the institutions in identifying prospective other-race students, defendants shall obtain from the Educational Testing Service and the American College Testing Program, and provide to each institution each fall, a list of all Tennessee students (by race) still enrolled in high school who took the SAT or ACT and agreed to have their names released.

3. Each institution shall send recruitment literature to each high school in its service area and encourage the high school to disseminate the same to all students, with particular emphasis given to reaching other-race students.

4. Defendants shall develop and provide to the predominantly white institutions which have graduate and professional programs a list of all black students expected to graduate during that school year from public and private undergraduate institutions in Tennessee, and who agree to have their names and their educational records released. The list shall provide the following information: name of each student, the student's major field, grade point average, and other relevant information. Each predominantly white institution shall actively seek applications from qualified students whose names appear on the list.

5. Defendants shall obtain and provide to all predominantly white institutions a list of all black students enrolled in Tennessee institutions of public higher education who take the Graduate Record Examination (GRE) and who agree to have their names released. Each predominantly white institution shall solicit applications from among all qualified students whose names appear on the list.

6. Tennessee's state-supported law schools shall obtain through the SBR and UT Governing Boards a list of black students enrolled in Tennessee's public and private four-year institutions who have taken the Law School Admission Test (LSAT) and agree to have their names released. A comparable list of black students who have taken the Medical College Admission Test (MCAT) and the Dental Admission Test (DAT) shall be supplied to Tennessee's

state-supported medical and dental schools. The professional schools shall actively seek applications from among qualified black students who take the above-named examinations and whose names appear on the appropriate list.

(N) Defendants will coordinate the development of a cooperative program to increase the number of black students who enroll in and graduate from professional programs. Every spring beginning in 1985 and for five years, 75 black sophomore students who are Tennessee residents enrolled in Tennessee public institutions will be selected by committees representing the faculties of all state-supported professional schools and all other public universities in the state for pre-enrollment in the state's schools of law, veterinary medicine, dentistry, pharmacy and medicine. There shall be representation by black faculty members on these committees, to the extent available. The professional schools will counsel these students, assist in planning their pre-professional curricula, provide summer programs at the end of their junior and senior years and agree to their admission as first year professional students if they successfully complete their undergraduate work and meet minimum admissions standards. Defendants will consult with other states that have developed similar programs [e.g., Kentucky] and complete development of the program described in this paragraph II, (N), including a proposed budget and projected source of funds, within 180 days.

III. EMPLOYMENT

A. Defendants will review various approaches, including effective programs in other states, to increase the number of qualified black applicants for employment in public institutions of higher education in Tennessee. Defendants will implement the program(s) determined to be feasible and effective to increase the number of qualified black applicants. Defendants will actively recruit in the relevant labor market to increase the black presence, especially in disciplines where blacks are underrepresented, at the predominantly white institutions.

B. Within 180 days, SBR and UT shall develop a plan, including financial and other incentives, to attract white faculty and administrators to TSU and black faculty and administrators to predominantly white institutions. The plan shall be widely publicized at all institutions. The plan shall address credit for prior service and other benefits of any person eligible for participation in the plan, including transferring faculty members to the extent allowed by law.

C. Defendants will within 120 days identify disciplines where blacks are underrepresented and where the national availability pool is small, and request adequate funding through the budgetary process pursuant to ¶I (C) above to

develop a "grow-your-own program," utilizing the public and private universities in Tennessee, to increase the pool of qualified black candidates for employment as faculty and administrators in the public universities.

D. SBR and UT will within 120 days request adequate funding through the budgetary process pursuant to ¶I (C) above to institute a staff development program, to enable black staff members to obtain advanced degrees and become eligible for positions of higher salary and higher rank within all institutions of higher education in the State of Tennessee.

E. Defendants will develop a plan for a Black Faculty Development Program, including a proposed budget therefor, within 120 days. The program will be designed to increase the number of black faculty with doctoral degrees at all public institutions of higher education.

F. SBR shall immediately establish as a five year interim objective for the desegregation of TSU's faculty and administration at least 50% white faculty and at least 50% white upper level administrators (president, vice-presidents, deans, department chairs). All other institutions shall increase their efforts to attract and employ other-race faculty and administrators and accomplish their objectives for other-race employment by utilizing the provi-

sions herein. After a period of five years, the defendants shall assess progress made under this plan and set further interim and/or long-range objectives for each institution as may be required to achieve a non-racially identifiable system of higher education.

G. Progress in affirmative action will be a factor in the review of department heads, deans and vice presidents/vice chancellors by institutional presidents and chancellors and in the review of presidents and chancellors by the chief executive officer of each system.

H. The SBR and UT must approve or disapprove, prior to any offer being extended, the recommended choice of the administration at each of its universities for the positions of vice president/vice chancellor, dean and department chair, beginning immediately upon execution of this agreement. This review will take into account the following factors:

1. The credentials and qualifications of the applicant.

2. Affirmative action[3] responsibilities of the institution in the system of the Board, and the degree of achievement of institutional desegregation objectives.

3. The degree of commitment to affirmative action on the part of the applicant.

IV. HIGHER EDUCATION IN MIDDLE TENNESSEE

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[3]"Affirmative action" refers to efforts to increase employment of black staff and faculty or enrollment of black

A. SBR and the Tennessee Higher Education Commission (THEC) agree to develop within 180 days a comprehensive plan for the enhancement of Tennessee State University (TSU), with the unique specialized regional and statewide missions, and to implement TSU's mission as the regional urban university for Middle Tennessee. Sufficient funding through the normal budgetary process will be projected in order to achieve success of the provisions of the plan.

B. To the extent that the increase in admission standards at TSU is expected to increase the quality of the student body but have an adverse budgetary impact as a consequence of total enrollment decline, THEC will follow its existing policy of negotiating a wider enrollment range for TSU so as to minimize this budgetary impact.

C. Within 120 days SBR will complete a physical facilities study for TSU that will include: a) a report of a comparative study between TSU and selected regional, predominantly white institutions throughout the State which are comparable, to identify deficiencies in TSU's physical plant and total campus environment; b) an assessment of the cost of bringing all TSU facilities up to standards for safety, health, environmental protection, and access to the

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students at historically white institutions and enrollment of white students and employment of white staff and faculty at historically black institutions.

handicapped; c) recommendations for changes or alterations necessary to support TSU's new mission.

Within 60 days of completion of the study, SBR will complete a plan to implement necessary renovations, modifications, and new construction at TSU in accordance with the study, such implementation to be completed within five years.

D. SBR will include in the TSU physical facilities plan the total cost of implementation and the proposed source of funds (state appropriations, bond issues, federal sources, etc.). SBR commits to assuring facilities at TSU that are comparable to those at comparable predominantly white institutions and adequate for TSU's enhanced mission.

E. SBR will within 120 days convene presidents and senior academic officers at Austin Peay State University, Middle Tennessee State University and TSU to a) discuss whether program duplication, especially at the post-baccaulaureate levels, is a barrier to the implementation of the state's commitment to enhance TSU and b) develop a plan for the realignment of certain specified programs in order to support TSU's enhanced mission. E.g., post-baccalaureate programs in education will be reviewed and, if necessary, realigned to create a master's degree in urban education at TSU.

F. During the next five years, the SBR will accord TSU first priority for all new graduate program proposals in the Middle Tennessee region. No doctoral programs will be proposed or approved for Middle Tennessee State University or Austin Peay State University during the five-year period. In addition, there will be no net increase of new master's level degree programs at either Middle Tennessee State University or Austin Peay State University during the five-year period.

G. SBR will develop at TSU within 120 days, with appropriate services of experts, needed and effective new programs to be offered at TSU. These proposed programs will be submitted to THEC for review and THEC approval will be obtained prior to implementation of the programs. In exercising its responsibilities of review and approval, the THEC will give special consideration to programs consistent with the aims of this plan.

H. SBR will within 180 days develop at TSU an Institute of Government, funded through the normal budgetary process, offering a degree program and courses for credit in public administration to train qualified administrators as needed for senior and middle level positions in state, county and local government and to conduct research. SBR will provide consultants to TSU to assist in the

development of this new program and to recommend how TSU's current program in public administration could be strengthened and the kinds of new programs that should be offered.

I. SBR will request adequate funding pursuant to Paragraph I (C) hereinabove to match any existing or future scholarship programs designed to increase white student enrollment at TSU with an identical scholarship program designed to increase black enrollment at Middle Tennessee State University.

J. The Board of Regents shall formulate a plan for the implementation of an educational "consortium" between MTSU and TSU which will require the institutions to establish a common university calendar, publish and disseminate a joint listing of all courses offered at each institution and design registration procedures whereby students at one institution may attend classes at the other for up to 30 hours of credit.

K. The SBR shall within 180 days initiate a study of all facets of administrative functions at all campuses of TSU. Faculty and students from both campuses of the institution will actively participate in this study. Specific recommendations for personnel and other changes necessary to improve the administrative function of all campuses of the university shall be made and implemented by the SBR.

V. Copies of all plans and proposals required to be formulated pursuant to this stipulation shall be submitted to counsel for all parties prior to implementation. Copies of all budget requests for plans or proposals developed pursuant to this Stipulation of Settlement shall be submitted to counsel for all parties to the lawsuit by the THEC upon receipt from UT and SBR.

VI. Each institution in the SBR and UT system shall annually make a substantial number of recruiting visits to other-race high schools.

VII. The governing boards or the institutions under their jurisdiction will conduct a desegregation impact analysis prior to implementing any proposals for the creation of new institutions or initiating changes in the mission of existing institutions. Defendants commit to implementing no such changes which would be inconsistent with provisions of this Stipulation of Settlement or which would adversely affect desegregation of higher education in Tennessee.

VIII. Defendants agree that no institution will be identified as a one-race institution or a predominantly one-race institution in any official university publication or in any public statement made in an official capacity by any administrator of that institution. Each institution mission statement shall refer to its mission as an institution com-

mitted to education of a non-racially identifiable student body.

IX. This Stipulation of Settlement shall not prevent any plaintiff or plaintiffs-intervenors from seeking further relief if funding requested through the normal budgetary process is not provided by the legislature to implement its provisions or is otherwise not provided.

X. If plaintiffs or any of the plaintiffs-intervenors to this lawsuit believe that any defendant or any agent or employee of a defendant is not acting in good faith to implement the provisions of this Stipulation of Settlement, their counsel shall initially bring the matter to the attention of defendants' counsel in writing, with service upon counsel for all other parties, identifying the specific act or acts alleged to be inconsistent with the objectives of this Stipulation of Settlement. The parties will make every effort to resolve such disputes informally without bringing the matter before the Court. However, if efforts at informal resolution of disputes are unsuccessful, any of the plaintiffs or plaintiffs-intervenors to this lawsuit may file a motion with the Court for further injunctive relief to enforce compliance with this Stipulation of Settlement.

Upon the filing of a motion by any party the Court shall hear arguments from counsel for all parties. The Court shall set the motion(s) for hearing within 60 days.

XI. The objectives provided for in this Decree are not to be construed as quotas.

XII. Defendants do not admit that failure to achieve any objective in itself constitutes noncompliance with this Decree.

XIII. Defendants by agreeing to this Stipulation do not admit that they are presently in violation of any constitutional or statutory provision.

Dated: Nashville, Tennessee
August , 1984

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SO ORDERED:

THOMAS A. WISEMAN, JR.
United States District Judge

APPENDIX B
1989 DESEGREGATION PROGRESS REPORT (APPENDIX F): STATEMENT OF REVISED MISSION STATEMENTS

1989

DESEGREGATION PROGRESS REPORT

Prepared by

THE TENNESSEE HIGHER EDUCATION COMMISSION

THE UNIVERSITY OF TENNESSEE

THE TENNESSEE BOARD OF REGENTS

for the

DESEGREGATION MONITORING COMMITTEE

APRIL 4, 1990

TENNESSEE BOARD OF REGENTS
STATEMENT OF REVISED
INSTITUTION MISSION STATEMENTS

In accordance with the five-year planning calendar, TBR institutions revised their Statements of Mission and submitted them for TBR staff review in November 1989. They thoroughly reviewed each statement to ensure, among other things, that it complied with the letter and the spirit of Sections VII. and VIII. of the Stipulation of Settlement Geier v. McWherter. Whenever necessary, changes were recommended to the institutions and affected prior to their submission to the Board. Specifically, the staff reviewed the proposed statements to ensure that:

(1) "no institution [was] identified as a one-race institution or a predominantly one-race institution...;" and

(2) the proposed mission would not raise the institution's admission, retention or graduation standards in such a way as to limit access to or progression in any of its degree programs.

Based on this review, the Chancellor recommended and the Tennessee Board of Regents approved the institutional Statements of Mission as proposed by the institutions at the December 1989 meeting of the Board.

THE UNIVERSITY OF TENNESSEE
REVISED INSTITUTIONAL MISSION STATEMENTS

University of Tennessee campuses, the UT Institute of Agriculture, the Institute for Public Service, and the UT Space Institute have developed revised Mission Statements. These Statements have been reviewed by the governing board staff, and will be presented to the UT Board of Trustees. The UT staff has reviewed the documents to ensure that no unit was identified as one-race or as predominantly one-race; also, to ensure that no Mission-related changes (in admission, retention, or graduation standards) will have an adverse effect on students.

Additionally, each Mission Statement includes an explicit commitment which underlies everything that the unit does:

> **As it pursues all activities in support of its mission, the University [and its specific operating units] is committed to Affirmative Action and other programs which contribute to cultural and ethical diversity. . .**

APPENDIX C
***GEIER* CONSENT DECREE NO. 5077, 2000**

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

RITA SANDERS GEIER, et al., Plaintiffs, UNITED STATES OF AMERICA, Plaintiff-Intervenor, RAYMOND A. RICHARDSON, JR., et al., Plaintiff-Intervenors, H. COLEMAN McGINNIS, et al., Plaintiff-Intervenors, v. DON SUNDQUIST, et al. Defendants.	)	CIVIL ACTION Nº: 5077 (Judge Wiseman)

CONSENT DECREE

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

RITA SANDERS GEIER, et al.,	)	
Plaintiffs,	)	
UNITED STATES OF AMERICA,	)	
Plaintiff-Intervenor,	)	
RAYMOND A. RICHARDSON, JR., et al.,	)	CIVIL ACTION Nº: 5077
Plaintiff-Intervenors,	)	(Judge Wiseman)
H. COLEMAN McGINNIS, et al.,	)	
Plaintiff-Intervenors,	)	
v.	)	
DON SUNDQUIST, et al.	)	
Defendants.	)	

CONSENT DECREE

IT IS HEREBY AGREED TO by and among the undersigned, and subject to this Court's approval, that the State of Tennessee Defendants (the "State") shall implement in good faith the provisions of this Consent Decree:

A. INTRODUCTION

A. Through extended negotiations spanning almost a year and with the help of a mediator, the parties have reached accord on and have memorialized a process that will lead to the elimination of the vestiges of Tennessee's prior *de jure* system of public higher education (hereinafter the "Agreement"). This Agreement requires that the Defendants take specific steps. It also sets forth procedures for further planning, assessment, and additional actions by the Defendants. This Agreement when fully implemented will create a system of public higher education that preserves and enhances access and educational opportunity for black and white students in Tennessee's public colleges and universities.

B. In dismantling the vestiges of the former dual system, it is the parties' intention to create an educational system that enhances the increased enrollment of African American students at the predominantly white institutions and that likewise enhances the enrollment of white students at the State's predominantly black institution. To achieve this goal, the parties are committed to maintaining educational institutions that are committed to desegregation and to reaching out to all residents of this State regardless of race. It is also the intention of the parties that employment and promotion decisions within the State's system of higher education be made in an environment unfettered by the discriminatory practices of the old dual system. The goal is to increase the presence of other-race faculty, staff, and administrators on the campuses of the State's colleges and universities.

C. The objective of this Agreement is to "eradicate policies and practices traceable to [the State's] prior *de jure* system [of public higher education] that continue to foster segregation." *United States v. Fordice*, 505 U.S. 717, 728 (1992). The parties are committed to reaching this objective in a timely and non-discriminatory manner and agree that with the implementation of all the provisions of this Agreement, the desegregation of all public institutions of higher education in Tennessee will be attained, and the vestiges of segregation eliminated.

D. The parties and their counsel further agree that the timely implementation of this Agreement will require all parties to act in a prompt and cooperative manner throughout the life of the Agreement. Accordingly, all parties and their counsel agree they shall (1) act in good faith, (2) seek to minimize expenses and costs whenever possible, (3) not withhold consent unreasonably, (4)

conduct reviews and consultations promptly, and (5) exhaust all reasonable options before seeking intervention from the Court.

E. If the Tennessee General Assembly does not appropriate sufficient funds to comply with the fiscal terms of this Agreement, then this Agreement shall be considered no longer binding on the Plaintiffs and Plaintiff-Intervenors.

F. This Agreement is divided into three primary areas: (1) issues related to higher education in Middle Tennessee; (2), statewide issues affecting student enrollment, faculty and staff hiring, and promotion decisions; and (3) a plan for monitoring and assessing the effectiveness of this Agreement.[1]

B. MIDDLE TENNESSEE

I. Tennessee State University

A. Establishment of the TSU Coordinating Committee

1. The TSU President shall appoint a racially diverse committee (the "TSU Committee" or "Committee") composed of faculty, administrators, students (traditional and nontraditional), and Davidson County business leaders. In addition, the Chancellor of the TBR and the Executive Director of THEC shall each appoint one representative to the TSU Committee so that enhancement issues and budgetary concerns embodied in this Agreement can be assessed from the broadest possible perspectives. The Committee shall report directly to the President.

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[1] The following acronyms are used throughout this Agreement: "**APSU**"–Austin Peay State University; "**DA**"–Doctorate of Arts; "**DMC**"–Desegregation Monitoring Committee; "**ETSU**"–East Tennessee State University; "**MTSU**–Middle Tennessee State University; "**NSL**"–Nashville School of Law; "**SREB**" Southern Regional Educational Board; "**TBR**"–Tennessee Board of Regents; "**THEC**"– Tennessee Higher Education Commission; "**TSU**"–Tennessee State University; "**TTU**"–Tennessee Technological University; "**UM**"–University of Memphis; "**UTC**"–University of Tennessee Chattanooga; "**UTK**"–University of Tennessee Knoxville; "**UTM**"–University of Tennessee Martin; "**UT**"–University of Tennessee; "**UTIA**"—University of Tennessee Institute of Agriculture.

2. The Committee shall be responsible for coordinating and implementing the various obligations imposed on TSU under the terms of this Agreement and will have authority to call upon the various academic and administrative units within the University as needed. With the approval of the President, the TSU Committee can operate through subcommittees or task forces as may be necessary. The specific duties of the Committee are defined in the various sections of this Agreement.

B. Administrative Enhancements

1. Tennessee State University shall undertake to enhance the effectiveness and outreach of its Admissions Office, Financial Aid Office, and Registrar's Office. To achieve this objective, the University shall take the following steps:

   a. Within forty-five (45) days after the appointment of the Monitor, the Monitor and the TSU President shall jointly select a nationally-recognized consulting firm that shall conduct a study of the University's admissions, financial aid, and registrar services. The purpose of the study is to assess these functions, to identify any policies or practices that may impede attainment of the Agreement's goals, and to recommend any administrative and structural changes in those offices and the programs they administer that will enhance the administrative efficiency and accessibility of TSU. The consulting firm should also study how to incorporate the administrative functions of the main campus with those to be established at the Williams Campus under this Agreement, and provide suggestions to the parties on how to assess the effectiveness of the changes to be implemented. The report and recommendation must include a proposed budget for any recommended changes or enhancements, as well as a timetable for implementation and a plan for post-implementation evaluation.

      1. In preparing the report, the consulting firm should interview students, faculty, staff, administrators, and where appropriate, TBR officials. In conducting its study, the consulting firm must secure the views of traditional and nontraditional[2] students, of

[2] As used throughout this Agreement, the term "nontraditional students" means (continued...)

black and white students as well as a cross-section of the faculty. The consulting firm should also seek out individuals who applied, were admitted, but chose not to attend the University and individuals who had requested information about the University, or sought an application but chose not to apply.

2. The purpose of this study and any subsequent proposals is to assist the University in positioning itself to achieve its educational mission as a major state-supported urban and comprehensive university in part by creating an administrative and admissions process that is responsive to the needs of current students and applicants seeking admission to the University.

b. The consulting firm shall deliver its report and recommendations to the President of TSU for his review and assessment. The President's assessment of the consulting firm's report and recommendations, together with the firm's report, shall be sent to the Monitor and to the parties of record. The study shall be completed and the report of the consulting firm delivered to the Monitor and the parties within nine (9) months of the consulting firm's appointment. Upon receipt of the study, the parties shall have thirty (30) days to comment on the proposal to the Monitor.

1. After consulting with the Private Plaintiffs, Plaintiff Intervenors, the University, and the TBR, the Monitor shall recommend those changes that in his or her judgment are educationally sound and practicable and appropriate in light of the obligations and objectives contained in this Agreement. The goal of the Monitor shall be to secure the parties' agreement on the steps to be taken and a timetable for implementation. If parties agree on a course of action and timetable, then the Monitor shall file with the Court the terms of that agreement and the State shall carry out the agreement.

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[2](...continued)
working adults generally over the age of 25. The terms "other-race" or "minority students" and "other-race or minority faculty" refer to white persons at TSU and black persons at the predominantly white institutions.

2. If the parties are unable to agree, then the Monitor in his or her discretion can call upon nationally-recognized educational experts to review the issues and offer an opinion. Thereafter, the parties with the help of the Monitor, will again consider a course of implementation. If they are unsuccessful, then the Monitor shall so inform the Court and shall file his or her recommendation with the Court.

C. Recruitment of Other-Race and Nontraditional Students

1. The President of TSU in consultation with the TSU Committee and Dean of Admissions and Records shall develop and implement a plan to recruit other-race and nontraditional students to TSU. The plan should include, as appropriate, using existing recruiting programs, including pre-university programs. The TSU Dean of Admissions and Records shall be provided with at least two recruiters, support staff, and the resources necessary to recruit other-race students to TSU. A focus of the plan must be on the recruitment of nontraditional students. As part of the plan, consideration shall be given to establishing programs that are specifically designed to introduce, or reintroduce, nontraditional age students to college. At least one of the recruiters' primary focus must be on nontraditional students planning to attend the Williams Campus.

a. Prior to implementation, the TSU President or the Dean of Admissions and Records on behalf of the president shall submit the recruiting plan to the parties and to the Monitor for review. Any party who wishes to comment on the recruiting plan must do so within thirty (30) days. Thereafter the Monitor shall determine whether the plan should be implemented as submitted or whether it should be modified. Any proposed modification shall be submitted to the parties for review and comment.

D. Institutional Public Relations

1. The University, subject to the funding available in Paragraph (c) below, shall undertake a two-year intensive public relations campaign in the Nashville/Davidson County metropolitan area. The essential purpose of the campaign is to increase awareness about the University and its educational opportunities throughout the metropolitan population and particularly among that segment of the population that has not

traditionally been aware of the opportunities available at TSU. The campaign shall emphasize the programmatic offerings for working adult students at the Williams Campus and available financial aid programs. The campaign must convey the image of TSU as a racially diverse institution dedicated to educational excellence and service to all segments of Middle Tennessee's population and its commitment to welcoming other-race students. The campaign shall begin once academic courses are available in significant number at nontraditional times and on weekends, and will feature prominently the University's commitment to diversity and to the education of nontraditional students.

a. The TSU Committee shall coordinate and plan the advertising program. The Committee shall seek the assistance of professionals with expertise in advertising and public relations within the Nashville metropolitan area and shall submit an advertising plan to the parties and Monitor in advance of initiating the campaign. The plan shall include the specifics of the campaign including identification of any private companies proposed to conduct or assist in the campaign, a time line for implementation of the plan, and a budget. The plan should be submitted to the parties and the Monitor at the same time the report on the enhancement of the Williams Campus is submitted.

b. The parties then shall have thirty (30) days to send their comments to the Monitor. Upon consideration of the plan and the comments of the parties, the Monitor shall approve the plan or propose modifications. Any proposed modifications shall be resubmitted to the parties for consideration.

c. The public relations campaign shall be funded jointly by the State and the University with the State responsible for 65% of the cost of the campaign. The State's total obligation for the campaign will depend on the amount contributed to the campaign by the University. The State's financial contribution to the campaign shall not exceed $400,000 over the two-year campaign period. The University's commitment to the campaign may include securing in- kind contributions such as the gratis services of a public relations firm, printing firm, production firm, etc. The University shall continue to advertise in Middle Tennessee even after this jointly funded campaign is concluded.

1. TSU and TBR officials shall certify the amount of institutional funding or in-kind contributions. The State shall use existing procedures, or design a procedure, for verification of the amounts.

E. Establishment of a College of Public Service and Urban Affairs and Program Exclusivity

1. If TSU can meet the ordinary procedures and policies of the TBR and THEC regarding the creation of a new College of Public Service and Urban Affairs, then TSU may establish such a college provided, however, that it should delay petitioning the TBR until after the enhancements at the Williams Campus are planned and underway.

   a. The purpose of such a college would be to consolidate existing programs and academic departments within a coherent administrative structure augmented from time to time by new programs where the requisite demonstration of need can be established and the requirement of start-up resources met by the University.

   b. The University shall be responsible through its own resources for the start-up costs associated with the establishing of a College of Public Service and Urban Affairs. The college shall be organized in a manner consistent with other existing colleges at the University.

2. TSU shall maintain its current exclusivity in Middle Tennessee for all current academic programs in which it now enjoys exclusivity unless there is a demonstrated need for duplication and such duplication will not adversely affect the desegregation of TSU.

F. The Endowment for Educational Excellence

1. The parties agree to the creation of a State and University partnership to establish the TSU Endowment for Educational Excellence ("Endowment").

   a. The State shall contribute one million dollars annually for ten years to the TSU Endowment. For the first ten years of the Endowment, the State shall also match, dollar for dollar, any privately raised gifts by the University up to an additional $10 million. The State, however, shall

never be required to pay more than $1.5 million in matching funds in any given year. If private donations to the Endowment exceed $1.5 million in any given year, the excess shall be carried forward to the next year and applied toward the match for that year. If private donations are less than one million in any given year, the State will match the amount actually raised. At the end of the ten year period, and assuming the University can secure the full match, the TSU Endowment will have a corpus in excess of $30 million.

b. At least 25% of the annual income from the Endowment must be reinvested in the Endowment's corpus.

c. The Endowment income not annually reinvested in the corpus must be used for educational purposes at Tennessee State University. Those purposes include merit-based scholarships, faculty development, research grants and support, Chairs of Excellence and Centers of Excellence, support of lectures and lecture series on the campus by nationally known authorities. The earnings from the Endowment can also be used for the enhancement and expansion of library holdings and services including enhancing access to electronic library services. Endowment income may also be spent on management fees associated with the management of the Endowment.

d. Income from the Endowment can never be used to construct buildings or to maintain facilities, nor can Endowment income be used for student athletic scholarships or to support the University's athletic program. Endowment income cannot be used to pay compensation to any trustees of the Endowment and Endowment principal cannot be spent without the consent of the Court.

e. Of the Endowment income to be annually devoted to merit-based scholarships, no more than one-third of such aid may be awarded to out-of-state students. The sole criterion for awarding Endowment scholarships shall be merit. Endowment scholarships shall not be limited to full-time or residential students. Of the Endowment income to be annually devoted to funding faculty research grant proposals, the University shall review the proposals and disburse funds pursuant to normal and currently established procedures including procedures for involving faculty.

f. TSU and TBR officials shall certify to the State the amount of annual private giving to the Endowment. The State shall use existing procedures, or design a procedure, for verification of the amounts.

2. The TSU Endowment shall begin one year after the Court approves this Agreement. The one-year period following approval of this Agreement is to be used by the University to prepare appropriate legal documents and to secure such tax exemptions as may be appropriate. The year shall also be used by the University to devise a plan for effective fund raising. The documents formally establishing the Endowment and the management thereof shall be submitted to the parties and the Monitor for review prior to execution by the trustees of the Endowment.

G. Facilities Review

1. Within ninety (90) days of the approval of this Agreement, The United States, at its own expense, shall employ a facilities consultant to examine whether in the judgment of the consultant and The United States the vestiges of segregation concerning the facilities on the TSU main campus have been removed to the extent practicable and consistent with sound educational practices.

2. The United States' facilities consultant will conduct on-site visits at MTSU, TSU and UM. In advance of those visits, the consultant will require documentation regarding facilities at selected institutions and the investment of state money in university physical plants. Accordingly, within one hundred twenty (120) days of the approval of this Agreement, the State shall make available (in narrative form or for inspection and copying, as appropriate) to the United States and the private plaintiffs those documents that are reasonably necessary to enable the United States to make the planned assessment. The United States and the State shall, within sixty (60) days of the approval of this Agreement, confer and agree upon those documents within the State's possession, custody or control that are to be made available to the United States and private plaintiffs.

3. Within one hundred eighty (180) days of the approval of this Agreement and on mutually agreeable dates, the State shall provide The United States and its consultant with reasonable access to the facilities, buildings and grounds at TSU, MTSU, and UM so that site visits may be conducted at each campus.

4. The United States agrees to provide the State, the other parties, and the Monitor a copy of the consultant's report and recommendations.

5. The State shall review the consultant's report and recommendations and shall respond within ninety (90) days of receipt of the report. Any other party wishing to respond to the consultant's report may do so within the same time permitted the State. All responses shall be served upon the parties and the Monitor. Thereafter, if the State and The United States or any other party are unable to agree whether the current facilities on the TSU main campus are a vestige of segregation that requires remediation or what action if any should be taken, then they may take up the matter with the Court.

H. Community Service and Outreach

1. The parties agree that for TSU to fulfill its mission as the major state-supported urban and comprehensive university in Middle Tennessee, it must establish partnerships with the Middle Tennessee business community.

   a. To encourage and strengthen these mutually beneficial partnerships, TSU must reach out to the broadest possible business constituency. To focus these relationships, the President of TSU, working through the TSU Committee, shall conduct a review and assessment of the University's current strengths in this area and prepare recommendations on how the University might enhance its business outreach.

   b. The President shall issue his report to the parties and to the Monitor within one hundred eighty (180) days after this Agreement is approved. The report shall include a description of how the University currently conducts its outreach operations and how the University can enhance them. The Monitor shall periodically review the implementation of the recommendations.

I. Minimum First-Time Freshman Admission Standards and Retention

1. The parties agree that over a three-year period, TSU shall raise its current minimum first-time freshman admission standards consistent with the provisions of paragraph (I)(1)(d) below. In making these changes it is further agreed as follows:

a. Within sixty (60) days of the appointment of the Monitor, there shall be a meeting among counsel, appropriate University and TBR officials, and the Monitor, to agree upon the data that needs to be collected and reviewed in order to evaluate the effect of any proposed changes. In addition to agreeing on the data to be collected and reviewed, the participants shall also agree on a timetable for the University to make a recommendation report to the parties and the Monitor.

b. Thereafter, in accordance with the timetable agreed to, the University shall review the data and make its recommendations regarding changes to the minimum first-time freshman admission standards.

c. As part of its review process, and prior to making its recommendations, TSU shall evaluate the likely effect of any proposed changes in admission standards on the admission of traditional and non-traditional first-time freshman by race. In recommending changes in admission criteria, the University must recommend those changes that are educationally sound and may not recommend admission standards that have an unacceptable detrimental effect on access for first-time freshmen wishing to attend TSU.

d. In determining what would be an "unacceptably detrimental effect on access," the parties agree that no change in admission standards shall be approved that in any one year, when fully implemented, would operate to exclude from admission more than five (5) percent of the first-time freshman class enrolled in the University, at the time the proposal for increasing admission standards is presented to the parties for consideration. In calculating this number, the University shall not include those freshmen admitted under an alternative standard. To ameliorate the effect on access of any increases in minimum first-time freshmen admission standards on traditional and nontraditional students, the University may increase its use of alternative standards.

e. The recommendations of the University, together with supporting data, shall be provided to the parties and the Monitor. The parties and the Monitor shall review the recommendations and if accepted, the University shall implement them.

f. If the parties are unable to agree with the University's recommendations, then the Monitor in his or her discretion can call upon nationally-recognized educational experts to review the issues and offer an opinion. Thereafter, the parties with the help of the Monitor will again consider the matter. If

they are unsuccessful in reaching agreement, then the Monitor shall so inform the Court and shall file his or her recommendation with the Court.

2. At the end of the three-year phase in period for new admission standards required by paragraph (I)(1) above, the University shall review the effect of those standards on enrollment and access. After the review, the University shall make a recommendation on whether the admission standards should be adjusted. The determination of what action to take, if any, shall be based, in part, on enrollment trends since the date of the Court's approval of this Agreement. If admission standards are to be increased after the third-year review, they must be increased in a fashion that is educationally sound and the increase may not have an unacceptably detrimental effect on access for first-time freshmen wishing to attend TSU.

   a. If the University decides to increase its minimum first-time freshmen admission standards after the review called for in this paragraph, it may do so over a three-year period of time. In determining what would be an "unacceptably detrimental effect on access," the parties agree that any increase in admission requirements may not exceed a point which would exclude more than five (5) percent of the first-time freshman class enrolled in the University at the time the proposal for a second increase in admission standards is presented to the parties for consideration. In calculating this number, the University shall not include those freshmen admitted under an alternative standard. To ameliorate the effect on access of any increases in minimum first-time freshmen admission standards on traditional and nontraditional students, the University may increase its use of alternative standards.

   b. The University shall report to the parties and the Monitor, the results of its assessment, and its recommendation regarding admission standards. The parties and the Monitor shall review the recommendations and if accepted, the University shall implement them.

   c. If the parties are unable to agree with the University's recommendations, then the Monitor in his or her discretion can call upon nationally-recognized educational experts to review the issues and offer an opinion. Thereafter, the parties with the help of the Monitor will again consider the matter. If they are unsuccessful in reaching agreement, then the Monitor shall so inform the Court and shall file his or her recommendation with the Court.

3. The parties also agree that TSU shall assess its post-admission support and retention programs aimed at achieving higher rates of student persistence to

graduation in the same fashion as other institutions are directed to do so under the requirements of this Agreement. In making this assessment it is further agreed as follows:

a. Within sixty (60) days of the appointment of the Monitor, there shall a meeting among counsel, appropriate University and TBR officials, and the Monitor, to agree upon the data that needs to be collected and reviewed in order to evaluate the effect of any proposed changes. In addition to agreeing on the data to be collected and reviewed, the participants shall also agree on a timetable for the University to make a recommendation.

b. Thereafter, within the agreed time, the University shall review the data and make its recommendation regarding changes, if any, to its retention programs

c. The recommendation of the University, together with supporting data, shall be provided to the parties and the Monitor. The parties and the Monitor shall review these recommendations and if accepted, the University shall implement them.

d. If the parties are unable to agree with the University's recommendation, then the Monitor in his or her discretion can call upon nationally-recognized educational experts to review the issues and offer an opinion. Thereafter, the parties with the help of the Monitor will again consider the matter. If they are unsuccessful in reaching agreement, then the Monitor shall so inform the court and shall file his or her recommendation with the Court.

J. Revitalization of the Downtown Williams Campus and Outreach to Nontraditional Students

1. The parties agree that the revitalization of TSU's Williams Campus so that it becomes a place for focused academic programming directed toward nontraditional undergraduate and graduate students is necessary to achieving the goals of this Agreement. To reach this goal the parties are committed to the creation of a dynamic educational environment on the Williams Campus for working adult students. This is to be accomplished by:

a. Providing classes at nontraditional hours, weekends, and during summer term.

b. Providing courses at the Williams Campus with the understanding that there must be programmatic integration with the main campus in terms of faculty and facility usage. The objective is to enable students to secure disciplinary degrees at hours attractive to nontraditional students to the fullest extent practicable using the resources of both the Williams Campus and the main campus.

c. The programs offered by TSU at its Williams Campus facility must meet the needs of nontraditional students and students from the business community, be consistent with the objectives of this Agreement and be in furtherance of TSU's mission.

d. Appropriate institutional services at the Williams Campus shall be available at hours and on days convenient to nontraditional students. TSU shall make available at the Williams Campus during the evening and on weekends while classes are in session institutional services including registration, recruitment, admissions, financial aid, registrar, bookstore, library and computer services.

e. The State shall provide the capital funding necessary to renovate the Williams Campus in order to meet programmatic, administrative, and student needs.

f. The State shall create a new five-year $750,000 a year scholarship program at TSU exclusively for residents living within the Nashville Statistical Metropolitan Area who attend evening and weekend classes at TSU. These funds would be available to support nontraditional full-time or part-time baccalaureate or graduate degree-seeking students (other than law school students) who enroll in TSU's evening and weekend curriculum. This scholarship program shall begin once the revitalization of the Williams Campus is underway and additional evening and weekend class offerings are available.

    1. TSU officials shall annually certify to the TBR in a manner prescribed by the TBR that all recipients of this aid program meet the requirements set out herein.

2. Because the University's outreach to nontraditional students will span academic disciplines and involve a range of administrative services, it is

essential to create an administrative unit that can coordinate and oversee the University's activities in this regard. The aim is to create an administrative unit at the highest level of the University that will give academic status and institutional credence to TSU's programming for nontraditional students. In order to achieve this goal, the parties agree as follows:

a. Working with the TBR, TSU shall create a new administrative unit to coordinate TSU's educational outreach to nontraditional students. This unit shall be administered by an Associate Vice President or Dean, whichever is appropriate, and report to the Chief Academic Officer. The position would be one for the management of nontraditional education and outreach. This person will be responsible for coordinating with other academic and administrative units of the University to ensure that TSU's educational programing to nontraditional students is focused and comprehensive.

b. This position shall be filled from a national search consistent with the requirements for hiring set forth in this Agreement and completed as quickly as practicable.

3. The academic and administrative changes required to expand the opportunities for nontraditional students attending TSU will require study and implementation. To implement these changes in an educationally sound and practicable manner, the parties agree to the following:

a. The TSU Committee shall plan for, and report on, the enhancement of the Williams Campus and the University's expanded focus on nontraditional students.

b. The report of the TSU committee shall include, among other things, a description of the courses and administrative services to be offered at the Williams Campus as well as the faculty requirements. The report shall also provide a description of any renovations to the Williams Campus that may be necessary. Furthermore, the report shall describe the administrative structure the University proposes to use to coordinate and administer its educational outreach to nontraditional students including any existing programs directed at nontraditional students. Finally, the committee's report shall include a timetable for implementation as well as a proposed budget. The committee will make every effort to issue its report within one year of the Court's approval of this Agreement.

1. The report of the committee shall be submitted to the parties and the Monitor for review and assessment. After consulting with the Private Plaintiffs, Plaintiff Intervenors, the University, the TBR, and THEC, the Monitor shall recommend to the parties those enhancements that are consistent with the obligations and objectives of this Agreement. The goal of the Monitor shall be to secure the parties' agreement on the steps to be taken and to agree to a timetable for implementation. If parties agree on a course of action and timetable, then the Monitor shall file with the Court the terms of that agreement and the State shall carry out the agreement within the time specified.

2. If the parties are unable to agree, then the Monitor in his or her discretion can call upon nationally-recognized educational experts to review the issues and offer an opinion. Thereafter, the parties, with the help of the Monitor, will again consider a course of implementation. If they are unsuccessful, then the Monitor shall so inform the Court and shall file his or her recommendation with the Court.

K. Establishment of a Public Law School at TSU

1. During the term of this Agreement, if a public law school is established in Middle Tennessee, it must be established at TSU.

2. Under this Agreement, TSU will enter into negotiations with The Nashville School of Law ("NSL"). The parties agree that the State is not obligated to secure the agreement of the NSL to merge with TSU. Merger negotiations must be concluded within one year of the approval of this Agreement. If negotiations are satisfactorily concluded and the NSL agrees to merge with the University, then the parties agree as follows:

   a. It is anticipated that the law school will be established on the Williams Campus. If, however, this space does not meet the American Bar Association accreditation requirements, then the TBR will locate the law school in another downtown Nashville location with funds provided by the State if necessary.

   b. The law school is to be established in such a way as to secure ABA accreditation. The State cannot guarantee accreditation, but it will make

every reasonable effort to assist the University in securing accreditation within the terms and financial limits set out by this Agreement.

c. The State shall provide the University funding to support the law school in its start-up phase in the following amounts: $10 million in capital funding and $5 million in start-up funding. In addition, the State shall match one dollar for every one-and-a-half dollars raised by the NSL or the University which they dedicate to covering start-up cost for the law school. The States total obligation for matching funds under this provision shall not exceed $2 million.

    1. TSU and TBR officials shall certify to the State the amount of any privately raised funds for the law school to which the match is to apply. The State shall use existing procedures, or design a procedure, for verification of the amounts.

3. No public law school may be started at TSU without first meeting the program approval requirements of the TBR and THEC.

4. In the event negotiations with the NSL do not lead to a merger agreement, the State shall provide up to $5 million in start-up funding for the following programs and college at TSU:

    a. A new high-demand doctoral degree program in an area where there is demonstrated need and that is consistent with the mission of TSU and the objectives of this Agreement.

    b. The start-up cost associated with establishing a College of Public Service and Urban Affairs and one new program to be included therein.

    c. Consistent with the requirements that the Williams Campus be enhanced in a fashion to attract nontraditional students, TSU may propose up to two new baccalaureate or masters programs for inclusion in the curriculum of the Williams Campus. Both programs should build on existing faculty and institutional resources and be in high demand areas that will attract and meet the needs of nontraditional students.

    d. All new programs proposed under this alternative must be submitted to the TBR and THEC, and TBR and THEC approval must be secured. In assessing the University's proposal, TBR and THEC shall apply their usual and customary procedures. TSU shall have programmatic exclusivity within Middle Tennessee with respect to new programs

initiated at the Williams Campus pursuant to this provision. Such programming must also be non-duplicative of any existing programs at public universities in Middle Tennessee.

5. The parties agree that the revitalization of the Williams Campus as contemplated in this Agreement and the possible establishment of a law school are of significant importance. The TSU Committee shall recommend means to minimize disruption to the ongoing educational services now being provided at the Williams Campus that might accompany the campus's revitalization and possible establishment of a law school.

II. The Proposed Davidson County Community College

A. Establishment of the Proposed Community College or Technical Community College in Davidson County

1. The decision of whether to establish a community college in Davidson County shall be made pursuant to sound educational policy and applicable statutory requirements through the ordinary and normal processes used by the State to make such decisions including the required desegregation impact analysis.

2. A community college in Davidson County, if any, shall not be subsumed within an existing university nor become a branch of an existing university.

B. Relationship Between the Proposed Community College or Technical Community College and Tennessee State University

1. If the State determines that a community college is needed in Davidson County, then TSU and any such community college shall have articulation and transfer agreements. Additionally, as part of any proposal for the establishment of a community college in Davidson County, the TBR must require and implement strong and sustainable linkages between the proposed community college and TSU. These linkages must be in addition to articulation and transfer agreements and shall be clearly set out prior to formally establishing a community college. These linkages, for example, could include utilizing TSU faculty and facilities both at the Williams Campus and on the main campus.

2. If the State determines that a community college is needed in Davidson County, then the relationship between that community college and TSU shall be established in such a way as to encourage enrollment from the two-year degree program directly into TSU's baccalaureate program. To that

end, the parties agree that during the term of this Agreement, if a community college is established in Davidson County, then for a period of five years thereafter, any student who is a resident of Tennessee as defined by TBR policy, and who graduates from the newly established Davidson County community college, shall be permitted to enroll in TSU's baccalaureate program at the same tuition rate then being paid at the community college. No more than 350 students shall be enrolled at TSU under this tuition reduction program at any one time. Student participation in the program shall be limited to no more than five consecutive semesters counting from the first semester when the student enrolls at TSU, or graduation whichever comes first. The difference in tuition payments between the community college and the TSU rates for students enrolled under this program shall be made up by the State.

III. Middle Tennessee State University

A. MTSU is permitted to seek the conversion of some or all its existing DA programs to Ph.D. programs provided they are noncompetitive and non-duplicative of TSU's existing doctoral programs. The conversion of some or all of MTSU's DAs to Ph.D.s is to be done consistent with the University's academic mission, meet a demonstrated need and comply with TBR requirements. The proposed conversions must be done pursuant to TBR and THEC policies, and TBR and THEC approval must be secured.

B. Subject to the requirements of Paragraph (III)(A), the parties further agree that MTSU shall convert no more than three of its DAs to Ph.D.s during the first two years of this Agreement. Thereafter, any remaining DAs that are appropriate for conversion to the Ph.D. may be converted upon approval by the TBR and THEC. During the term of this Agreement, the number of Ph.D. programs at MTSU shall not exceed the number at TSU.

C. For the term of this Agreement, MTSU may not offer courses for credit at any physical location in Davidson County.

IV. Relationship Between Middle Tennessee Institutions

A. MTSU, TSU and APSU shall form a committee to establish coordinated academic calendars that enable cross registration agreements and transfer agreements between the cooperating universities. These calendars shall be

intended to facilitate the enrollment of students taking courses during the same enrollment period at one or more of these institutions. Every effort must be made to secure common registration periods, dates for the start and end of classes, final exam periods and vacation and holiday periods. The transfer agreements are to be instituted pursuant to the requirements of Tenn. Code Ann. § 49-7-202(d)-(e). These agreements and coordinated calendars shall be in place no later than the start of Academic Year 2002-03. If the State establishes a community college in Davidson County, that community college shall also participate in the coordinated academic calendars.

1. In order to plan for the establishment of coordinated calendars and the other requirements of this provision, the chief academic officers of the three institutions and the chief academic officer of the TBR shall meet within forty-five (45) days after approval by the Court of this Agreement. The group will constitute a committee whose charge is the preparation of a proposal for the implementation of this provision. The committee will be chaired by the TBR official. Once the work of the committee is complete, the proposal shall be submitted to the Board of Regents for review and approval, and to the parties and Monitor for review.

V. New Program Development, Program Termination and Program Exclusivity in Middle Tennessee

A. Future academic program approval and termination decisions in Middle Tennessee shall be guided by the ordinary procedures of the TBR and THEC and by the terms of this Agreement and be consistent with the TBR's plan for programming in Middle Tennessee.

1. In the exercise of these procedures, the TBR and THEC shall require of any new program proposal that an assessment of the program's potential impact on the desegregation of Middle Tennessee institutions (universities and two-year schools) be made and that no negative effect be discernible. Program approvals must be consistent with an institution's mission and not infringe or diminish the educational mission of any other institution.

2. The TBR and THEC shall disclose to the parties those requirements it intends to put in place to ensure that a desegregation impact analysis is performed.

B. Copies of all Letters of Intent to propose new academic programs received at the TBR from APSU, MTSU, and TSU, shall be provided to counsel of record for the term of this Agreement. This provision shall apply only to those Letters of Intent received after the date the Court approves this Agreement.

C. TSU shall maintain its current exclusivity in Middle Tennessee for all programs in which it now enjoys exclusivity unless there is a demonstrated need for duplication and a showing that such duplication will not adversely affect the desegregation of TSU. The decision of whether duplication is necessary shall be made by the TBR and THEC. The exclusive academic programs at TSU can be determined by reference to THEC's Academic Program Inventory.

C. STATEWIDE ISSUES

I. Faculty and Administrative Hiring and Retention[3]

A. UT and TBR Committees on Faculty and Administrative Hiring

1. The parties agree to the establishment of two statewide committees on faculty and administrative hiring. One committee is to be chaired by the TBR Chancellor and the other to be chaired by the UT System President. The two committees have identical charges, with the TBR committee focusing on TBR institutions, and the UT committee focusing on UT institutions.

2. Except as specified in Paragraph A(1)(d)(3), the committees shall operate independently. Each committee will examine its institutions' current practices with respect to the hiring and retention of African-American

[3] These proposals apply to TBR institutions other than TSU unless otherwise noted.

faculty and administrators. The committees will also examine how existing *Geier* programs for recruitment and retention of other-race faculty and administrators are being utilized, and whether changes in those programs could enhance the employment and promotion opportunities for other-race faculty and administrators. The committees will examine examples of "best practices" underway at other universities throughout the country, and how current affirmative action guidelines and policies are applied.

3. The goal of the committees is to propose innovative ways to utilize institutional resources to enhance and further the recruitment and retention of African-American faculty and administrators.

4. The following shall govern the creation of the committees and the carrying out of their charges:

   a. Membership on the committees is to be drawn from faculty, administrators, students, business leaders and prominent citizens within the State. The membership and size of the respective committees is to be decided by the UT President and the TBR Chancellor but shall be at least fifteen members. The two committees must reflect the various institutions they represent and strive to be at least 45% African American. The committees shall be established within forty-five (45) days of the Court's approval of this Agreement.

   b. The UT President and the TBR Chancellor can appoint vice-chairs to oversee the day-to-day responsibilities of administering the committees. However, the chairs must actively participate in the work of the committees as their schedules permit.

   c. Within ninety (90) days after the appointment of the Monitor, the Monitor and the committees shall jointly select a nationally-recognized expert or consultant in the hiring and retention of African-American faculty and administrators. The consultant will assist the committees in determining the best practices now underway across the country. To save costs, the committees can act jointly in hiring a consultant and receiving the consultant's report.

d. The committees will study the feasibility of providing incentive funding to academic departments who successfully recruit and retain African-American faculty. The incentive program could take the form of additional departmental operating funds, travel funds, equipment funds, etc., subject to renewal as long as the department retains and promotes African-American faculty.

e. The committees will also study whether the current procedures for granting tenure have any negative affect on African-American faculty seeking tenure and promotion. The committees will also assess whether there is an inappropriate disparity in salary levels between black and white faculty and administrators that discourages employment and retention of black faculty and administrators. If such studies have already been conducted, they shall be reviewed to ensure that the conclusions reached are still valid.

f. The committees shall prepare individual reports that include an assessment of current practices and any proposed changes and enhancements to those practices. The reports shall include a proposed budget for any new initiatives and a timetable for implementation. The committees shall provide the reports to the parties and the Monitor and shall submit them within one year following approval by the Court of this Agreement.

   1. After consulting with the Private Plaintiffs, Plaintiff Intervenors, the TBR, and the UT System, the Monitor shall recommend to the parties the enhancements and initiatives that in the judgment of the Monitor are educationally sound and practicable and appropriate in light of the obligations and objectives contained in this Agreement. The goal of the Monitor shall be to secure the parties' agreement on the steps to be taken and to agree to a timetable for implementation. If parties agree on a course of action and timetable, then the Monitor shall file with the Court the terms of that agreement and the State shall carry out the agreement.

   2. If the parties are unable to agree, then the Monitor in his or her discretion can call upon nationally-recognized educational experts to review the issues and offer an opinion. Thereafter, the parties, with

the help of the Monitor, will again consider a course of implementation. If they are unsuccessful, then the Monitor shall so inform the Court and shall file his or her recommendation with the Court.

B. Specific Actions in Addition to the Recommendations of the Committees

1. For a period of five years, State funds shall be made available to UTK, UM, and MTSU in the event it offers Ph.D.s, to establish a pre-doctoral fellowship program to recruit and support other-race graduate students from across the country who are completing dissertation research. The fellows must be currently enrolled in universities other than the university awarding the fellowship. This fellowship program is intended to be a recruitment tool by bringing to Tennessee universities soon-to-be Ph.D.s who would then have the opportunity to develop professional relationships within departments interested in possibly recruiting fellows to tenure track positions. Criteria for participating in the fellowship program shall be set by each institution.

2. For a period of five years, State funds are to be made available to the predominately white institutions to recruit established and respected African American scholars as visiting professors. This program's objective will be to increase awareness among African-American scholars across the country of Tennessee's universities and the employment and professional opportunities that exist in the State for their doctoral students.

3. One of the sources from which the State's predominately white universities can identify African-American candidates for new or vacant faculty positions is the SREB's Minority Doctoral Scholars Program.

4. In preparing their recommendations, the committees shall incorporate the points contained in this section.

C. Employment Search Practices Within the TBR and UT Systems[4]

1. The parties agree that employment decisions of every institution within the TBR and UT systems must be open, fair, and competitive.

2. Both the TBR and the UT systems have federally required affirmative action guidelines and hiring policies. In addition to these established requirements, the parties agree that with respect to all positions to be filled from a search–whether faculty at any rank or administrative–the following obligations shall apply:

   a. Every effort must be made to secure diversity in the composition of the faculty and administrative search committees unless it is impractical to do so. In those instances where a committee is formed to search for a university or college administrator at the level of dean or higher, the search committee must be racially diverse.

   b. Any candidate for hire must first be screened by the search committee before an offer of employment can be extended.

   c. In addition to publishing notices of job openings in journals of general circulation such as *The Chronicle of Higher Education* or *Black Issues in Higher Education*, the institutions, where appropriate, shall also publish notices of job openings in discipline-specific journals.

   d. At the time the search committee submits the list of candidates to fill a position to the hiring authority, each candidate shall meet or exceed the criteria published in the job description, and the chair of the search committee shall so certify.

3. The EEO officer of each institution prior to a final offer of employment being extended shall certify to the staffs of the respective boards that the requirements of this section have been met.

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[4] This provision shall apply to TSU.

4. The TBR and the UT system administrations must approve or disapprove, prior to any offer of employment being extended, the recommended choice of the campus appointing authority for any academic administrative position at the department chair (or head) level and above at each of its institutions. The review required by this Agreement shall be limited to a determination of whether the factors listed above in section 3(b)(1-4) have been complied with. Upon receiving a request to make an offer, the TBR and UT system administrations shall promptly provide the Monitor with a certification that the search has complied with section 3(b)(1-4). The Monitor shall have three days following receipt of the certification to raise any questions regarding compliance with the terms of the Agreement. If no issues are raised within the three-day period, then the offer of employment may be made immediately upon compliance by the institution with all other pre-employment policies of the TBR and UT systems. The Monitor's sole task shall be to confirm compliance with the terms listed above in section 3(b)(1-4). The Monitor's review shall not include making a judgment on whether the candidate to be hired meets or exceeds the criteria published in the job description.

5. Nothing in this Agreement is intended to reserve any administrative or academic position at any UT or TBR institution for an individual of a certain race or ethnicity.

6. The parties agree that in designing the annual reporting called for by this Agreement, they shall devise a method for monitoring compliance with these provisions.

7. It is understood and agreed that while employment issues have been addressed in some measure in this litigation, individual complaints of discrimination have not. Consequently, a subsequent finding that the State's system of higher education is unitary in the area of faculty, administrative, and staff employment, shall not operate to preclude an individual complaint of employment discrimination, any admissible evidence in support of or in opposition thereto, or the granting or denial of relief therefrom.

II. Other-Race Undergraduate Student Recruitment and Retention

A. UT System Study of Minority Recruitment

1. The Directors of Undergraduate Admissions at UTK, UTC, and UTM together with their staffs and appropriate university and System officials shall individually at the institutional level and collectively at the System level, study currently implemented strategies for the recruitment of other-race high school students and other-race community college students. The objective of the study is to assess current practices and to propose enhancements to those practices. The study will also evaluate the effectiveness of the current *Geier* programs and make "best practice" recommendations on whether those programs should be enhanced, modified, replaced, or terminated.

2. In assessing its current practices and proposing new initiatives, the UT institutions are to be mindful of the following points:

   a. One of the most important determinants for the majority of student enrollment decisions is the receipt of financial aid.

   b. An open, welcoming campus climate is an important determinant of other-race student enrollment decisions.

   c. The utilization of pre-college and pre-university summer programs as a means of attracting potential students is a powerful device and recognizes that the recruitment of minority students must begin early in a student's high school years.

   d. The establishment of strong linkages in minority student communities (churches, schools, etc.) enhances the visibility of the university and furthers awareness of the educational opportunities available.

   e. Increased use of alternative admission standards as a means of admitting students who do not meet the minimum regular admission requirements, but show potential for successful college work.

3. Once the studies required above are concluded, the System shall prepare a report in which it provides an assessment of its current recruitment practices and any proposed enhancements and changes to those practices. This report can be prepared in conjunction with the work of the Noel-Levitz consulting firm[5] if the System determines that it is appropriate.

4. The UT System has previously contracted with Noel-Levitz to conduct an assessment of its recruiting markets and recruiting practices. As part of this contract, the UT System will request the Noel-Levitz firm to undertake an assessment of the techniques for successfully recruiting transfer students from the state's community college system. The UT System shall use the techniques it acquires from the Noel-Levitz assessment to assist in recruiting transfer students from community colleges with significant African-American student populations.

5. Following receipt of the Noel-Levitz report and recommendations and its own self-studies, the UT System shall report to the parties and the Monitor the specific steps it plans to take to enhance and sustain African-American undergraduate recruitment. The System's report shall include a proposed budget for new initiatives as well as a timetable for implementation. The System shall submit the report within one year of the approval by the Court of this Agreement.

6. After consulting with the Private Plaintiffs, Plaintiff Intervenors, and the UT System, the Monitor shall recommend to the parties the enhancements and initiatives that in the judgment of the Monitor are educationally sound and practicable and appropriate in light of the obligations and objectives contained in this Agreement. The goal of the Monitor shall be to secure the parties' agreement on the steps to be taken and to agree to a timetable for implementation. If parties agree on a course of action and timetable, then the Monitor shall file with the

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[5] Noel-Levitz is a national recognized consulting firm with expertise in a number of areas related to student recruitment, retention, and enrollment.

Court the terms of that agreement and the State shall carry out the agreement.

7. If the parties are unable to agree, then the Monitor in his or her discretion can call upon nationally-recognized educational experts to review the issues and offer an opinion. Thereafter, the parties, with the help of the Monitor, will again consider a course of implementation. If they are unsuccessful, then the Monitor shall so inform the Court and shall file his or her recommendation with the Court.

B. Specific Actions in Addition to the Committee's Recommendations

1. In addition to the initiatives that will flow from the self-study, the following specific requirements are agreed to and shall be incorporated in the recommendations to be prepared by the UT System.

   a. UTK Recruiters in Nashville and Memphis

      1. UTK presently employs one full-time recruiter in Nashville and another in Memphis. For the term of this Agreement, UTK shall continue to maintain full-time recruiter positions in each of these cities. These recruiters shall devote significant effort and resources to the recruitment of African-American students.

      2. The Nashville and Memphis recruiters shall each be supported by at least one full-time support staff person.

      3. The Nashville and Memphis recruiting offices shall each be housed in adequate facilities and located in accessible locations.

   b. Pre-University Programs

      1. The State for a period of five years shall provide financial support for the establishment of a summer pre-university enrichment program for rising African-American high school freshmen, sophomores and juniors. Students would be selected on the basis of academic aptitude and recommendations. Criteria

for participation shall be set by the System. The program's academic focus shall be on popular undergraduate programs.

2. The program shall be designed to accommodate 250 students a year.

3. The students shall participate in a one- or two-week session. The students will live on campus, attend classes taught by university personnel, and generally experience college life. The System shall devise the structure of the program and will report to the parties and the Monitor in its report. The objective of the program is to expose students to collegiate life and provide an opportunity to recognize the benefits of a college education.

4. In designing the program, the System may choose either to require all the participating students to be on one campus and then rotate the program every year among the System's institutions, or it could decide to divide the students equally among the participating universities every year.

c. Additional Other-Race Financial Aid

1. The State agrees to form a partnership with the UT System to increase the availability of financial aid for other-race students attending UT institutions.

2. For a period of five years, the State and the UT System will jointly participate in making funding available to support minority financial aid programs. These funds shall be in addition to any existing *Geier* other-race scholarship programs as well as any other scholarship programs currently underway that are directed toward undergraduate minority students. This funding can be used to increase the size of existing scholarship programs or to establish wholly new programs. Such funds may not be used for athletic scholarships.

3. The State shall cover 40% of the cost of the scholarship program. The amount of the State contribution shall depend on the amount

of funding contributed to the program by UT institutions. The State's total financial commitment shall not, however, exceed $450,000 a year for five years. If UT secures the full State match, an additional $1.125 million would be available for other-race undergraduate financial aid programs.

4. UT officials shall certify the amount of institutional funding contributed to the program. The State shall use existing procedures, or design a procedure, for verification of the amounts.

5. The UT System shall devise a method for distributing the proceeds of the program among its institutions.

III. Other-Race Undergraduate Student Recruitment and Retention Within the TBR System

A. TBR Study of Minority Recruitment[6]

1. The Directors of Undergraduate Admissions at APSU, ETSU, MTSU, TTU and UM together with their staffs and appropriate university and System officials shall individually at the institutional level and collectively at the System level, study currently implemented strategies for the recruitment of other-race high school students and other-race community college students. The objective of the study is to assess the effectiveness of current practices and to propose enhancements to those practices. The study shall also evaluate the effectiveness of the current *Geier* programs and make "best practice" recommendations on how those programs should be enhanced, modified, replaced, or terminated.

2. A similar study will be undertaken by the TBR on behalf of its community colleges.

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[6] These proposals apply to TBR institutions other then TSU unless otherwise noted.

3. In assessing its current practices and proposing new initiatives, the TBR institutions shall be mindful of the following points:

   a. One of the most important determinants for the majority of student enrollment decisions is the receipt of financial aid.

   b. An open, welcoming campus climate is an important determinant of other-race student enrollment decisions.

   c. The utilization of pre-college and pre-university summer programs as a means of attracting potential students is a powerful device and recognizes that the recruitment of minority students must begin early in a student's high school years.

   d. The establishment of strong linkages in minority student communities (churches, schools, etc.) enhances the visibility of the university and furthers awareness of the educational opportunities available.

   (e) Increased use of alternative admission standards as a means of admitting students who do not meet the minimum regular admission requirements, but show potential for successful college work.

4. The institutions, under the direction of the TBR, can collectively hire a consulting firm with expertise in the recruitment of African-American students. This consulting firm will provide ideas on the enhancement of current practices and an assessment of the "best practices" now underway across the country.

5. The parties agree that the community college system provides a rich opportunity for the TBR's four-year institutions to recruit other-race students. As part of its study, the TBR shall propose effective techniques for recruiting transfer students from the state's community college system including those community colleges with large African-American populations.

6. Following the receipt of any external report and recommendations and its own self-studies, the TBR shall report to the parties and the Monitor

the specific steps its institutions plan to take to enhance and sustain African-American undergraduate recruitment. The TBR's report shall include a proposed budget for any new initiatives as well as a timetable for implementation. The report shall be submitted within one year of the approval by the Court of this Agreement.

a. After consulting with the Private Plaintiffs, Plaintiff Intervenors, and the TBR, the Monitor shall recommend to the parties the enhancements and initiatives that in the judgment of the Monitor are educationally sound and practicable and appropriate in light of the obligations and objectives contained in this Agreement. The goal of the Monitor shall be to secure the agreement of the parties on the steps to be taken and to agree to a timetable for implementation. If parties agree on a course of action and timetable, then the Monitor shall file with the Court the terms of that agreement and the parties shall carry out the agreement.

b. If the parties are unable to agree, then the Monitor in his or her discretion can call upon nationally recognized educational experts to review the issues and offer an opinion. Thereafter, the parties with the help of the Monitor, will again attempt to agree on a course of implementation. If they are unsuccessful, then the Monitor shall so inform the Court and shall file his or her recommendation with the Court.

B. Specific Actions in Addition to the Committee's Recommendations

1. In addition to the initiatives that will follow from the self-study the following specific requirements are agreed to and may be incorporated in the recommendations to be prepared by the TBR.

   a. Pre-University Programs

      1. The State for a period of five years shall provide financial support for the establishment of a summer pre-university enrichment program for rising African-American high school freshmen, sophomores and juniors. Students would be selected on

the basis of academic aptitude and recommendations. Criteria for participation shall be set by the institutions. The program's focus shall be on popular undergraduate programs.

2. The program should be designed to accommodate 375 students.

3. The students shall participate in a one- or two-week session. The students will live on campus, attend classes taught by university personnel, and generally experience college life. The TBR will devise the structure of the program and will report to the parties and the Monitor in its report. The objective of the program is to expose students to collegiate life and to provide an opportunity to recognize the benefits of a college education.

4. In designing the program, the TBR may choose to either require all the participating students to be on one campus and then rotate the program every year among the participating institutions, or it could decide to divide students equally among the participating universities every year.

2. Additional Other-Race Financial Aid

   a. The State agrees to form a five-year partnership with the TBR System to increase the availability of financial aid for other-race students attending TBR four-year and two-year institutions.

   b. For a period of five years, the State and the institutions shall jointly participate in making funding available to support minority financial aid programs. These funds shall be in addition to any existing *Geier* scholarship programs as well as any other scholarship programs currently underway that are directed toward undergraduate minority students. This funding can be used to increase the size of existing scholarship programs or to establish wholly new programs.

   c. The State shall cover 40% of the cost of the scholarship program. The amount of the State contribution will depend on the amount of funding contributed to the program by the TBR institutions.

The State's total financial commitment shall not, however, exceed $950,000 a year. If the full State match were secured, an additional $2.375 million would be available for other-race undergraduate financial aid programs.

d. TBR officials shall certify the amount of institutional funding contributed to the program. The State shall use existing procedures, or design a procedure, for verification of the amounts.

e. The TBR shall devise a method for distributing the proceeds of the program among its institutions.

IV. Institutional Commitment to the Recruitment of Other-Race Students[7]

A. The parties agree that the development of an effective recruitment strategy for other-race undergraduate students benefits from the involvement of the entire institution, not just those specifically charged with recruitment. Therefore, the president of each TBR and UT institution must appoint a standing biracial committee composed of faculty, staff and students from throughout the institution whose charge shall be to advise and assist the undergraduate recruitment office in assessing and updating recruitment strategies for other-race students. The committee shall report to the institution's president on an annual basis regarding the committee's assessment of the effectiveness of the institution's other-race recruiting efforts and any modifications to those efforts that in the judgment of the committee ought to be considered. The annual reports of these committees shall become part of the *Geier* reporting required of the Defendants. Each committee shall be chaired by the Director of Undergraduate Admissions.

B. The parties acknowledge that there may be committees of this type already in existence at some or most of the TBR and UT institutions. If so, the charge to those committees shall be expanded to include the requirements of this section.

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[7] This section applies to TSU.

V. Graduate Recruitment and Enrollment at Tennessee Technological University

1. The parties agree that TTU shall undertake an assessment of its current graduate recruitment practices to determine if there are other recruitment strategies it could use to attract African-American graduate students. Additionally, the University will assess what other similarly situated institutions in the country are doing to enhance black graduate enrollment, particularly in the engineering disciplines.

2. The University shall prepare a report in which it assesses its own recruitment practices and recommends enhancements to those practices. The report shall also contain a timetable for implementation of any changes recommended as well as a proposed budget for any new initiatives. The report shall be submitted within one year of the approval by the Court of this Agreement.

    a. After consultation with the Private Plaintiffs, Plaintiff Intervenors, the University, and the TBR, the Monitor shall recommend to the parties the enhancements and initiatives that in the judgment of the Monitor are educationally sound and practicable and appropriate in light of the obligations and objectives contained in this Agreement. The goal of the Monitor shall be to secure the parties' agreement on the steps to be taken and to agree to a timetable for implementation. If parties agree on a course of action and timetable, then the Monitor shall file with the Court the terms of that agreement and the parties shall carry out the agreement.

    b. If the parties are unable to agree, then the Monitor in his or her discretion can call upon nationally-recognized educational experts to review the issues and offer an opinion. Thereafter, the parties with the help of the Monitor, will again consider a course of implementation. If they are unsuccessful, then the Monitor shall so inform the Court and shall file his or her recommendation with the Court.

VI. Student Retention and Persistence

A. The parties agree that persistence from year to year and persistence to graduation are valid measures of student retention. Based on the data in the 2000 DMC Report, there is a differential in retention rates between black and white students at some public institutions.

B. The parties agree that APSU, ETSU, UTM, and UTK shall assess their current retention practices and programs and propose changes to those practices that will close the "persistence gap" between black and white students. In cooperation with the respective governing boards' staffs, these institutions shall report to the parties and the Monitor their findings and any proposed changes or enhancements to their current retention practices. The reports shall include a proposed budget for any new initiatives and a timetable for implementation. The report shall be submitted within one year of the approval by the Court of this Agreement.

1. After consultation with the Private Plaintiffs, Plaintiff Intervenors, the universities, and TBR and UT System officials, the Monitor shall recommend to the parties the enhancements and initiatives that in the judgment of the Monitor are educationally sound and practicable and appropriate in light of the obligations and objectives contained in this Agreement. The goal of the Monitor shall be to secure the agreement of the parties on the steps to be taken and to agree to a timetable for implementation. If parties agree on a course of action and timetable, then the Monitor shall file with the Court the terms of that agreement and the parties shall carry out the agreement.

2. If the parties are unable to agree, then the Monitor in his or her discretion can call upon nationally-recognized educational experts to review the issues and offer an opinion. Thereafter, the parties with the help of the Monitor, will again consider a course of implementation. If they are unsuccessful, then the Monitor shall so inform the Court and shall file his or her recommendation with the Court.

3. In examining methods for closing the "persistence gap," the institutions are directed to consider the following:

   a . Students should have access to remedial and/or developmental course work, or tutorial assistance. At institutions where there is

not a program for remediation, such institutions should consider partnering with nearby community colleges to provide such services.

b. Mentor/mentee programs with upperclassmen and alumni have proven effective in retaining students.

c. Where possible, cooperative programs between industry and the university should be established to encourage students to stay in school by giving them real-world work experience.

4. After reviewing the progress made as a result of any initiatives, the parties will discuss whether the program to close persistence rates should be extended to other specific institutions.

VII. Expanding Cooperative Extension and Agricultural Research Collaboration Between TSU and UTK

A. Extension

1. The parties agree that the TSU and UTIA cooperative extension programs benefit from existing collaboration, ongoing interaction and continued State support. The parties further agree that other areas of mutually beneficial collaboration between the TSU and the UTIA extension programs should be explored. Additionally, the current administrative and managerial agreements between the extension divisions should also be reviewed and updated to reflect current practices.

2. In order to assess areas of mutual collaboration and enhance existing administrative and managerial agreements, the Administrator of Cooperative Extension Programing at TSU ("Administrator"), and the Dean of Agricultural Extension Service at UTIA ("Dean") shall co-chair a committee whose charge will be to review the current relationship between the extension divisions and make recommendations to further mutually beneficial collaboration and update current administrative and managerial agreements.

3. The recommendations shall be submitted to appropriate university officials at TSU and UTIA for review and action. The committee

shall be formed within sixty (60) days after approval by the Court of this Agreement and the report submitted within six months thereafter. Membership on the committee shall be equally divided between persons selected by the Administrator and persons selected by the Dean. A copy of the submitted report shall also be provided to the parties and the Monitor.

B. Agricultural Research

1. UTIA and TSU both operate agricultural research experiment stations and facilities in various parts of the State. The parties agree that the TSU and the UTIA experiment stations benefit from existing collaboration, ongoing interaction and continued State support. The parties further agree that UTIA and TSU should collaborate to the fullest extent possible in making such facilities and research stations available to researchers regardless of university affiliation and to expand collaboration between agricultural researchers at the universities. To that end, the parties agree that the Director of the TSU Experiment Station and the Dean of the Agricultural Experiment Station will form a committee which they will co-chair to examine these matters and make recommendations to achieve these objectives.

2. The recommendations of the committee shall be submitted to appropriate university officials at TSU and UTIA for review and action. The committee shall be formed within sixty days after approval by the Court of this Agreement and the report submitted within six months thereafter. Membership on the committee shall be equally divided between persons selected by the TSU Director and persons selected by the UTIA Dean. A copy of the submitted report shall also be provided to the parties and the Monitor.

D. OVERSIGHT

I. Right to Petition the Court to Review Acts of Alleged Non-Compliance

A. Any party may bring to the Court's attention allegations of non-compliance with the Agreement. As a condition precedent to filing a motion, the party alleging non-compliance must first give notice to the party whose conduct is alleged to have violated the Agreement, and notice must to all other

parties and to the Monitor as well. Thereafter, the involved parties shall attempt to resolve the dispute with the help of the Monitor. If unsuccessful, the party alleging a violation may seek relief from the Court.

II. Court-Appointed Monitor

A. The parties agree that the Court shall appoint a Monitor whose responsibility shall be to facilitate the orderly and timely implementation of this Agreement and to mediate points of controversy between the parties as they may arise. The parties also agree that the Monitor must be committed to the removal of the vestiges of segregation within Tennessee's system of public higher education and to attainment of the objectives of this Agreement.

B. In addition to the general responsibilities described in the Agreement, the parties believe that the Court should provide the Monitor with the following additional duties and powers:

1. The Monitor shall be authorized to attend the meetings of any committee created as a result of this Agreement.

2. The Monitor shall bring to the attention of the parties any occurrences of non-compliance with the terms of this Agreement. If after first attempting to resolve the matter with the parties directly, the Monitor in his or her judgment continues to believe that a party is in non-compliance with the Agreement, then the Monitor shall so inform the Court.

3. The Monitor shall be permitted to have *ex parte* contact with the parties and counsel.

4. The Monitor shall be permitted from time to time to seek the assistance of nationally-recognized experts in the administration and operation of public institutions of higher education. These experts would work at the direction of the Monitor and would provide a judgment regarding the educational soundness and practicability of any proposals that the Monitor might submit to the experts. The parties agree that any such experts should be persons who have never worked at any of the public or private universities in Tennessee.

5. The Monitor shall report to the Court and the parties twice a year on the status of implementation and the State's compliance with the terms and objectives of the Agreement. At the time the State moves the Court for a declaration of unitary status, the Monitor shall also file a final report with the Court regarding the Monitor's judgment on whether the terms and objectives of the Agreement have been met.

6. If requested to do so by the Court, the Monitor shall file a report and recommendation regarding any issue pending before the Court.

3. The State will be responsible for the reasonable costs of the monitorship.

III. Collection of Data and the Elimination of the DMC

A. The parties agree that the statistical data annually collected and reported in the Tables of the DMC Report shall be continued for the term of this Agreement unless the parties and the Monitor agree to discontinue one or more tables. The parties further agree that within ninety (90) days of the appointment of a Monitor, counsel and the Monitor shall meet and agree on what other data, if any, shall be collected and how it should be reported. The data that is collected must be sufficient to enable the parties to make an assessment about the effect of the Agreement. The parties further agree that the data to be collected shall be reported on an annual basis, and that the data is not intended to be a measure of the State's compliance with the terms of this Agreement.

B. The UT Board, the TBR, and THEC shall annually prepare a narrative describing the specific actions they and as appropriate their institutions have taken to implement the terms of this Agreement.

C. The parties agree that the DMC shall be disbanded, and the numeric other-race goals established by the DMC no longer employed.

E. MISCELLANEOUS

I. Court Jurisdiction and Term of Agreement

A. The Court shall retain jurisdiction of this case for a period of five years or for a period of time sufficient to insure compliance with the Agreement's

terms. As recognized in the introduction, the parties agree that with the implementation of all the provisions of this Agreement, the desegregation of all public institutions of higher education in Tennessee will be attained, the vestiges of segregation eliminated, And pursuant to the procedures set forth in (E)(I)(B) below, the case terminated. At the end of the period of Court supervision, this Agreement shall terminate automatically and without further formality unless extended by the Court upon appropriate motion. Notwithstanding the term of this Agreement, the Court shall retain jurisdiction over the payments to be made by the State to the TSU Endowment until the last agreed-upon payment is made.

B. At the end of the five-year period or at such time not sooner than five years when the State believes it has complied with the terms of this Agreement, the State, may file a motion for a declaration of unitary status provided that the terms and objectives of the Agreement have been met. Any party wishing to oppose unitary status may do so and that party shall bear the burden of showing that the State has failed to fully carry out the Agreement or that vestiges of *de jure* segregation remain. The party objecting to unitary status may move the Court to permit discovery and for an evidentiary hearing on the issue of unitary status.

C. The parties recognize that the Court may upon its own initiative or upon the motion of a party extend or shorten the time of any provision contained in this Agreement.

II. Reaffirmation of Nondiscriminatory Identity, Practices and Procedures

A. Each institution and governing board shall reaffirm its non-discrimination policies in all aspects of university and college life, including financial aid, extracurricular activities, hiring and retention of employees, and recruitment and enrollment of students.

B. Each institution of the TBR and UT systems shall continue currently existing policies for dealing with issues of racial harassment on campus.

III. Existing *Geier* Initiatives and Scholarship Program

A. The parties agree that the State shall continue to fund all existing *Geier* initiatives and scholarship programs; provided, however, that the

existing programs may be modified or eliminated by the development of new and more effective initiatives under the provisions of this Agreement. To the extent the existing *Geier* scholarship programs have been interpreted to apply only to full-time students, the parties now agree that those programs shall include part-time-degree-seeking students as well. In the event any existing *Geier* program is found by a court to be inappropriate or unlawful, the State shall use the funds from that program to support the various requirements of this Agreement.

IV. Adoption of Provisions from the 1984 Stipulation of Settlement

A. Except as specifically set out below, the provisions of the 1984 Stipulation of Settlement are superceded by this Agreement. The provisions listed below are specifically retained:

1. "(F) If either governing board should take any steps in the next five years to increase admissions and/or retention requirements and to establish minimum requirements statewide, the Board will:

   "1. Conduct a desegregation impact analysis prior to the implementation of the new requirements, to ascertain whether these new requirements will have an adverse impact on black students;

   "2. Authorize institutions to enroll a percentage of new entering classes under alternative admissions standards, said percentage to be determined periodically by the appropriate governing board and to be consistent with the objectives of this [agreement].

2. "(G) Progress in [obtaining the goals of this Agreement] will be a factor in the review of department heads, deans and vice presidents and vice chancellors by institutional presidents and chancellors and in the review of presidents and chancellors by the chief executive officer of each system.

3. "(VII.) The governing boards or the institutions under their jurisdiction will conduct a desegregation impact analysis prior to implementing any proposals for the creation of new institutions or initiating changes in the mission of existing institutions. Defendants commit to implementing no such changes which would be inconsistent with provisions of this [Agreement] or which would adversely affect desegregation of higher education in Tennessee.

4. "(VIII.) Defendants agree that no institution will be identified as a one-race institution or a predominantly one-race institution in any official university publication or in any public statement made in an official capacity by any administrator of that institution. Each institution mission statement shall refer to its mission as an institution committed to education of a non-racially identifiable student body.

5. "(X.) Upon the filing of a motion by any party [or the filing of a report and recommendation required as a result of this agreement] the Court shall hear arguments [if necessary] from counsel for all the parties. The Court shall set [any such hearing] within 60 days [of receipt of the motion or report]."

V. Access to Consultants Prior to Studies Being Conducted and Opportunity to Comment on Any Desegregation Impact Analyses

A. The parties agree that in those instances where an outside consultant or consulting firm is hired to conduct a review or assessment, or to provide recommendations, that the consultant or consulting firm shall separately interview the parties or their representatives prior to undertaking the study. The purpose of these interviews is to ensure the consultant has the broadest possible access to information and opinion in advance of the study being designed and implemented.

B. Any desegregation impact study required by the terms of this Agreement shall be made available to the parties and the Monitor, and the parties shall have an opportunity to comment thereon.

VI. Attorneys' Fees and Expenses

A. Within 30 days of approval by the Court of this Agreement, the Private Plaintiffs and Private-Plaintiff Intervenors shall file their statements of fees and claims for expenses with the State through the Attorney General's Office. These submissions shall comport with the requirements of 42 U.S.C. § 1988.

B. The State then shall have 120 days to review the submissions and to seek clarification. Thereafter the State shall inform those moving for attorneys' fees and expenses what amounts it is prepared to pay voluntarily.

C. If, the State and a movant for attorneys' fees and expenses are unable to agree on the amount of the payment, then the party seeking fees and expenses shall move the Court for an award.

VII. Other Provisions

A. By consenting to this Agreement, the Defendants are not admitting that they are presently in violation of any constitutional or statutory provision of federal law.

B. The parties consent to the withdrawal without prejudice of all pending motions in this case.

C. The State shall provide funding to support one new full-time staff position at the TBR. This position will be held by an individual whose responsibility it shall be to assist the TBR and its institutions in the implementation of this Agreement.

D. Ten days after the approval of the Agreement by the Court, the State, through the Governor's office, shall provide $75,000 in initial funding to the TBR so that the consultants to be hired under Section B paragraph (I)(B)(1)(a) of this Agreement can begin to work as soon as they are selected, and the TSU coordinating committee established under Section B paragraph (I)(A)(1) can begin its duties.

* * *

Consent Decree entered and approved in Nashville, Tennessee, on this the _____ day of _____, 2000.

_____
HON. THOMAS A. WISEMAN, JR.
SENIOR U.S. DISTRICT JUDGE

Approved as to Form and Content:

Please see page 54 of 54 for The United States

_____
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APPENDIX D
***GEIER* FINAL ORDER OF DISMISSAL NO. 5077, 2006**

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

RITA SANDERS GEIER, et al.,	)	
Plaintiffs,	)	
UNITED STATES OF AMERICA,	)	
Plaintiffs-Intervenors,	)	
RAYMOND A. RICHARDSON, JR., et al.,	)	No. 5077
Plaintiffs-Intervenors,	)	Judge Wiseman
and	)	
H. COLEMAN MCGINNIS, et al.,	)	
Plaintiffs-Intervenors,	)	
v.	)	
PHIL BREDESEN, et al.,	)	
Defendants.	)	

FINAL ORDER OF DISMISSAL

This case is before the Court on the Joint Motion for the Entry of a Final Order of Dismissal ("Joint Motion") and the parties' Statement in Support of the Joint Motion ("Statement in Support"). Having reviewed the Joint Motion and the Statement in Support, and having given the parties a full opportunity to be heard and to participate in a hearing on the Joint Motion, it is ADJUDGED and ORDERED as follows:

The Defendants have fully complied with the requirements of the 2001 Consent Decree, Geier v. Sundquist, 128 F. Supp. 2d 519 (M.D. Tenn. 2001), and any remaining vestiges of segregation have been removed from the Tennessee system of public higher education, to the

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This document was entered on the docket in compliance with Rule 58 and/or Rule 79(a) FRCP, on 12/1/06 By [illegible]

extent practicable and as required by United States v. Fordice, 505 U.S. 717 (1992). The State is now operating a unitary system of public higher education and the Defendants have represented to the Court that they will continue to do so. The Defendants have represented they do not intend to reinstitute or reestablish any practices or policies of its prior dual system that would foster or encourage the resegregation of the Tennessee system of public higher education, nor dismantle the unitary system they have achieved.

The Court adopts the Statement in Support of the Motion and the same is incorporated herein by reference.

Finally, having had the judicial responsibility of this case for the entire 28 years of my tenure as a judge, the Court takes this opportunity to record officially in the Order of Dismissal and in the permanent records of the Middle District of Tennessee some personal observations and laudatory remarks.

The progress of this case, particularly in recent years, presents a remarkable example of the societal benefit that can occur when lawyers of vision and imagination, motivated by a passion to not only represent a client but to achieve a just result, apply their energy and intellect to a problem. This Court and this case have been blessed with outstanding lawyers in the finest traditions of the profession. Mr. George Barrett recognized the problem and brought to it his inimitable creativity and perseverance. Senator Avon Williams and now Chancellor Richard Dinkins intervened and brought their civil rights litigation experience and the perspective of an historically black college to the case. These intervenors are now represented by Mr William Paz Haynes, son of our colleague and friend Judge Joe Haynes. John Norris and formerly counsel, now U.S. District Judge Aleta Trauger, intervened and ably represented the perspective of the

TSU and former UTN faculty. The NAACP Legal Defense Fund and the Department of Justice came into the case and provided input of the national significance of the case. Successive Attorneys General of Tennessee, culminating in the insightful leadership of General Paul Summers and his assistants Andrew Bennett, Kevin Steiling, and Kate Eyler ably presented the position and interests of the State of Tennessee. Good lawyers make a judge's job easy.

The parties to the case deserve special commendation. The consistently well-intentioned attitude of the respective parties has made for a largely non-confrontational, non-litigious atmosphere. Of particular note has been the active involvement of both former Governor Don Sundquist and his assistant, Justin Wilson, and current Governor Phil Bredesen and his counsel Bob Cooper. This settlement could never have been accomplished without their cooperative participation and their sincere conviction that it was in the best interest of all the citizens of Tennessee. The knowledgeable contributions of Mrs. Rita Sanders Geier, Dr. Coleman McGinnis and Dr. Ray Richardson have been invaluable.

Lastly, the tremendously important contribution of the court appointed mediator, Mr. Carlos Gonzalez, is probably the single most significant factor in bringing about this very great day. He possessed and demonstrated to the parties the integrity and neutrality, the understanding of and sensitivity to the respective positions to be fully accepted and trusted as an honest broker. He finishes this job with my great respect and gratitude for a job well done.

APPENDIX E
INFORMED CONSENT AND SURVEY INSTRUMENT FOR *A QUALITATIVE ANALYSIS OF* GRUTTER V. BOLLINGER*: IMPLICATIONS FOR USE IN PROFESSIONAL PROGRAMS CONDUCTED UNDER* GEIER V. BREDESEN

INFORMED CONSENT FORM:

"A Qualitative Analysis of Grutter v. Bollinger, et al: Implications for Use in Professional Programs Conducted Under Geier v. Bredesen"

My name is Marva L. Rudolph, Director of the Office of Equity and Diversity (OED) at the University of Tennessee, Knoxville. More importantly for this contact, I am a Doctoral student in Political Science conducting dissertation research. The dissertation is entitled "A Qualitative Analysis of Grutter v. Bollinger, et al: Implications for Use in Professional Programs conducted Under Geier v. Bredsen". The purpose of the research is to determine if the race-conscious efforts currently used by Tennessee to recruit and retain a diverse student population within its professional programs comply with the standards rendered in Grutter v. Bollinger and, if not, what must be done to meet such standards.

This contact is to request your voluntary assistance as a participant in this research effort. Such participation would consist of completing a written survey, which could take approximately thirty minutes of your time. For some of the participants, face-to-face interviews might then be requested and, if permitted by the participant, tape-recorded to ensure that all information is accurate. This researcher will serve as the transcriber of tape-recorded information. Audio tapes will be destroyed when transcribed. Such tape recorded sessions might take 30-60 minutes to conduct.

Data will be stored securely and made available only to persons involved in the research study, unless you give specific permission in writing to do otherwise. No reference will be made in oral or written reports, which could link participants to the study.

As stated, your participation is voluntary. You may withdraw from the study at anytime without penalty. Upon completion and acceptance of the dissertation research, data will be returned to you or destroyed.

If you have any questions about the study or procedures, you may contact me, Marva L. Rudolph, at Office of Equity and Diversity (office address), 1840 Melrose Avenue, Knoxville, TN 37996-3560, 865-974-0717. If you have questions about your rights as a participant, you may contact the Research Compliances Services at the Office of Research at 865-974-3466.

I have read the above information. I have received a copy of this form. I agree to participate in this study.

Participant's signature_____ Date_____

Investigator's signature_____

Survey Questions for: "A Qualitative Analysis of Grutter v. Bollinger, et al: Implications for Use in Professional Programs Conducted Under Geier v. Bredesen"

1. What is your definition of affirmative **action?**

2. What is your definition of **diversity?**

3. Does your institution have a current **mission statement** regarding diversity?

   Yes____ No____ If Yes, cite that mission statement.

4. Does your institution currently have special **race-conscious admissions programs**?

   Yes____ No_____

5. If No, has your institution made a conscious choice not to use race-conscious admissions programs?

   Yes___ No____ If Yes, please explain.

6. If you answered "Yes" to Question #4, identify the types of race-conscious admissions programs used (ex. undergraduate admissions, graduate admissions, post-doctoral programs, etc.):

   a.
   b.
   c.
   d.

7. Which professional position(s) or office(s) at your institution:

   a. Administers the program(s)
   b. Recruits and selects participants (students) into the program(s)
   c. Develops the criteria used to review and select participants into the program(s)
   d. Monitors the programs(s)

8. Identify the types of professional programs provided at your institution.
   a.
   b.
   c.

9. If you use race-conscious admissions criteria for admission into the professional programs, do you have procedures to:

    a. Recruit potential applicants Yes___ No____

    b. Select participants Yes___ No___

    c. Monitor and evaluate the progress of the selected participants Yes____ No____

    d. Compensate participants Yes___ No____

    e. Help secure employment for graduates Yes___ No____

10. If you answered "Yes" to Question #9 above, please describe (or attach information regarding) procedures used to:

    a. Recruit potential applicants

    b. Select participants

11. Based on your personal knowledge, what has/ve been the strength(s) of the race-conscious admissions programs?

12. Based on your personal knowledge, what has/ve been the area(s) of concern regarding the race-conscious admissions programs?

13. If your race-conscious admissions programs are funded under the Geier Stipulation/Consent Decree, how will such programs be directly affected if Geier funding is eliminated?

14. If Geier programs are eliminated, will your institution continue race-conscious admissions programs? If yes, what criteria will be used to recruit and select participants?

15. If you answered "No" to Question #14 but answered "Yes" to Question #3, will the institutional mission statement change? If yes, in what way?

APPENDIX F
SELECTED STUDENT ENROLLMENT DATA BY RACE FOR TENNESSEE PROFESSIONAL PROGRAMS AT PUBLIC INSTITUTIONS (FALL 2000-FALL 2004)

Institution	Semester				
	2000	2001	2002	2003	2004
East Tennessee State University (Medicine)					
Total	242	238	234	229	234
Whites	191	188	187	182	191
Blacks	28	26	23	23	18
Other	23	24	24	24	25
University of Memphis (Law)					
Total	425	413	474	445	436
Whites	360	345	407	383	317
Blacks	54	56	52	48	46
Other	11	12	15	14	19
University of Tennessee, Knoxville (Law)					
Total	456	457	457	457	450
Whites	399	389	396	396	380
Blacks	45	51	47	44	49
Other	12	17	14	17	21

*Source: THEC: Noland. Fall 2000 through Fall 2004 Headcount Enrollment and Employment in Tennessee Public Institutions. Information provided to the author by Russ Denton of the Tennessee Higher Education Commission.

Institution	Semester				
	2000	2001	2002	2003	2004
University of Tennessee, Knoxville (Veterinary Medicine)					
Total	257	270	276	274	271
Whites	240	253	260	251	257
Blacks	3	3	2	2	2
Other	14	14	14	21	12
University of Tennessee Health Science Center (Dentistry)					
Total	310	304	300	304	308
Whites	254	241	234	233	240
Blacks	27	33	38	41	35
Other	29	30	28	30	35
University of Tennessee Health Science Center (Medicine)					
Total	678	669	644	620	609
Whites	500	485	484	463	462
Blacks	96	98	78	72	63
Other	82	86	82	85	84

Institution	Semester				
	2000	2001	2002	2003	2004
University of Tennessee Health Science Center (Pharmacy)					
Total	384	390	416	442	483
Whites	299	293	318	347	373
Blacks	63	65	70	66	76
Other	22	32	28	29	34

APPENDIX G
LETTER FROM UNIVERSITY OF TENNESSEE COMMISSION FOR BLACKS TO DR. LOREN CRABTREE, CHANCELLOR, THE UNIVERSITY OF TENNESSEE, KNOXVILLE, RE: SUPPORT FOR *GEIER* CONSENT DECREE

THE UNIVERSITY of TENNESSEE
College of Arts and Sciences
Office of the Dean
26 Alumni Memorial Building
Knoxville, TN 37996-1320
(865) 974-5332
Fax: (865) 974 4352
www.artsci.utk.edu

May 22, 2006

Chancellor Loren Crabtree
527 Andy Holt Tower
University of Tennessee, Knoxville
Knoxville, Tennessee 37996

Dear Chancellor Crabtree:

As you know, we, the members of the Commission for Blacks, have been charged with advising on planning, implementation, and evaluation of University programs, policies, and services as they relate to Black students, faculty, and staff on the University of Tennessee campus. In that capacity we want to express our deep concern about the prospect of lifting the stipulations of the Consent Decree established in Geier v. Alexander and our conviction that it is not in the best interest of the University of Tennessee to settle the law suit at this time. The Geier stipulation has allowed the University the legal protection to move forward with programs specifically designed to attract Black students, faculty, and staff. The legal protection and the funding are necessary for progress to continue. Since the University of Tennessee has recently reaffirmed its commitment to diversity, we feel that you may well share many of our concerns.

The number of Black students enrolled at the University has historically lagged behind the percentage in the overall population of the state. While recent numbers still show that the University has work to do in increasing the presence of Black students on this campus, we must note that, in recent years, there has been marked improvement in both the number and quality of Black students admitted to the University. Certainly, much of this is to be credited to an administration that has worked hard to achieve these positive gains, however modest they may be. But it is also fair to say that the University has been aided in its efforts by the resources and thrust given by several of the Geier stipulations. It is our position, therefore, that without the funds made available under Geier, the University will not have adequate financial resources to fund scholarships for Black undergraduate and graduate students. Furthermore, we contend that once the stipulations are lifted, we may experience a drop in those resources needed to attract and keep Black students on this campus. We note that this has been the experience around the country, i.e., once the protections are lost, there is a corresponding drop in those services and the successful recruitment that those protections are meant to address.

The hiring and retention of Black faculty and staff will be similarly challenged by the lifting of the Consent Decree. In their report of March 2002, William B. Harvey and Reginald Wilson made several recommendations for increasing the number of Black faculty and administrators on this campus. It should be noted that their recommendations assumed the full implementation and not the dismantling of the Consent Decree. If the University is to continue to work toward a

diverse community of students, faculty, and staff, it must keep the resources it presently has in place while actively pursuing others.

Recognizing that you have provided support to the efforts of the Commission for Blacks and the development of the campus Diversity Plan, we respectfully request that you respond to our concerns by sharing with us in writing what proactive measures are being put in place and what discussions are underway with the Geier Committee, President Petersen, the Tennessee Legislature, and the Legislative Black Caucus to address these issues in a timely and effective manner. We also ask that you share with the parties listed above the issues and questions that have been raised. Looking forward to your response, we remain

Sincerely yours,

Carolyn R. Hodges, Chair

Jane Redmond, Chair-Elect

APPENDIX H
EXCERPTS OF THE UNIVERSITY OFTENNESSEE, KNOXVILLE,
DIVERSITY PLAN AND PROGRESS REPORTS

DIVERSITY AND THE UNIVERSITY OF TENNESSEE

A FRAMEWORK FOR ACTION

COUNCIL MEMBERS:

Stan L. Bowie	College of Social Work
Clark J. Brekke	College of Agricultural Sciences and Natural Resources
James (JJ) Brown	Dean of Students
Denise Harvey	Office of Vice President of Operations
Robert J. Hinde	Department of Chemistry, College of Arts & Sciences
Pamela Hindle	Commission for Women/Office of the Registrar
Carolyn Hodges	Commission for Blacks/College of Arts & Sciences
Denise Jackson	Commission for Blacks/College of Engineering
Deseriee Kennedy	Faculty Senate/College of Law
Paul Lee	School of Art, College of Arts & Sciences
Susan Martin	Office of the Chancellor
Mary Papke	Graduate Studies
Jane Redmond	Student Affairs
Bob Rider	College of Education, Health & Human Sciences
Malaika M. Serrano	Programs Abroad Office/Center of International Education
Jan Simek	College of Architecture & Design
Wornie Reed	African & African American Studies Program

STUDENT REPRESENTATIVES:

Carmen Bandy
Daniel Klyce
Amy Michaelson

CO-CHAIRPERSONS:

Alan Chesney	Human Resources
Marva Rudolph	Office of Equity & Diversity

DIVERSITY AND THE UNIVERSITY OF TENNESSEE

A FRAMEWORK FOR ACTION, 2005-2010

CONTEXT AND BACKGROUND

The University of Tennessee, Knoxville is the state's flagship research institution, a campus of choice for outstanding undergraduates, and a premier graduate institution. As a land-grant university, it is committed to excellence in learning, scholarship, and engagement with society. In all of its activities, the University aims to advance the frontiers of human knowledge and enrich and elevate society. The University intends that all members of its community promote the values and institutions of a representative democracy and lead lives of political integrity, civic engagement, and responsibility.

Therefore, the University holds intellectual curiosity and the thirst for knowledge to be among its core values and recognizes that intellectual and academic freedom and integrity are essential components of a campus atmosphere that fosters the pursuit of knowledge and understanding. The University further recognizes that the pursuit of knowledge and understanding is enriched by an environment in which people of diverse backgrounds learn together and from each other, and participate in free and genuine exchanges of views. It recognizes that all members of the University community benefit from diversity and that the quality of learning, research, scholarship and creative activities is enhanced by a campus climate of inclusion, understanding, and appreciation of differences and the full range of human experience. The University of Tennessee must prepare students to function successfully in a diverse society. A university diverse in its people, curricula, scholarship, research, and creative activities expands opportunities for intellectual inquiry and engagement, helps students develop critical thinking skills, and prepares students for social and civic responsibilities.

Consequently, the University aspires to be an institution that celebrates diversity by welcoming all students, staff, and faculty as respected and valued participants in the University's educational mission. In furtherance of these goals, the University welcomes people of different races, ethnicities, religions, creeds, national origin, genders, sexual orientations, physical abilities, age, veteran status, and social, economic, or educational backgrounds. The University is particularly committed to welcoming groups who have been historically underrepresented, discriminated against or excluded. The University also supports and encourages the promotion of diversity in its curricula, programs, faculty research, scholarship, and creative activities.

The Legacy of Discrimination and Segregation

During the past half century the United States has moved steadily to address issues related to equality of opportunity. Building on such earlier successes as the women's voting rights movement and the integration of the armed forces, equal rights movements have focused on legal and moral issues related to ethnicity, race, gender, disabilities, sexual orientation, and intellectual freedom. The result has been the elimination of many legal barriers to equality and the promotion of justice for historically under-represented groups.

Despite progress, however, the legacy of discrimination remains. The University of Tennessee, Knoxville, thus reaffirms its intention to create a campus environment characterized by respect for diversity in all its forms. We begin by reviewing the impact of racial segregation upon the institution.

Public education in the state of Tennessee was segregated by law from 1870 to 1956. Although not legally segregated thereafter, de facto segregation continued. In 1968, Rita Sanders (now Rita Sanders Geier) filed suit against the state, alleging that segregation continued in violation of Title VI of the 1964 Civil Rights Act. The immediate occasion of the lawsuit was the University of Tennessee's decision to grant degrees and build a new facility for its Nashville campus. In 1968, the federal court ordered the state to develop plans to eliminate segregation in higher education. In 1977, UT-Nashville was merged with the historically black Tennessee State University, and in 1984 a Stipulation of Settlement was implemented with the intention of upgrading the Tennessee State campus and stimulating further integration of the historically white campuses. While the Stipulation of Settlement made progress toward these goals, more needed to be done. On January 5, 2001, the Court approved the Geier Consent Decree. The Decree sets out expectations for desegregation that if achieved within five years will relieve the state of the desegregation order. The state provides significant funding for the desegregation efforts, which have been progressing energetically since 2001. The possible termination of this lawsuit provides both an opportunity and a critical need to recommit to the value of a diverse University and to plan for the post-Geier University of Tennessee.

Consequently, The University of Tennessee, Knoxville, asserts that diversity is integral to the stated mission, culture, and goals of the institution. Intercultural and international understanding enriches the quality of education for all students and provides them with the skills they need to cross multiple cultural boundaries and communities. We live in a global village where the interests and actions of diverse peoples impact daily on our lives.

The University of Tennessee Board of Trustees affirmed its commitment to this mission in 2001:

"The primary mission of The University of Tennessee is to provide quality educational opportunities for the people of this state. Essential components of a quality education include an outstanding and diverse faculty [staff and students], first-class facilities, and an environment conducive to learning. The Board of Trustees is committed to achieving each of these essential components at The University of Tennessee. The Board of Trustees expressly reaffirms the University's policy of nondiscrimination in all aspects of university life including financial aid,

extracurricular activities, hiring, promotion and retention of employees, and the recruitment, enrollment and retention of students."

In many ways, The University of Tennessee, Knoxville, has become a more diverse institution in the past decade, striving for improved communication, addressing racial incidents forthrightly and openly, demanding respect for all individuals, accepting and celebrating differences as integral to institutional life and practice, and recruiting and retaining more diverse students, faculty and staff.

The following are examples of recent improvements:

Increasing ethnic and racial diversity

- In 2002-03, of the 4,536 regular UTK employees, 50% were females, and 13% were minorities (of whom 61.5% were African American). At the upper administrative level, 51% of persons in the executive/managerial/administrative ranks were female.
- The percentage of African American students in the entering freshman class continues to rise, from under 8% three years ago to nearly 10% in fall, 2004. This reflects the successful implementation of the African American Achievers and African American Incentive Grant programs under the Geier Consent Decree.
- Persons are filling higher administrative positions from historically under-represented populations, including six academic deans, a director of a school, two vice chancellors, two associate vice chancellors, three academic associate deans, and a dean of students.

Programmatic development

- The African and African-American Studies Program has a new director and enhanced quarters and operating funds.
- The revised General Education Program includes a specific requirement in intercultural studies.
- The Life of the Mind Program for entering freshmen introduces students to diverse cultural and ethnic perspectives through the reading of a book in common and supporting academic and public programs.
- The Africa Semester in Spring 2003 was a resounding success for both academic programming and student development.
- The Programs Abroad Office has expanded study abroad programs and greatly increased the number of students studying abroad.

Physical facilities

- The elegant new Black Cultural Center building, which opened in 2002, is fast becoming a

gathering place for peoples of all colors and creeds.
- The International House brings together international and domestic students in a wide variety of intercultural programs and activities.

Advocacy

- Religious diversity is well represented by numerous campus organizations.
- Advocates of diverse sexual orientations have generated broad campus support from faculty and students.
- As greater numbers of Hispanic/Latino students come to the University, a Hispanic/Latino Task Force, a Hispanic/Latino fraternity and sorority, and a Hispanic/Latino speaker series support them.
- The Chancellor's Commissions for Women and for Blacks are actively engaged in assessing the status of blacks and women and are advocating on their behalf.

The Imperative for Action

Even with these achievements, the University must work to ensure that the practice of discrimination does not continue. It is clear that the University needs to create a more inclusive community within the University and to reach out to the people of the surrounding community. Many groups still encounter barriers to the promise and achievement of equality, justice, and the unprejudiced quest for knowledge. A land-grant institution founded upon principles of access and opportunity, the University is still too often perceived as ineffectively serving a society that is daily growing more diverse. We must redouble our efforts to erase barriers based on differences in race, ethnicity, gender, religion, class, age, ability, and sexual orientation.

In April 2004, the Knoxville chancellor and vice chancellors announced plans for a comprehensive initiative based on a plan to enhance diversity, with the primary goal of creating a civil society that prepares students to function effectively in our increasingly complex global society. The campus leaders enunciated four fundamental perspectives:

- The University is committed to respecting diversity in all its forms: different ideas and perspectives, age, ability, race, ethnicity, gender, sexual orientation, religious beliefs, political persuasions, and the socioeconomic and geographic composition of its faculty, staff and students.
- We approach cultural differences with an attitude of learning from others in order to enrich our own experiences, thus making progress toward creating a genuinely civil society in which all peoples are welcomed and honored.
- When our ideals fall short in daily practice, we will redouble our efforts to achieve a university community that reflects the pluralism of our society and of the world at large.
- As a free marketplace of ideas, the University believes that spirited discussion of diversity in all its manifold aspects and an acknowledgment of the complexity of the issues will lead to positive change.

Summary of the Action Plan's Goals

The University's Action Plan will focus on six broad goals, supported by more detailed plans advanced by departments, colleges, and administrative units. Accountability is the key to success and will be articulated at every level of the plan.

Goal One: Create and sustain a welcoming, supportive and inclusive campus climate.

> The University aims to become a model academic community that promotes diversity and excellence and incorporates diverse perspectives in all its campus and community activities and communications.

Goal Two: Attract and retain greater numbers of individuals from under-represented populations into faculty, staff, and administrative positions (particularly department heads, directors, deans, and vice chancellors).

> Increased success in recruiting and retaining diverse persons is critical. Success requires genuine commitment, persistence, and intentional planning on the part of the entire university community. An inclusive campus climate fosters retention.

Goal Three: Attract, retain, and graduate increasing numbers of students from historically under-represented populations and international students.

> The University intends that its students will reflect the diversity of qualified students graduating from Tennessee high schools. The University will increase the retention and graduation rates of historically underrepresented students. The University will engage in increasing the recruitment and inclusion of international students into all facets of the university community.

Goal Four: Develop and strengthen partnerships with diverse communities in Tennessee and globally.

> Alliances with civic, business, community, educational, and ethnic organizations will enable the University to strengthen its intercultural programs and will promote the productive exchange of ideas and resources. Because of its intimate linkages with global affairs, the University will seek to internationalize its programs and curricula to enhance both domestic and international cultural understanding.

Goal Five: Ensure that undergraduate curricular requirements include significant intercultural perspectives.

> Because the world is made up of diverse peoples, the University academic curricula must ensure that all students study diversity. The University intends to strengthen academic

preparation of all students by infusing curricula with reputable scholarship and critical thinking skills regarding diversity. Courses incorporating diversity perspectives may be offered at any level, and will be incorporated in general education requirements as appropriate.

Goal Six: Prepare graduate students to become teacher, researchers, and professionals in a diverse world.

In today's world, learning communities and research groups are pluralist, heterogeneous entities typically characterized by high levels of diversity. The University intends that its graduate students leave the University well-equipped to serve as teachers, researchers, and professionals in environments and institutions that are increasingly diverse.

THE ACTION PLAN: A CAMPUS-WIDE FRAMEWORK

The following goals and objectives will guide the action plans to be advanced by departments, colleges, and administrative units. Each vice chancellor will coordinate the planning for his/her unit. A comprehensive University-wide plan including near- and longer-term strategies and responsibility for implementation and oversight will be in place by October 1, 2005.

The University seeks to ensure that genuine progress is made in intercultural and international understanding in all sectors of the institution. Successful implementation of the action plans requires individuals to take personal responsibility for improving diversity. To that end, all administrators will be held accountable for developing, implementing, and assessing diversity plans.

Goal One: Create a welcoming, supportive and inclusive campus.

Objectives:

- Develop and implement a campus-wide Quality Enhancement Plan focused on the enhancement of intercultural and international awareness.
- Ensure that the University's academic curricula prepare students to prosper in the pluralistic world of the 21st century.
- Develop strategies to oppose and eliminate all aspects of discrimination on campus.
- Foster professional development and advancement for all employees.
- Review and improve all elements of campus safety and security.
- Improve internal and external communication regarding diversity issues.
- Create and implement policies, and design physical facilities to support the family needs of faculty, staff, and students.
- Involve all campus constituencies – students, faculty, staff, and alumni – in promotion of diversity.

University strategies and benchmarks:

- Streamline and coordinate all African-American student support services.
- Develop support services for other historically under-represented populations.
- Support faculty efforts to infuse intercultural and international perspectives into courses across the curriculum.
- Appoint by nomination a campus-wide Council on Diversity to establish benchmarks, monitor, and update the action plan.
- Develop comprehensive procedures to assess and monitor annually the progress and effectiveness of diversity initiatives.
- Support student, campus, and community advisory groups working on diversity initiatives.
- Develop a diversity-training workshop for students, faculty, and staff.
- Protect the rights of all parties involved with allegations of discrimination.
- Develop procedures for reporting diversity-related incidents.

Goal Two: Attract and retain greater numbers of individuals from under-represented populations into faculty, staff, and administrative positions.

Objectives:

- Provide career advancement mentoring opportunities for faculty, staff, and administration.
- Increase the diversity of personnel at all levels.
- Ensure that University policies and procedures reflect and promote diversity.

University strategies and benchmarks:

- Require that all units conduct aggressive searches, including strategic hiring, and emphasize developing pools that include under-represented individuals.
- Require that each unit implement hiring plans that aggressively enhance the identification of diversity within their disciplines.
- Employ aggressive hiring, training, and promotion programs to increase the number of individuals of historically under-represented populations in all University positions.
- Develop a central revolving fund to support the strategic recruiting and hiring of diverse individuals.
- Annually evaluate administrators and hold them accountable for success in promoting diversity in their units.

Goal Three: Attract, retain and graduate increasing numbers of individuals from historically under-represented populations and international students.

Objectives:

- Develop need-based academic scholarships in order to increase student diversity.
- Prepare students to engage in the complex world of the 21st century.
- Through intensive recruitment, increase and retain the number of undergraduate and graduate ethnically and culturally diverse students, including international students.
- Bring the retention and graduation rates of diverse students to the same level as the University average.
- Provide career development mentoring opportunities for graduate, undergraduate, and professional students.

University strategies and benchmarks:

- Evaluate all existing minority recruitment and mentoring/retention programs, including Geier activities, to determine their effectiveness. Reallocate resources as necessary.
- Develop a plan and secure the funds needed to maintain progress after successfully meeting the Geier Consent Decree provisions.
- Ensure that classroom materials, methods, and climate reflect the imperatives of intercultural and international knowledge and awareness.
- Provide a wide range of cultural and intellectual programs that demonstrate a connection between academic and extra-curricular activities.

University of Tennessee-Knoxville
Diversity Plan Progress Report

Submitted by the Diversity Council
June 2006

Executive Summary

In 2005, Chancellor Loren Crabtree appointed a campus Diversity Council at the University of Tennessee-Knoxville (UTK) consisting of 22 persons from the administrative, faculty, and student ranks. The Council was given a charge of developing a framework and process whereby campus units could identify goals, objectives, and programs to address the diversity needs within their respective areas. The framework consisted of six basic goals which addressed the areas of recruiting and retaining students and faculty, preparing faculty and graduate teaching assistants to teach a diverse student body, strengthening ties between the campus and Knoxville community, and creating and sustaining an overall diverse campus climate conducive to welcoming students, employees, and visitors to the university community. The framework was disseminated to every campus department/unit. Members of the Diversity Council met with campus units to provide assistance in developing their individual plans.

As a result of such efforts, 74 individual plans were submitted to the Diversity Council by units representing every aspect of the University—student affairs, academic affairs, and support programs. The Council was then sub-divided into six task forces that reviewed the plans and assessed them by focusing on themes or patterns, best practices, challenges and recommendations.

During the assessment, several diversity plans rose to the forefront as overall best practices. These units had a director, department head, dean ,and/or the associate Dean who embraced the initiative by taking an active role in developing the plan and promoting it within the unit or college. They communicated with the Diversity Council concerning their plan and used feedback to enhance their plan. These commendable plans included sound, feasible, and often innovative strategies and benchmarks with clear timelines and responsible parties. The units that provided diversity plans that serve as best practices are:

- College of Education, Health and Human Sciences
- College of Business Administration
- Division of Student Affairs
- University Libraries
- Office of Disability Services
- Department of English

Along with identifying best practices, each task force also identified themes or patterns in strategies for each goal among the various diversity plans. These patterns show possibilities for collaborations across campus. Multiple diversity plans identified the following strategies for goal one (Create and sustain a welcoming, supportive and inclusive campus climate): diversity training, diversity websites, publications, and/or newsletters, display cases, cultural events and programming: i.e. celebrations, speakers and including diversity in staff evaluations and diversity awards.

Patterns that emerged among strategies for goal two (Attract and retain greater numbers of individuals from under-represented populations into faculty, staff, and administrative

positions (particularly department heads, directors, deans, and vice chancellors)) include: Designing recruiting/marketing plans that emphasize attracting qualified individuals from underrepresented populations; encouraging faculty and staff to participate in workshops/ professional meetings which address issues of diversity and retention; seeking funding for workshops and professional meetings; developing clear guidelines/directives for hiring strategies designed to increase diversity among faculty and staff; and providing mentoring opportunities for underrepresented faculty and staff to increase retention.

Goal three (Attract, retain, and graduate increasing numbers of students from historically under-represented populations and international students) strategies often focused on: increasing scholarship dollars to attract students from underrepresented groups, mentoring programs that allow students to connect with others in an attempt to retain them and educational programs targeting students involved with their department, college or major.

Multiple diversity plans focused on the following strategies for goal four (Develop and strengthen partnerships with diverse communities in Tennessee and globally): establishing programs with overseas universities, participating in or hosting community groups, staff participation in international experiences and encouraging students to explore international opportunities.

Goal five(Ensure that undergraduate curricular requirements include significant intercultural perspectives) showed the following patterns among strategies in plans: supporting and expanding interdisciplinary programs that focus on diversity in curriculum, integrating study abroad into curriculum, assuring that a wide range of undergraduate courses address issues of diversity and encouraging departments to address global issues in curriculum.

Finally, the patterns that emerged in goal six (Prepare graduate students to become teacher, researchers, and professionals in a diverse world) strategies include: diversity training exercises for graduate teaching assistants, international research collaborations and study abroad programs for graduate students.

The review and assessment of the diversity plans shows that UTK is faced with many challenges in its venture of creating a campus-wide Diversity Plan. In response to these challenges, the Diversity Council makes the following recommendations:

- **Increase public awareness of the Diversity Plan and its relationship with the Ready for the World (RFW) initiative.** Include a greater web presence and diversity related iconography, messaging and communications for the Diversity Plan and Diversity Council.

- **Keep diversity dialogue active on campus.** Retain diversity as an issue in the forefront. Diversity should be inherent in every aspect of campus life. Dialogue around diversity should use the Diversity Council definition of diversity, which is more inclusive than past definitions of diversity on campus. The Chancellor should address the campus on the importance and obligation of the Diversity Plan.

- **Make the Diversity Plan central to decision-making at UTK.** If administration keeps the Diversity Plan at the heart of decision making, campus culture will evolve. There should be ongoing efforts on campus to achieve buy-in for the Diversity Plan.
- **Create and publicize a plan for accountability in regards to the Diversity Plan.** Create a specific plan for accountability. Include diversity initiatives and activities as part of performance reviews.

- **Maintain the Diversity Council.** Transform the ad-hoc committee into a permanent commission on campus. The Council will provide key roles in monitoring and assessing the Diversity Plan, as well as cultivating strategic planning skills within units.

- **Foster coordination of diversity efforts across campus.** UTK should have regular meetings and/or create a committee comprised of diversity related positions across campus representing each major academic and administrative unit.

- **Develop a routine system of collecting diversity-related data**. Develop a systemic process for data collection that can be used for benchmarking and monitoring, such as student demographic data within departments and diversity program information.

- **Make funding available for the diversity plans to foster innovative initiatives.** Publicize information on available funds for diversity initiatives and innovative ideas units place in their diversity plans. Create a budget for the Diversity Council to allocate funds to units regarding recruiting and retention of diverse faculty, staff, administration and students.

APPENDIX I
GLOSSARY OF TERMS

Affirmative Action—Policies and procedures used to offset past discrimination in employment or education of under-represented groups such as women and racial minorities. It is a term of general application referring to government policies that directly or indirectly award jobs, admission to universities and professional schools, and other social goods and resources to individuals on the basis of membership in designated protected groups in order to compensate those groups for past discrimination caused by society as a whole. (Hall, Ely, Grossman, & Wiecek, 1992).

Case Study—As used within this research, a research tool that allows for an examination of the particular policies and processes used in the particular situations of the court cases of *Grutter v. Bollinger* and *Geier v. Bredesen.*

Compelling State Interest—The assertion that an educational institution or level of government has a substantial interest that legitimately may be served.

Consent Decree—An official order or agreement.

Critical Mass—Meaningful numbers or meaningful representation. As used in *Grutter*, critical mass referred to sufficient numbers or representation with a group such that students in the under-represented group feel free to participate in the classroom and not feel isolated or like spokespersons for their particular group. *(Grutter v. Bollinger)*

De Jure Segregation—Segregation by law or officially sanctioned government action.

Diversity—Made of many different elements, forms, kinds, or individuals. In the educational environment, diversity is most often used to signify a set of campus-based educational activities designed to include students from all backgrounds and to enhance the educational experience of all students. Diversity refers to differences in such things as gender, socio-economic status, cultural backgrounds, religion, race, and ethnicity (*Assessing Campus Diversity Initiatives: A Guide for Campus Practitioners*, 2002).

Dual System—An educational condition, arrangement, or established method of segregating by race.

En banc—Refers to court sessions where the entire membership of the court participates.

Equal Opportunity—A combination of circumstances designed to treat similarly situated persons in the same/like manner.

Equal Protection Clause of the Fourteenth Amendment—Clause in the Fourteenth Amendment to the U. S. Constitution stating that no state shall deny to any person within its jurisdiction the equal protection of the laws.

Ex rel.—An abbreviation of *ex relatione*, defined as legal proceedings, which are instituted by the attorney general (or other person) in the name and behalf of the state, but

on the information and at the instigation of an individual who has a private interest in the matter (Kluger 2004, p. 202).

Executive Order—An order by a president or governor directing some particular action to be taken.

Habeas Corpus—A petition filed with a court by a person who objects to his/her detention.

Harvard Plan—Race-conscious admissions program used by Harvard University and cited by Justice Powell in *Regents of the University of California v. Bakke.* According to the Harvard Plan, race could be considered as one of many factors if applied in a competitive process, if all applicants were eligible to compete against each other for spaces available, and if the plan were flexible enough so that it did not constitute a quota system.

Law School Admissions Council (LSAC)—A nonprofit corporation whose members are more than 200 law schools in the United States and Canada. All law schools approved by the American Bar Association (ABA) are LSAC members.

Narrowly Tailored (See Strict Scrutiny)—Refers to a policy that is carefully designed to achieve its intended goal with a minimal negative impact on civil liberties (*American Civil Liberties*, Stephens & Scheb, 1999). Standard of review which requires that a race-conscious plan/policy/program must consider three basic factors: (1) the efficacy of alternative, less intrusive, race-neutral approaches; (2) the extent, duration, and flexibility and (3) the burden on those who do not receive the benefit of any consideration of race ("*What Now? The Michigan Cases and the Future of Affirmative Action in Higher Education,*" Springer, 2004).

Per Curium Decision—Decision delivered via an opinion issued in the name of the Court rather than specific justices. Most decisions rendered on their merits by the Supreme Court (and other appellate courts in the United States) take the form of one or more opinions signed by individual justices and joined in by others. Even when such signed opinions are unanimous, they are not termed "per curium." Per Curium decisions are given that label by the Court itself and tend to be short. Usually, though not always, they deal with issues the Court views as relatively non-controversial.

Petition for Certiorari—A document, which a losing party files with the Supreme Court asking the Supreme Court to review the decision of a lower court. It includes a list of parties, a statement of facts of the case, the legal questions presented for review, and arguments as to why the Court should grant the writ.

Professional Schools—Educational programs in the fields of law, medicine, dentistry, pharmacy, and veterinary medicine.

Soft Variables—Factors used by the Michigan College of Law to help identify persons with diverse backgrounds for consideration of admission. Such factors included: enthusiasm of the applicant's references, quality of the undergraduate institution attended, quality of the essay submitted by the applicant, and types of undergraduate courses taken by the applicant.

Stipulation of Settlement—An official order or decision used to settle a lawsuit that outlines a specific course of action to be taken by all parties involved ("The Fruits of Judicial Decision: An Analysis of *Geier v. Sundquist"*)

Strict Scrutiny—The most demanding level of judicial review in cases involving alleged infringements of civil rights or liberties (American Civil Liberties). The highest standard of review used by the Court to evaluate the constitutionality of policies under the Equal Protection Clause of the Fourteenth Amendment. Under strict scrutiny, racial classifications are constitutional only if they are narrowly tailored and if they further compelling governmental interests (*The Civil Rights Project*, Harvard University, 2003).

Title VI of the Civil Rights Act of 1964—An Act stating that no individual should be treated differently because of race, color, or national origin. Title VI prohibits race, color, and national origin discrimination by recipients of federal financial assistance, which applies to almost all institutions.

Unlawful Discrimination—Difference in treatment because of race, gender, age, disability, color, national origin, and veteran status.

VITA

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In 1990, she joined the Office of Affirmative Action at the University of Tennessee (Knoxville) as Equal Employment Opportunity Investigator and, between 1990-1999, served as Investigator, Assistant Director, and Associate Director of the Office. In 1999, she became the Director of the Office of Equity and Diversity. Other professionally relevant employment has included positions as EEO Investigator (1984-1986) and Regional Coordinator (1986-1989) of the Tennessee Human Rights Commission, Knoxville office.