TOWARDS AN ESTBALISHMENT CLAUSE THEORY OF RACE-BASED ALLOCATION: ADMINISTERING RACE-CONSCIOUS FINANCIAL AID AFTER GRUTTER & ZELMAN

Maurice R. Dyson[†]

INTRODUCTION

Diversity-consciousness in a post-*Grutter* era has taken on new meaning than previously conceived in constitutional jurisprudence. Yet despite the victory of colleges and universities to use race in student admissions, the full reality of diversity recruitment is not found in the *Grutter*[1] and *Gratz*[2] decisions themselves but rather in the implications of the decisions for another prominent battle that lurks on the horizon: the battles for race-based financial aid.

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† A.B., Columbia College, Columbia University; J.D., Columbia University School of Law; Assistant Professor of Law, Southern Methodist University Dedman School of Law. A former faculty member of Columbia University and enforcement attorney at the U.S. Department of Education Office for Civil Rights (OCR), Professor Dyson has participated in landmark school finance litigation and has advised the Texas State Legislature Joint Committee on Public Finance. He has also served as educational program coordinator for the Merrill Lynch Philanthropic Foundation and as a law clerk to the NAACP Legal Defense and Educational Fund. He currently serves as Secretary of the Association of American Law Schools Section on Education Law. His most recent works include *Putting Quality Back Into Equality: Rethinking The Constitutionality of Charter School Enabling Legislation and Centric School Choice In A Post-Grutter Era; Playing Games With Equality: A Game-Theoretic Critique of Educational Sanctions, Remedies & Strategic Noncompliance; In Search of The Talented Tenth: Diversity, Affirmative Access and University-Driven Reform*; *Racial Free-Riding The Coattails Of A Dream Deferred: Can I Borrow Your Social Capital? Leave No Child Behind: Normative Proposals To Link Educational Adequacy Claims To High Stakes Assessment Challenges*; *School Finance and Educational Ultimatums*: *A Look At School Funding Implications For Public School Accountability*; *The Death of Robin Hood: Proposal For Overhauling Public School Finance; Multiracial Identity, Monoracial Authenticity and Racial Privacy: Towards An Adequate Theory of Multiracial Resistance; A Covenant Broken: The Crisis of Educational Remedy for New York City's Failing Schools*. The author wishes to thank for their support Roy Anderson, Gregory Crespi, Jane Dolkart, Ndiva Kofele-Kale and Dean Attanasio and the faculty of Southern Methodist University Dedman School of Law. Unless otherwise indicated, the views and opinions are those of the author.

[1] Grutter v. Bollinger, 123 S.Ct. 2325 (2003).

[2] Gratz v. Bollinger, 123 S.Ct. 2411 (2003).

These battles which are sure to ensue with greater frequency in the coming years appear to be even more of a critical high stakes struggle that directly implicates the promise of the expanded diversity interest recognized in *Grutter* and *Gratz*. Indeed, race conscious grants and scholarships are so paramount to achieving racial diversity that it is likely that many admissions officials would view the award of race-based grants even more vital to the effective recruitment, matriculation and retention of minority students than the mere plus factor use of race in an individualized admissions process.[3]

Considering further that many minority applicants are likely to hail from lower socioeconomic backgrounds, the considerations of cost are likely to weigh heavier than nearly any other factor in a student's decision where to attend college.[4] As a member of the admissions committee intimately involved in minority student recruitment, it is a fact of nature in each recruitment cycle that many minority students are compelled to reject prestigious admissions offers faced with the inability to afford tuition that race-based financial grants might otherwise make it possible to attend.[5]

Consequently, college and university admissions offices are now confronted with a uniquely important challenge. No longer are we satisfied with a nebulous notion of diversity. As O'Connor detailed, meaningful racial diversity in the classroom should translate into a racially diverse set of national leaders. She writes that if we are to "cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race."

Accordingly, we know that racial diversity in the classroom is a compelling state interest by way of looking to the outcome of such classroom diversity. Maintaining a selective military officer core from the ROTC ranks consisting of racial minorities and fostering civic leaders is viewed as a critical benefit of classroom diversity on college and university campuses. Another purported benefit is the multicultural competence the global marketplace demands of employees of prestigious fortune 500 companies who filed the "3-M brief" in the Michigan case.

But herein lies a critical question. Does either the need for legitimacy by fostering civic leadership from every racial

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[3] Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994).

[4] Approximately one in six students deemed as qualified low-income applicants are African American. *See* Kane, *Racial and Ethnic Preferences, supra* note 11, at 450; WILLIAM G. BOWEN, SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 46 - 50 (1998).

[5] Maurice R. Dyson, *In Search of The Talented Tenth: Diversity, Affirmative Access and University-Driven Reform*, 6 Harv. Latino L. Rev. 41, (2003).

group, the need for diverse military officers or the need for multicultural competence in the global marketplace amount to the same compelling interests upheld in *Bakke*? Because the classroom benefits generally claimed for diversity of perspective was the only compelling interest that Justice Powell upheld, at least one commentator has suggested the Court misapplied *Bakke*.[6]

By adding additional interest as national legitimacy of leaders and equal access to leadership paths, it is argued that the Supreme Court misapprehend the precise compelling state interest at stake in *Grutter* and *Gratz*.[7] If so, then are we correct to conclude that the interest alleged to be compelling was not "a diverse student body" but rather the "educational benefits" that presumably flow from such a diverse student body? The distinction is critical not only for a constitutionally permissible admission policy, but it is also of critical importance in a financial aid policy that arguably is designed to further the admissions office's use of race to achieve diversity. In the former, the appropriate remedy is to use race as means in and of itself whereas in the latter, racial diversity through a critical mass is a principle means to achieve the educational benefits that flow from a critical mass.

So what do the *Grutter* and *Gratz* decisions tell us about the legality of race based financial aid or how its legal status should be construed to support the twin aims of diversity and legitimacy? Further, to what extent does the Court's purported deference to the university's use of race vis-à-vis a First Amendment-based academic freedom shield university officials from concerns regarding race-based scholarships as a means to achieve campus diversity. How do these decisions fit into the constellation of past Supreme Court precedent that has attacked race-based scholarships on grounds that would now seem to crumble under O'Connor's ruling in *Grutter*. How does a university structure and administer race-conscious financial aid or can it?

This article will attempt to address these doctrinal ambiguities and in so doing, suggest some modest claims in support of the diversity principle as furthered through constitutionally permissible race-conscious financial aid schemes. For instance, I would like to begin by attempting to unpack some the doctrinal complexities that illustrate the yet unanswered difficulties with race-based financial aid. My principle endeavor here is to show that although there are means to construct a

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[6] Lackland H. Bloom, Jr. *Grutter and Gratz: A Critical Analysis*, 41 Hous. L. Rev. 459 (2004).

[7] *Id.* These include the international competence of future fortune 500 companies and the racial diversity of the military officer core.

narrowly tailored financial aid program in compliance with *Grutter* and *Gratz*, deference to the goals of legitimacy and diversity raised by these important cases require us to carefully ponder whether to import race conscious admissions principles into the financial aid context. Indeed, it is questionable whether the guidelines espoused in *Grutter* and *Gratz*, even if faithfully adhered to, would ever feasibly achieve the needed diversity of underrepresented minorities as a pure admissions question.

The picture, however, appears evens more bleak when one takes into account the lack of true diversity that will be reinforced by a race-neutral financial aid scheme that afford little racial diversity in actuality. Because the Supreme Court indicated that the University of Michigan's role was to educate, not merely admit, future leaders of all races, then it follows that in order to do so, students must be able to afford to sit in the classroom in order for the robust exchange of ideas to take place. While I shall suggest some modest racially neutral means universities may pursue in devising scholarship programs and the means to narrowly tailor race-plus factor approaches, it remains painfully obvious that there is only one clear alternative. Private, race-based, donor restricted financial aid schemes, administered by universities, promises to be the most effective in terms of achieving actual diversity of underrepresented minorities. Unfortunately, it also appears that this option is the least feasible under *Grutter* and *Gratz* and prior precedent. To be sure, beyond narrow tailoring analysis, state action remains the most formidable obstacle to such a suggestion. This need not mean, however, that universities remain constrained. As I shall elaborate further below, courts and universities would do well to examine the question of state action in the same conceptual lens as religious vouchers under Establishment Clause analysis. The theoretical centerpiece of this article, therefore, is to define the constitutional contours of this novel proposal and its implications for overcoming the difficulties of state action.

Overview

Part I begins by briefly reviewing the question of race based financial aid generally and the concerns of narrow tailoring as raised by the *Podberesky, Grutter* and *Gratz* cases. It also discussed the problem of state action and the contradictory treatment of race-restricted grants at various institutions and the contradictory interpretation of Title VI in these contexts against the backdrop of *Gratz*. Part II devotes some attention to the central question of institutional deference. For instance, to what extent should deference be accorded in the post-admissions stage of financial aid determinations. Is there any sound basis to distinguish how courts should look at race differently in the

financial aid context than from admissions? Part III explores Title VI of the Civil Rights Act in connection with the question of disproportionality or disparate impact of funding approaches that target aid indirectly on the basis of race-related factors. Some attention is dedicated to the constitutionality of such approaches that appear designed to circumvent the plus factor approach of *Grutter*, yet endeavors to avoid the constitutional pitfalls of race-based aid implicated by *Gratz*. Part IV discusses the contradictory interpretations of Title VI with regard to disparate impact regulations under the DOE and the manner in which this approach has been abandoned in the Department of Education (DOE) unrevised policy guidance on race-based scholarships. Part V provides a nuanced analysis on the factors of narrow tailoring analysis and the related difficulties of, among other things, alleviating undue burden resulting from race-based scholarships. Part VII elaborates on a numerical methodology for establishing a benchmark by which to measure minority under-representation and what qualifies as a critical mass. Part VIII attempts to show three principle ways in which financial aid may be allocated to achieve this critical mass of underrepresented racial minorities. These three approaches include: (1) employing race-plus considerations in holistic race-conscious allocation determinations of financial aid; (2) allocating race-based financial aid directly from university funding while maintaining race-conscious admissions process under *Grutter* and *Gratz* and; (3) administering race-based financial aid selecting recipients for private donor, race-restricted, grants while maintaining race-conscious admissions process under *Grutter*. Part IX concludes with a discussion on the theoretical centerpiece of this article. I attempt to extrapolate a novel application of the Establishment Clause analogy to the question of race-based scholarships. While not identical, the analogy speaks to the real issues of neutrality and endorsement that remain implicit in the debate of administering race-base scholarships by universities. I attempt to show by extrapolating from establishment clause cases an analytical framework to understand and apply a doctrinal test may provide a theoretical basis to "immunize" universities from liability from administering race-based scholarships.

PART I

The Constitutionality of Race-Based Financial Aid After Podberesky

Neither of the *Bollinger* cases addresses the constitutional question of race-based scholarships at colleges and universities. Further, it is clear that past precedent is of little help in clarifying

this important question, leading to further doctrinal ambiguity on the question of race based scholarships. This is particularly so when one considers that, to date, courts that have had occasion to consider the question of race-based financial aid have never considered whether such aid awards are permissible to achieve the diversity interest recently upheld in *Grutter*. For instance, in *Podberesky v. Kirwan,* the plaintiff Daniel Podberesky was ineligible to compete for the merit- based Banneker scholarship at the University of Maryland because he is not African-American although he met all of the other requirements.[8] The court in applying the standard articulated in *J.A. Croson Co.*[9] to racial minority scholarships at public universities, required that a party must, "at a minimum, prove that the [present] effect . . . is caused by the past discrimination and that the effect is of sufficient magnitude to justify the program."[10] The University cited four present effects of the past discrimination, the first of which was its poor reputation in the African- American community.[11] The court concluded that "mere knowledge of historical fact [of past discrimination] is not the kind of present effect that can justify a race-exclusive remedy."[12] The University also claimed that the hostile racial climate on campus justified its program.[13] The court was once again not persuaded, claiming that present incidents of hostility "do not necessarily implicate past discrimination on the part of the University, as opposed to present societal discrimination."[14] The University's last two claimed present effects were based on statistical evidence showing minority under-representation and rates of attrition.[15] In response, the Fourth Circuit dismissed these on procedural grounds given conflicting evidence presented by Podberesky.[16] The *Podberesky* court highlighted the fact that the University had not demonstrated any attempt at a race-neutral solution.[17]

Any scholarship distributed along racial lines must also be narrowly tailored. Prior to the nuanced analysis of the *Grutter* and *Gratz* cases, commentators have reduced this requirement to four factors: (1) The state must explore possible race-neutral remedies and approve race-based remedies only when necessary; (2) any

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[8] Podberesky, 38 F.3d at 161.

[9] City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

[10] Podberesky, at 153.

[11] *Id.* at 152.

[12] *Id.* at 154.

[13] *Id.* at 152.

[14] *Id.* at 154.

[15] *Id.* at 152.

[16] *Id.* at 155-56.

[17] The court also faulted the University and the lower court for using an inappropriate population that considered all qualified African-American students as the disadvantaged class, rather than the subclass of Maryland residents for whom the university intended the scholarship.

race-based remedy must be flexible and temporary; (3) there must be a statistical correlation between the race-based remedy and the appropriate population; and (4) the race-based remedy must not prefer one minority to the exclusion of others.[18] Of course, because *Podberesky* involved race-based scholarships as a means to address past discrimination as a near insurmountable burden to meet, many opponents attacked race-based funding leading up to and in the aftermath of the *Grutter* and *Gratz* decisions. In fact, recently Princeton and MIT, under complaints from anti-affirmative action activists, were forced to dissolve their programs for minorities and educationally disadvantaged students.[19] Indeed, it has already been reported that the Center for Individual Rights is determining which scholarship program based on high school enrollment to sue.[20] Other targets include minority outreach to high schools and colleges, scholarships, fellowships in addition admissions schemes.[21] Given the forthcoming onslaught of legal challenges, the contour and limits of judicial deference to any race-conscious or race-based financial aid schemes takes on new significance.

PART II

The Powell Deference

Grutter recognized that the use of race to achieve diversity survives strict scrutiny much easier under a First Amendment right of a university to constitute its student body as it sees proper in order to achieve a critical mass of minorities that will lead to certain educational benefits. The Powell deference to a university's academic freedom in *Bakke* is most apparent in *Grutter* to the neutral observer when one reads O'Connor's opinion. In it, we are told time and time again by O'Connor that deference means that racial diversity leads to beneficial

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[18] William E. Thro, *The Constitutional Problem of Race-Based Scholarships and a Practical Solution,* 111 Educ. L. Rep. 625, 633-34 (1996).

[19] *See, e.g.,* Austin American-Statesman, *available at* http://www.austin360.com/aas/news/ap/ap_story.html/National/AP.V6456.AP-Princeton-Minor.html (Feb. 7, 2003).

[20] *See* Ron Nissimov, *UT Tailors Scholarship to Minority High Schools*, HOUS. CHRON., Feb. 12, 2002, at A21; Pearce Adams, *Reverse Discrimination Suits Shelve Black Scholarship Aid at UGA*, Atlanta J.-Const., July 3, 2000, at B6; Alexis Orenstein, Minority Scholarships Challenged, Daily Pennsylvanian, Feb. 2, 2004, *available* at http://www.dailypennsylvanian.com/vnews/display.v/ART/401dfe740db03.

[21] Arthur L. Coleman et al, *Diversity In Higher Education: A Strategic Planning and Policy Manual Regarding Federal Law in Admissions, Financial Aid, and Outreach*, 32, *at* www.collegeboard.com/prod_downloads/highered/ad/014624WODiversutyHighrEdT.pdf

educational benefits and that a critical mass is the best means to achieve this pedagogical objective.[22]

Although this is consistent with *Bakke*, Justice Thomas did correctly point out that such deference to educational expertise involved in constituting a student body did not extend to the Virginia Military Institute's (VMI) assertion that the admission of woman would compromise the quality and nature of it educational program. For that matter, Thomas' argument would apply similarly in *Mississippi University for Women v. Hogan,*[23] where the Court extended no deference to a nursing school that sought to deny admission to males because of implicit gender stereotyping of the nursing profession as most appropriate for females.

However, what Justice Thomas neglects to understand is that in *VMI* and *Hogan*, the issue presented was whether the exclusion of a certain class of persons from being admitted to a state educational institution solely on the basis of their sex violates the Equal Protection Clause. In *Grutter* and *Gratz,* the issue was not whether a certain class of persons should be excluded, and certainly not on the basis of sex, but rather to what *extent* may a certain class of persons be *admitted* by special consideration of their race without running afoul of the Equal Protection Clause. Accordingly, Justice Thomas misapprehends the nature of the question presented. The result is an incorrect understanding of the deference at issue in the Bollinger cases. If the University of Michigan were seeking to deny an *entire* class of persons as in *Hogan* and *VMI*, whether it be here all Blacks or all whites from admission to the University of Michigan, and assuming further their denial was predicated on some racial stereotypical perceptions applicable to that entire class, then Justice Thomas would be more on the correct track. To be sure, there are racial minorities that would be eligible for admission to Michigan without the benefit of any race-conscious considerations. Indeed, there would also presumably be some underrepresented racial minorities that would also be eligible for admission without such special consideration. The question, or questions then become, is whether race-based diversity as an admissions concept satisfy a compelling state interest; how may the use of race as a special consideration be narrowly tailored to minimize any undue burden on non-recipients; whether achieving a critical mass is the best way of satisfying the narrow tailoring requirement.

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[22] Law School defined critical mass as "numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race." Grutter, 539 U.S. at 326.

[23] 458 U.S. 718, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982).

However, it is also clear from Thomas' remarks that at the very least, such deference must never run afoul of the Fourteenth Amendment's Equal Protection Guarantee in the form of a disguised racial quota. Therefore, universities do not have a free hand or absolute discretion to constitute it student body entirely as it would see fit. Notwithstanding this, however, it is not inconceivable that race-based scholarships may have a second bite at the jurisprudential apple after *Podberesky*.[24] Of course, the very possibility that race-based financial might be permissible under the U.S. Department of Education's still unrevised 1994 policy interpretation if no other viable alternative exist, may only further spurn debate about such race-sensitive financial grants.[25] Before *Grutter,* most race based scholarships in select circuits could not, practically speaking, survive the "fatal in fact" standard of strict scrutiny.[26] So was it the case with *Flanagan v. Georgetown Coll.,*[27] where the court held that a set aside of scholarship funds for minority students violates Title VI of the Civil Rights Act of 1964 but in *Wash. Legal Found. v. Alexander*,[28] a court dismissed a challenge which alleged the United States Department of Education's change from prohibiting minority scholarships to allowing such scholarships violated Title VI. But under Title VI regulations, the question remains murky because less intrusive, viable means may be available and there may be an undue burden on those who are ineligible for the funds as a result of the racial restriction.[29] Indeed, some will claim that financial aid grants based upon economic need rather than race are more suitable race-neutral alternatives.[30] However, this stance fails to recognize that most studies relying on socioeconomic indicators alone have proved ineffectual in maintaining previous levels of racial diversity and largely tend to benefit low socioeconomic whites instead of racial minorities. However, this point is not

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[24] Sara Hebel, *The Michigan Rulings: Court Rulings May Open the Door for More Use of Race in Student Aid*, Chron. Of Higher Educ., Jul. 4, 2003, at S6, *available* at http://chronicle.com/prm/weekly/v49/ i43/43s00601.htm (last visited Feb. 21, 2004).

[25] Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964; Notice of Final Policy Guidance; 59 Fed. Reg. 8756-01 (Feb. 23, 1994). Under Title VI, private universities operate under the same constitutional rules of racial preferences as the Michigan Law School in *Grutter* but confront the same constraints as the Michigan undergraduate LSA college in *Gratz.*

[26] Justice Brennan argued that the Court's review under the Fourteenth Amendment should be strict, but not 'strict' in theory and fatal in fact.". *See* Bakke, 438 U.S. at 361-62.

[27] 417 F. Supp. 377, 385 (D.D.C. 1976).

[28] 778 F. Supp. 67 (D.D.C. 1991).

[29] Notice of Final Policy Guidance; 59 Fed. Reg. 8756-01 (Feb. 23, 1994).

[30] *See e.g.*, Thro, *supra* note 9, at 634.

without controversy. Earlier this year, the Century Foundation released its own study espousing the effectiveness of such schemes. This report, which is somewhat at odds with the current position of the federal government, in that it does acknowledge that there is no adequate substitute for race-based affirmative action and therefore recommends it be preserved and considered in conjunction with socioeconomic factors.[31]

PART III

What Happened To Disproportionality? Title VI and Its Contradictory Interpretation In Race-Based Financial Aid

Race consciousness denotes a cognizance of race as being a relevant factor among many, race-based denotes an assessment which solely relies upon race in a way sure to lead to a determinative result.[32] Under the Department of Education's 1994 Policy Guidance, a "college may make awards of financial aid to disadvantaged students, without regard to race or national origin, even if that means that these awards go disproportionately to minority students."[33] This interpretation could potentially mean that colleges and graduate universities can target urban feeder high schools or colleges respectively, in ways that are race-based. Many such scholarships that are race-based may specifically target minority students without specifically enumerating race as a prerequisite for eligible scholarship applicants.

In fact, there appears to be some support for this approach. For instance, under Texas law[34], colleges may consider a number of factors including family income, whether a student is from an urban or rural school, and how that school fared in the state accountability ratings in making their admission decisions.[35] Additionally, a university could decide, without exposing itself to liability, to target persons who are first generation college bound students in their family or who are the first graduate from an institution of higher education,[36] whether the applicant has

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[31] See Anthony P. Carnevale & Stephen J. Rose, *Socioeconomic Status, Race/Ethnicity & Selective College Admissions*, http://www.tcf.org/Publications/White_Papers/carnevale_rose.pdf

[32] *See* Mark Spencer Williams, *Skin Formulas Belong In A Bottle: North Carolina's Diversity Scholarships Are Unconstitutional Under Grutter*, 26 Campbell L. Rev. 135, 144 (2004).

[33] 59 Fed. Reg. 8756-01 (Feb. 23, 1994).

[34] Tex. Educ. Code Ann. § 51.804 (Vernon 2001).

[35] *Id.* at (b)(2), (6), (9).

[36] *Id.* at (b)(3).

bilingual proficiency,[37] the financial status of the applicant's school district,[38] the applicant's performance on standardized tests in comparison with those of other students from similar socioeconomic backgrounds,[39] whether the applicant attended any school which was under a court-ordered desegregation plan,[40] and any other considerations the institution deems necessary to accomplish its stated mission.[41]

Some other possible race-targeted, race-based approaches may even prove more novel in application. For instance, it is conceivable to structure scholarship criteria around more targeted race related indicia. These include race-based scholarships that target the victims of sickle cell anemia which are more likely than not to target African-Americans.[42] Likewise, scholarships based upon students with a Black Studies major, or membership in the Native American Students Association, Alpha Phi Alpha or other nonprofit institutions are likely to target race.[43] The same effect may also apply to scholarships targeting those of the Baptist faith or scholarships targeting those who simultaneously fall into multiple categories noted above.[44]

Notwithstanding minorities that would primarily benefit under these approaches, it is hard to see how the DOE's interpretation permitting them could ever comport with the strongly worded mandate in the *Bollinger* cases that racial considerations in financial aid must not be outcome determinative.[45] Further, it is even harder to see how the DOE's policy guidance allowing race-conscious financial is able to circumvent its own implementing regulations regarding disproportionality. If the DOE states "college may make awards of financial aid to disadvantaged students, without regard to race or national origin, even if that means that these awards go disproportionately to minority students,"[46] how is this policy stance reconciled with a disproportionate adverse impact analysis?

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[37] *Id.* at (b)(4).

[38] *Id.* at (b)(5).

[39] *Id.* at (b)(11).

[40] *Id.* at (b)(12).

[41] *Id.* at (b)(18).

[42] Mark Kantrowitz, *Affirmative Action and Financial Aid*, THE SMART STUDENT GUIDE TO FINANCIAL AID, *available at* http://www.finaid.org/educators/*affirmativeaction.phtml*

[43] *Id.*

[44] *Id.* In accordance with these approaches, this does not mean, however, scholarships can be based upon a membership in organizations where race or ethnicity is an explicit prerequisite for membership affiliation.

[45] Grutter, 539 U.S. at 321; Gratz, 539 U.S. at 284.

[46] 59 Fed. Reg. 8756-01 (Feb. 23, 1994).

Presumably, if scholarship awards "go disproportionately to minority students", non-minority students theoretically would have viable complaint that the scholarship leads to a disproportionate or disparate adverse impact. The regulations implementing Title VI, at 34 C.F.R. Part 100, prohibit discrimination that is the result of different treatment,[47] as well as that resulting from facially neutral policies and practices that have an impermissible disparate adverse impact.[48] The Education Department's regulations follow caselaw under Title VI, and as appropriate, under Title VII and the Equal Protection Clause, in applying these regulations. To that end, we learn from *Bakke* that Title VI is coextensive with the Equal Protection Clause and that from the infamous *Alexander v. Sandoval* decision there does not exist a private right to enforce disparate regulations, except perhaps under Section 1983[49] and under a formal complaint lodged with the DOE and pleaded with particularity.[50]

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[47] Differential treatment analysis essentially has three parts: (1) Are there differences in the treatment of minority and non-minority students who are similarly situated?; (2) Can the recipient justify these differences?; and (3) Are the recipient's reasons legitimate or a pretext for unlawful discrimination? Different treatment cases involve proof of intentional discrimination such that acts or omissions are on the basis of race, color, or national origin. In assessing whether actions are race based, intent may be inferred through consideration of a variety of factors, such as whether the burdens of the decision are greater for students of particular races or national origins, a history of discriminatory official actions, departure from the recipient's norms in procedural and substantive matters, and evidence of discrimination in statements made during the history of the action, *see Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977). A different treatment violation does not require proof of bad faith or racial motive by school officials. In these cases, evidence of foreseeable consequences is relevant, but not necessarily conclusive, in assessing intent.

[48] The ability of courts to enforce Title VI disparate impact regulations is demonstrated by the existence of a well-established three-part burden shifting framework in which a plaintiff must establish a prima facie case of disparate impact discrimination, a defendant may offer a substantial and legitimate justification in rebuttal, and, finally, if a defendant has offered a proper rebuttal, a plaintiff may establish that the defendant ignored an equally effective alternative with less discriminatory impact. *See generally New York Urban League,* 71 F.3d at 1036*; Georgia State Conference of Branches of NAACP v. Georgia,* 775 F.2d 1403, 1417 (11th Cir. 1985); *SCCIA II,* 145 F. Supp. 2d at 540-41, 31 ELR at 20688; Mank, Recipient Agencies, supra note 32, at 799-801; *See generally,* Mank, *South Camden Citizens In Action v. New Jersey Department of Environmental Protection: Will Section 1983 Save Title VI Disparate Impact Suits?* 32 ELR 10454 (2002); Mank, *South Camden Citizens In Action v. New Jersey Department of Environmental Protection: Will Section 1983 Save Title VI Disparate Impact Suits?* 32 ELR 10454 (2002).

[49] *See generally Blessing v. Freestone,* 520 U.S. 329, 340 (1997); Bradford Mank, *Using Section 1983 to Enforce Title VI's §602 Regulations*, 49 U. KAN. L. REV. 321, 332 (2001) (arguing Title VI disparate impact regulations may be enforced through §1983).Under Title VI, private universities given the same legal protection from so called reverse discrimination suits if they abide by the requirements of individualized consideration and narrow tailoring in *Bakke* and

It is unlikely that pure race-based financial aid and scholarships can be narrowly tailored under *Gratz*. Accordingly, some commentators have suggested that if it is constitutionally impermissible to employ a two track system or a set-aside in student admissions, there is little reason to believe it should be permissible to employ similar set asides in the award of financial assistance.[51] It is thus at this point that it becomes clear the U.S. Department of Education's policy guidance interpretation, while not carrying the force of law, is clearly at odds with the *Gratz* court.

This reality raises several issues about whether the many restricted grants administered by universities may "cleanse' themselves from putative suits alleging racial discrimination by virtue of their participation. To address this question of liability, it is first necessary to tease out some of the conceptual distinctions in restricting financial aid allocation that might implicate potential bases for establishing state action.

PART IV

State Action & Title VI: Doctrinal Contradictions Abound

Under the U.S. Department of Education's Policy Guidance, a specific carve out exception for Historically Black Colleges and Universities (HBCUs) permits these institutions to "participate in race-targeted programs for Black students established by third parties if the programs are not limited to

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Gratz with respect to the use of racial preferences. The implications of the Sandoval ruling are far reaching for civil rights groups as well as private litigants. Since the rights and remedies under the implementing regulations of Title II of the Americans With Disabilities Act of 1990 and Section 504 of the Rehabilitation Act of 1973 (at C.F.R. Part 104) and Title IX of the Higher Education Amendments of 1972 (at C.F.R. Part 106) are the same as those under Title VI, the decision may have implications for disability and other civil rights litigants as well.

[50] Complicating the matter, however, is that complaints which may be filed directly with the U.S. Department of Education Office for Civil Rights (OCR), which under the policies of the Bush Administration will need to plead with enhanced particularity of facts that will support a disparate impact violation.[50] This will mean private citizens will likely need the assistance of attorneys and other complainants to pool supportive collective statistical data to supplement their complaint allegations. This data will need to include specific supportive numerical data and/or anecdotal testimony from competent witnesses knowledgeable about the adverse racial disparate impact that will supports the allegation of disparate impact. Absent the production of very specific evidence, OCR may be reluctant to investigate and enforce disparate impact complaints. The result could be a smaller window for recourse.

[51] Bloom, *supra* note 6 at 500-501.

students at HBCUs."[52] This approach presumably preserves the mission of HBCUs to educate underrepresented African-Americans so long as it does not institutionally monopolize the benefit of its efforts to create race-based scholarships. There nonetheless remains an internal tension with the DOE's policy guidance and its differential treatment of NVCC and a HBCU.

As with NVCC, there is a doctrinal preoccupation *not* with the *source* of the funds, but with the university that merely administers it. However, when a HBCU is involved in administering and participating in a race-based scholarship, the inquiry instead turns upon the affiliation status of scholarship recipients. Why should the question of legality turn upon the dubious status as one's affiliation with the participating HBCU?

This apparent contradiction as to the manner in which NVCC is prohibited from administering race-based scholarships while HBCUs are precisely permitted to participate in the administration of these same types of scholarships can hardly be reconciled by the neutral observer. Nor can the distinction hardly be explained as a matter of state action that arises with a public institution on the one hand, and a private institution such as an HBCU on the other that nonetheless receives federal funding sufficient to trigger Title VI. One may perhaps conclude that this difficulty stems from the awkward attempt of the policy guidance to serve two masters so to speak. It attempts on the one hand to preserve institutional mission of HBCUs, while simultaneously seeking to cleanse any perceived institutional imprimatur on racial discrimination vis-à-vis the administration of a race-based scholarship. Nonetheless, state action still remains a formidable obstacle for universities to overcome before allocating or simply administering race-based financial aid. Moreover, because Title VI has essentially incorporated the equal protection clause including its requirement of strict scrutiny, [53] the other formidable roadblock presented by such scholarships is the narrow tailoring requirement of strict scrutiny.

State Action & Strict Scrutiny Of Restricted Grants

The Fourteenth Amendment's Equal Protection Clause as well as Title VI of the Civil Rights Act may be triggered when an institution of higher learning selects a recipient for, or administers a race-based scholarship as such would constitute state action.[54] In those instances where race-based grants are

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[52] 59 Fed. Reg. 8756-01 (Feb. 23, 1994).

[53] *See* Angelo N. Ancheta, *Revisiting Bakke and Diversity-Based Admissions: Constitutional Law, Social Science Research, and the University of Michigan Affirmative Action Cases,* March 2003, at http://www.civilrightsproject.harvard.edu.

[54] Mark Kantrowitz, *Affirmative Action and Financial Aid*, THE SMART

offered to university students, current law would behoove the college or university to contact donors to seek revisions to the terms of the scholarship to bring it into compliance with *Gratz*.[55] Rice University, for instance, has rejected racial restrictions on scholarships funds donated by its alumni.[56] The problem, moreover, gets a bit thornier when the donor is deceased and donative intent may be frustrated. In these cases, the institution would necessarily have to seek modification of the restricted gift in probate court.[57] Absent these options, university officials may have little other choice than to transfer administration of the scholarship to completely into the hands of private institutions as those receiving Title VI funds would be similarly constrained by *Gratz*.[58]

This was precisely the case with the Northern Virginia Community College (NVCC), which in response to a DOE complaint filed by a white student, was forced to transfer the administration of five private race-based scholarships out of university hands and back to the original donor.[59] No longer could NVCC choose students for the scholarship, and its mission to serve as a feeder to four year institutions of higher education appeared to be frustrated.[60]

In other instances, transfer of funds or the elimination of the program altogether may be mandated by state law. For instance, California's Proposition 209 forbids colleges and universities from administering aid grants to increase racial diversity. Other than closing down the aid program, transferring funds back to donors, or altering the selection criteria of scholarships, donative intent will ultimately remain frustrated in the vast majority of cases.[61]

STUDENT GUIDE TO FINANCIAL AID, *available at* http://www.finaid.org/educators/*affirmativeaction.phtml*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *The* Department of Educations' 1994 Policy Guidance does leave some wiggle room in this regard. Principle 5—"Private Gifts Restricted By Race or national Origin"—"has been *amended to clarify* that a college can administer financial aid from private donors that is restricted on the basis of race or national origin only if that aid is consistent with the other principles in this policy guidance."

[59] *See* Elizabeth Frengel, *Using Race-Based Scholarships To Promote Campus Diversity,* Community C.J., Dec. 1998/Jan. 1999, at 21.

[60] Amy Weir, *Should Higher Education Race-based Financial Aid Be Distinguished From Race-based Admissions? available at* http://infoeagle.bc.edu/bc_org/avp/law/lwsch/journals/bclawr/43_4/09_TXT.htm#T10

[61] There are some cases in factor where donative intent may be honored, although it is a matter of fortuitous timing. Funds received before August 28, 1997 would take priority over the statewide proposition. See Kantrowitz, *supra* note 46.

To circumvent the difficulties that arise in these contexts, many institutions structure financial aid by a method commonly referred to as "pooling". Pooling involves awarding facially neutral grants to all students on the basis of objective indicia such as grade point average and financial need for which matching funds would then be allocated from university coffers in accordance with specified donor preferences. This option permits compliance with both donor preferences and the Equal Protection Clause by relieving any undue burden upon students who do not meet the race-based eligibility requirements of race-based scholarships.[62] Nonetheless, no difficulty would arise with purely private scholarships such as the Gate Millennium Scholarship Fund and the United Negro College Fund so long as the college or university did not raise funds or provide resources for candidate selection.[63]

PART V

Narrow Tailoring

Despite this doctrinal obfuscation, what is pristinely unmistakable is that any incarnation of a narrowly tailored race-conscious scholarship program would have to contain six indispensable characteristics so as not to transgress the strict scrutiny of equal protection racial discrimination analysis. They are: (1) the individualized comparison of applicants—No minority candidate can be subjected to set aside, quota or dual tracks designed to shield minority candidates from the crucible of competition in the admission and financial aid process; (2) the absence of mechanistic formulas—No minority candidate may be given individual file consideration by virtue of the automatic operation of a quota or plus factor that is wholly deprived of undifferentiated professional discretion and which renders race outcome determinative; (3) the goal of achieving a "critical mass" of under-represented minorities—Attempts to achieve a critical mass must clearly be noted in the mission statement and permeate admissions policy, registration, financial aid, program curriculum so as not to appear as sham lip service to racial diversity without adequate justification. It follows that officials must be prepared with documented institutional specific data, surveys, reports, expert summaries, alumni and student statements and empirical social science data available to properly

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[62] Mark Kantrowitz, *Affirmative Action and Financial Aid*, THE SMART STUDENT GUIDE TO FINANCIAL AID, *available at* http://www.finaid.org/educators/*affirmativeaction.phtml*

[63] *Id.*

buttress the benefits of diversity and its efforts to achieve a critical mass of underrepresented minorities[64]; (4) doing "no undue harm" to members of groups not favored by the system—Admissions and general counsel must be vigilant in considering to what extent special consideration of race may adversely affect other non-minorities or non-underrepresented minorities. It is rather hard to imagine an instance, however, when a financial aid package, more so than an admissions decision, would not unduly harm someone in the binary competition fought between those who ultimately receive financial aid and those who do not. However, the more careful and flexible admissions and financial officers are in opening up the notion of diversity, the less there is a viable basis for which non-recipients can claim an undue burden. This is because race-conscious financial aid does not, alone, necessarily dictate that a student would be foreclosed from attending a college solely on the basis of race.[65] However any undue burden may also be mitigated and less intrusive if the pool of financial resources available to non-minority recipients of financial are much greater.[66] Conversely, the burden might be minimized if the number of non-minority recipients is considerably small and diffuse.[67] There is, however, another aspect that distinguishes financial aid from admissions that do not cause undue burden. Further, should any institution prefers to admit and fund African-Americans to Asian-Americans, for example, it ought to be prepared to demonstrate through statistical data and careful internal deliberations that it has properly reached a sound pedagogical judgment that the university has a sufficient representation of Asian-Americans on campus already; (5) a continuing exploration of race-neutral alternatives—periodic reviews of the use of race by admission officers and faculty are appropriate from admission cycle to admission cycle. This does not mean, however, that a university is compelled to attempt, fail and exhaust every race-neutral alternative if it is not reasonably calculated to, or likely to yield, a sufficient number of minority students to constitute a critical mass admitted under selective criteria before employing race-conscious consideration.[68] All that is required is a serious "good

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[64] *See* NACUA NOTES, (May 11, 2004), Vol. 2, No, 2. *at* http://ogc.arizona.edu/Race-Conscious%20 Financial%20Aid.htm

[65] Amy Weir, *Should Higher Education Race-based Financial Aid Be Distinguished From Race-based Admissions? available at* http://infoeagle.bc.edu/bc_org/avp/law/lwsch/journals/bclawr/43_4/09_TXT.htm#T10.

[66] Arthur L. Coleman et al, *Diversity In Higher Education: A Strategic Planning and Policy Manual Regarding Federal Law in Admissions, Financial Aid, and Outreach*, 32, *at* www.collegeboard.com/prod_downloads/highered/ad/014624WODiversutyHighrEdT.pdf

[67] 59 Fed. Reg. 8756-01 (Feb. 23, 1994).

[68] As the majority in Grutter notes:

faith consideration of workable, race neutral alternatives that will achieve the diversity" that the institution seeks.[69]; (6) a realistic time limit— where deemed appropriate, the implementation of sunset provisions should occur when the continued use of race is found no longer to be necessary in order to achieve a critical mass.[70] This point was further underscored by O'Connor in *Grutter*. The Court noted that it:

> [t]ake[s] the Law School at its word that it would "like nothing better than to find a race-neutral admissions formula" and will terminate its race-conscious admissions program as soon as practicable. . . . [The Court] expect[s] that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.[71]

For the majority, the necessity for some finality to all race-conscious admissions programs "assure[s] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself."[72]

However, while only race-based scholarships and financial aid will not pass constitutional muster under narrow tailoring analysis, it is clear that race-conscious scholarships may suffice provided the six characteristics previously noted are faithfully taken into account. To this end, a number of diversity factors such as the enthusiasm of the recommenders, the character of the undergraduate institution, the quality of the applicant's essay, the difficulty of undergraduate coursework, extracurricular activities, adversities overcome (i.e. illness, disease, parental or sibling death) languages spoken, international travels,

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> good faith consideration does not entail, however, "exhaustion of every conceivable race-neutral alternative" or force an institution between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members for all racial groups. Grutter, 123 S. Ct. at 2344.

[69] Grutter, 123 S.Ct. at 2345.

[70] These factors are adapted from the Supreme Court's opinions in *Grutter* and *Gratz*, as well as Michael Madden, *U.S. Supreme Court Decisions in University of Michigan Admissions Cases*, 1 NACUANOTE 5 (2 July 2003); *Grutter*, 123 S.Ct. at 2343, *citing Regents of the University of California v. Bakke*, 438 U.S. 265, 318, n. 52.

[71] Grutter,123 S.Ct. at 2346.

[72] *Id.* (citing Richmond v. J. A. Croson Co., 488 U.S. 469, 510 (1989))(plurality opinion); *see also* Nathaniel L. Nathanson & Casimir J. Bartnik, *The Constitutionality of Preferential Treatment for Minority Applicants to Professional Schools*, 58 Chi. B. Rec. 282, 293 (1977).

geographical diversity, graduate degrees, military experience, work experience, veteran status, parental occupation, parental divorce, parental abuse, frequent family relocation, playing a musical instrument, drama, writing, painting, athletics, disability, orientation, gender, national origin, high poverty neighborhood, and the applicant's other potential to contribute to student diversity may all be considered in the selection process for scholarships.

Another prudent strategy in devising financial aid is to require students wanting to be considered for diversity scholarships to write a "diversity of perspective personal statement" detailing how the student will contribute to the overall diversity and learning environment of the college and university. In this way, administrators are less likely to engage in impermissible racial stereotyping and are better able to assess that it is establishing a critical mass. Moreover, such an approach would foster the requisite individualized consideration of each candidate admonished in *Bakke* and *Gratz* while subjecting each applicant for diversity scholarships to an unshielded, integrated, competitive process. The use of a diversity of perspective personal statement is thus, the most prudent approach to achieving a critical mass.

Moreover, under this proposed scenario, admissions officials will rely on a personal statement in the admissions process and a diversity of perspective personal statement for race-conscious diversity scholarships. Accordingly, it is proper to assume that the decisions to admit a minority applicant would both have been further imbued with professional judgments about the decision to award financial aid to that applicant on a basis of her diversity of perspective personal statement. Seen in this way, financial aid is only a conduit by which to reinforce admissions offers that in turn may be designed to attract and recruit a critical mass of diversity.

Therefore, it then stands to reason that a minority student who is admitted and given financial aid is twice the beneficiary of reasoned, careful consideration by university admissions staff that have reached a professional consensus that the students will make a positive contribution to the university. As such, a university's exercise of professional discretion to admit and fund a minority student is twice protected by the deference under the First Amendment right of academic freedom.

Consequently, it may be of little consequence that a diversity conscious scholarship is administered in a race-sensitive fashion primarily to racial minorities so long as other non-minorities receive a financial aid award as well. Neither a Benjamin Banker Blacks-only scholarship that was at issue in *Podberesky* nor the Whites-only mock scholarship offered by a

Rogers and Williams College Republican student would appear to pass constitutional muster.[73] In fact, it is questionable whether even universities could target certain ethnicities for scholarships, no matter how underrepresented they may be on college campuses across the nation unless the judgment to target the specific group is carefully documented and the undue burden upon non-beneficiaries is minimal. Accordingly, scholarship set asides like those at the University of North Carolina's for only Native Americans are legally vulnerable on the same grounds the set asides of seats at U.C. Davis Medical School in *Bakke* or subcontracting set-aside programs in *Croson*.[74] Moreover, UNC's approach is also wanting as it is ultimately not likely to yield the desired results for Native Americans precisely because their own representation may be called into question by groups such as Latinos, West Indians, and African-Americans.

In this regard, one can see quite clearly how the words of Justice Scalia in *Grutter* gradually starts to take on ominous importance when he warns: "Finally, litigation can be expected on behalf of minority groups intentionally short changed in the institution's composition of its generic minority 'critical mass.' I do not look forward to any of these cases."[75] In fact, it is this generic "Black" minority status that can lead to further litigation among Native Black Americans attempting to procure the same affirmative action opportunities that West Indians and African immigrants have received at some of our nation's most selective institutions.

This eventuality take on new life when one considers that that the descendants of *American* slaves comprise a minority of West Indian and African immigrants who actually benefit from affirmative action. These groups, their children and the children of biracial couples represented the largest portion of Blacks admitted to the most selective institutions of higher education.[76] Recent research confirms that on average, West Indians account for more than forty-one percent of all "Blacks" at twenty eight selective institutions including Harvard University, Columbia University, Duke University, University of Pennsylvania and the University of California at Berkeley. This forty-one percent

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[73] Elissa Gootman, *Scholarship, 'Whites Only,' Roils a Campus*, N.Y. Times, Feb. 17, 2004, at A17.

[74] City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989) (invalidating a subcontracting set-aside program intended to remedy effects of racial discrimination for not serving a compelling purpose and not being narrowly tailored under the Equal Protection Clause).

[75] Grutter v. Bollinger, 539 U.S. 306, 349 (2003) (Scalia, J., dissenting).

[76] *See* Sara Rimer and Karen W. Arenson, *Top Colleges Take More Blacks, But Which Ones*? N.Y. TIMES, June 24, 2004 *available at* www.nytimes.com/2004/06/24/education/24AFFI.final.html?ex=1403409600&en=92df04e0957d73d3&ei=5007&partner=USERLAND

identified themselves as immigrants, children of immigrants, or as mixed race.[77] Given the tension that has arisen over this new revelation, it would come as no surprise that, as Justice Scalia further predicts, "other suits may claim that the institution's racial preferences have gone below or above the mystical-*Grutter* approved critical mass."'[78] Just as Native Black Americans will seek recourse for the preferred status of immigrants, so too will the preferred status of Blacks in admissions become the predicate by which either Latinos or Native Americans will challenge the suit. Further, with Asians, Asian-Americans and Caucasian women being among the greatest beneficiaries of affirmative action, it might be reasonable to expect that another inter-group conflict this time with West Indians, Africans, and biracial person is inevitable.

Michigan's focus on truly underrepresented minorities, however, has been upheld as laudable among universities that too often struggle to attract and education underrepresented Native Americans, African-Americans and Latinos. An admissions decision to focus solely on underrepresented minorities may very well be imbued with the professional discretion and judgment deserving judicial deference.[79] The problem may arise, however, whenever a university may appear to arbitrarily draw artificial lines of preference between favoring one deserving underrepresented racial group while ignoring a similarly situated underrepresented group. In such an instance, a reviewing court may be wary of placing its imprimatur on what it may see as an unreasonable, arbitrary, and unsupported distinction between Native Americans and African-Americans for instance. Here, it is unlikely that documentation would be as much help as where the distinction is between an underrepresented group like Latinos and an often over-represented group like Asian-Americans.[80] These difficulties only further buttress an approach where private donor, race-based, restricted grants is seen as the most targeted means to recruit underrepresented minority groups since the

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[77] These numbers are consistent with other reported findings by sociologist studying this issue:

Douglas S. Massey, a Princeton sociology professor who was one of the researchers, said the black students from immigrant families and the mixed-race students represented a larger proportion of the black students than that in the black population in the United States generally. Andrew A. Beveridge, a sociologist at Queens College, says that among 18- to 25-year-old blacks nationwide, about 9 percent describe themselves as of African or West Indian ancestry. Like the Gates and Guinier numbers, these tallies do not include foreign students. Sara Rimer and Karen W. Arenson*, Top Colleges Take More Blacks, But Which Ones?*, *supra* note 75.

[78] *Id.*

[79] Grutter v. Bollinger, 123 S. Ct. 2325, 2339 (2003) (discussing the Court's deference to a school's "educational mission" and judgments).

[80] Bloom, *supra* note 6 *at* 500-01.

grants themselves have not been provided by the university, but by private individuals.

PART VI

A Right To Be Preferred?

An unanswered question that arises in the *Grutter* and *Gratz* cases is whether a disfavored racial group would ever have a constitutional right to a preference in admissions schemes, and by extension, a preference in the award of financial aid scholarship and grants under a race plus approach. The principal doctrinal arsenal on each side can be gleaned with some imagination. For instance, it is not hard to conjure a situation where second generation students of southeast Asian Indian Hindu parents and Pakistani Muslim students challenge a preference to admit native Black Americans. On a plus factor analysis, one might say that the former may even bring more diversifying factors to the table than the latter. Whether it is linguistic diversity, religious diversity, national origin, political point of view diversity, international travel, color, etc., we might very well conceive a scenario where an Indian or Pakistani might rank higher on the scale of these various diversifying factors than the native Black American. Of course, the rebuttal on the other side is also not hard to conceive. Here, it would be argued that individualized consideration means something more than "adding all the sum total of all the parts" approach that is devoid of meaningful discretion and holistic whole file consideration. Perhaps the Pakistani ranks higher on a number of statistical indicators, but individualized consideration would look at character and a voice that is distinctly missing from class debates, moot court briefs, law review notes and the alumni and professional practicing community of a law school, university or college. Individualized consideration means in this context what contribution can this student make, and will likely make, to the overall educational community, both nationally and in state.[81]

[81] In this regard, it is significant that Justice Thomas applauds the success of Wayne State University Law School in educating students in the state of Michigan than the university that bears its namesake. Thomas appeared to suggest that there can be such a thing as too much diversity when it comes at the expense of an institution's own mission. This is a slightly different argument than suggesting that the implicit choice is between diversity and selectivity. There is but no question that the University of Michigan is widely regarded a more selective institution than Wayne State, but as Justice Thomas notes, the University of Texas maintains its reputation as a selective institution while educating, by state legislative mandate, resident Texans in half of its entering class seats. The choice need not be mutually exclusive, although there may be in the end little choice depending upon the qualifying characteristics of local demographics from which to constitute an entering

Individual consideration then, is not just a science, but an art form requiring careful, intuitive judgment gleaned from faculty recommendations and at some Ivy League institutions, personal interviews. The counterpoint, one could argue, is that *Gratz* does not prohibit quantification or numerical value assignment on diversifying factors, only the automatic and determinative assignment of value on the basis of race.[82]

Moreover, diversity is a moving target, which is in constant flux depending upon the demographics of entering classes. In instances where religious diversity is adequately supported in a critical mass, then diversity may mean something qualitatively and quantitatively different in successive admissions cycles where perhaps it is appropriate to look instead at other diversifying factors such adversities overcome, discrimination surmounted, etc. There is little difficulty with this approach because while it may attract more native Blacks than Indians, it does not guarantee an outcome. Indeed, an Eritrean or Liberian that has escaped civil war in their home country to emigrate to American and learn a new language will fare well in the assessment of diversifying factors, but it does not foreclose the consideration of language minority Latinos or African-Americans who have endured daily struggles of discrimination as well. Moreover, even though there may be a clear preference for underrepresented minorities such as Native Americans, Latinos or Blacks in admission and financial aid, it does not necessarily mean that a critical mass of these groups will actually be achieved or retained on campus. The revelations that immigrants, Africans and biracial persons are the beneficiaries of affirmative action more so than native Black Americans is a strong testament of this fact. That said, it may be prudent, as one commentator suggest, that similarly situated groups be given "parity of treatment rather than simply assuming that the courts will defer to whatever the university decides to do."[83]

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student body. Perhaps then, what Thomas suggests is a notion that individualized consideration that ask this fundamental question: will this individual contribute to the school's mission to educate members of the state bar or future doctors and consultants for the state or region? The problem arises when universities in states with low a low number of resident minorities that may have no choice but to recruit from out of state. In these instances, however, we learn that diversity is fluid and always in flux. Where in state students are adequately represented, a new characteristic may become a diversifying factor.

[82] *See Reaffirming Diversity: A Legal Analysis of the University of Michigan Affirmative Action Cases,* HARVARD CIVIL RIGHTS PROJECT, 19 *available at* http://www.civilrightsproject.harvard.edu/policy/legal_docs/Diversity_ %20 Raffirmed.pdf

[83] Bloom, *supra* note 6 at 501.

All of these complex issues nonetheless speak to the need for further nuance and sophistication in how admissions staff chose to diversity their faculty. No longer is it acceptable for admissions staff to lump such a diffuse number of distinct racial groups such as persons from Jamaica, Trinidad, Dominica, Guyana, Barbados, Haiti, St. Lucia, St. Vincent, Grenada, St. Kitts/Nevis, Antigua, Cape Verde, Kenya, Eritrea, and Nigeria under the rubric "Black" or "African-American" in order to diversity their student body. Likewise, the same would apply to those that fall within the generic "Latino" or "language minority" categories but nonetheless hail from areas as diverse as the Dominican Republic, Puerto Rico, Cuba, Mexico, Costa Rica, Venezuela, Brazil, El Salvador, Argentina and Columbia. Each bring their own unique perspective and we would continue to do a great disservice to ignore such a heterogeneous assortment of backgrounds all for the sake of a shallow conception of what constitutes diversity. Likewise, we would do a great disservice to include every diffuse groups by sacrificing or ignoring long underrepresented racial groups whose voice and presence have been excluded from the hallowed halls of academia. Moreover, there is nothing legally suspect with a suggestion that admission offices be mindful of such racial, ethnic, cultural and linguistic backgrounds of admitted applicants. In fact, if the Court agrees that closely monitoring acceptance of offers of admission extended to minority students, will not give rise to an inference that the institution is maintaining a quota, neither should it if an admissions office closely monitors the specific racial background of those that fall within the generic "Black" and "Latino" nomenclatures.[84]

Indeed, the way an institution largely satisfies the requirement of narrow tailoring is by taking account of all relevant diversifying factors, including ethnicity, national origin and color, in an individualized and competitive process in both the admissions and financial aid decisions of a college or university. Of course, I would even say that we fall short of the individualized consideration required under *Gratz* if we were to maintain the current status quo of minority student selection used at institutions such as Harvard University, Columbia University, Duke University, University of Pennsylvania and the University of California at Berkeley which fail to take into account differences in "Black" heritage and underrepresented racial groups.

PART VII

Underrepresentation & Critical Mass

[84] *See* Grutter, 123 S.Ct. at 2343.

Yet as we know from Chief Justice Rehnquist cynical questioning of Michigan College of Literature, Science, and the Arts (LSA) counsel, John Payton, during oral argument, a group can only be underrepresented if there is a benchmark by which to measure the purported deficiency of representative numbers.[85] Otherwise, how do we know any particular racial minority is underrepresented?

Unfortunately, something more than a Justice Stewart's "I know it when I see it" approach is required to answer this critical question. The principle difficulty in abiding with the rules of this logic is that it is designed to fall on its own sword if one is not careful. For instance, anything that might look like a benchmark by which one is able to say with any mathematical certitude a racial group is underrepresented may be a standard, which might appear dangerously close to the functional equivalent of a disguised quota. But as Justice Powell noted: "there is of course 'some relationship between numbers and achieving the benefits to be derived from a diverse student body and the between the numbers and providing a reasonable environment for those students admitted."[86] To say that some group is underrepresented is to say that there is some level of representation that one numerically *ought* to be entitled to have on campus. That, to critics, may very well look like a quota. A quota is a program in which a fixed number or proportion of opportunities that "must be met or cannot be exceeded is reserved exclusively for certain minority groups."[87] Likewise, for some it may appear that the practical difference between a racial quota and "a numerical aspiration" as nothing more than adept slight of hand. Not quite so.

For instance, in *Grutter* it was shown that underrepresented minority graduates ranged from as low as 5.4% in 1998 to a high just four year earlier of 19.2%.[88] As we now

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[85] *Id.*

[86] Bakke, 438 U.S. 265 at 323.

[87] Grutter, 123 S.Ct. at 2342 (quoting Sheet Metal Workers v. EEOC, 478 U.S. 421, 495 (1986)(O'Connor, J., concurring in part and dissenting in part).

[88] Though the range varied considerably, the mean percentage of underrepresented minority students from 1986 to 1999 was 12.6%. See Grutter v. Bollinger, 288 F.3d 732, 739-42 (6th Cir. 2001); Grutter v. Bollinger, 137 Supp.2d 821, 870 (2001) n. 26. As the district court noted in the original Michigan admission policy, it stated clearly that:

> "…we seem to have achieved the kinds of benefits that we associate with racial and ethnic diversity from classes in which the proportion of African-American, Hispanic and Native American members has been between about 11% and 17% of total enrollees.

Id. at 21.

know in light of *Grutter,* a good faith effort to "come within a range demarcated by the goal itself and permits consideration of race as a 'plus' factor" can serve as a permissible numerical aspiration that may rise or fall in a given year.[89] With this in mind, Professor Bloom suggests some common sense benchmarks as a place to measure critical mass:

> "Representation might be judged by comparison to the group's percentage in the national population or its population in the state or city in which the institution is located, to a percentage in the school's applicant pool or percentage in the national applicant pool, to the percentage admissible without the use of racial preferences, or to the percentage of admitted members who choose to attend if admitted without racial preferences …Arguably, the most appropriate comparison would be between the percentage of a particular minority group's members in the applicant pool and the percentage of that group admissible in the absence of racial preferences."[90]

This last suggestion of a possible benchmark appears not only to be supported by *Croson's* observation, as Bloom notes, that a nonqualified pool would be of little significance as a basis of comparison. It also appears to be supported by *Grutter*'s admonition that the use of racial preferences be used only when necessary, for a limited time and only when race-neutral alternatives do not promise to yield a diverse student body. In fact, only by comparing racial groups in the applicant pool to the percentage of that group admissible without racial preferences do we truly come to see the need for race-conscious considerations. If for instance, the percentage of those minority groups admissible without so called racial preferences in the overall applicant pool is significantly lower to the point that a critical mass cannot possibly be sustained without the benefit of such consideration, then we know that the use of race-conscious considerations are warranted for the admission cycle.

PART VIII

Three Proposals For Race Conscious and Race Based Financial Aid Allocations

[89] Grutter, 123 S.Ct. at 2342.

[90] Bloom, *supra* note 6 at 500.

Once the admissions offer is extended, there are three principle ways in which financial aid may be allocated to achieve this critical mass of underrepresented racial minorities. The first approach represents the least legally vulnerable doctrinal approach under current interpretations of Grutter and Gratz, while the last two approaches represent normative theoretical proposals to allocate financial aid in a pure race-based fashion. These three approaches include: (1) employing race-plus considerations in holistic race-conscious allocation determinations of financial aid. The analysis for consideration of race-conscious financial aid would likewise mirror the analysis for admission under *Grutter* and *Gratz*. This approach is the one most likely to be endorsed by the courts; (2) allocating race-based financial aid directly from university funding while maintaining race-conscious admissions process under *Grutter* and *Gratz*. This approach attempts to distinguish the financial aid context apart from the admissions context at issue in the Bollinger cases; (3) administering race-based financial aid selecting recipients for private donor, race-restricted, grants while maintaining race-conscious admissions process under *Grutter*. This approach attempts to offer a theoretical alternative to the current policy guidance provided by the U.S. Department of Education that often is filled with internal contradiction in application. I discuss these three approaches in turn below.

(1) *Race Conscious Allocation As A Plus Factor*

What I propose here is a multi-step step analysis to be conducted by a joint admissions and financial aid office staff. The analysis begins by first asking, is there a critical mass of racial minorities, both underrepresented and those of various national origins admissible without race-conscious consideration after subjecting each applicant to full competition in a one track admission review process? If so, there is no need for race conscious consideration in the admission process. If not, race conscious consideration is warranted. A race plus factor approach is permissible. Once the admission offer is extended, admissions staff should ask whether the number of minority students that have accepted the offer and matriculated constitute a critical mass. If so, is there a critical mass of students and there is no need for the distribution of race-conscious financial aid (at least in the entering year. The analysis may be repeated in order to retain those upper-class minority students already on campus). If not, there is a need for individualized consideration of race-conscious scholarships and financial aid to recruit and attract a diverse critical mass that would actually exist in the classroom.

What might have looked like a diverse entering class may no longer be the case if minority students ate unable to attend because of costs. In other words, the entering class is threatened to become less diverse without the consideration of race as a plus factor in financial aid allocations. Therefore, in order to determine financial aid recipients, finance office staff, in conjunction with admissions staff, might require each applicant to write a "diversity of perspective" essay or personal statement that would take into account all the diversifying factors for the competitive allocation of financial resources including the consideration of race. In this fashion, all recipients are placed in the cauldron of competition on equal footing with no set asides. Each competes for resources in a matter that will be upheld as sufficiently narrowly tailored to pass constitutional strict scrutiny.

(2) *University Funded Race-Based Scholarships*

Another approach that is admittedly all but certain in light of *Gratz* is to distinguish the financial aid context distinctly altogether from the admission context. In so doing, the doctrinal reach of *Grutter* and *Gratz* would be limited as universities and colleges could take into account race more freely in order to achieve a critical mass of underrepresented minorities. But how is this theoretically possible in light of *Grutter* and *Gratz*? In fact, the majority in *Grutter* recognized that strict scrutiny must be applied within the specific context or program in question. As the court noted, the narrow tailoring "inquiry must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity."[91] Accordingly, calibration might in fact differ in the financial aid context than the admission aid context to address the distinct issues of race and financial need in order to achieve a student body. To this end, a university must demonstrate "that the means chosen fit the compelling goals closely. As the Supreme Court has noted, the fit need not be perfect, but it must be reasonable and it must "represent not necessarily the single best disposition but one whose scope is in proportion to the interest served."[92] It is possible by re-conceptualizing race based financial aid not as a set aside.

When the admissions context ends, it is clearer that all Blacks, Native Americans and Latinos have competed in a one-tier track admissions process. Thus, the very fact that racial minorities have successfully competed for a seat does not render financial aid a set aside when its principal aim is to allow the student remain in that earned seat. This is qualitatively different from reserving seats in the admissions process as was the issue in

[91] Grutter,123 U.S. at 2341.

[92] Florida Bar v. Went For It, Inc., 515 U.S. 618, 632 (1995).

Bakke. In *Bakke*, special candidates in a separate admissions program were not required to meet the 2.5 grade point average cutoff and were not ranked against candidates in the general admission process although sixteen seats were reserved. Nor is it qualitatively the same as permitting contract set asides as in *Croson* that were not subjected to the full unprotected process of competitive bidding.

Finally, the very fact that the university funded, race-based scholarship would not purport on its terms to compensate for past discrimination places it on different constitutional footing than the Benjamin Banneker scholarship at issue in *Podberesky*. There, it was clear that the race-exclusive scholarship suffered from, *inter alia*, the constitutional defect of insufficient narrow tailoring precisely because it posed an undue burden to non-beneficiaries, to wit: non-African-Americans.

But even on this ground, the university funded race based scholarship still presents no such concern. Financial aid packages are set based upon information that is compiled by the Free Application For Federal Student Aid (FAFSA).[93] Given the fact that most schools will reduce their financial aid funds in direct proportion to funds a student receives from the federal government, one commentator wonders whether Podberesky himself would not have seen his race-exclusive scholarship reduced or received some other form of aid.[94] When there is such an offsetting mechanism in university financial aid based upon a greater amount of federal funds received, it is quite difficult to say that one has been unduly burdened by virtue of the scholarship solely because of their race. Moreover, this type of compensatory offsetting in financial benefits is wholly different in character from the zero sum battle for an admission seat that was denied Jennifer Gratz and Allan Bakke.

A Question Of Merit?

Moreover, it is questionable whether an undue burden test should apply in the financial aid context. One fundamental distinction worth noting between admissions and financial aid, is that in the former, there is an expectation that good grades, good test cores and a competitive showing on other supposed "objective" criteria will be awarded in the form of an admissions offer. To some extent this may also be true of what is referred to as "merit" scholarships.

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[93] *See* Focus on Financial Aid: The Basics, Steps to College (Jan/Feb. 2001) *available at* http://www. nacac.com/p&s_steps.html.

[94] Amy Weir, *Should Higher Education Race-based Financial Aid Be Distinguished From Race-based Admissions?*, *supra* note 59.

The notion of merit as one's demonstrated ability or achievement is but one basis for judicial deference to a university driven mission where the value of diversity is an alternative, but legitimate, aim. As opposed to "merit", the notion of value in this context signifies a sense of worth in usefulness or importance to the university. Therefore, the university is best able to determine how to pursue policies, and allocate aid, in a manner that consistently reflects these institutional values. Thus, whereas the intrinsic conception of merit exist entirely in the domain of individual capacity to leverage academic ability or achievement, it is an incomplete picture. For when we say there is an extrinsic value to diversity, we are essentially saying that value is always relative to the utility and significance any given candidate brings to the table. But even here, the distinction collapses very often in the admissions context. But it also in the context of financial aid decisions where the *value* of an applicant to a college or university determiners whether and to what extent a prospective candidate may receive *merit*-based aid. There is still little in the way of a definitive entitlement.

To further illustrate this proposition, consider the following scenario between two students: Student A and Student B.

Distinguishing Race-Based Considerations
In The Admissions and Financial Aid Contexts

Student A is a Caucasian male history teacher at Taft, a prestigious predominantly white boarding school in New England and a graduate of Princeton University *summa cum laude* and Student B, a female minority calculus teacher at an inner city school who graduated from Hostos Community College and City College, is known to work well with a diverse set of students. In an admission context, it is clear Student A is meritorious and will likely be admitted. It is also clear that Student B is technically qualified and is also admissible under eligibility criteria. But it remains uncertain whether Student A has "value" in the same sense as Student B in a graduate school of education whose institutional mission is deeply rooted in educating the surrounding inner city community that has important historic ties to the university's founding. The value of Student B, notwithstanding credentials, may be greater than Student A where there is a diverse racial demographic of learners and a dearth of upper-level math teachers in the local community where graduates of the school are desperately needed. Student B would be a better "fit" with the institutional values of the graduate school than Student A who statistically is less likely to teach in the local community upon graduation or whose record of teaching experience indicates he would not be as effective

teaching in a classroom filled with racially and ethnically diverse math students.

However, in the financial aid context, a different set of considerations may govern in a good faith attempt to achieve a critical mass. Student A is able to pay ¾ of his annual tuition. It is apparent that Student B, on the other hand, has communicated she is simply not able to attend without scholarship and fellowship support. General institutional funds available for need-based and female undergraduate math majors are not sufficient to offer Student B a full ride while still being capable to provide aid to other students in need. In fact, it is clear that while Student B would need a full grant in order to matriculate, a great number of other non-minority, male and female students would need the same amount as well. Student B would qualify for the only additionally available funds: (1) a race-based university administered scholarship offered by a private donor and; (2) funds that are potentially available to Student B as a race-exclusive scholarship if the law permits it. Are there different considerations in taking race into account the same in the financial and context than in the admissions context? Should *Grutter* and *Gratz* be extended to financial aid scenarios like these playing out across the nation? Is there a basis for a distinction in financial aid that would permit the university to dedicate the lion share of institutional funding of race based aid to Student B while not allocating a similar amount to Student A?

The above scenario indicates that in the grand expanse of financial aid that may include scholarships, there remains no single entitlement to aid based upon some universal notion of merit and value. No one is guaranteed or entitled to receive financial aid. Accordingly, it is hard to argue that one has been unduly burden by the denial of financial aid solely because of their race. Many factors may play into the decision to award and not to award aid that an expectation that one is entitled to receive a general institutional grant may be regarded as unreasonable. Further, a college or university may decide to extend funds based upon athletic ability, linguistic skill, Scottish lineage, undergraduate major, left handed dexterity and a host of other bases that are likely to exclude many minorities in a manner that is sure to unduly burden some. Yet, it can hardly be said that these minority non-beneficiaries are excluded from financial aid as a whole on the basis of their race. Likewise, the same applies to white students who may inconveniently fall outside the purview of these scholarship eligibility criteria.

Discretion, Legitimacy & Selectivity

More so than in the admission scheme, the award of financial aid is a matter of greater institutional discretion and the discretion of scholarship donors. Alumni, research foundations, fellowship programs, national and regional professional associations as well fortune 500 companies such as those featured in the "3-M Brief" may very well grant restricted and unrestricted discretionary funds to learning institutions that will ultimately comprise a reserve pool of university funded scholarships and university administered scholarships. In the exercise of its reasoned discretion, many donors may well conclude that the contribution of funds or the allocation thereof best represents what they believe are the best return on its investment. That judgment should not be impinged upon or frustrated merely because of judicial interference. Furthermore, for universities, an additional layer of discretion permeates decisions in the allocation of funds, whether donated or even if the monies are directly fundraised by university official themselves in order to execute its own policies. Thus, financial aid allocations may very well embody a policy to fund students it believes may potentially contribute to a skilled, but underrepresented workforce more generally and perhaps to the workforce of these donors in particular. In any case, the policy judgment of donors and universities require a modicum of judicial restraint when it comes to how these important institutions achieve racial diversity through financial aid.

But if the exercise of professional and academic discretion in the allocation of grants are not enough to accord judicial deference, intrusive judicial oversight in the use of race in financial aid is troubling for yet another reason. Just as students do not possess a legal guarantee or entitlement to financial aid, neither do they have such a guarantee when it comes to how much a student may receive of financial aid. For the judiciary to second guess whether "Student A" should in fact have receive more grant funds than Student B" or an equal amount would embroil the bench in the policy judgments that go to the core of a university's institutional mission and autonomy and its entitled deference to achieving the real pedagogical benefits of diversity.

This last component is of critical importance. Observers will recall *Grutter*'s pronounced discussion of the "real" benefit of race-based diversity, rather than mere "theoretical," to wit, it yields a credible legitimacy when national leadership is diverse.[95] Justice O'Connor writes:

[95] Grutter, 123 S. Ct. at 2340.

> In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.[96]

Education is key to national legitimacy because, for O'Connor, it provides the training ground for a diverse national leadership to develop. This diverse leadership in turn fosters a sense of legitimacy of a democratic nation that reflects all of its citizens.[97] Accordingly, the critical mass analysis must be performed twice to ensure that of those admitted, there is an actual critical mass or racial minorities who can afford to remain on campuses through scholarships as this is the only way universities can ever begin "to cultivate a set of leaders."

Therefore, the question of legitimacy extends not only to ensuring a diverse set of national leaders, but to the very institutions themselves that are charged with the responsibility to create those leaders. In declaring that "all members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions", O'Connor indicates that legitimacy is not just on the macro level of national leadership, but it also implicates the micro level of individual feeder institutions. This important legitimacy, in turn, engenders a parallel level of accountability that rests on each individual institution to fulfill it commitment to educate every American of every hue, national origin and race, both as a democratic and economic matter. Accordingly, when viewed in this way, it is clear why Michigan chose not to simply lower it admissions standards as Sacalia suggested.

Scalia nonchalantly stated to Michigan Law School counsel, Ms. Mahoney:

> "Now, if Michigan really cares enough about that racial imbalance, why doesn't it do as many other State law schools do, lower the

[96] *Id.* at 2341.

[97] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 at 312-313 (Powell, J., concurring)(quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967))("[T]he 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples."

> standards, not have a flagship elite law school, it solves the problem."[98]

But query whether it does. If, as is suggested above, there is indeed a macro and micro level of legitimacy concerns, and if there is a direct nexus between the legitimacy of national leaders and those of feeder institutions respectfully, then it is a *non sequiter* to suggest that simply lowering the standards "will solve the problem." The fact remains that the legitimacy of future national leaders a university may produce depends in no small measure upon the confidence we put into the institution's legitimacy that produced these leaders in the first instance. Therefore, a university that lowers its standards may very well be less respected in leadership circles and in global markets. In a way that undermines the needed legitimacy of our leaders of color.

The ramifications of Scalia's suggestion to lower standards also means the military will have less educationally prepared officers to assume leadership reigns that became such a critical concern of several prominent retired military generals. The idea is that because racial diversity will ensure broad legitimacy in a racially and ethnically diverse world, the face of America must resemble those of its officer core (and other nations that have long seen their interest diametrically opposed to our own). The group of twenty-nine retired military and civilian leaders, included General H. Norman Schwarzkopf, who directed the allied forces in the 1991 Gulf War, Robert McFarlane, who was President Reagan's national security adviser, Admiral William T. Crowe, who was chairman of the Joint Chiefs of Staff from 1985 to 1989, and General Wesley Clark, who was Supreme Allied Commander in Europe from 1997 to 2000. These military officers also took note of the nexus between legitimacy and racial diversity:

> In the interest of national security, the military must be selective in admissions for training and education for the officer corps, *and* it must train and educate a highly qualified, racially diverse officer corps in a racially diverse educational setting. It requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective. Like our military

[98] *See* United States Supreme Court Transcript at 30-31, Grutter (No. 02- 241) (Oral Argument of Maureen E. Mahoney for Respondents Lee Bollinger et al.)

> security, our economic security and international competitiveness depend upon it. An alternative that does not preserve both diversity and selectivity is no alternative at all.[99]

In their brief, it is clear that the generals comprehend the dual nature of preserving diversity without sacrificing selectivity and international competitiveness in the same manner that Ms. Mahoney and the prestigious corporations in the 3-M Brief also suggest. On the other hand, Chief Justice Rehnquist, Justices Scalia and Thomas's response seems to suggest that these twin aims are mutually exclusive. Perhaps they are. However, it is also logical to assume that sacrificing entry standards of flagship institutions altogether as they suggest will do more to harm global competitiveness, multicultural competence and national security overall than to give only a plus factor consideration to racial diversity. If there were any rebutting arguments or evidence to suggest this would not result from disregarding selectivity and diversity, it was not forthcoming from these skeptical justices. Moreover, as discussed earlier, race neutral alternatives hardly promise at this current time to be effective in attracting racial minorities as it does poor whites. Thus, without a race-conscious scholarship program, universities may fail to adhere to their inherit democratic function to educate all racial groups. But even here, it remains an open question whether even marginally weightier race-conscious plus factors can even lead to the meaningful critical mass numbers in the final analysis when among other diversifying factors are calculated in the applicant pool.[100]

Indeed, one primary economic justification for tax exemption of colleges and universities under market failure theory is relevant to the military generals and O'Connor's diversity concerns because education is viewed as a public good which is not democratically distributed to all.[101] In essence, the subsidy the federal government extends by recognition of tax exempt status to higher education institutions is an important recognition of their importance to educate leaders and an informed citizenry.[102] Therefore, arguably universities fulfill their

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[99] *See* Brief of Amici Curiae Lt. Gen. Julius W. Becton, Jr., et al. at 29-30, Grutter (No. 02-241).

[100] Bloom, *supra* note 6, at 504-05.

[101] See Lester M. Salmon, AMERICA'S NONPROFIT SECTOR: A PRIMER 7-9 (1992).

[102] This is the classic justification under "subsidy theory", see H.R. Rep. No. 75-1860, at 19 (3d Sess. 1938) *See also* Nina J. Crimm, An Explanation of the Federal Income Tax Exemption For Charitable Organizations: A Theory Of Risk Compensation, 50 Fla. L. Rev. 419 (1998) (recounting that the

core tax exempt function by broadening the opportunity to a racially and economically diverse community of learners otherwise not served.[103] The reciprocal obligation, therefore, of colleges and universities is to utilize its own grants and scholarships to further advance its institutional mission of campus diversity. Naturally, just as the government extends by recognition tax exempt status to higher education institutions as evidence of its mission to educate diverse students, the university extends by recognition financial aid to underrepresented minority students as evidence of its endorsement of diversity as an institutional commitment.

PART IX

Race-Based Administered Funds

That an institution subjects itself to liability merely by administering a race-based scholarship appears draconian in application. In these cases, it is not necessarily its own funds that have been called into question. Nor is the source of those funds what renders the scholarship constitutionally suspect under the DOE's formulation. As discussed earlier, DOE's formulation is inconsistent with the Bollinger cases on a number of levels. However, another important inconsistency is worth discussing here. The very fact that *Grutter* permits some form of race as a factor in administering an admissions program suggest that a university may also lawfully administer a financial aid program that similarly uses race. Whether this proposition would extend to restricted race-exclusive scholarships, however, remains uncertain in light of *Gratz*, but common sense suggests that it should. Why should a university potentially target itself for lawsuits for administering race-based scholarship when the race-based preference reflects the donative intent of private donors rather than the university itself. To be sure, concerns that a university may endorse or place its imprimatur on unlawful racial discrimination is the principle operative concern animating such a rule. Yet it is clear in other legal context that this incidental

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exemption from taxation is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriation of public funds, and by the benefits resulting from the promotion of the general welfare. *See also* McGlotten v. Connally, 338 F.Supp. 448, 456, (D.D.C. 1972)("[T]he Government relieves itself of the burden of meeting public needs which in the absence of charitable activity would fall on the shoulders of the Government.")

[103] *See also Should Race Count? A Policy Discussion On The Future of Affirmative Action*, Century Foundation, *at* http://www.tcf.org/ Events/ 033103_AA/transcript.pdf.

administration of funds simply does not give rise to liability. In the Establishment Clause context, for instance where tax dollars are diverted to colleges and universities often reflected an institutional commitment, the question of endorsement arose. In *Zelman v. Simmons-Harris*, tuition aid was distributed to parents according to financial aid need and directed in accordance with parental wishes of where parents choose to send their children. The vast majority of tuition aid nonetheless went to religious schools which provided education at a lower, affordable cost than other nonsectarian schools in the program. Nonetheless, the Supreme Court found that the Ohio Pilot Project did not amount to state endorsement of religion because the expenditure of aid reflected the private choices of students and parents. Likewise, with race-based scholarships, I suggest that the mere administration of funds should not amount to university endorsement of racial discrimination simply because the race-based preference of restricted grants reflects the private choices of donors, not universities. Further, the Supreme Court in *Mitchell v. Helms* [104] relied heavily on recent cases such as *Agostini v. Felton*[105] to find that a program was neutral only if the government aid was directed as a result of genuinely independent and private choice of individuals.

The Court in *Zelman* gave lip service to the other aspect of neutrality, namely that the Ohio Pilot Program does not somehow advance or differentiate between religions. However, although no religion was differentiated, it could hardly be said the court honored this critical component of neutrality as a matter of intellectual honesty. Indeed, the court is able to set this neutrality concern aside and in so doing, it functionally, although not formally, overruled *Everson v. Board of Education of Ewing Tip*.[106] There it was said that "[n]o tax in any amount, large or small, can be levied to support religious activities or institutions, whatever they may be called, or whatever form they mad adopt to teach or

[104] 530 U.S. 793 (2000). In *Mitchell,* the Court endorsed and defined the new *Agostini* test. It proceeded to consider government school aid under the first two prongs of *Lemon v. Kurtzman,* 403U.S. 602 (1971). However, when reaching the second element as whether government aid neither advance or prohibit religion, the court employed the revised *Agostini* test to determine if the primary effect of the program advanced religion.

[105] 521 U.S. 203 (1997). The *Agostini* test is a revised version of the *Lemon* test to address the question of state aid. Justice O'Connor set forth three new requirements. First, aid cannot result in the governmental indoctrination of a religion. Second, there can be no discrimination among different religions. Third, there can be no excessive entanglement with religion. The *Zelman* never addressed the question of excessive entanglement. As in *Mitchell,* the *Zelman* court examined the first two prongs of the *Lemon* test.

[106] 330 U.S. 1 (1947).

practice religion.[107] As Justice Souter ask: "How can a court consistently leave Everson on the books and approve the Ohio vouchers? The answer is that it cannot."[108] The analogy may also help to explain why scholarships that are open to all races might be disproportionately awarded to Native Americans because as is *Zelman*, where grants did not discriminate between religious and nonreligious schools, it did not matter that funds disproportionately ended up in the coffers of 96.6% of religious schools.[109] Moreover, the Zelman analogy is also useful in showing that the use of public state revenue for race-based scholarship may not necessarily negate neutrality since private individual choice takes on new significance in the analogy to *Zelman*.

However, because *Zelman* tuition aid did not discriminate between religious and nonreligious schools, the same cannot be said for pure race-based (as opposed to race-conscious) scholarships which do make a clear distinction in eligibility criteria. The analogy, however, is not intended to replicate the identical structure as the Ohio Pilot Project, but merely to illustrate that a scholarship that is payable to the parents or the student entitled to the scholarship is directed in accordance wherever the parent and student wish, and not the university. Thus, there is a multi-layered analysis of private choice. The private choice of donors to restrict aid on the basis of race and the private choice of scholarship recipients to direct the aid to whatever institution would be acceptable. This accounts for why a Gates Millennium scholarship or United Negro College fund might withstand strict scrutiny for each involves private donors and private recipients without any university intervention.

As in *Mitchell*, the *Zelman* court examined the first two prongs of the *Lemon* test. Accordingly, the Court never addressed the question of excessive entanglement of religion separately, which after *Agostini* has become more prevalently conflated into the "effect" inquiry.[110] It is nonetheless helpful, however, to briefly revisit what the *Agostini* court believed constituted excessive entanglement because OCR's prohibition on institutions that "administer" race based financial aid suggest colleges and universities become unduly or excessively entangled with the impermissible use of race. Left unclarified,

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[107] *Id* at 16.

[108] *Zelman*, 536 U.S. at 688.

[109] *Id.* at 703.

[110] As the court in *Agostini v. Felton* notes:

> …to assess whether an entanglement is "excessive" are similar to the factors we use to examine "effect."…Thus it is simplest to recognize why entanglement is significant and treat it-as we did in Walz—as an aspect of the inquiry onto a stature's effect."

"administering" race-based scholarship funds can mean just about anything and may be overly-inclusive. In theoretically following the Establishment Clause analogy to its logical endpoint, it would be reasonable to assume that a university violates the law by administering race-exclusive funds, unless the administration of those race-exclusive scholarships were somehow deemed an "excessive" entanglement. In looking to the factors in *Agostini* as to what comprises excessive entanglement, we learn that: (1) pervasive monitoring; (2) administrative cooperation and (3) the increased dangers of political divisiveness are relevant factors to consider.[111]

To be sure, in a private, race-based restricted scholarship where a college selects candidates, there is bound to be some administrative cooperation. Likewise, in an institution where minority race-based scholarships come under the public scrutiny of a predominantly white student body, the very distribution and restricted eligibility criteria of these minority race-exclusive scholarships are sure to enhance the dangers of political divisiveness on these campuses. But query whether these two factors combined render a race-based scholarship excessively administered? The *Agostini* court writes: Under our current understanding of the Establishment Clause, the last two considerations are insufficient by themselves to create an "excessive entanglement."[112]

Burdensome, pervasive monitoring might very well suffice to strike down a university administered race based scholarship under this analogy. Cases where such a concern arise may occur where restricted scholarships require universities to interview, select and monitor minority scholarship finalists, or to monitor and report their grade point averages from semester to semester to donor recipients as potentially stipulated in the scholarship grant. Pervasive monitoring may also require periodic reviews to ensure continued eligibility if the scholarship calls for regular assessments. Likewise, any combination of the above monitoring requirements or the combination of monitoring requirements in conjunction with close administrative cooperation that may increase political divisiveness will surely fail as an excessively university-administered race-based scholarship.

However, it is clear that by mitigating monitoring, interviewing and reporting requirements, donors can theoretically preserve the donative intent of scholarship grants that so happen to be university monitored. For instance, donors can limit some of the reporting requirements by a university and shift that responsibility instead to the scholarship recipient directly who can

[111] 473 U.S. at 413-414.
[112] *Id.*

collect and share transcripts, update reports their academic progress and certify its continued eligibility. Likewise, donors can follow up with candidates that are initially identified by the college or university.

The novel application of the Establishment Clause analogy, while not identical, speaks to real issue of neutrality that is implicit in the debate of administering race-based scholarships that should be truthfully acknowledged. There is no concern about improper university indoctrination of race as the *Grutter* court has already established race-based diversity as worthy of a compelling state interest. Moreover, there is no concern that a college or university would establish an imprimatur on race-based scholarships merely or solely because it identifies potential candidates meeting specified eligibility criteria which have been established not by the university, but by private donors. Although on its face such funds are not neutral to race in the same way funds were facially neutral to religion in *Zelman*, it is clear that the private choices of donors, like parents, provide a theoretical basis to "immunize" universities from liability. In today's day and age, it is exceedingly difficult to justify race-based/race-exclusive scholarships, particularly in light of the Bollinger cases. Conversely, race-based aid is the most effective means to achieve underrepresented racial diversity of Native Americans, native Blacks and non-white Latinos. These diametrically opposed and unyielding realities will mean that well intentioned universities will now have to code aid to correlate to racial characteristics such as sickle cell anemia in order to avoid frustrating its institutional mission-driven diversity they have come to value. Race-based aid should be distinguished for a number of doctrinal and policy reasons from admissions. If not, form will triumph over substance in the allocation of financial aid to racial minorities through disguised and contrived correlations that only reflect the enduring significance of race.

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