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## Dog Wags Tail: The Continuing Viability of Minority-Targeted Aid in Higher Education

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# Dog Wags Tail: The Continuing Viability of Minority-Targeted Aid in Higher Education

OSAMUDIA R. JAMES\*

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## INTRODUCTION

In the 2003 *Grutter v. Bollinger*<sup>1</sup> and *Gratz v. Bollinger*<sup>2</sup> cases, the Supreme Court addressed the use of race in the admissions policies of institutions of higher education, holding that the pursuit of diversity was a compelling interest which would justify the consideration of race. The Supreme Court also freed institutions to pursue a “critical mass” of minority students through narrowly tailored policies in which race was only one of several factors to consider when admitting students.<sup>3</sup> The Supreme Court did not, however, address the use of race in any context outside of admissions, creating uncertainty as to how broadly the Court’s pronouncements could be applied. This Article seeks to resolve some of the uncertainty by exploring the constitutionality of “minority-targeted aid” policies—financial-aid policies that direct institutions to consider race when making award determinations or that limit aid eligibility to students from particular races and ethnicities.

Based on the Supreme Court’s assertion that diversity is a compelling interest which yields educational benefits, many scholars believe that race-conscious recruitment, outreach, financial aid, and support programs may all be justified if they are narrowly tailored.<sup>4</sup> Although scholars and practitioners alike are unsure as to how exactly the

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\* Associate Professor of Law, University of Miami School of Law. I am grateful to Professor William Clune, at the University of Wisconsin, for the many hours he patiently spent guiding this project as my advisor. I am also grateful to Professor Roberto Corrada, Professor Gil Carrasco, and Professor Michael Olivas for detailed and thoughtful feedback on the analysis in the article. Finally, I would like to thank my husband, Kamal James, who has never failed to support me in all my endeavors, professional or personal.

1. 539 U.S. 306 (2003).

2. 539 U.S. 244 (2003).

3. *Grutter*, 539 U.S. at 325–30.

4. See THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., REAFFIRMING DIVERSITY: A LEGAL ANALYSIS OF THE UNIVERSITY OF MICHIGAN AFFIRMATIVE ACTION CASES, A JOINT STATEMENT OF

Supreme Court would analyze minority-targeted aid, most apply the 2003 holdings directly to minority-targeted aid programs as if the goals, benefits, and burdens of financial aid and admissions programs are exactly the same.<sup>5</sup> Under such an analysis, minority-targeted aid can only be awarded in a process that uses race as one factor for consideration when selecting award recipients, and race-exclusive aid, which restricts the group of students eligible for the aid, is unconstitutional.

There is, however, little precedent to support this legal analysis of minority-targeted aid. Only two lower court cases have addressed minority-targeted aid, and as discussed in Part I.A., neither case addressed the use of minority-targeted aid in the pursuit of diversity.<sup>6</sup> Moreover, although the Department of Education's Office for Civil Rights (OCR) issued a 1994 memo endorsing both race-conscious and race-exclusive aid, OCR has since taken a seemingly more hostile stance on the issue.<sup>7</sup> In the absence of clear guidance from the courts, organizations opposed to the use of race-conscious policies in higher education have worked together to challenge the use of minority-targeted aid programs on college campuses.<sup>8</sup> The result has been widespread retreat by institutions of higher education from minority-targeted aid. Indeed, minority-targeted aid has been described as being in a "state of flux and confusion."<sup>9</sup>

This Article argues that both race-conscious and race-exclusive aid are constitutional. Part I explores the current status of minority-targeted aid, presenting both the current legal status of minority-targeted aid, highlighting the uncertainty among institutions of higher education regarding use of the aid and the resulting retreat by institutions from the aid in response to litigation threats. Part II conceptualizes minority-targeted aid as an enrollment-management tool and considers how strict-

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CONSTITUTIONAL LAW SCHOLARS 2 (2003), available at [http://www.civilrightsproject.ucla.edu/policy/legal\\_docs/Diversity\\_%20Reaffirmed.pdf](http://www.civilrightsproject.ucla.edu/policy/legal_docs/Diversity_%20Reaffirmed.pdf).

5. See, e.g., *id.* at 21–22 (applying the standard of analysis articulated in *Grutter and Gratz* to draw legal distinctions between admissions and financial aid); Elizabeth B. Guerard, *The Lingering Question of Race*, U. BUS., June 2005, available at <http://www.universitybusiness.com/viewarticle.aspx?articleid=388> (referring to interview with education law attorney during which attorney applies questions posed by the Court in the Michigan cases to minority-targeted financial-aid analysis).

6. See *Podberesky v. Kirwan*, 38 F.3d 147, 154–55 (4th Cir. 1994) (striking down a University of Maryland scholarship program reserved for African-American students because the University failed to show that its own segregated and discriminatory past justified the scholarships); *Flanagan v. Georgetown Coll.*, 417 F. Supp. 377, 385 (D.D.C. 1976) (striking down a Georgetown University Law Center scholarship program, which reserved sixty percent of funds for minority students who only constituted eleven percent of the student body, because the Law Center failed to demonstrate that minority students had disproportionate need for the funds).

7. In 2004, OCR issued a statement declaring that "[g]enerally, programs that use race or national origin as sole eligibility criteria are extremely difficult to defend." Peter Schmidt, *Not Just for Minority Students Anymore*, CHRON. HIGHER EDUC. (Wash., D.C.), Mar. 19, 2004, at A17.

8. For example, Roger Clegg of the Center for Equal Opportunity reports that in response to a campaign of letters threatening to file complaints with OCR regarding that institution's minority-targeted aid program, seventy colleges opened up the programs in question to nonminority students. *Id.*

9. JAMES A. BECKMAN, *AFFIRMATIVE ACTION NOW: A GUIDE FOR STUDENTS, FAMILIES, AND COUNSELORS* 109 (2006).

scrutiny analysis of minority-targeted aid is changed in that context, ultimately concluding that both race-conscious *and* race-exclusive aid programs are constitutional.

Minority-targeted financial aid has long been incorrectly conceptualized as a competitive process independent from admissions. In order to reap the benefits of a diverse student body, however, the pursuit of a critical mass of minority students must be a multistep effort. Step one is admission of minority students through an admissions process guided by the analytical framework established in *Grutter* and *Gratz*. The second step focuses on actually enrolling a critical mass of minority students, a goal that is often unattainable without financial aid. Accordingly, minority-targeted aid is correctly conceptualized as an enrollment-management tool used to give effect to admissions decisions. Like the admissions process sanctioned in *Grutter*, race-conscious aid is viable because it provides each potential aid recipient with an individualized review process in which race is only one factor to consider. Race-exclusive aid is also viable because although race or ethnicity limits eligibility, the aid is motivated by the legitimate pursuit of a critical mass of minority students. Moreover, individualized review is still required, and there is no undue burden on nonminority candidates as long as the amount of aid does not exceed what is necessary for enrollment management aimed at a critical mass.

#### I. MINORITY-TARGETED AID'S UNCERTAIN FUTURE

During the 2003–2004 school year, over \$122 billion of financial aid in the form of federal, state, institutional, and private sources was made available to students.<sup>10</sup> As the costs of higher education continue to sharply rise, scholars, critics, students, and their families have all paid increased attention to the use of financial aid, including minority-targeted aid, to not only meet student financial need, but to also influence student enrollment. This use of financial aid has been reflected in a shift in emphasis by institutions of higher education from need-based aid to merit-based aid.

As merit aid reemerged during the late 1970s and early 1980s, it expanded to include minority-targeted financial aid.<sup>11</sup> One of the first merit-aid programs implemented by Oberlin College, for example, was a scholarship for minority students that awarded high-achieving black and Latino students a \$4000 grant.<sup>12</sup> Similarly, a 1994 survey of liberal arts colleges found that all of the colleges surveyed reserved some of their merit scholarships for outstanding minority students and that even those institutions that did not give merit awards often offered minority students preferential aid packages consisting of more aid in the form of grants and less aid in the form of loans.<sup>13</sup> Even though minority-targeted aid can be considered affirmative action, it is still at its core a financial-aid program, and historical trends in financial-aid practices, including increased reliance on loans over grants, greater emphasis on merit relative to

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10. ALISA F. CUNNINGHAM, NAT'L CTR. FOR EDUC. STATISTICS, CHANGES IN PATTERNS OF PRICES AND FINANCIAL AID, at iii (2005).

11. ELIZABETH A. DUFFY & IDANA GOLDBERG, CRAFTING A CLASS: COLLEGE ADMISSIONS AND FINANCIAL AID, 1955–1994, at 151–55 (1998).

12. *Id.* at 157.

13. *Id.* at 157–58.

need, and higher tuition cost, have all affected the impact of minority-targeted aid in higher education.

Today, minority-targeted aid is distributed in two forms. The first form uses race as a “plus factor” or as one of many factors considered in selecting award recipients; for purposes of this Article, such aid will be referred to as race-conscious aid. The second form uses race to limit aid eligibility to applicants from a minority racial or ethnic group; such aid will be referred to as race-exclusive aid.<sup>14</sup>

Whether race-conscious or race-exclusive, minority-targeted aid is generally administered according to one of four models. In the first model, the institution develops criteria for aid eligibility, processes applications, provides funding for the awards, and selects the recipients.<sup>15</sup> In the second model, funding for the aid is obtained from both the institution and outside or private sources.<sup>16</sup> In the third model, funding for the aid is obtained exclusively through an outside or private source.<sup>17</sup> The fourth model completely eliminates the institution through the use of a private entity that provides the funding, selects recipients, and operates at “arm’s length” from the institution.<sup>18</sup>

Institutions that award race-conscious or race-exclusive aid according to the first three models are subject to federal scrutiny regarding their use of race in selecting award recipients; it is less clear whether aid awarded according to the fourth model is similarly subject.<sup>19</sup> Title VI of the Civil Rights Act of 1964 prohibits racial

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14. In higher-education parlance, the term “race-conscious aid” is generally used to refer both to aid that considers race as only one factor among many in selecting recipients and to aid that limits eligibility by race or ethnicity. The meanings assigned to the terms “race-conscious” and “race-exclusive” in this Article are used for the sake of clarity and are applicable to this Article only.

15. Gus Douvanis, *Is There a Future for Race-Based Scholarships?*, C. BOARD REV., Fall 1998, at 18, 22.

16. *Id.*

17. *Id.*

18. *Id.*

19. Debate exists about whether higher education constitutes a “contract for educational services” subject to scrutiny under 42 U.S.C. § 1981, which prohibits racial discrimination in the making of contracts. 42 U.S.C. § 1981 (2006). The provision is applicable to both public and private contracts and is applicable to contracts for educational services. *Runyon v. McCrary*, 427 U.S. 160, 168, 172–73 (1976); *see also* BECKMAN, *supra* note 9, at 113. The Supreme Court itself has recognized the applicability of § 1981 to private contracts and contracts for educational services, writing in *Gratz v. Bollinger* that 42 U.S.C. § 1981 “proscribe[s] discrimination in the making or enforcement of contracts against, or in favor of, any race.” 539 U.S. 244, 275–76 n.23 (2003) (citing *MacDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295–96 (1976)). The Court also said that “a contract for educational services is a ‘contract’ for purposes of § 1981.” *Id.* (citing *Runyon*, 427 U.S. at 172). Similarly, in *Grutter v. Bollinger*, the Court explained that “the prohibition against discrimination in § 1981 is co-extensive with the Equal Protection Clause,” and that because the law school’s admissions policy satisfied strict scrutiny under the Equal Protection Clause, it also satisfied § 1981. 539 U.S. 306, 343 (2003). Critics argue, therefore, that private scholarships awarded for education are “contracts” within the meaning of § 1981 and that even scholarships like those awarded by the United Negro College Fund (UNCF) might be subject to legal challenge once applied to a student’s tuition at an institution.

discrimination at any institution that receives federal funds, including federal financial-aid funding and research grants. Moreover, in response to a Supreme Court decision holding that Title VI's prohibitions on discrimination applied only to the particular programs or departments within institutions that were receiving federal financial aid,<sup>20</sup> Congress passed legislation in 1988 stating that federal financial aid received by any program within an institution obligated the entire institution to comply with Title VI.<sup>21</sup> Almost all institutions of higher education, public and private, receive federal funding in some form and are thus subject to Title VI's prohibition on discrimination. Title VI is a particularly strong section of the Civil Rights Act because it derives its power from the Spending Clause of the Constitution, which authorizes federal agencies to withhold funding from institutions that violate the Constitution. In addition, it creates a private cause of action for individuals to sue for violations of the Act.<sup>22</sup> Finally, the Supreme Court has concluded that Title VI's definition of discrimination is coextensive with the Fourteenth Amendment.<sup>23</sup> As such, institutions of higher education that administer minority-targeted aid are vulnerable to potent legal challenges that will ultimately be decided under the Court's Fourteenth Amendment strict-scrutiny rubric.

It is difficult to predict, however, how the Court's strict-scrutiny rubric will be applied to minority-targeted aid. To compound the uncertainty, existing court precedents and pronouncements from OCR have failed to provide consistent and dependable guidance as to how minority-targeted aid should be analyzed.

#### A. Judicial Precedents

Case law addressing minority-targeted aid is scarce. In 1976, the United States District Court for the District of Columbia decided *Flanagan v. Georgetown College*,<sup>24</sup> a case that predates both the decision in *Regents of the University of California v. Bakke*<sup>25</sup> and any Department of Education guidelines on minority-targeted aid. In order to increase minority enrollment, the Georgetown University Law Center reserved sixty percent of its scholarship funds for minority students, who made up only eleven percent of the student body.<sup>26</sup> A white student whose scholarship was funded exclusively by the unreserved funds, even though the funds reserved for minorities had not yet been exhausted, filed suit.<sup>27</sup> The court first noted that because there was no evidence of past discrimination by the Law Center, the financial-aid policy constituted affirmative action as defined in the Department of Health, Education and Welfare (HEW)

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20. *Grove City Coll. v. Bell*, 465 U.S. 555, 605 (1984).

21. 42 U.S.C. § 2000d-4a (2006).

22. Douvanis, *supra* note 15.

23. See Fullilove v. Klutznick, 448 U.S. 448, 517 n.1 (1980) (Marshall, J., concurring) ("In *Bakke* five Members of the Court were of the view that the prohibitions of Title VI—which outlaws racial discrimination in any program or activity receiving federal financial assistance—are coextensive with the equal protection guarantee of the Fourteenth Amendment."); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 284–87 (1978).

24. 417 F. Supp. 377 (D.D.C. 1976).

25. 438 U.S. 265 (1978).

26. *Flanagan*, 417 F. Supp. at 379–80.

27. *Id.*

regulations at the time.<sup>28</sup> These regulations applied Title VI to institutions funded by HEW and defined affirmative action as policies or programs enacted to "overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin."<sup>29</sup>

The court then decided that Title VI's prohibition against discrimination must be balanced against federal regulations that provide for affirmative action.<sup>30</sup> Accordingly, the ultimate question was whether the Law Center needed to allocate sixty percent of its funds to eleven percent of its students merely because they constituted a minority.<sup>31</sup> In response to that question, the court determined that when a process like admissions is permeated with social and cultural factors, separate treatment for minorities may be justified in order to ensure that all candidates are judged in a racially neutral fashion.<sup>32</sup> Financial need, however, "cuts across racial, cultural, and social lines," providing no justification for the conclusion that minority students with demonstrated financial need require more aid than nonminority students with the same amount of demonstrated need.<sup>33</sup> The disproportionate distribution of a sparse resource like financial aid to one group to the detriment of another group was a violation of Title VI.<sup>34</sup>

The next federal circuit court decision on minority-targeted aid would be decided eighteen years later, after the Court's decision in *Bakke* but before the decisions in *Grutter* and *Gratz*. In 1994, Daniel Podberesky filed suit against the University of Maryland at College Park (UMCP) because he was denied a Banneker Scholarship.<sup>35</sup> Although Mr. Podberesky was academically qualified, the scholarships were only awarded to African-American students.<sup>36</sup> Mr. Podberesky was Hispanic and therefore ineligible.<sup>37</sup> The race-exclusive Banneker Scholarships had been established as part of UMCP's desegregation plan to comply with the Civil Rights Act of 1964.<sup>38</sup> Funded from both state and private funds, the provision of financial aid on a race-exclusive basis had been approved by OCR.<sup>39</sup>

In response to the Fourth Circuit's insistence that the aid program be narrowly tailored to respond to the compelling interest of remedying the present effects of past discrimination, UMCP issued a report recommending the continuation of the Banneker Scholarships based on the present effects of UMCP's history of segregation and discriminatory acts against African-Americans.<sup>40</sup> Present effects of that history included the university's poor reputation in the black community, the underrepresentation of African-American students at the university, the high attrition

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28. *Id.* at 384.

29. *Id.* (citing 45 C.F.R. § 80.3(b)(6)(ii) (1975)).

30. *Id.* at 385.

31. *Id.*

32. *Id.* at 384.

33. *Id.*

34. *Id.*

35. *Podberesky v. Kirwan (Podberesky II)*, 38 F.3d 147, 152 (4th Cir. 1994).

36. *Id.*

37. *Id.*

38. *Podberesky v. Kirwan (Podberesky I)*, 956 F.2d 52, 54 (4th Cir. 1992).

39. *Id.*

40. Anne Wells & John L. Strobe, Jr., *The Podberesky Case and Race-Based Financial Aid*, J. STUDENT FIN. AID, Winter 1996, at 33, 35-38.

rates of enrolled African-American students, and the hostile climate for African-Americans on campus.<sup>41</sup>

The Fourth Circuit, however, was unconvinced that the university's segregated and discriminatory past justified the existence of the Banneker Scholarships.<sup>42</sup> In striking down the program, the Fourth Circuit cited concerns regarding inaccurate statistics on the underrepresentation and high attrition rates of African-Americans.<sup>43</sup> The court also considered the hostile environment on campus to be a result of societal discrimination, rather than the university's segregated past.<sup>44</sup> Moreover, the scholarship program was not narrowly tailored both because it was unclear how efforts to attract high-achieving Blacks already on their way to college would increase retention rates and because the university failed to demonstrate that it had considered race-neutral solutions to the retention problem.<sup>45</sup> Although the university appealed the case, the Supreme Court denied certiorari.<sup>46</sup> The decision not only prohibited race-exclusive scholarships at the University of Maryland, but it also served as a barrier to race-exclusive aid at all institutions within the Fourth Circuit, including other institutions in Maryland, as well as those in Virginia, West Virginia, and Delaware.

The *Podberesky* decision laid the groundwork for future challenges to minority-targeted aid within the Fourth Circuit. In 1996, a complaint filed with OCR alleged that Northern Virginia Community College's use of minority-targeted scholarships was in violation of the law as established in *Podberesky*.<sup>47</sup> A private foundation created by college officials funded the scholarships, but the foundation was located on campus and aid recipients were chosen by the college.<sup>48</sup> Although federal agencies typically decline to enforce circuit court decisions unless it is clear that an institution has misinterpreted a Supreme Court decision, the OCR ultimately concluded that the scholarship program was a violation of the *Podberesky* ruling;<sup>49</sup> the college could not prove that they were remedying past discrimination because the college had never discriminated against minority students.<sup>50</sup> If race-exclusive aid was to be made available to students through private sources, the college could not be involved with administration of the aid in any way. By enforcing the Fourth Circuit's *Podberesky*

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41. *Id.*

42. *Podberesky II*, 38 F.3d at 147.

43. *Id.* at 156–57.

44. *Id.* at 154–55.

45. *Id.* at 158–61.

46. *Podberesky v. Kirwan*, 514 U.S. 1128 (1995).

47. BECKMAN, *supra* note 9, at 109.

48. See Douvanis, *supra* note 15, at 22–23; see also Patrick Healy, *Education Department Sends Strong Warning on Race-Exclusive Scholarships*, CHRON. OF HIGHER EDUC. (Wash., D.C.), Oct. 31, 1997, at A47.

49. Healy, *supra* note 48. The OCR also considered the scholarship program to be a violation of the Department of Education's own policy on minority-targeted aid to cultivate diversity. *Id.* Data given to the OCR revealed that by 1994, retention rates for minority students equaled or exceeded those of white students at the college. *Id.* Accordingly, race-exclusive aid was unnecessary. *Id.* For a detailed discussion of the Department's own policy on minority-targeted aid, see *infra* Part I.B.

50. Healy, *supra* note 48.



decision, OCR implicitly endorsed the ruling, suggesting that the decision should be national policy.<sup>51</sup>

The D.C. District Court's ruling in *Flanagan*, the Fourth Circuit's ruling in *Podberesky*, and OCR's subsequent enforcement of the *Podberesky* ruling have raised concerns among institutions of higher education regarding the legality of minority-targeted aid, and race-exclusive aid in particular. The legal significance of the cases, however, is unclear. Although the *Flanagan* case essentially prohibited all racially exclusive financial-aid programs,<sup>52</sup> the holding is limited to the District of Columbia. Similarly, although endorsed by OCR as potential national policy, the *Podberesky* holding is limited to the Fourth Circuit. Moreover, *Flanagan* and *Podberesky* are remedial cases that focused on an institution's compelling interest in remedying past discrimination.

Both *Flanagan* and *Podberesky* were also decided before the Supreme Court decided *Grutter* and *Gratz*. The *Grutter* and *Gratz* decisions marked a shift away from the use of race as a remedial tool to the use of race as a tool to cultivate diverse student bodies. In the *Grutter* case, the Court affirmed Justice Powell's diversity rationale as explained in *Bakke*, establishing that diversity is a legitimate compelling interest that will justify the use of race in the admissions process as long as race is one of several competitive "plus" factors considered.<sup>53</sup> The Court's holding in *Gratz* also affirmed diversity as a legitimate compelling interest for institutions of higher education, although it struck down the admissions policy at issue for insufficient narrow tailoring.<sup>54</sup> Collectively, the two cases conclusively established that diversity is a compelling interest that justifies the use of race-conscious college programs. Unfortunately, the cases failed to address minority-targeted aid specifically. Neither case overturned the *Flanagan* and *Podberesky* holdings, both of which were based on efforts to remedy past discrimination. Nor do the *Grutter* and *Gratz* cases alter the Fourth Circuit's conclusion that the race-exclusive scholarship program at issue was insufficiently narrowly tailored. As such, the chilling effect of the existing court precedents regarding minority-targeted aid, and of the *Podberesky* holding in particular,<sup>55</sup> did not abate with the *Grutter* and *Gratz* decisions. Thus, minority-targeted financial aid remains in a "state of flux and confusion."<sup>56</sup>

### B. Guidance from the Office for Civil Rights

The Department of Education has only once formally issued guidance on the legal status of minority-targeted aid—in 1994, OCR issued a notice in the *Federal Register*.<sup>57</sup> Never revoked by OCR, and considered by practitioners to be the "bible"<sup>58</sup>

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51. *Id.*

52. BECKMAN, *supra* note 9, at 107.

53. *Grutter v. Bollinger*, 539 U.S. 306, 325–30 (2003).

54. *Gratz v. Bollinger*, 539 U.S. 244, 270–72 (2003).

55. BECKMAN, *supra* note 9.

56. *Id.*

57. Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964, 59 Fed. Reg. 8756 (Feb. 23, 1994).

58. Daren Bakst, *Race-Targeted Financial Aid: Untangling the Legal Web*, STUDENT AID TRANSCRIPT, Winter 2000, at 4, 4.

on the legality of minority-targeted financial aid, the notice clarifies how colleges, including historically black colleges and universities,<sup>59</sup> may use financial aid to promote diversity and minority access to institutions of higher education without violating federal antidiscrimination laws. The notice applies to student financial aid that is awarded, “at least in part, on the basis of race or national origin”;<sup>60</sup> as such, the notice applies to both race-conscious and race-exclusive aid. In drafting the notice, OCR consulted a then-recent Government Accountability Office (GAO) report concluding that those scholarships restricted to students of a specific race or ethnicity constituted a very small percentage of scholarships awarded to all students.<sup>61</sup>

The notice outlines five principles that represent the circumstances under which minority-targeted aid is legally permissible, according to OCR’s legal interpretations.<sup>62</sup> Under Principle 1, financial aid may be distributed to disadvantaged students, without regard to race or national origin, even if the awards disproportionately go to minority students.<sup>63</sup> Disadvantaged students include students from low-income families, students from single-parent families, and students from school districts with high dropout rates.<sup>64</sup> These awards are permissible, despite their potentially racially disproportionate effect, because the indicia of disadvantage have a demonstrable relationship to the institution’s educational mission; an applicant’s character, motivation, and ability to overcome an educational disadvantage are educationally justified considerations in both admissions and financial-aid decisions.<sup>65</sup>

Principle 2 permits an institution to award financial aid “on the basis of race or national origin if the aid is awarded under a federal statute that authorizes” its distribution.<sup>66</sup> The fact that there are such federal statutes, however, does not itself authorize states or institutions to create their own minority-targeted aid for a reason other than those outlined in the notice.<sup>67</sup>

Principle 3 allows an institution to award financial aid on the basis of race or national origin if it is necessary to overcome the effects of the institution’s “own past

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59. The notice addresses the unique status of historically black colleges and universities (HBCUs), particularly in light of Congressional findings regarding their “special role and needs . . . in light of the history of discrimination by States and the Federal Government against both the institutions and their students.” Nondiscrimination in Federally Assisted Programs, 59 Fed. Reg. at 8758. Accordingly, the Department interprets Title VI to permit these institutions to participate in student-aid programs established by third parties that target financial aid to black students across the country, even if the HBCUs must contribute their own institutional funds to participate in the program. *Id.* According to the Department, “[p]reclu[sion] . . . would have an unintended negative effect on [HBCUs’] ability to recruit talented student bodies and would undermine congressional actions aimed at enhancing these institutions.” *Id.* Otherwise, HBCUs may neither create their own race-conscious aid programs using institutional funds, nor accept privately donated funds restricted to use for race-conscious aid at HBCUs, unless the program satisfies the five general principles outlined in the notice. *Id.*

60. *Id.* at 8756.

61. *Id.*

62. *Id.*

63. *Id.* at 8757.

64. *Id.*

65. *Id.* at 8759.

66. *Id.* at 8757.

67. *Id.* at 8759.

discrimination.”<sup>68</sup> In such cases, a court or administrative agency should make a finding of discrimination.<sup>69</sup> A state or local legislative body may also make a similar finding if the legislative body has a strong basis in evidence identifying the discrimination within its jurisdiction for which remedial action is necessary.<sup>70</sup> In addition, an institution may award minority-targeted financial aid to remedy its own past discrimination without a formal finding, but it must be ready to demonstrate in court that there was a strong basis in evidence for concluding that the institution’s discrimination necessitated awarding minority-targeted aid.<sup>71</sup> Documentation of specific intent to discriminate is not necessary, and statistical evidence from which one can infer intentional discrimination against minority applicants may suffice.<sup>72</sup>

Principle 4 permits minority-targeted aid if an institution uses the aid to promote its First Amendment interest in cultivating diversity through recruitment and retention.<sup>73</sup> In this context, an institution may consider race or national origin as a “plus factor,” along with other factors, if the aid is necessary to further the institution’s interest in diversity and is narrowly tailored.<sup>74</sup> The Department presumes that the use of race as a plus factor is narrowly tailored as long as the institution periodically reexamines the necessity of its use of race.<sup>75</sup>

Principle 4 also permits an institution to use race or national origin as a condition of eligibility if the aid program is necessary to further an interest in diversity and does not unduly restrict access to financial aid for those students who do not meet the race-based eligibility criteria (i.e., the program is narrowly tailored).<sup>76</sup> OCR will determine, on a case-by-case basis, whether such programs are narrowly tailored based on the following factors: (1) whether a race-neutral means of achieving the goal would have been ineffective; (2) whether a less intrusive use of race would have been ineffective; (3) whether the use of race is limited in extent and duration and is applied in a flexible manner; (4) whether the institution regularly reexamines the continued use of the racial classification; and (5) whether the racial restriction unduly burdens students who cannot be beneficiaries of the aid.<sup>77</sup>

Finally, Principle 5 permits a recipient of federal financial assistance to distribute aid funded by private gifts restricted by race or national origin only if the aid is either distributed to remedy the effects of past discrimination pursuant to Principle 3 or distributed to achieve a diverse student body pursuant to Principle 4.<sup>78</sup> Privately

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68. *Id.* at 8757 (emphasis added).

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 8760. For example, evidence of a statistically significant disparity between the percentage of minority students in an institution’s student body and the percentage of qualified minorities in the relevant applicant pool might be sufficient. *Id.*

73. *Id.* at 8757.

74. *Id.*

75. *Id.* at 8761 n.10.

76. *Id.* at 8757.

77. *Id.*

78. *Id.* at 8757–58. To be sure, financial aid awarded on the basis of race or national origin may be provided by an organization that does not receive federal financial assistance, as Title VI does not apply to such organizations. *Id.*

donated funds that are not restricted by race or national origin can be used to fund aid that is distributed pursuant to Principle 1.<sup>79</sup>

To date, the notice guidelines remain the only complete and comprehensive guide regarding the permissibility of using race or ethnicity as a basis for awarding financial aid. In response to the Supreme Court's refusal to grant certiorari in *Podberesky*, the Department of Education's Office of the General Counsel issued a memo to college and university counsel across the country, reaffirming the Department's policy on minority-targeted aid as outlined in the 1994 notice.<sup>80</sup> The memo also clarified the holding in *Podberesky*, explaining that the Fourth Circuit did not rule that all race-targeted scholarships were impermissible but only that the university failed to prove that their scholarship program was narrowly tailored to remedy the present effects of past discrimination.<sup>81</sup> As such, the *Podberesky* decision did not invalidate Principle 4 of the notice, and institutions could still consider race when distributing financial-aid awards to cultivate diversity.<sup>82</sup>

In 1996, the Fifth Circuit, in *Hopwood v. Texas*,<sup>83</sup> struck down a race-conscious admissions program, writing that Justice Powell's diversity rationale in *Bakke* was not a legitimate compelling interest because Justice Powell did not speak for a majority of the Court. In response, the Office of the General Counsel issued a second memo reaffirming its position that minority-targeted aid was permissible in "appropriate circumstances" and stating that neither the Fifth Circuit's decision in *Hopwood* nor the Supreme Court's denial of certiorari in the case affected the Department's position.<sup>84</sup> The memo also elaborated on the Court's denial of certiorari, explaining that the denial neither affirmed nor reversed the Fifth Circuit's decision and that the Court had not necessarily departed from Justice Powell's diversity rationale in *Bakke*.<sup>85</sup> Finally, the Department expressed its belief that outside of the Fifth Circuit, it was permissible for an institution to "consider race in a narrowly tailored manner in . . . its financial aid program in order to achieve a diverse student body or to remedy the effects of past discrimination in education systems."<sup>86</sup>

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79. *Id.* at 8758.

80. Memorandum from the Office of the Gen. Counsel, U.S. Dep't of Educ., to Coll. and Univ. Counsel (Sept. 7, 1995), available at [http://www.acenet.edu/bookstore/descriptions/making\\_the\\_case/legal/ED\\_95\\_09.cfm](http://www.acenet.edu/bookstore/descriptions/making_the_case/legal/ED_95_09.cfm) (Memorandum on Race-Targeted Student Financial Aid).

81. *Id.* at 1–2.

82. *Id.* at 2.

83. 78 F.3d 932, 944 (5th Cir. 1996). A subsequent interpretation by the Attorney General of Texas stated that the *Hopwood* decision applied not only to admissions but to financial aid as well. The Attorney General of Texas, John Cornyn, eventually reversed the interpretation, noting that the pronouncement was too broad and should be limited solely to admissions. Bakst, *supra* note 58, at 7. The *Gratz* and *Grutter* holdings, however, have succeeded in overturning the ruling in *Hopwood*, establishing conclusively that diversity is a compelling interest that justifies the use of race-conscious college programs. *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

84. Memorandum from the Office of the Gen. Counsel, U.S. Dep't of Educ., to Coll. and Univ. Counsel (July 30, 1996), available at [http://acenet.edu/bookstore/descriptions/making\\_the\\_case/legal/ED\\_96\\_07.cfm](http://acenet.edu/bookstore/descriptions/making_the_case/legal/ED_96_07.cfm) (Memorandum on Impact of the *Hopwood* Decision).

85. *Id.*

86. *Id.*

As discussed above, however, OCR would go on to endorse *Podberesky* through its investigation of Northern Virginia Community College.<sup>87</sup> In addition to a finding that the college's scholarship program violated the *Podberesky* ruling, OCR also concluded that the program violated the Department's guidelines on minority-targeted aid.<sup>88</sup> Because retention rates for minority students at the college equaled or exceeded those of white students, race-exclusive aid was unnecessary under Principle 4.<sup>89</sup>

### C. Recent History

Based on the rulings in *Bakke*, *Grutter*, and *Gratz*, it seems certain that cultivating diversity is a compelling interest that justifies the use of race-conscious programs at institutions of higher education. Nevertheless, with only a dated OCR policy for guidance, and court precedents that are not necessarily applicable to aid distributed in the pursuit of diversity, institutions are still unsure about the viability of minority-targeted aid programs.

Moreover, the applicability of the *Grutter* and *Gratz* decisions to minority-targeted aid is subject to debate. Roger Clegg, Director of the Center for Equal Opportunity (CEO), has expressed his belief that the prohibition of discrimination outlined in the companion cases must "extend to scholarships, internships, summer programs, and the rest."<sup>90</sup> In contrast, Elisie Boddie of the NAACP has noted that the companion cases applied only to the use of race-conscious admissions programs, and they do not mandate that racially exclusive scholarships be opened to nonminority students.<sup>91</sup> Recent events indicate that the debate still rages, and the uncertainty has caused colleges and universities to retreat from minority-targeted aid.

#### 1. Investigations of Minority-Targeted Aid by the Federal Government

OCR has never revisited or updated its 1994 guidelines. Nor has any court overturned, invalidated, or even addressed the guidelines. Moreover, scholars note that the guidelines would probably withstand a legal challenge because they are based on Powell's diversity rationale in *Bakke*, which was subsequently affirmed in *Gratz* and *Grutter*.<sup>92</sup> Accordingly, it should be the best indication of the Department's official position regarding minority-targeted aid. Nevertheless, despite the Department's assertions in 1995 and 1996 that it has no desire to revisit the 1994 guidelines, the Department has begun numerous investigations into minority-targeted financial-aid programs at institutions around the country, suggesting a more hostile stance in recent years toward minority-targeted aid, particularly race-exclusive aid.<sup>93</sup> Furthermore,

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87. See *supra* notes 47–51 and accompanying text.

88. Healy, *supra* note 48.

89. *Id.*

90. BECKMAN, *supra* note 9, at 112 (internal quotation marks omitted).

91. *Id.* Although Boddie does not discourage institutions from reexamining their programs, she "[doesn't] think it's wise for them to so quickly abandon ship" because "these programs are critical, and without them, diversity on campus can very easily unravel." *Id.* (internal quotation marks omitted).

92. *Id.* at 110.

93. Schmidt, *supra* note 7.

OCR issued a statement in 2004 declaring that “[g]enerally, programs that use race or national origin as sole eligibility criteria are extremely difficult to defend.”<sup>94</sup>

The investigations are often prompted by organizations like CEO, the American Civil Rights Institution (ACR), and the National Association of Scholars (NAS), and the Center for Individual Rights (CIR), all of which work in tandem to find and challenge programs that only serve members of certain racial and ethnic minorities.<sup>95</sup> Their targets include minority scholarships, fellowships, internships, and summer sessions for minority students.<sup>96</sup> Roger Clegg of CEO, for example, has admitted to his organization’s campaign to “‘visit the web site of every college and university in the country’ to look for evidence of race-exclusive programs.”<sup>97</sup> Organizations like CEO use freedom-of-information laws to force colleges to disclose how much weight is given to race in admissions and financial-aid programs.<sup>98</sup> The organizations then send letters that accuse the institutions of violating civil-rights laws, demand that the institutions open minority-targeted programs to all students, and provide a deadline by which the institutions must comply.<sup>99</sup> If the institutions do not comply, the organizations file complaints with OCR.<sup>100</sup> CEO and ACR are reported to have used this method to jointly contact approximately 100 colleges, mostly between 2003 and 2004.<sup>101</sup> Roger Clegg reports that about seventy colleges responded by either opening up the programs in question or by informing his organization that the programs had already been opened.<sup>102</sup>

In an effort to avoid costly litigation, institutions often capitulate to threats by organizations like CEO and ACR or ultimately settle with OCR.<sup>103</sup> In 1997, OCR investigated race-exclusive scholarship programs at Florida Atlantic University, including the Martin Luther King, Jr. Scholarships that the university used to increase minority enrollment.<sup>104</sup> The investigation was a follow-up to a complaint originally filed by the Washington Legal Foundation (WLF) in 1990.<sup>105</sup> In a letter responding to the WLF’s complaint, OCR stated that it believed the MLK scholarship programs to be “legally supportable as narrowly tailored measures to pursue the university’s interest[]

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94. *Id.*

95. Peter Schmidt, *Behind the Fight Over Race-Conscious Admissions*, CHRON. HIGHER EDUC. (Wash., D.C.), Apr. 4, 2003, at A22 [hereinafter Schmidt, *Behind the Fight*]; Peter Schmidt, *Excluding Some Races from Programs? Expect a Letter from a Lawyer*, CHRON. HIGHER EDUC. (Wash., D.C.), Mar. 7, 2003, at A22 [hereinafter Schmidt, *Excluding Some Races*].

96. *Id.*

97. Peter Schmidt, *From ‘Minority’ to ‘Diversity,’* CHRON. HIGHER EDUC. (Wash., D.C.), Feb. 3, 2006, at A24.

98. Schmidt, *Behind the Fight*, *supra* note 95.

99. Schmidt, *Excluding Some Races*, *supra* note 95.

100. *Id.*; see also Peter Schmidt, *Federal Civil-Rights Officials Investigate Race-Conscious Admissions*, CHRON. HIGHER EDUC. (Wash., D.C.), Dec. 17, 2004, at A26.

101. See Schmidt, *supra* note 7.

102. *Id.*

103. *Cf. id.*

104. BECKMAN, *supra* note 9, at 111.

105. Letter from Barbra Shannon, Acting Director, Atlanta Office, Southern Division, Office for Civil Rights, to John C. Scully, Counsel, Washington Legal Foundation (Apr. 3, 1997) (on file with author).

in seeking a diverse student body.”<sup>106</sup> Moreover, OCR noted that the university’s continued use of race, even as a limit on eligibility, was supported by sufficient evidence of the institution’s previously unsuccessful attempts at achieving diversity.<sup>107</sup> Despite its findings, however, OCR “advised the university that using race as a plus factor, rather than an eligibility criterion, could . . . strengthen the legal support for [the] programs.”<sup>108</sup> Acting on this “advice,” the university opened the MLK scholarship program to all applicants, utilizing race only as a plus factor and promising to give “equal, if not greater, weight to economic need and scholastic achievement.”<sup>109</sup> The university also removed race restrictions on three additional race-exclusive scholarships, including the Southeastern Consortium for Minorities in Engineering Scholarship (SECME), the Minority Education Achievement Award (MEAA), and the South African Scholarship.<sup>110</sup>

In 2004, the OCR responded to complaints regarding the Minority Pre-College Scholarship Program in Wisconsin.<sup>111</sup> The program was established in 1985, and provided money for black, Hispanic, American Indian, and Asian-American students in the sixth through twelfth grades to attend precollege programs at colleges throughout the state.<sup>112</sup> The program cost the state approximately \$1.1 million per year and distributed scholarships to 4000 minority students.<sup>113</sup> In the fall of 2001, a private citizen filed a discrimination complaint with OCR.<sup>114</sup> As a result of the investigation, OCR negotiated a settlement with the Wisconsin Department of Public Instruction (DPI) to open the scholarship program to nonminority students.<sup>115</sup> Officials of the state agency explained, however, that they decided to make the changes only after concluding that OCR would not allow the program to remain race-exclusive.<sup>116</sup> The settlement called for the program to be renamed as the “DPI Pre-College Scholarship Program” and stripped the program of any eligibility criteria linked to race or ethnicity.<sup>117</sup> Rather, scholarships would be awarded to needy students.<sup>118</sup> The settlement did stipulate, however, that DPI was free to take account of race if the program failed to help enough minority students under the newly established income-based criteria.<sup>119</sup>

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106. *Id.*

107. *Id.*

108. *Id.*

109. BECKMAN, *supra* note 9, at 111.

110. The SECME was revised to include race as only one factor to be considered, the MEAA was changed to provide financial aid to all disadvantaged students, and the South African Scholarship was opened to all South African citizens, regardless of race. Letter from Barbara Shannon, *supra* note 105.

111. Peter Schmidt, *Education Department Pressures Wisconsin to Open Scholarship Program to White Students*, CHRON. HIGHER EDUC. (Wash., D.C.), Dec. 3, 2004 (on file with the Indiana Law Journal).

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

In 2005, OCR began investigating a complaint filed by a retired economics professor from the University of Wisconsin who alleged the university system was violating federal civil-rights laws by providing financial aid specifically to minority undergraduates.<sup>120</sup> The Ben R. Lawton Minority Undergraduate Grant Program, established under a state law enacted in 1985, limits eligibility to students who are black, Hispanic, or American Indian, or whose families came to the United States as refugees from Cambodia, Laos, or Vietnam.<sup>121</sup> In 2004, the program provided awards of up to \$3000, averaging about \$1400 each, to 2715 students.<sup>122</sup> In contrast to other institutions that quietly opened their race-exclusive aid programs to all students in response to investigations, the University of Wisconsin vowed to defend its race- and ethnicity-based scholarships, noting that the program was “forward-thinking . . . progressive” and “in the best interests of the students in [the] state.”<sup>123</sup> As of the 2007–2008 school year, OCR was still investigating the university’s scholarship program.<sup>124</sup>

In November 2005, even the Department of Justice stepped into the fray. In response to a complaint filed by CEO, the Justice Department wrote a letter to Southern Illinois University, notifying the institution that it would file a suit against the university system’s board of trustees and administration for using three graduate fellowship scholarships to engage in a pattern of intentional discrimination against Whites, nonpreferred minorities, and males.<sup>125</sup> Initially, Southern Illinois challenged the Justice Department, explaining that the programs had a combined budget of only \$200,000 out of a total \$12 million in aid given to over 4000 graduate students per year.<sup>126</sup> To focus on the lack of white men in the graduate fellowship program “without at least ‘noting the myriad of options available to all graduate assistants would simply be unconscionable.’”<sup>127</sup> By January 2006, however, the university had reached an agreement with the Department in which the fellowships would be opened to any race or gender.<sup>128</sup>

## 2. Widespread Retreat and the Impact on Diversity

In reaction to the complaints filed with OCR and the ensuing investigations, many institutions fear they are in legal jeopardy and have voluntarily expanded eligibility for

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120. Peter Schmidt, *U. of Wisconsin Vows to Defend an Aid Program Based on Race*, CHRON. HIGHER EDUC. (Wash., D.C.), Apr. 22, 2005, at A29.

121. *Id.*

122. *Id.*

123. Peter Schmidt, *Bucking a Trend, U. of Wisconsin System Will Defend Race-Based Student-Aid Program Against Complaint*, CHRON. HIGHER EDUC. (Wash., D.C.), Apr. 13, 2005 (on file with the Indiana Law Journal).

124. This statement is based on my knowledge that the case was still open, based on my relationship with staff at the University of Wisconsin’s Legal Services Department.

125. Peter Schmidt, *Justice Dept. Is Expected to Sue Southern Illinois U. over Minority Fellowships*, CHRON. HIGHER EDUC. (Wash., D.C.), Nov. 25, 2005, at A34.

126. *Id.*

127. *Id.*

128. Peter Schmidt, *Southern Illinois U. Agrees to Justice Department Demands to Open Programs to All Races*, CHRON. HIGHER EDUC. (Wash., D.C.), Jan. 26, 2006 (on file with the Indiana Law Journal).



all race-exclusive programs, including minority-targeted financial aid, before formal investigations are even launched.<sup>129</sup> When Carnegie Mellon was challenged early in 2003 by both CEO and ACR regarding its academic summer camps for minority students, it was initially defiant, and university counsel Mary Jo Dively stated that she would “not . . . take the word of some outside group that presumes to tell Carnegie Mellon what to do”; rather, the institution would wait for federal court guidance.<sup>130</sup> After the Court issued opinions in the Michigan cases, however, Ms. Dively concluded that “race-exclusive programs—except in certain extreme factual circumstances—are not likely to withstand a legal challenge.”<sup>131</sup> In February 2004, Carnegie Mellon not only opened its summer program to white and Asian students who demonstrated an ability to contribute to campus diversity, but also opened a full-tuition minority scholarship program and ended its policy of giving black, Hispanic, and American Indian students a preference when awarding need-based aid.<sup>132</sup> Similarly, Washington University in St. Louis also initially refused to alter two race-exclusive scholarship programs in 2004, even when its programs were brought to the attention of OCR.<sup>133</sup> By October 2005, however, the university opened both programs for the 2005–2006 school year. As a result, white students have received twelve of forty-two scholarships offered by one program and five of twenty scholarships offered by the second program.<sup>134</sup>

Fear of litigation also resulted in the opening of minority-targeted aid programs at both Harvard University’s business school and Yale University’s undergraduate college.<sup>135</sup> Similarly, in response to a challenge by the CEO and ACR, Laurence Pendleton, associate general counsel at Colorado State stated, “[i]t appears that, under the Michigan cases, race-exclusivity will not pass legal muster.”<sup>136</sup> Although the Massachusetts Institute of Technology and Saint Louis University initially refused the demands of ACR and CEO, both institutions backed down when the matter was referred to OCR.<sup>137</sup> Saint Louis University ultimately discontinued a program that awarded thirty scholarships of \$11,000 a year to black students, replacing it with a program that awards scholarships of \$8000 to students of any race or ethnicity who show a commitment to promoting a diverse but unified nation.<sup>138</sup>

As yet another example of early surrender, in January of 2006, the State University of New York Board of Trustees expanded eligibility for a \$6.2 million fellowship program and a \$649,000 scholarship program that had both been originally restricted to black, Hispanic, and American Indian students.<sup>139</sup> Similarly, the University of

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129. Schmidt, *supra* note 7; see also Peter Schmidt, *As Colleges Open Race-Exclusive Programs to All, Some Minority Students May Be Left Out in the Cold*, CHRON. HIGHER EDUC. (Wash., D.C.), Jan. 26, 2006 (on file with the Indiana Law Journal).

130. Schmidt, *supra* note 7.

131. *Id.*

132. *Id.*

133. *Id.*

134. Schmidt, *supra* note 125.

135. Schmidt, *supra* note 7.

136. *Id.*

137. *Id.*

138. Schmidt, *supra* note 125.

139. *Id.*

Delaware opened a scholarship program that was reserved for racial and ethnic minorities to students who are the first generation in their families to attend college, who are financially needy, or who have experienced challenging life circumstances.<sup>140</sup>

Some institutions have refused to be intimidated by the challenges, preferring instead to wait for federal court guidance, or to try to justify the legality of their programs. In addition to the University of Wisconsin's defiance, Pepperdine University responded to CEO and ACR allegations that the institution's minority scholarships, which provide up to \$1000 for financially needy minorities, were in violation of the Supreme Court's rulings in the Michigan cases.<sup>141</sup> Pepperdine officials refused to open the scholarships, asserting that the scholarships are consistent with both the law and the Christian philosophy followed by the university.<sup>142</sup> In response to Pepperdine's resistance, CEO and ACR filed complaints with OCR in 2004.<sup>143</sup> As of February 2006, Pepperdine was still in negotiations with OCR regarding its race-exclusive scholarships.<sup>144</sup> Although also defiant, the University of Missouri at Columbia took a slightly altered stance, opening some programs reserved for black students to include "all underrepresented minority students," but refusing to open the programs to white applicants.<sup>145</sup>

Despite the resistance of some institutions, the threat of costly investigations and litigation has negatively impacted the efforts of colleges and universities to recruit, retain, and support minority students. In June 2005, the NAACP Legal Defense Fund (LDF) issued a report asserting that OCR actively discourages colleges from using minority-targeted policies that are both legally permissible and necessary to close the achievement gap between white and black students.<sup>146</sup> Moreover, because OCR must investigate every complaint it receives, groups opposed to race-conscious policies have created a chilling effect simply by threatening to file complaints; in response to the threats, institutions dismantle their programs to avoid litigation or a time-consuming OCR investigation, regardless of the legal merit of their programs.<sup>147</sup> Sometimes, institutions even enter into settlements prior to the release of formal findings by the government.<sup>148</sup>

Furthermore, OCR has not necessarily been a passive player that merely responds to complaints.<sup>149</sup> To the contrary, OCR actively encourages institutions to focus on race-

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140. *Id.*

141. Alyson Klein, *Foes of Affirmative Action Take Aim at Scholarship Offered by Pepperdine U.*, CHRON. HIGHER EDUC. (Wash., D.C.), Jan. 23, 2004 (on file with the Indiana Law Journal).

142. *Id.*

143. *Id.*

144. Schmidt, *supra* note 97.

145. Schmidt, *supra* note 7.

146. Peter Schmidt, *Education Department's Actions Contradict Supreme Court's Rulings on Affirmative Action, Report Says*, CHRON. HIGHER EDUC. (Wash., D.C.), June 23, 2005 (on file with the Indiana Law Journal).

147. NAACP LEGAL DEF. & EDUC. FUND, INC., *CLOSING THE GAP: MOVING FROM RHETORIC TO REALITY IN OPENING DOORS TO HIGHER EDUCATION FOR AFRICAN-AMERICAN STUDENTS* 9–10 (2005), available at [http://www.naacpldf.org/content/pdf/gap/Closing\\_the\\_Gap-Moving\\_from\\_Rhetoric\\_to\\_Reality.pdf](http://www.naacpldf.org/content/pdf/gap/Closing_the_Gap-Moving_from_Rhetoric_to_Reality.pdf).

148. *Id.* at 10.

149. *Id.*

neutral alternatives, even in the face of data suggesting that such policies are insufficient by themselves for closing gaps in enrollment and graduation.<sup>150</sup> Moreover, it seems that conservative groups opposed to race-conscious programs have an inside track at OCR. OCR staff, for example, include prior employees of organizations like CIR<sup>151</sup>—the same group that represented the plaintiffs in the Michigan cases.<sup>152</sup> LDF alleges that this connection has led to the divulgence of nonpublic inside information to anti-affirmative action groups.<sup>153</sup>

The aggressive threats of litigation by organizations opposed to race-conscious policies, in combination with OCR's sympathetic ear, have resulted in a dampening of institutional efforts to attract a diverse group of students through recruitment, retention, and financial-aid programs, and have depressed minority enrollment.<sup>154</sup> As minority-targeted programs quietly open to nonminority students without expanding in overall size, the programs serve fewer students from the minority groups that the programs were initially designed to target, and the programs are less focused on the goals for which they were first established to achieve.<sup>155</sup> The programs also suffer from "benign neglect," as administrators become distracted by accusations of discrimination and threats of litigation.<sup>156</sup> As Lee Cokorinos, author of a book researching anti-affirmative action groups, notes, "[these groups] are on a mission . . . to eliminate the gains of the civil-rights movement."<sup>157</sup> In light of higher education's retreat from minority-targeted aid, it would appear that the mission has been successful thus far.

## II. THE CONSTITUTIONALITY OF MINORITY-TARGETED AID

As institutions face increasingly intense scrutiny over their use of minority-targeted aid, it is important to consider how strict-scrutiny analysis should be applied to the aid, should a legal challenge reach the Supreme Court. Although current analysis characterizes minority-targeted aid as an independent, competitive process similar to admissions, minority-targeted aid is better conceptualized as one step in a multistep process, used to cultivate a critical mass of minority students by ensuring minority enrollment.

### *A. Correctly Conceptualizing Minority-Targeted Aid*

Financial aid is often conceptualized as a competitive process that is similar to, but independent of, the admissions process. Arguably, the financial-aid process is similar to the admissions process in that they both affect the composition of a student body; financial aid makes an institution more attractive to potential students, and facilitates

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150. *Id.*

151. *See id.*

152. Jeffrey Selingo, *Michigan: Who Really Won?*, CHRON. HIGHER EDUC. (Wash., D.C.), Jan. 14, 2005, at A21.

153. NAACP LEGAL DEF. & EDUC. FUND, *supra* note 147, at 10.

154. *Id.*

155. Schmidt, *supra* note 125.

156. *Id.*

157. Peter Schmidt, *Behind the Fight over Race-Conscious Admissions*, CHRON. HIGHER EDUC. (Wash., D.C.), Apr. 4, 2003, at A22.

retention by ensuring that students can afford their educations. Even courts have recognized that one of the most important determinants for the majority of student-enrollment decisions is the receipt of financial aid.<sup>158</sup>

Accordingly, it is no surprise that when analyzing the constitutionality of minority-targeted financial aid today, scholars<sup>159</sup> and practitioners<sup>160</sup> alike depend on the Supreme Court's holdings in *Grutter* and *Gratz* and apply the analytical framework outlined in those cases to financial aid as if aid and admission policies implicate the same goals, benefits, and burdens. Similarly, opponents of minority-targeted aid insist that the holdings in *Grutter* and *Gratz* extend not only to financial aid, but to internships, summer programs, and other forms of minority outreach.<sup>161</sup>

Writing for the majority in the *Grutter* case, Justice O'Connor established that diversity is a legitimate compelling interest that will justify the use of race in the admissions process, as long as it is used as one of several competitive "plus" factors.<sup>162</sup> In upholding the University of Michigan Law School's admissions policy in *Grutter*, the Court deemed the process narrowly tailored because it allowed for individual, holistic review of each applicant, considered racial and nonracial factors, and placed no undue burden on nonminority applicants.<sup>163</sup> Moreover, the pursuit of a "critical mass" of minority students was not the sort of unconstitutional quota barred in *Bakke*, but rather a legitimate goal in pursuit of the educational benefits that result from diversity.<sup>164</sup> Writing for the majority in *Gratz*, Chief Justice Rehnquist struck down the undergraduate admissions process because the automatic assignment of twenty points

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158. *E.g.*, *Geier v. Sundquist*, 128 F. Supp. 2d 519, 538 (M.D. Tenn. 2001).

159. *See* BECKMAN, *supra* note 9 at 102–13 (noting that despite the Court's failure to address financial aid in the Michigan cases, the standards from the cases continue to be imported to analysis of minority-targeted financial aid); THE CIVIL RIGHTS PROJECT, *supra* note 4, at 21–22; Angelo N. Ancheta, *After Grutter and Gratz: Higher Education, Race, and the Law*, in HIGHER EDUCATION AND THE COLOR LINE: COLLEGE ACCESS, RACIAL EQUITY, AND SOCIAL CHANGE 175, 186–88 (Gary Orfield, Patricia Marin & Catherine L. Horn eds., 2005) (analogizing minority-targeted aid to admissions, and concluding that generally race-conscious aid may be permissible, while race-exclusive aid may not); Jonathan Alger, *Putting the Michigan Rulings into Practice*, CHRON. HIGHER EDUC. (Wash., D.C.), Feb. 25, 2005, at B28 (applying standard of analysis articulated in *Grutter* and *Gratz* to draw legal distinctions between admissions and financial aid); *see also* Maurice R. Dyson, *Towards an Establishment Clause Theory of Race-Based Allocation: Administering Race-Conscious Financial Aid After Grutter and Zelman*, 14 S. CAL. INTERDISC. L.J. 237 (using current interpretation of *Grutter* and *Gratz* to assess the viability of several approaches to minority-targeted aid).

160. *See* ARTHUR L. COLEMAN, SCOTT R. PALMER & FEMI S. RICHARDS, HOLLAND & KNIGHT LLP, *FEDERAL LAW AND FINANCIAL AID: A FRAMEWORK FOR EVALUATING DIVERSITY-RELATED PROGRAMS* (2005) (using standards set forth in Michigan cases to provide a guide to creating legal race- and ethnicity-conscious financial aid at colleges and universities); Elizabeth B. Guerard, *The Lingering Question of Race*, U. BUS., June 2005, at 35, 35–36 (referring to interview with education law attorney during which attorney applied questions posted by the Court in the Michigan cases to minority-targeted financial-aid analysis).

161. BECKMAN, *supra* note 9, at 112 (highlighting comments by Roger Clegg, director of CEO).

162. *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003).

163. *Id.* at 337.

164. *Id.* at 330.

to minority applicants was an inflexible policy that did not allow for individualized, holistic assessment.<sup>165</sup> In addition, the automatic point allocation made race a decisive factor for every minimally qualified minority applicant, thus impermissibly insulating minority applicants from competition.<sup>166</sup>

Based on the analysis articulated in the two cases, analysis of minority-targeted aid typically concludes that the aid can only be awarded in a process that uses race as one of many factors for consideration. Similar to the quotas struck down in *Bakke* and the points automatically allocated to minorities in the *Gratz* case, race-exclusive aid is deemed unconstitutional.<sup>167</sup> OCR has endorsed this analysis by characterizing race-exclusive aid programs as “extremely difficult to defend.”<sup>168</sup>

Minority-targeted financial aid, however, is placed in the wrong analytical context when the aid is conceptualized as a process independent from admissions. The legitimate pursuit of a critical mass of minority students, in order to reap the benefits of a diverse student body, is a multistep effort. Step one is admission of minority students through an admissions process guided by the analytical framework established in *Grutter* and *Gratz*. The second step focuses on actually enrolling a critical mass of minority students, a goal that is often unattainable without the support of aid. Minority-targeted aid, then, is a tool used in the second step. The correct analytical context for minority-targeted aid conceptualizes the aid as an enrollment-management tool, used to give effect to admission decisions.

### *B. Minority-Targeted Aid as an Enrollment-Management Tool*

Enrollment management is defined as “an organizational concept and a systematic set of activities designed to enable educational institutions to exert more influence over their student enrollments.”<sup>169</sup> Using institutional research, colleges and universities assess the social forces that affect student retention<sup>170</sup> and develop marketing, recruiting, and financial-aid strategies that best position institutions in the marketplace to secure desired student enrollment.<sup>171</sup> The enrollment-management movement is a recent phenomenon, which included the reemergence of merit-based awards during the late 1970s and the continued prominence of merit aid throughout the 1990s as a way to compete for students. The use of merit aid as a competitive tool is usually driven by (1) the desire of an institution of lower reputation to lure students away from more

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165. *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003).

166. *Id.* at 272.

167. *See, e.g.,* Ancheta, *supra* note 159, at 186–88 (analogizing minority-targeted aid to admissions to conclude that, generally, race-conscious aid may be permissible, while race-exclusive aid may not).

168. Schmidt, *supra* note 7.

169. Don Hossler, *The Role of Financial Aid in Enrollment Management*, NEW DIRECTIONS FOR STUDENT SERVICES, Spring 2000, at 77, 78 (quoting DON HOSSLER & JOHN P. BEAN, *THE STRATEGIC MANAGEMENT OF COLLEGE ENROLLMENTS* 5 (1990)).

170. *Id.*

171. Michael D. Coomes, *The Historical Roots of Enrollment Management*, NEW DIRECTIONS FOR STUDENT SERVICES, Spring 2000, at 5, 13.

prestigious institutions and (2) competition among schools of equal prestige or reputation to enroll the most qualified candidates.<sup>172</sup>

The use of minority-targeted aid as an enrollment-management tool is driven by a third desire on the part of institutions: to attract and enroll qualified and *diverse* candidates. Minority-targeted aid makes education more affordable for admitted minorities, enhances an institution's reputation in the minority community, and positively impacts recruiting and enrollment efforts. The existence of minority-targeted aid also serves important administrative and fundraising functions. As such, minority-targeted aid enables institutions to realize their goal of attracting and enrolling a critical mass of minority students.

### 1. Affordability

In light of rising tuition costs, the provision of additional aid to minorities is particularly important if an institution wishes to ensure enrollment of a critical mass of minority students. The price of secondary education has risen steeply during the last three decades; between 1976 and 2004, the average tuition at public and private four-year institutions increased 732% and 693%, respectively.<sup>173</sup> Moreover, research suggests a strong relationship between financial aid and educational attainment, with financial aid heavily influencing a student's choice of institution, a student's decision to enroll, and a student's ability to persist and attain a bachelor's degree.<sup>174</sup> The Advisory Committee on Student Financial Assistance has found that 96% of students with low unmet need enroll in some form of postsecondary education within two years of graduating from high school.<sup>175</sup> In contrast, only 78% of students with high unmet need attended college within the same time frame.<sup>176</sup> Furthermore, equally qualified students with high unmet need were only one-third as likely to graduate from college as students with low unmet need.<sup>177</sup>

Reports from the Advisory Committee in 2002 also concluded that more than 150,000 college-qualified students do not enroll each year in *any* postsecondary education because of a lack of financial aid, a situation which the Committee described as an "affordability crisis" for low-income students.<sup>178</sup> In 2003, 80% of college-qualified high school graduates from families with incomes above \$78,800 enrolled in college within a year of graduation, while only 61% of graduates from middle-income families, and 48% of graduates from families with incomes below \$48,400 enrolled.<sup>179</sup>

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172. MICHAEL S. MCPHERSON & MORTON OWEN SCHAPIRO, *THE STUDENT AID GAME* 109–10 (1998).

173. Donald E. Heller, *Can Minority Students Afford College in an Era of Skyrocketing Tuition?*, in *HIGHER EDUCATION AND THE COLOR LINE*, *supra* note 159, at 83, 83.

174. Derek V. Price & Jill K. Wohlford, *Equity in Educational Attainment: Racial, Ethnic, and Gender Inequality in the 50 States*, in *HIGHER EDUCATION AND THE COLOR LINE*, *supra* note 159, at 59, 63–64.

175. Heller, *supra* note 173, at 94.

176. *Id.*

177. *Id.*

178. See Price & Wohlford, *supra* note 174, at 63–64.

179. Sandy Baum, *Lowering Work and Loan Burden: The Current Status of Student Reliance on Grants, Loans, and Work*, in *REFLECTIONS ON COLLEGE ACCESS & PERSISTENCE* 62,

Students from low-income families are particularly reluctant to take on loans to ensure their matriculation, and with good reason. Students hailing from low-income families have a more difficult time repaying loans than those from middle-income or high-income families with similar levels of debt and postcollege earnings because they are less likely to receive assistance from family members, and they are more likely to have responsibility for supporting their families of origin after graduation.<sup>180</sup> Accordingly, it is no surprise that a 1995 GAO report found that every \$1000 increase in loans results in a 3% increase in student dropout rates, which mainly adversely affected low-income students.<sup>181</sup> Working during college is similarly problematic for low-income students who cannot obtain sufficient grant or work-study aid. Although studies have found that limited on-campus work can help with persistence and academic achievement, as hours worked increases, year-to-year persistence and likelihood of completion of a bachelor's degree are negatively affected.<sup>182</sup>

The affordability crisis is compounded for minorities. The 2000 Census reported that although the median income for white families in 1999 was \$54,698, the median incomes for black, Native American, and Hispanic families were all below \$35,000.<sup>183</sup> Among 1992 high school graduates, 54% of African-American students were low-income, as opposed to only 21% of white students.<sup>184</sup> In addition, the ability of minority families to pay for higher education has not risen commensurate with increases in price, particularly when compared with white families. Between 1999 and 2003, the median income for white families grew by 11%, while the median income for Blacks and Hispanics grew by only 8%.<sup>185</sup> Minority students are more likely to come from low-income families less able to afford higher education, and they are also likely to be more price-responsive to tuition than white and middle- or upper-income students, an issue reflected in the disproportionate representation of minority students in community colleges.<sup>186</sup> As such, need-based aid awards have a stronger influence on educational attainment for minorities than loans or work-study awards.<sup>187</sup> Indeed, when challenged by OCR regarding its race-exclusive scholarships in 1997, Florida Atlantic University reported that most entering black students would not have matriculated without scholarships.<sup>188</sup> For these reasons, the maintenance of aid specifically for minorities is necessary.

The affordability crisis for minorities, however, is not just limited to low-income students. African-American students, regardless of family-income levels, are less willing to finance their education through loans because they are more doubtful of the

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62 (Advisory Comm. on Student Fin. Assistance ed., 2006).

180. *Id.* at 67.

181. See Robert DeBard, *Alternative Financing Methods for College*, NEW DIRECTIONS FOR STUDENT SERVICES, Spring 2000, at 47, 49 (citing U.S. GEN. ACCOUNTING OFFICE, HIGHER EDUCATION: RESTRUCTURING STUDENT AID COULD REDUCE LOW-INCOME COLLEGE STUDENT DROPOUT RATES (1995)).

182. See *id.* at 50–51.

183. Heller, *supra* note 173, at 83–84.

184. NAACP LEGAL DEF. & EDUC. FUND, *supra* note 147, at 5.

185. Heller, *supra* note 173, at 100.

186. See *id.* at 86.

187. *Id.*

188. Letter from Barbara Shannon, *supra* note 105.

ultimate benefits.<sup>189</sup> Although white students are also negatively influenced by debt and living costs, black students value student aid in their college choice more than white students and are more vulnerable to pricing and living costs than other ethnic groups.<sup>190</sup> Latino students are similarly less likely to finance their education through loans, opting instead to work.<sup>191</sup>

Research also suggests that middle-income minorities are systematically financially disadvantaged, particularly when compared to their white counterparts. Black middle-class professionals, for example, tend to be concentrated in the least remunerative professions upon completing their educations,<sup>192</sup> making loan repayment after graduation more difficult. Income security for black middle-class families is also less stable than that of white middle-class families. Not only is a black family's high income at a particular point in time less predictive of permanent high earnings than the high income of a white family, but black middle-class families are also more likely than white middle-class families to be dependent on the income of two working spouses.<sup>193</sup> In contrast, white middle-class families are more likely to be dependent on the earnings of one spouse, leaving the income potential of the second spouse untapped and on reserve in case of a financial emergency.<sup>194</sup> Because black middle-class status is more likely to be based on the income of both spouses, the income of the second wage earner in black middle-class families often finances the costs of the second wage earner's participation in the work force, including clothing, transportation, and child care.<sup>195</sup>

Furthermore, wealth accumulation for black middle-class families is not on par with that of white middle-class families. Black middle-class status is more likely than white middle-class status to be based on income instead of wealth. Accordingly, black middle-class families own only fifteen cents for every dollar owned by white middle-class families.<sup>196</sup> Similarly, although median income of black middle-class families is about 64% of median white middle-class family income, median black-family net worth is only 12% of white-family net worth.<sup>197</sup> Because black middle-class families are also more likely to live in less affluent neighborhoods with close proximity to poor, black enclaves, black middle-class families do not capture as much value appreciation of their homes as do white middle-class families.<sup>198</sup> Accordingly, black families have less income surplus to share with children as parents approach retirement, and are thus less likely to transmit their tenuous middle-class status to the next generation.<sup>199</sup> Finally, black middle-class families, as much as 80% of whom are the first in their

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189. DeBard, *supra* note 181, at 49.

190. Edward P. St. John, *The Impact of Student Aid on Recruitment and Retention: What the Research Indicates*, NEW DIRECTIONS FOR STUDENT SERVICES, Spring 2000, at 61, 71.

191. *Id.* at 71.

192. Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 975 (1997).

193. *Id.* at 976–77.

194. *Id.* at 977.

195. *Id.* at 977.

196. *Id.* at 983.

197. RICHARD ROTHSTEIN, *CLASS AND SCHOOLS: USING SOCIAL, ECONOMIC, AND EDUCATIONAL REFORM TO CLOSE THE BLACK-WHITE ACHIEVEMENT GAP* 48 (2004).

198. *See* Malamud, *supra* note 192, at 972.

199. *Id.* at 985.



families to attain middle-class status, are expected to support those extended family members who have not attained the same status.<sup>200</sup> As a result, less money is available to pay for the costs of higher education.<sup>201</sup> This expectation of support is particularly taxing when minority students graduate and are expected to both pay back student loans and support extended family.

Free Application for Federal Student Aid (FAFSA) forms and financial-aid formulas do not account for these additional social forces that impact a minority student's ability to finance higher education. FAFSA forms, for example, do not consider home equity as a financial resource for higher education,<sup>202</sup> and thus, they mask the additional financial resources more likely to be available to white families. Minority-targeted aid, then, acts as an enrollment-management tool that justifiably acknowledges, and responds to, the social forces that affect enrollment.

Using financial aid to encourage enrollment by particular students has been generally criticized as an entitlement to those students who can attend college without the additional aid.<sup>203</sup> Those minority students, however, who appear to be middle-income on paper, may not actually be so in fact, making loans more burdensome and harder to pay back than loans obtained by nonminority students and their parents. Accordingly, the critique of merit aid as an unjustified entitlement is not necessarily applicable to minority-targeted aid. By providing aid sufficient to assuage heightened price sensitivities of both low-income and middle-income minority students, minority-targeted aid serves as a particularly effective and necessary enrollment-management tool to ensure the enrollment of a critical mass of minority students.

## 2. Reputation, Recruitment & Enrollment

Enrollment-management tools also encompass techniques that enhance an institution's reputation and result in effective recruitment.<sup>204</sup> The existence of minority-targeted aid positively influences an institution's reputation regarding racial climate. College officials interviewed by the GAO in 1994 reported that minority-targeted aid sent a message to potential students that their institution was serious about wanting minorities to enroll and ultimately graduate.<sup>205</sup> The aid provided tangible evidence, more concrete than an affirmative action statement, that an institution supported diversity.<sup>206</sup>

The effect on reputation makes it more likely that minorities will even apply in the first place. In its guide on minority-targeted aid, the Department of Education

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200. *Id.* at 983–84.

201. *Id.*; see also ROTHSTEIN, *supra* note 197, at 48 (explaining that because of the expectation of support to extended family, black families have less income available to spend on children than white families with the same total income).

202. See MCPHERSON & SCHAPIRO, *supra* note 172, at 35.

203. Heller, *supra* note 173, at 90–91 (explaining that based on the high correlation between socioeconomic status and the academic criteria on which merit aid is often based, the benefits usually flow to middle- and upper-income families).

204. See Coomes, *supra* note 171, at 13.

205. U.S. GEN. ACCOUNTING OFFICE, HIGHER EDUCATION: INFORMATION ON MINORITY-TARGETED SCHOLARSHIPS 10 (1994).

206. *Id.*

explained that a failure to attract a sufficient number of minority applicants who meet an institution's academic qualifications makes it impossible for an institution to enroll a diverse student body, even if race is given a competitive "plus" in the admissions process.<sup>207</sup> This assertion is underscored by an examination of the effects of Proposition 209 on applications to California institutions of higher education. In 1996, successful adoption of the California public referendum banned the use of all racial and ethnic preferences in public colleges and government agencies throughout the state.<sup>208</sup> The effects of Proposition 209 on enrollment throughout the state university system, particularly at the state's elite universities, were dramatic. By 2006, minority enrollment across the entire state university system had declined by 30%.<sup>209</sup>

Perhaps more telling for purposes of enrollment management, however, was the decline in applications to both U.C. Berkeley and the University of California, Los Angeles (UCLA). In 1995, the percentage of applications received by Berkeley and UCLA from African-American students was 5.8% and 6.0%, respectively.<sup>210</sup> The percentage of applications received from Hispanic students was 13.4% and 16.1%, respectively.<sup>211</sup> After Proposition 209 was passed in 1996, applications received from both groups plummeted. The percentage of applications received by Berkeley from African-American students immediately decreased in 1996 to 5.3%, and dropped to a low of 4.2% in 1999, before beginning to climb back up to 4.6% in 2001.<sup>212</sup> The percentage of applications to Berkeley from Hispanic students dropped to 12.4% in 1996, and continued to a low of 10.5% in 1999, before climbing back up to 13.1% in 2001.<sup>213</sup> Similarly, at UCLA, the percentage of applications received from African-American students immediately dropped to 5.6% in 1996, and continued to decrease to a low of 4.2% in 1999, before climbing up to 4.4% in 2001.<sup>214</sup> The percentage of applications received from Hispanic students decreased to 14.7% in 1996, continuing to a low of 13.1% in 1999, before increasing in 2001 to 15.3%.<sup>215</sup> The dips in percentages of applications received from the groups are not only a potential indication of how discouraged minority students were regarding their prospects of admissions after Proposition 209, but also a possible indication of an unwillingness by minorities to even consider attending institutions they perceived to be unwelcoming. Minority-targeted aid can change student perception and encourage applications by sending a message regarding an institution's commitment to diversity.

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207. Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964, 59 Fed. Reg. 8756, 8761 (Feb. 23, 1994) The Department based the permissibility of race-exclusive scholarships on this explanation. *Id.*

208. See LEE COKORINOS, *THE ASSAULT ON DIVERSITY: AN ORGANIZED CHALLENGE TO RACIAL AND GENDER JUSTICE* 32 (2003).

209. BECKMAN, *supra* note 9, at 49.

210. CATHERINE L. HORN & STELLA M. FLORES, *THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., PERCENT PLANS IN COLLEGE ADMISSIONS: A COMPARATIVE ANALYSIS OF THREE STATES' EXPERIENCES* 36 (2003).

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

Finally, the existence of minority-targeted aid even has an effect on the enrollment of minority students who do not receive additional aid. Institutions of higher education report that minority students who do not receive minority-targeted aid are nevertheless more likely to enroll upon realizing that those minority students whose enrollment is guaranteed by the provision of aid will be attending.<sup>216</sup> This is so because the students believe they are less likely to be isolated and therefore more likely to persist in their studies.<sup>217</sup> This chain-reaction effect in response to the provision of minority-targeted aid enables institutions to recruit and enroll a critical mass of minority students, and it further illustrates why minority-targeted aid is an enrollment management tool that can effectively ensure sufficient enrollment of minority students.

### 3. Administration

Finally, there are administrative reasons to specifically reserve funding for minority-targeted aid. At any institution with a finite amount of resources, it is necessary to decide which resources will be allocated to projects that support the institution's development goals. If an institution is committed to enrolling a critical mass of minority students who will need additional aid to secure enrollment, it is only logical that institutions ensure that the additional aid is indeed available. Best practices for financial-aid management dictate that financial-aid directors prepare annual plans which detail the utilization of financial-aid funds.<sup>218</sup> The plans should not only identify funding sources for financial aid, but they should also outline the demand for financial aid likely to be generated by each category of students and should allocate available resources against projected demand.<sup>219</sup> Financial-aid offices should also ensure that awards are maximally utilized without overexpenditure, and reconcile amounts awarded from each funding source with the fiscal records of the institution.<sup>220</sup> These best practices require the sequestration of funds particularly for minority-targeted aid.

Moreover, limited resources dictate that funding for particular goals are reserved in order to ensure that sufficient funding is ultimately available. Public institutions, in particular, have been experiencing expanding enrollment and decreased state appropriations.<sup>221</sup> As state governments are less able to subsidize the costs of higher education at state institutions, state legislatures and institutions must make decisions about the development goals to which they are financially committed.<sup>222</sup> Reserving funding for particular development goals ensures that sufficient financial resources are gathered and that the resources are not used for purposes other than that for which they were originally intended.

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216. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 205, at 10.

217. *Id.*

218. See THOMAS E. TELLEFSEN, *IMPROVING COLLEGE MANAGEMENT: AN INTEGRATED SYSTEMS APPROACH* 285–86 (1990).

219. *Id.* at 286.

220. See *id.*

221. 1 ALISA F. CUNNINGHAM, JANE W. WELLMAN, MELISSA E. CLINEDINST & JAMIE P. MERISOTIS, U.S. DEP'T OF EDUC., NCEES 2002–157, *STUDY OF COLLEGE COSTS AND PRICES, 1988–89 TO 1997–98* (2001).

222. See THOMAS J. KANE, *THE PRICE OF ADMISSION: RETHINKING HOW AMERICANS PAY FOR COLLEGE* 59 (1999).

In addition, reserving funds for targeted purposes serves as a marketing tool that attracts donors willing to support an institutional project. Donors are increasingly unwilling to pledge funding for general purposes, insisting instead that their money be used for a particular purpose of their choosing. Donors who make significant contributions to scholarship funds desire higher levels of accountability and often make donations coupled with specific conditions and instructions regarding how the gift is to be used. In response to this trend, institutions attract donors by characterizing funds by a specific purpose, cause, or development goal.<sup>223</sup> Alternately, institutions engage in “targeted asks” campaigns, through which institutions solicit donations from alumni for specific purposes; such campaigns yield higher returns, as donors are more likely to give to a specific program or fund than they are to give to an institution’s general discretionary fund.<sup>224</sup> Accordingly, if institutions depend on donations to support their minority-targeted aid program, which in turn augments the amount of aid available for all students, best practices dictate that funding for the aid be reserved and clearly identified as such.

### *C. Strict Scrutiny of Minority-Targeted Aid as an Enrollment-Management Tool*

When correctly conceptualized as an enrollment-management tool, minority-targeted financial aid is not an independent competitive process subject to the same strict-scrutiny analysis to which race-conscious admissions policies are subject under the *Grutter* and *Gratz* cases. Rather, minority-targeted aid is the second step in the overall effort to cultivate diverse student bodies, and it enables institutions to enroll the students they have already admitted under a *Grutter*-compliant admissions process. Institutions already use aid as an enrollment-management tool through the distribution of merit aid, a practice that has received scant constitutional scrutiny. Among private four-year institutions, 66% give merit-based aid to students who are academically talented, without any regard for need.<sup>225</sup> Similarly, 26% of public four-year institutions provide merit aid based on academic ability.<sup>226</sup> It is not uncommon for institutions to provide tuition discounts as high as 25% to 30%,<sup>227</sup> thereby making an institution particularly attractive to students receiving the aid and increasing the likelihood of student enrollment.

Minority-targeted aid similarly makes an institution attractive to minority students who are offered the aid. First, minority-targeted aid enhances the institution’s reputation for racial climate, making it more likely that minority students will apply and, if admitted, enroll. Once a minority student has been legitimately admitted under a *Grutter*-compliant admissions process, an institution can then individually assess whether financial need that was not reflected on FAFSA forms must be met in order to effectuate enrollment. If additional aid is necessary, as is more likely to be the case with both low-income and middle-income minorities, and the institution considers the

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223. Interview with Anonymous Development Program Manager, Top Tier Law School (June 8, 2007).

224. *Id.*

225. WILLIAM G. BOWEN, MARTIN A. KURZWEIL, EUGENE M. TOBIN & SUSANNE C. PICHLER, *EQUITY AND EXCELLENCE IN AMERICAN HIGHER EDUCATION* 188 (2005).

226. *Id.*

227. Hossler, *supra* note 169, at 83.

student a particularly desirable addition to the entering class, funds that have been reserved specifically for this purpose are used to secure enrollment.

Critics of minority-targeted aid are sure to frame minority-targeted aid as a "set aside" that unduly burdens nonminorities denied access to additional funds. Opponents will argue that race-exclusive funds, in particular, are unconstitutional and that race-conscious funds can only be distributed if race is one of many factors used to select award recipients. Accordingly, it is appropriate to examine if, and how, strict-scrutiny analysis yields different results when applied to minority-targeted aid used for enrollment-management purposes.

### 1. Compelling Interest

Under strict scrutiny, the use of race by an institution of higher education that receives federal funds must be narrowly tailored to meet a compelling government interest.<sup>228</sup> The Court has affirmed two compelling interests justifying the use of race in higher education: (1) an institution's interest in remedying the effects of that institution's own past racial discrimination,<sup>229</sup> and (2) an institution's interest in cultivating a diverse student body.<sup>230</sup> The Court's position, however, is shortsighted.

In affirming an institution's interest in remedying the effects of that institution's own past racial discrimination, the Court has insisted that remediation of de facto discrimination<sup>231</sup> and societal discrimination<sup>232</sup> does not rise to the level of a

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228. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007); *Gutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003); *Regents of the Univ. of Cal. V. Bakke*, 438 U.S. 265, 357 (1978).

229. *See City of Richmond v. J.A. Croson Co.* 488 U.S. 469 (1989) (holding that the City failed to prove that its affirmative action program was remedying the effects of the City's past discrimination in the construction industry); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (holding that societal discrimination, absent a showing of prior discrimination by the governmental unit, was an insufficiently compelling interest which would allow for the use of racial classifications).

230. *Gutter v. Bollinger*, 539 U.S. 306 (2003); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

231. In order to prove a compelling interest in remedying past discrimination, government entities must provide specific proof illustrating their past practice of discrimination and the present effects of that discrimination. *See J.A. Croson Co.*, 488 U.S. at 497-98 (striking down a plan requiring city contractors to subcontract at least 30% of the dollar amount of each contract to minority business enterprises because the city failed to prove it was remedying the present effects of the city's own discrimination in the construction industry or identifiable discrimination by contractors in Richmond's local market); *Wygant*, 476 U.S. at 274-76 (holding that absent a showing of prior discrimination from the Jackson School Board, racial classifications used in a collective bargaining agreement designed to provide minorities preferential treatment in the event of layoffs was impermissible). As such, the Supreme Court has adopted a "strong basis in evidence" rule in remedial cases to ensure that an institution's motivation in remedying discrimination is neither insincere nor a pretext for a more invidious motivation. THE CIVIL RIGHTS PROJECT, *supra* note 4, at 4 n.13.

232. In *Bakke*, the University of California, Davis medical school's admissions policy set aside sixteen out of one hundred seats in the entering class for disadvantaged minority applicants. Although a five-member plurality ultimately held that the use of race as one of many

compelling interest. Assuming, however, that a public institution is willing to admit to past racial discrimination, the “strong basis in evidence”<sup>233</sup> standard adopted by the Court, requiring government entities to provide specific proof illustrating their past practice of discrimination and the present effects of that discrimination, is not always easily met.<sup>234</sup>

Moreover, institutions are not only occupied with remedying the present effects of past discrimination. Institutions of higher education, for example, may also have an interest in remedying de facto discrimination caused by standardized testing. Students and prominent civil-rights organizations intervened in the Michigan affirmative action cases, submitting amicus briefs characterizing the standardized tests on which admissions committees rely as tools of a “racial caste system” that keeps Blacks and Latinos in inferior schools and jobs.<sup>235</sup> As such, the use by institutions of higher education of racially-biased admission criteria perpetuated de facto segregation in primary and secondary education, college, and graduate schools, as well as discrimination in the workplace.<sup>236</sup> Accordingly, affirmative action was necessary to offset discrimination that universities engaged in as a result of their unwillingness to abandon their admission practices.

Indeed, other scholars have examined admissions criteria, finding that the selection frameworks used by elite institutions in particular are arbitrary and exclusionary systems that deny advancement not only to racial and gender minorities, but also to poor and working-class Americans of all groups.<sup>237</sup> Scholastic Aptitude Tests (SAT) given to high school students, for example, have been shown to correlate poorly with freshman grades, prompting some researchers to note that there is a better

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factors in a competitive admissions process was constitutionally permissible, the Court nevertheless decided that helping certain groups the medical school perceived to be victims of general societal discrimination did not constitute a compelling interest that could justify the school’s use of race in the admissions process. *Bakke*, 438 U.S. at 310, 320. The Court went on to affirm its holding that societal discrimination cannot justify affirmative action policies in two subsequent employment cases: *J.A. Croson Co.*, 488 U.S. at 498, and *Wygant*, 476 U.S. at 274.

233. THE CIVIL RIGHTS PROJECT, *supra* note 4, at 4 n. 13.

234. Such was the case in *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994). In *Podberesky*, the University of Maryland sought to defend a minority-targeted scholarship by arguing, among other things, that the scholarship was needed to remedy the disproportionately high attrition rates of black students; the university believed the rate to be directly attributable to the university’s segregated past and hostile racial climate. *Id.* In rejecting the remediation of high attrition rates as a compelling interest, the Fourth Circuit cited concerns regarding the accuracy of statistics presented and the failure of the university to conclusively prove that the hostile climate had an effect on attrition rates. *Id.* at 156. The Supreme Court denied certiorari, thereby allowing the Fourth Circuit’s ruling to stand. *Kirwan v. Podberesky*, 514 U.S. 1128 (1995).

235. Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1461 (2005).

236. *Id.*

237. Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 BUFF. L. REV. 1155, 1194 n.217 (2008) (“Although law schools no longer make exclusionary admissions decisions based on race, sex, or class, modern law school admissions criteria and ranking mechanisms have the same limiting effect.”).

correlation between weight and height.<sup>238</sup> Law School Admissions Test (LSAT) scores are no exception, with a study of the University of Pennsylvania Law School finding that LSAT scores were a weak predictor of law school performance, explaining only 14% and 15% of the differences in first- and second-year law school grades, respectively.<sup>239</sup> It has long been understood that standardized test scores do, however, correlate closely with parental income,<sup>240</sup> thereby disadvantaging both women and minorities, two groups that are overrepresented in lower socioeconomic brackets.<sup>241</sup> Despite the evidence supporting the intervenors' claims, the Court failed to address the "cultural . . . and economic biases"<sup>242</sup> imbedded in standardized tests that have a disparate impact on minorities; even the Justices who supported race-conscious admissions policies failed to respond to the intervenors' arguments.<sup>243</sup>

The de facto discriminatory effects of test scores in university admissions do not qualify as the present effects of past de jure discrimination, but they are nevertheless compelling because the impact on minorities is the same; overreliance on the tests excludes minority students. The Supreme Court, however, has refused to recognize de facto discrimination as a compelling interest that survives strict scrutiny. By embracing a distinction between de jure and de facto discrimination and disregarding the reality that inequality stems from both types of discrimination, the Court ignores the fact that racial bias is not always the result of overt government policy, but the result of myriad local, state, and federal laws and policies that, although difficult to prove, are sometimes covertly motivated by racial animus. Moreover, decisions that produce genuinely unintended racial consequences, however innocent, can often reflect unconscious bias traceable to the legacy of racial oppression with which our country has struggled since its inception. Most importantly, however, the harm from an equal protection violation is not the act of discrimination per se, but rather the inequality that results from the discrimination. The harm of that inequality is identical, whether produced by de jure or de facto discrimination, government action or government inaction. In both cases, racial minorities bear the burden of that harm in violation of the spirit of the Equal Protection Clause. The Court's false distinction between de jure and de facto discrimination fails to acknowledge that burden.

The Court's rejection of a compelling interest in remedying societal discrimination is also problematic. In addition to their arguments regarding de facto discrimination and disparate racial impact, intervenors in the Michigan cases also argued that imbalance in higher education is caused by societal discrimination against minorities and that affirmative action which results in increased minority access to higher education corrects the imbalance by redistributing opportunities, status, and political

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238. See Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 971 (1996) (quoting DAVID OWENS, NONE OF THE ABOVE: BEHIND THE MYTH OF SCHOLASTIC APTITUDE 207 (1985)).

239. *Id.*

240. *Id.* at 987-92.

241. *Id.* at 993.

242. Paula C. Johnson, *Jam Tomorrow & Jam Yesterday: Reflections on Grutter, Gratz and the Future of Affirmative Action*, JURIST, Sept. 5, 2003, <http://jurist.law.pitt.edu/forum/symposium-aa/johnson.php>.

243. Brown-Nagin, *supra* note 235, at 1485-86.

power.<sup>244</sup> The majority opinion in *Grutter*, however, failed to acknowledge these arguments, leaving Justice Ginsburg to file concurring (in *Grutter*) and dissenting (in *Gratz*) opinions in which she provided a detailed outline of the societal discrimination against people of color that justifies affirmative action.<sup>245</sup>

Most recently, the Court encountered societal discrimination as a potentially compelling interest in the education context in the *Seattle School District*<sup>246</sup> case. In implementing controlled-choice integration plans, the Seattle, Washington, and Jefferson County, Kentucky, school districts were motivated by a desire to reduce racial isolation in their public schools and avoid the negative impact on academic outcomes that segregated educational settings have on minority children.<sup>247</sup> By implementing the plans, the districts sought to achieve educational equity by ensuring that minority students were not academically disadvantaged by attending majority-minority schools which tend to replicate, in the form of under-resourced schools, inferior learning materials, and concentrations of poverty, the disadvantage and discrimination that minorities encounter in broader society.<sup>248</sup> Despite the legitimacy of the districts' concerns, the Supreme Court failed to definitively address whether there was a compelling interest in eliminating racial isolation. In doing so, the Court implicitly reaffirmed earlier pronouncements that attempts to address the manifestations of societal discrimination are not compelling interests that justify affirmative action.<sup>249</sup>

In preferring diversity to other remedial interests, the Court gives undue importance to the burden that might be shouldered by a majority group in the implementation of remedial policies. At the same time, the Court ignores the continuing societal bias that minorities face, as indicated by the failure of more than two Justices to concur in the account of enduring societal racial bias that Justice Ginsburg outlined in her dissenting opinion in *Gratz*.<sup>250</sup> This failure has prompted scholars like Derrick Bell to argue that a focus on diversity allows courts and policy makers to avoid the truth about past and

244. See Brown-Nagin, *supra* note 235, at 1455–56.

245. See *Grutter v. Bollinger*, 539 U.S. 306, 344–46 (2003) (Ginsburg, J., concurring); *Gratz v. Bollinger*, 539 U.S. 244, 298–302 (2003) (Ginsburg, J., dissenting).

246. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

247. *Id.* at 711–18.

248. See Brief for Respondents at 28–31, *Seattle Sch. Dist. No. 1*, 551 U.S. 701 (No. 05-908); Brief for Respondents at 27–29, *Seattle Sch. Dist. No. 1*, 551 U.S. 701 (No. 05-915).

249. A plurality of the Justices, including Chief Justice Roberts and Justices Scalia, Thomas, and Alito, declined to even consider whether there was a compelling interest in using integration to reduce racial isolation, suggesting that even if addressing the isolation was a compelling interest, the controlled-choice plans were insufficiently narrowly tailored to serve that interest. *Seattle Sch. Dist. No. 1*, 551 U.S. at 725–27. Justice Kennedy filed a separate opinion, concurring in part and concurring in the judgment, in which he characterized the four Justices in the plurality as too dismissive of a legitimate governmental interest in ensuring equal educational opportunity. *Id.* at 783 (Kennedy, J., concurring in part and concurring in the judgment). Nevertheless, Justice Kennedy also found the plans insufficiently narrowly tailored, stating that racial classifications in school assignments can only be used as a “last resort.” *Id.* at 786–87. Thus, the Court failed to clearly address the legitimacy of social equality as a compelling interest.

250. See *Gratz*, 539 U.S. at 298–302 (Ginsburg, J., dissenting).



continuing racial discrimination.<sup>251</sup> Instead of accepting that truth as justification for a remedial interest in affirmative action, a focus on diversity encourages continued denial and is upheld because of its benefit to Whites, rather than its benefit to Blacks.<sup>252</sup> As such, minorities are only “fortuitous beneficiaries” of a policy goal that is subject to change when the majority asserts different priorities,<sup>253</sup> while the focus on diversity legitimizes the tendency of institutions of higher education to place burdens on minority candidates (the burden of diversifying a community), while failing to place similar burdens on white candidates.<sup>254</sup>

A focus on diversity also allows colleges and universities to continue to give “undeserved legitimacy” to grades and tests scores that favor the privileged, instead of reducing their reliance on these methods and finding fairer standards by which to screen applicants.<sup>255</sup> And as long as admissions criteria like standardized tests continue to have a disparate impact on minorities,<sup>256</sup> the diversity rationale makes it difficult for affirmative action proponents to defend the programs whenever institutions deviate from standard patterns of selection in order to compensate for the disparate impact.<sup>257</sup>

At the same time, diversity as a compelling interest does have its benefits. Although it is true that the premium diversity places on a student’s background may make diversity politically unpalatable for those groups that are overrepresented in higher education, diversity’s basis on inclusion frees it from the demographic caps that may accompany remedial interests. Accordingly, an institution is not forced to suspend focus on a minority group just because proportional representation of that group in an institution implies that prior discrimination has been remedied.

In addition, diversity does allow, indeed encourages, institutions to not only consider racial minorities, but many historically disadvantaged groups in the admissions process—a policy that may be more politically palatable to the public. That accomplishment, however, is at the cost of an open and frank conversation about the place of race in our national history and what remains to be done to overcome its damaging legacy. Broader interpretations of the Fourteenth Amendment, including a different level of Supreme Court scrutiny for remedial programs and recognition of de facto and societal discrimination as compelling interests satisfying strict scrutiny, can provide additional support for affirmative action. Although rejected by the Court, these interpretations are considered persuasive by local decision makers and have been recognized by dissenting Justices in Supreme Court cases addressing affirmative action.<sup>258</sup>

Despite its shortcomings, when the Court in *Grutter* upheld the pursuit of a diverse student body as a compelling interest, which could justify the use of race in the admission process, it relied heavily on the substantial educational benefits that

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251. See Derrick Bell, *Diversity’s Distractions*, 103 COLUM. L. REV. 1622 (2003).

252. *Id.* at 1625.

253. *Id.*

254. See Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 961 (1997).

255. Bell, *supra* note 251, at 1629–31.

256. See *supra* notes 237–43 and accompanying text.

257. Malamud, *supra* note 254, at 961.

258. See *supra* notes 245–46 and accompanying text.

diversity confers.<sup>259</sup> These benefits included the breakdown of racial stereotypes, the promotion of cross-racial understanding, and more spirited and enlightening classroom discussion.<sup>260</sup> The Court also relied on testimony from law school officials that a “critical mass,” defined as “meaningful numbers” or “meaningful representation”<sup>261</sup> of minorities, is necessary to promote the benefits of diversity in general and the breakdown of racial stereotypes in particular.<sup>262</sup> Based on this testimony, the Court endorsed the law school’s pursuit of a “critical mass” as constitutionally legitimate,<sup>263</sup> acknowledging that there is some relationship between numbers and achieving the benefits of diversity.<sup>264</sup> As such, paying attention to numbers does not necessarily constitute a quota.<sup>265</sup> Rather, the institution has a right to pursue the goal of critical mass by reference to a numerical range, within which the benefits of diversity would be realized.<sup>266</sup>

The Court also referred to the First Amendment rights implicated when institutions select students for admission.<sup>267</sup> Originally explained in Justice Powell’s *Bakke* opinion, on which the *Grutter* Court relied heavily, academic freedom encompasses the right of an institution to make its own judgments regarding the education it provides, including the selection of its student body.<sup>268</sup> Although it must be balanced with the constitutional limitations that protect individual rights, an institution’s effort to cultivate a diverse student body is of “paramount importance” to fulfilling its educational mission.<sup>269</sup>

The concepts of critical mass and academic freedom must affirm not just an institution’s right to admit students the institution believes will contribute to diversity, but an institution’s right to attract those students in the first place and later ensure their matriculation. Justice O’Connor’s affirmation of both a compelling interest in diversity and of the benefits of diversity is meaningless unless diverse students actually apply, gain admission, and ultimately enroll. Accordingly, the compelling interest is not just the goal of diversity but the pursuit of diversity as well. By responding to the unique social issues regarding race and class with which minority applicants often grapple, minority-targeted financial aid gives effect to admissions decisions so that diverse student populations may actually be realized. Like the use of race in admissions to cultivate diversity, the use of minority-targeted aid as an enrollment-management tool to cultivate diversity is legitimate under the Court’s diversity rationale.

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259. *Grutter v. Bollinger*, 539 U.S. 306, 328–29 (2003).

260. *Id.* at 330.

261. *Id.* at 318.

262. *Id.* at 319–20.

263. *Id.* at 316.

264. *Id.* at 336.

265. *Id.*

266. *Id.*

267. *Id.* at 324.

268. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (plurality opinion).

269. *Id.* at 313.

## 2. Narrow Tailoring

Narrow tailoring refers to the Court's assessment of whether there is an appropriate "fit" between a compelling government interest and the action taken to advance that interest. The purpose of this inquiry is to ensure that there is "little or no possibility that the motive for the classification [based on race or ethnicity is an] illegitimate racial prejudice or stereotype."<sup>270</sup> Although the Supreme Court has never offered a precise test for narrow tailoring, Court precedents have considered various factors in assessing the extent to which a race-conscious program is narrowly tailored. There has been overlap in the use of narrow tailoring factors in both the Court's remedial and diversity cases,<sup>271</sup> but the only diversity cases to specifically address narrow tailoring in higher education are *Bakke*, *Grutter*, and *Gratz*.

In *Regents of the University of California v. Bakke*,<sup>272</sup> Justice Powell considered two major factors in determining whether an admissions policy designed to promote diversity in higher education was narrowly tailored: (1) whether the admissions policy relied on quotas or separate tracks that insulated minorities from review; and (2) whether race was a determinative factor in the admissions process, or merely one of several factors considered in a process that evaluates each applicant individually.<sup>273</sup>

To assess the race-conscious admissions policies at the University of Michigan, the Court in *Grutter v. Bollinger* and *Gratz v. Bollinger* affirmed the use of both of Powell's factors, and considered three additional factors, to create a more extensive list of narrow-tailoring factors that includes (1) whether the process provides flexible, individualized review for all applicants; (2) whether the process offers a competitive review of all applicants that does not utilize quotas or separate tracks to insulate minorities; (3) whether the institution has considered race-neutral alternatives; (4) whether the use of race unduly burdens nonminorities; and (5) whether the use of race is limited in time.<sup>274</sup>

Assuming an institution can successfully demonstrate a commitment to achieving diversity, the crux of the analysis when assessing the permissibility of minority-targeted aid will likely be whether the aid is narrowly tailored. As articulated in *Grutter*, "context matters," and when applying strict scrutiny to race-based government actions, courts must take into account relevant differences in situations.<sup>275</sup> Accordingly,

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

271. *See, e.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989) (striking down remedial programs, in part, because the programs had no "logical stopping point," a factor the Court would examine in the *Grutter* case); *United States v. Paradise*, 480 U.S. 149, 177-78, 182-83 (1987) (assessing "flexib[ility]," considering the efficacy of race-neutral alternatives, and assessing burden on third parties, three factors which would be later considered in *Grutter* and *Gratz*); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275, 280-81 (1986) (considering a program's "logical stopping point" and the burden placed on third-party non-beneficiaries of the program, both factors which would later be considered in *Grutter* and *Gratz*).

272. 438 U.S. 265 (1978).

273. *See id.* at 317-19.

274. *See Grutter*, 539 U.S. at 333-43; *Gratz v. Bollinger*, 539 U.S. 244, 270-75 (2003).

275. *Grutter*, 539 U.S. at 327.

the differences between the admissions process and the aid process will feature prominently in any narrow-tailoring analysis of minority-targeted aid.

#### i. Individualized Review

The concerns highlighted in *Bakke* regarding individualized review centered on preventing race from becoming determinative in the admissions process, on providing an individualized review to each applicant, and on cultivating “genuine” diversity that encompassed the many ways in which students contribute to diversity through alternative perspectives.<sup>276</sup> The Court in *Grutter* affirmed Powell’s vision of a constitutionally permissible admissions process, upholding the law school’s use of race as a “plus” factor.<sup>277</sup> Unlike the undergraduate admissions process that was struck down in *Gratz*, the law school did not automatically award a mechanical or predetermined diversity “bonus” that incorrectly assumed that a racial or ethnic characteristic “ensured a specific and identifiable contribution to . . . diversity.”<sup>278</sup>

The same concerns are not necessarily implicated when considering minority-targeted aid used as an enrollment-management tool. The Court’s guidelines regarding individualized review address how diversity is conceptualized and the extent to which institutions can use race or ethnicity as a marker of diversity. The distribution of minority-targeted aid, however, is a postadmissions process; minority-targeted aid programs are responsive to the financial needs of students who have already been admitted. Accordingly, minority-targeted aid is not based on the faulty assumption that a member of a particular race or ethnicity will automatically diversify an institution. Rather, minority-targeted aid programs simply ensure that sufficient aid has been reserved for those minority students who have already been admitted and who are more likely to require additional aid in order to matriculate.

Moreover, individualized review is still possible when distributing minority-targeted aid, even in race-exclusive scholarships. Minority-targeted aid is used to ensure that a candidate will enroll. If minority-targeted aid is given to an applicant who would enroll without it, use of the aid as an enrollment-management tool is no longer valid. Accordingly, for each admitted minority student, institutions must consider whether additional aid is necessary to ensure the student’s enrollment. Institutions must also consider the desirability of each admitted minority student, a decision that will inevitably be determined by several factors, including standardized test scores, high school grade point average, and special talents or skills; in such a determination, race is not the determinative factor, but rather just one of many factors.

Race-exclusive funding does not mean that every minority candidate is guaranteed additional aid, but rather that the funds have been reserved for a particular enrollment-management purpose—in this case increasing diversity. If, based on an individual review of an admitted student’s financial status and admissions profile, an institution decides that a highly desirable, diverse candidate is unlikely to attend without additional aid, minority-targeted funds can be used. In this way, race is not necessarily

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276. See *Bakke*, 438 U.S. at 317.

277. *Grutter*, 539 U.S. at 337–38.

278. *Id.* at 337 (quoting *Gratz v. Bollinger*, 539 U.S. 244, 271–72 (2003)) (referring to the admissions policy in *Gratz*, characterized as making race decisive for “virtually every minimally qualified underrepresented minority applicant”).

outcome determinative for minority candidates,<sup>279</sup> even in those scholarships for which race is an eligibility criterion.

## ii. Flexibility

In the Michigan cases, the question of flexibility was heavily linked to the question of individualized review and centered largely on whether an admissions program made race or ethnicity the defining feature of an application. Such an admissions process would run counter to the individualized, holistic review that contemplates all the pertinent ways, other than race or ethnicity, in which a student might contribute to diversity at an institution.<sup>280</sup> As discussed earlier, assessments of diversity are not relevant to the distribution of minority-targeted aid as an enrollment tool, and individualized review is still possible for minorities who receive minority-targeted aid through race-exclusive grants or scholarships.

The Court's earlier remedial cases have also considered a program flexible if the race-conscious conditions of a program can be waived when necessary.<sup>281</sup> Even under such a standard, minority-targeted aid is flexible. In using minority-targeted aid as an enrollment-management tool, an institution is free to distribute awards based on the desirability of the admitted student and on the particular financial need of that student. After awards have been made to those minority candidates an institution wishes to enroll, any remaining funds can be used for other aid purposes, including awards to nonminority candidates. Moreover, if an institution decides that additional aid is not necessary for its minority candidates to ensure enrollment, minority-targeted aid need not be awarded at all.

## iii. Quotas/Separate Tracks

The clearest principle to emerge from the Court's three cases addressing diversity in higher education is that quotas in the admissions process are virtually impermissible and will usually fail any narrow-tailoring test. In striking down the admissions policy at issue in *Bakke*, which reserved sixteen out of one hundred seats in each entering class for disadvantaged minorities, Justice Powell noted that nonminority students were excluded from competing for a specific percentage of seats in the entering class,<sup>282</sup> thereby insulating minority students from competition.<sup>283</sup> The *Grutter* Court affirmed Powell's assessment, stating that to be narrowly tailored, a race-conscious admissions program can neither use a quota system that would insulate a "category of applicants

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279. *Gratz*, 539 U.S. at 272 (striking down the admissions policy because the automatic assignment of twenty points to each minority candidate made race a determinative factor in the admissions process by guaranteeing admission to almost every minimally qualified minority).

280. *Grutter*, 539 U.S. at 337.

281. *United States v. Paradise*, 480 U.S. 149 (1987). In *Paradise*, the Court reviewed a promotion policy meant to address past discrimination against Blacks in the Alabama Department of Public Safety and deemed the program flexible because the policy could be waived if no qualified black candidates were available and only applied when the Department needed to, and could afford to, make promotions. *Id.* at 177-78.

282. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 319 (1978).

283. *See id.* at 317.

with certain desired qualifications from competition with all other applicants,” nor place applicant groups on separate admissions tracks.<sup>284</sup>

Critics will inevitably liken minority-targeted aid, and race-exclusive aid in particular, to the quotas that were deemed impermissible in *Bakke* and *Grutter*. According to this critique, limiting scholarship funds to all but a certain subset of students, defined by race or ethnicity, reserves a fixed number or proportion of opportunities exclusively for those students. Like the quotas in *Bakke*, this insulates minority students from competition with other nonminority students for the aid.

In considering the validity of these critiques, context matters and requires a more nuanced understanding of the way in which race-exclusive aid operates. Concern over quotas in *Bakke*, *Grutter*, and *Gratz* was underscored by the question of which applicants deserved to receive an offer of admission and which factors an institution could consider in making that determination. That determination was particularly important, as an offer of admission to one student meant that another student would be denied admission, and there were no alternate sources for an offer of admission to a particular institution. As such, the use of quotas in the admissions context was problematically outcome determinative. A financial-aid award to one student, however, does not necessarily mean that another student cannot also obtain a financial-aid award, either from the same or a different funding source. Moreover, determinations regarding minority-targeted aid are less about which students deserve an award and more about the desire of an institution to secure enrollment of a particular student. Institutions regularly express these desires through the use of differential packaging to all students; the fact that the aid comes from minority-targeted funding is an incidental administrative function, the significance of which has no bearing on an institution’s right to manage its enrollments. Therefore, the need to avoid quotas that reserve opportunities exclusively for one group is not as necessary in the case of minority-targeted aid as it is in the case of race-conscious admissions.

Finally, race-exclusive aid can be likened to the “critical mass” or “attention to numbers” that was sanctioned in *Bakke* and *Grutter*. Both cases recognized that some attention to numbers is necessary if institutions are to admit diverse students in numbers sufficient to reap the benefits of diversity. Justice Powell noted in *Bakke* that including more than a token number of diverse students requires an institution to pay attention to the distribution of students admitted among types and categories.<sup>285</sup> In *Grutter*, the Court supported the law school’s goal of achieving a “critical mass” of underrepresented minority students because there is a relationship between numbers and the benefits of diversity; the fact that an institution pays attention to numbers does not transform the admissions process into a rigid quota.<sup>286</sup> Just as critical-mass goals represent the range in number of minority students an institution believes it must admit to reap the benefits of diversity, resources for race-exclusive aid represent the amount of funding an institution believes it needs to secure enrollment of those minorities. Just as critical mass eschews a fixed number or percentage that must be attained, the amount of funding reserved for race-exclusive aid does not necessarily have to be exhausted, nor must it remain the same from year to year. Like the admissions process,

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284. *Grutter*, 539 U.S. at 334 (quoting *Bakke*, 438 U.S. at 315).

285. *Bakke*, 438 U.S. at 316–17.

286. *Grutter*, 539 U.S. at 336.

individual determinations of whether a minority will need additional aid to enroll can be made until an institution is comfortable that it has made enrollment possible for its most desirable minority candidates.

#### iv. Necessity of Relief and Race-Neutral Alternatives

Narrow tailoring “does not require exhaustion of every conceivable race-neutral alternative.”<sup>287</sup> Moreover, as articulated in *Grutter*, race-neutral alternatives must also be examined in light of the efficacy of those alternatives<sup>288</sup> and must serve the compelling interest “about as well.”<sup>289</sup> In upholding the University of Michigan Law School’s admissions program, the Court noted that several race-neutral alternatives existed, including the use of a lottery system for admission offers or a decrease in emphasis on standardized test scores and grades.<sup>290</sup> The former alternative, however, would have caused a decrease in genuine diversity, as institutions would be unable to make nuanced decisions about diversity that contemplate characteristics other than race and ethnicity.<sup>291</sup> The latter would have required the law school to compromise academic quality, an option that would have “sacrifice[d] a vital component of [the law school’s] educational mission.”<sup>292</sup> Because neither option served the law school’s compelling interest in diversity as well as its “race-as-a-plus factor” admissions process, race-neutral alternatives were not required.<sup>293</sup>

Similarly, equally effective race-neutral alternatives to minority-targeted aid do not seem to exist. As an enrollment-management tool, minority-targeted aid seeks to address the heightened financial concerns of minority groups, while at the same time providing a symbol of commitment to diversity that encourages minority candidates to apply and enroll if admitted. Initiatives like academic programming addressing race and ethnicity, race- and ethnicity-themed housing, or retention programs may communicate commitment to diversity as effectively as aid. But what is the alternative to the provision of aid for students with heightened financial concerns? If an institution seeks to be responsive to the heightened financial sensitivity of a particular race or ethnic group, there is no alternative to reserving additional aid for that group. Minority-targeted aid is a direct and efficient tool that allows an institution to respond to the needs of groups it wants to enroll.

In addition, race-exclusive aid may be the only option for an institution with limited aid resources and low levels of diversity on campus. In such a situation, race-exclusive aid is perhaps the most efficient way of addressing a lack of diversity with limited resources. In fact, this is the type of situation contemplated by Principle 4 of the Department of Education guidelines on minority-targeted aid.<sup>294</sup> Noting that even an institution that is able to offer admission to a diverse group of applicants may

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287. *Id.* at 339.

288. *United States v. Paradise*, 480 U.S. 149, 171 (1987).

289. *Grutter*, 539 U.S. at 339 (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986)).

290. *Id.* at 340.

291. *Id.*

292. *Id.*

293. *Id.*

294. *See supra* notes 73–77 and accompanying text.

nevertheless find their offers disproportionately rejected by minority applicants absent aid, the Department conceded that such circumstances may warrant the use of race-exclusive aid.<sup>295</sup> Although race-exclusive aid at an institution with limited aid may increase the burden for nonminorities, few alternatives exist if additional aid is genuinely needed to encourage minorities to enroll.

Critics may be quick to insist that financial aid be strictly limited to need, rather than race or ethnicity. Myriad social and economic factors, however, affect minority need in a manner that is not readily captured by FAFSA forms and current financial-aid formulas. FAFSA forms, for instance, do not consider home equity for purposes of needs analysis.<sup>296</sup> This exemption makes it more likely that FAFSA forms will indicate equal need for many black and white students, even though black students are more likely to hail from families with tenuous long-term financial security and lower levels of home equity.<sup>297</sup> Finally, race-neutral alternatives should be as effective as race-targeted options.<sup>298</sup> Research has suggested that initiatives that focus on economic status alone do an inferior job of helping minority groups, often providing substantial benefits to low-income Whites instead.<sup>299</sup> Accordingly, distributing financial aid to minorities solely on the basis of income is not warranted by the current constitutional standards because it would not be as effective.

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295. Nondiscrimination in Federally Assisted Programs, Title VI of the Civil Rights Act of 1964, 59 Fed. Reg. 8756, 8757 (Feb. 23, 1994).

296. MCPHERSON & SCHAPIRO, *supra* note 172, at 35.

297. See Malamud, *supra* note 192, at 984.

298. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986) (stating that race-neutral alternatives should serve the interest “about as well”) (quoting Kent Greenawalt, *Judicial Scrutiny of “Benign” Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 578–79 (1975)); see also *Gutter*, 539 U.S. at 339–40.

299. See Elena M. Bernal, Alberto F. Cabrer & Patrick T. Terenzini, *The Relationship Between Race and Socioeconomic Stress (SES): Implications for Institutional Research and Admissions Policies*, REMOVING VESTIGES, Dec. 2007, at 6 (concluding that low socioeconomic Whites would disproportionately benefit from a class-based affirmative action admission program, as compared to low socioeconomic status minority peers); Susan Leigh Flinspach & Karen E. Banks, *Moving Beyond Race: Socioeconomic Diversity as a Race-Neutral Approach to Desegregation in the Wake County Schools*, in *School RESEGREGATION: MUST THE SOUTH TURN BACK?* 261, 270–76 (John Charles Boger & Gary Orfield eds., 2005) (finding that integration plans that consider only socioeconomic status produce mixed to little success in reducing racial isolation for minority students, even as they have provided access to middle-class schools for white students); Sean F. Reardon, John T. Yun & Michal Kurlaender, *Implications of Income-Based School Assignment Policies for Racial School Segregation*, 28 EDUC. EVALUATION & POL’Y ANALYSIS 49 (2006) (concluding that given residential segregation patterns, it is unlikely that race-neutral income-integration policies will significantly reduce racial segregation). *But see* John W. Young & Paul M. Johnson, *The Impact of an SES-Based Model on a College’s Undergraduate Admissions Outcomes*, 45 RES. IN HIGHER EDUC. 777 (2004) (concluding that for particular application populations, SES-based admissions policies might still maintain diversity).



## v. Undue Burden

In cases addressing both remedial race-conscious programs and diversity in higher education, the Court has emphasized that although some race-conscious policies or programs may legitimately impose a burden on some, that burden must nevertheless be balanced by the protection of individual rights.<sup>300</sup> The Court elaborated on that burden in the *Grutter* opinion, concluding that under narrow tailoring standards, a race-conscious admissions program may not “unduly harm members of any racial group.”<sup>301</sup> The law school’s admissions process, however, did not impose undue burden on nonminority applicants because the individualized inquiry ensured that a rejected applicant was not foreclosed from consideration merely because he or she was from a nonpreferred race or ethnic group.<sup>302</sup>

Based on the analysis in *Grutter*, it may initially seem that race-exclusive aid similarly forecloses all nonminority applicants from consideration for an award from minority-targeted funding. Comparisons of the burdens associated with admissions and aid, however, warrant a different conclusion. The interest at stake in *Grutter* was an offer of admission. The burden of being denied an offer on account of race meant that a student could not attend the institution of his or her choice; in the admissions process, for every student that is accepted, another student must be denied. In contrast, the award of financial aid to one student from one source does not necessarily deny another student financial aid from an alternate source, thus imposing a more diffuse burden. This is particularly true considering the amount of minority-targeted aid which is distributed every year. In the 1991–1992 school year, race-conscious aid made up no more than 5% of all undergraduate and graduate scholarships and scholarship dollars.<sup>303</sup> Scholarships for which race or ethnicity were the sole criterion, represented less than 1% of all undergraduate and graduate scholarships in the same year.<sup>304</sup> Furthermore, Whites are considerably more likely to receive merit aid than Blacks, Latinos, and Asians,<sup>305</sup> particularly at private institutions where white students have historically received amounts of aid that are not in proportion with their representation.<sup>306</sup> In addition, because merit aid is often awarded on the basis of academic records and standardized test scores, both of which are correlated with

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300. *Id.* at 280–81 (recognizing that “[a]s part of this Nation’s dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy”); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 314 (1978) (qualifying Justice Powell’s assertion that colleges and universities have wide discretion to make admission decisions by adding that constitutional limitations protecting the rights of individuals could not be disregarded in exercise of that discretion).

301. *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003).

302. *Id.*

303. U.S. GEN. ACCOUNTING OFFICE, HIGHER EDUCATION: INFORMATION ON MINORITY-TARGETED SCHOLARSHIPS 4 (1994).

304. *Id.* at 6.

305. MCPHERSON & SCHAPIRO, *supra* note 172, at 122.

306. *Id.* at 126 (noting that Whites receive 86.4% of merit aid, even though they make up only 82.9% of students).

socioeconomic status, black and Latino students have been less likely than Whites to be eligible for state merit programs.<sup>307</sup>

Accordingly, the denial of aid from a minority-targeted- or race-exclusive-aid fund does not intrusively deny nonminority students all aid; it merely forecloses one of a multitude of aid sources for the sake of reserving enough funds to enable institutions to manage minority enrollment.<sup>308</sup> In light of the increased likelihood that a nonminority student will receive merit aid (when compared to a minority student), and in light of the small percentage of financial aid constituted by minority-targeted aid, the burden on nonminorities, if any, is minimal and certainly worth the benefit. At the very least, if the pursuit of a critical mass of minority students is constitutional, despite the burdens created, then there is no undue burden in extending minority-targeted aid to ensure enrollment of the students.

#### vi. Duration

The Supreme Court has not issued any concrete guidance regarding the permissible duration of race-conscious programs employed at institutions of higher education seeking diverse student bodies. Although acknowledging its prior assertions in earlier remedial cases that race-conscious programs must have a termination point,<sup>309</sup> the Court in *Grutter* nevertheless extended to the University of Michigan extraordinary deference in deciding when its race-conscious admissions policies should be terminated.<sup>310</sup> Accordingly, the Court “[t]ook the Law School at its word that it would ‘like nothing better than to find a race-neutral admissions formula’ and [would] terminate its race-conscious admissions program as soon as practicable.”<sup>311</sup> This leap of faith regarding educational institutions was grounded in Justice Powell’s assertion twenty-five years earlier that the Court would “presume good faith on the part of university officials in the absence of any showing to the contrary.”<sup>312</sup>

In distributing minority-targeted aid, institutions pursue the legitimate goal of diversity with little or no burden to nonminorities. In the absence of any showing of “bad faith,” the same deference extended to institutions regarding the termination of

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307. THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., WHO SHOULD WE HELP? THE NEGATIVE SOCIAL CONSEQUENCES OF MERIT SCHOLARSHIPS 76 (Donald E. Heller & Patricia Marin eds., 2002).

308. Although addressing a remedial case in *United States v. Paradise*, 480 U.S. 149 (1987), the Court made a similar determination regarding burden, concluding that a race-conscious promotional policy imposed only a diffuse burden because it foreclosed only one of several promotion opportunities, instead of creating job loss all together. *Id.* at 183.

309. *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003) (“[D]eviation 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.”). Earlier remedial cases include *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989) (striking down a race-conscious contracting policy, in part, because it had no logical stopping point), and *Wygant v. Jackson Board Of Education*, 476 U.S. 267, 275 (1986) (striking down a race-conscious hiring and promotion plan, in part, because the plan had “no logical stopping point” and allowed a state entity to “engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose”).

310. *Grutter*, 539 U.S. at 343.

311. *Id.*

312. *Id.* (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 317–18 (1978)).

admissions policies should be extended to institutions regarding the termination of minority-targeted aid. Like decisions about admissions, institutions are capable of deciding when consistent achievement of diversity goals warrants the termination of minority-targeted aid or when the use of race-neutral alternatives are likely to be just as effective.

#### CONCLUSION

The future of affirmative action programs in higher education is uncertain. The majority that upheld race-conscious admissions in 2003 is no longer intact; recent changes to the Court's composition have taken the Court in a decidedly more conservative direction when addressing race-based policies and programs. Furthermore, the narrow approach to Fourteenth Amendment jurisprudence of the Supreme Court undermines the future of race-conscious programs and policies. Recognition that universities may compensate for de facto discrimination caused by standardized tests would strengthen the case for all programs that give a preference based on race partly in response to de facto or societal discrimination, as would the application of intermediate scrutiny, rather than strict scrutiny, to race-conscious programs designed to increase minority access to higher education. Unfortunately, the Court has neither recognized remediation of de facto discrimination as a compelling interest that satisfies strict scrutiny, nor approved intermediate scrutiny for benign race-conscious policies.

Despite these uncertainties and existing scholarship to the contrary,<sup>313</sup> both race-conscious and race-exclusive financial-aid programs are constitutional. Under *Grutter's* strict-scrutiny analysis, which recognized diversity as a compelling interest in admissions, minority-targeted aid is constitutional when properly contextualized as an enrollment-management tool effectuating admissions decisions. Both race-conscious and race-exclusive aid legitimately pursue a critical mass of minority students, while providing individualized review to each candidate and placing no undue burden on nonminority candidates.<sup>314</sup>

Minority-targeted aid exists to give effect to *Grutter*-sanctioned admissions decisions—"dog wags tail." As scholars and practitioners prepare for the inevitable challenge to minority-targeted aid that will surely reach the Supreme Court, a more nuanced understanding of minority-targeted aid, and the purpose it serves, will help ensure continued access to higher education for people of color.

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313. See *supra* notes 4–8 and accompanying text.

314. Arguably, if an institution can administer race-conscious aid without forfeiting aid donated with restrictions, and still enroll the same number of minority students, then race-exclusive aid is probably not necessary. This proposition, however, is unrealistic for many institutions, as illustrated by those institutions that refuse to abandon minority-targeted aid, even in the face of potential legal action, as well as those institutions that only begrudgingly dismantle minority-targeted aid programs to avoid legal action while acknowledging the detrimental impact it will have on minority enrollment.