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## Disappearing Without a Case—The Constitutionality of Race-Conscious Scholarships in Higher Education

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# DISAPPEARING WITHOUT A CASE—THE CONSTITUTIONALITY OF RACE-CONSCIOUS SCHOLARSHIPS IN HIGHER EDUCATION

## I. INTRODUCTION

Race-conscious scholarships in higher education are disappearing for three primary reasons. First, a small handful of independent legal nonprofits—led by the Center for Equal Opportunity (CEO) and the American Civil Rights Institute (ACRI)—have applied extensive pressure on colleges and universities to abandon race-conscious scholarships.<sup>1</sup> Second, the United States Department of Education’s (DOE) Office of Civil Rights (OCR),<sup>2</sup> became, under the Bush administration, increasingly skeptical of race-conscious classifications.<sup>3</sup> As OCR has the authority to deny federal funds to institutions of higher education that it finds to be in violation of Title VI of the Civil Right Act of 1964 (Title VI),<sup>4</sup> there is a strong incentive for colleges and universities under OCR investigation to avoid litigation at all costs. This combination of government and private pressure has caused colleges and universities to abandon race-conscious scholarships in large numbers. Added to this pressure is a third factor: the growing impact of state constitutional bans on affirmative action. As of 2009, four states—California, Washington, Michigan, and Nebraska—have voted to ban affirmative action in state programming.<sup>5</sup>

While the story of race-conscious scholarships has received attention in the higher education and civil rights communities,<sup>6</sup> it has gone largely unnoticed by the general public. This is due in large part to the informal, behind-the-scenes manner in which such scholarships have been challenged. Nearly all of the evidence documenting the demise of race-conscious scholarships exists in complaints and letters sent between the

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1. *See infra* Part II.B (describing CEO and ACRI’s role in the rapid reduction of race-conscious scholarships throughout the United States).

2. OCR is responsible, among other things, for implementing Title VI of the Civil Rights Act of 1964. OCR’s mission is “to ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights.” Office for Civil Rights, Overview of the Agency, available at <http://www.ed.gov/about/offices/list/ocr/index.html> (last visited Feb. 17, 2009).

3. *See infra* note 79 and accompanying text.

4. 42 U.S.C. § 2000(d) (2000).

5. *See infra* note 90 and accompanying text.

6. The most extensive coverage of the controversy surrounding race-conscious scholarships appears in the *Chronicle of Higher Education*.

legal organizations challenging race conscious scholarships (such as CEO and ACRI), the colleges and universities that implement the scholarships, and OCR, the institution responsible for enforcing Title VI.<sup>7</sup> As the courts have not addressed the constitutionality of race-conscious scholarships in the years since *Grutter v. Bollinger*,<sup>8</sup> colleges and universities have become extremely vulnerable to these external pressures calling for the scholarships' elimination.

The purposes of this Note are twofold. First, it tells the story of race-conscious scholarships. Part II begins with a discussion of the historical and contemporary justifications for race-conscious scholarships, and it concludes with a detailed description of the behind-the-scenes letter writing campaign that has led to their demise.

Second, this Note argues that race-conscious scholarships are constitutional. Part III sets forth the legal framework. In its 2003 *Grutter* decision, the Supreme Court held that race-conscious university admissions policies designed to promote student body diversity<sup>9</sup> can withstand strict scrutiny under both the Equal Protection Clause of the Fourteenth Amendment and Title VI.<sup>10</sup>

While *Grutter* resolved nearly twenty-five years of doubt with respect to the constitutionality of race-conscious admissions programs,<sup>11</sup> it left programs outside of the admissions context, such as race-conscious scholarships, outreach and recruitment, and support and retention programs, in a constitutional haze.<sup>12</sup> Part III analogizes *Grutter* in the context of race-conscious scholarships and concludes by describing the importance of that context in Equal Protection analysis.

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7. The author was able to obtain these communications through a Freedom of Information Act (FOIA) request to OCR, as well as through the generosity of Minnesota law professor Karen Miksch, who shared the results of one of her previous FOIA requests.

8. 539 U.S. 306 (2003).

9. For a discussion of the Court's definition of student body diversity, see *infra* note 140.

10. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

11. From 1978 until *Grutter* in 2003, the constitutionality of race-conscious programming in higher education was analyzed under the framework of Justice Powell's lone concurrence in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

12. For a description of outreach/recruitment and support/retention programs, see *infra* note 28. While it is not the subject of this Note, it is important to mention that race may also be considered via facially neutral policies, when those policies are designed to benefit minority students. Because such policies do not facially classify individuals on the basis of race, they are unlikely to be subject to strict scrutiny. See *Hayden v. County of Nassau*, 180 F.3d 42, 54 (2d Cir. 1999) (refusing to apply strict scrutiny to a police entrance exam that was designed to minimize discriminatory impact on black candidates, but did not amount to a facial classification that expressly distinguished between applicants on the basis of race).

With this background established, Part IV analyzes the constitutionality of two kinds of race-conscious scholarships: (1) “race-as-a-plus-factor” scholarships, where race is one of many factors considered in the allocation of benefits; and (2) race-exclusive scholarships, where eligibility is restricted on the basis of race.<sup>13</sup> Concluding that the vast majority of both types are constitutional, this Part calls on colleges and universities that value racial diversity to stand their legal ground and challenge the assertion that their scholarships are unlawful.

## II. THE RISE AND FALL OF RACE-CONSCIOUS SCHOLARSHIPS

### A. *Racial Inequality in Higher Education: The Purpose Behind Race-Conscious Scholarships*

Race-conscious scholarships were born out of a desire to increase African Americans’ access to American colleges and universities and thereby advance the goals of racial justice and equality.<sup>14</sup> For hundreds of years, state and local governments actively resisted the education of African Americans, and they did so “regardless of whether that education was provided by whites or by African Americans themselves.”<sup>15</sup> Prior to the Civil War, for example, “almost all southern states forbade teaching slaves to read and write and several states extended the prohibition to free African-Americans as well.”<sup>16</sup> The resistance to the education of African Americans that continued well after the Civil War and, indeed, well after the Supreme Court declared segregation illegal in 1954, is a familiar story.

Race-conscious scholarships were originally designed as a response to this long history of racial oppression and unequal access to higher education, first appearing with the Civil Rights Movement and the rise of affirmative action.<sup>17</sup> In 1965, President Lyndon B. Johnson famously

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13. When this Note refers to “race-conscious” scholarships, it is referring to *both* race-as-a-plus-factor scholarships and race-exclusive scholarships. When referring to one specific scholarship type, this Note will refer to it by name, as either a plus-factor or race-exclusive scholarship.

14. This goal is noticeably different from the rationale underlying *Grutter*’s compelling interest in “student body diversity.” See *infra* note 140 and accompanying text. As explained below, the express goals of race-conscious scholarships are changing over time: originally justified as a small part of the greater effort to remedy America’s long history of slavery and racial oppression, race-conscious scholarships are today justified on the grounds of their educational benefit to all students. See *id.*

15. Sean M. Scott, *Justice Redefined: Minority-Targeted Scholarships and the Struggle Against Racial Oppression*, 62 UMKC L. REV. 651, 663 (1994).

16. *Id.* (citing W.E.B. DUBOIS, *BLACK RECONSTRUCTION IN AMERICA, 1860–1880*, at 638 (Antheneum 1992) (1935)).

17. While the concept of affirmative action has existed since the Civil War and Reconstruction, the actual phrase “affirmative action” was introduced to the popular discourse in President John F.

explained the rationale behind affirmative action; evoking the imagery of slavery, he explained: “You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say ‘you are free to compete with all the others,’ and still justly believe that you have been completely fair.”<sup>18</sup>

Following this logic, and buttressed by the enactment of the 1964 Civil Rights Act and 1965 Voting Rights Act, colleges and universities began considering race in admissions decisions in order to increase African American enrollment. Schools quickly realized, however, that “[w]ithout adequate financial aid, minority students, though admitted under the revised admission programs, were unable to matriculate.”<sup>19</sup> Consequently, educational institutions began “restructuring financial aid policies to be more responsive to the needs of African-American students . . . [by] designat[ing] certain funds which only minority students [would be] eligible to receive.”<sup>20</sup>

Today, there remains a vast racial disparity in access to higher education in America,<sup>21</sup> and numerous studies suggest that the disparity is growing.<sup>22</sup> At the most general level, there are three primary features to

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Kennedy’s 1961 Executive Order 10925. This Order required federal contractors to “take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.” Exec. Order No. 10,925, 26 Fed. Reg. 1977 (Mar. 8, 1961). President Lyndon B. Johnson used the same language in his affirmative action order. Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 28, 1965).

18. Lyndon B. Johnson, To Fulfill These Rights, Commencement Address at Howard University (June 4, 1965), in *THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY* 126 (Lee Rainwater & William L. Yancey eds., 1967). Reflecting similar logic, Justice Blackmun, eleven years later, explained: “In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently.” *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., dissenting).

19. Scott, *supra* note 15, at 653 (internal citations omitted).

20. *Id.*

21. In 2006, the U.S. Census Bureau explained that if you are an African American twenty-five years of age or older, you are more likely to be *without* a high school diploma than you are to *have* a college degree. Conversely, if you are white and in the same age group, you are nearly *three times* as likely to have a college degree than you are to be without a high school diploma. As of 2006, eighty-one percent of African Americans over the age of 25 had *not* completed four or more years of college. See U.S. Census Bureau, Black History Month: February 2008 (Dec. 3, 2007), available at <http://www.census.gov/Press-Release/www/releases/archives/cb08ff-01.pdf>.

22. See Victor B. Saenz et al., *Losing Ground? Exploring Racial/Ethnic Enrollment Shifts in Freshman Access to Selective Institutions*, in *CHARTING THE FUTURE OF COLLEGE AFFIRMATIVE ACTION: LEGAL VICTORIES, CONTINUING ATTACKS, AND NEW RESEARCH* 79, 90 (Gary Orfield ed., 2007) (“[R]elative to the representation in their age-group population, Hispanics and Blacks are losing ground while Asian and White students are posting gains in [higher education] access . . . . This access gap is even more compelling when one considers that White students are under-reported given their increasing tendency to not report their racial status to their institutions.”); see also Leigh Jones, *Minority Enrollment at Law School Is Faltering*, NAT’L L.J., Feb. 6, 2008, at 1 (“From 1996 to 2006, the number of blacks and Mexican-Americans enrolled in the nation’s law schools accredited by the

this inequality. First, in comparison with whites, “African-American students are . . . far less likely to have access to college information and resources within their families or communities.”<sup>23</sup> Second, once in college, the attrition rate for African Americans is significantly higher than for their white peers.<sup>24</sup> Third, because students of color are “far more likely to come from low-income families than their white peers,”<sup>25</sup> high tuition costs provide a disproportionate impediment to their access to higher education.<sup>26</sup> Thus, “[e]ven for African-American students who are academically prepared, college costs present a significant obstacle to enrolling in and graduating from college.”<sup>27</sup>

Race-conscious scholarships seek to alleviate the disproportionate financial barrier to college access.<sup>28</sup> Financial aid is “often the key to

American Bar Association (ABA) fell from 3,937 to 3,595. During that same period, the number of ABA-accredited law schools grew from 176 to 195.”) (citing Society of American Law Schools and Lawyering in the Digital Age Clinic, Columbia University School of Law, A Disturbing Trend in Law School Diversity, *available at* <http://www2.law.columbia.edu/civilrights/> (last visited Feb. 17, 2009)).

23. NAACP LEGAL DEF. AND EDUC. FUND, INC., CLOSING THE GAP: MOVING FROM RHETORIC TO REALITY IN OPENING DOORS TO HIGHER EDUCATION FOR AFRICAN-AMERICAN STUDENTS 4 (2005) [hereinafter NAACP REPORT] (citing SANDRA RUPPERT, CTR. FOR CMTY. COLL. POLICY, CLOSING THE COLLEGE PARTICIPATION GAP: A NATIONAL SUMMARY, (2003)). For example,

African-American students typically attend schools that are unable to provide resources to fill the gaps in parental knowledge of, and familiarity with, the college preparation process.

Whereas the national average ratio of students to guidance counselors is 490:1, the ratio can be 1056:1 or higher in schools serving large numbers of minority and low-income students.”

*Id.* at 5. Thus, while the number of African-American students enrolling in college is slowly increasing, it remains that “[o]nly 55% of African-American high school graduates are enrolling in college immediately after high school, in comparison to 64% of white students.” *Id.*

24. For example, “[a]mong African-American students who enrolled in four-year colleges in 1995–1996, only 36.4% attained a bachelor’s degree in five years, as compared to 58% of white students.” *Id.* (citing AMERICAN COUNCIL ON EDUC., MINORITIES IN HIGHER EDUCATION 2003–2004: TWENTY-FIRST ANNUAL STATUS REPORT (2005). What’s more, “[n]early one-third of African-American students (30.1%) dropped out. Even as African-American college enrollment is rising, college degree attainment has remained flat.” *Id.*

25. *Id.*

26. “Among 1992 high school graduates, 54% of African Americans were low-income [family income of less than \$25,000] as compared to 21% of white students.” *Id.*

27. *Id.*

28. In addition to race-conscious scholarships, colleges and universities frequently implement outreach/recruitment programs as well as support/retention programs. Outreach and recruitment programs are designed to close the preparation and access to information gaps by reaching out to minorities before, during, and just after the college admissions process. Examples of such programs include: (1) sending recruitment officers to predominately minority high schools to publicize and discuss opportunities at a university, (2) minority-specific advertising and public relations materials, (3) fairs and open house events specifically for minority applicants, and (4) targeted mailings to minority students. Angelo N. Ancheta, *Antidiscrimination Law and Race-Conscious Recruitment, Retention, and Financial Aid Policies in Higher Education*, in CHARTING THE FUTURE OF COLLEGE AFFIRMATIVE ACTION, *supra* note 22, at 27. Further, once students are admitted, university admissions officers may offer on-campus programs that provide minority students “an opportunity to visit the

encouraging college attendance among low-income students or those who are first in their families to consider college.”<sup>29</sup> Indeed, as one court recognized, “[o]ne of the most important determinants for the majority of student enrollment decisions is the receipt of financial aid.”<sup>30</sup> Additionally, “the amount of aid that institutions offer often determines where highly recruited minority students enroll.”<sup>31</sup> Moreover, race-based financial aid often provides “continued financial support that could mean the difference, for some minority students, between continuing their studies or leaving school.”<sup>32</sup>

While race-conscious financial aid will not, on its own, eliminate the inequalities described above, it does have a positive impact. This point was not lost on colleges and universities: by the early 1990s (prior to their rapid demise), “[e]ighty-nine percent of independent colleges and universities, and eighty-three percent of state colleges and universities” offered some form of race-based scholarship program.<sup>33</sup>

### *B. The Fall of Race-Conscious Scholarships*

Race-conscious scholarships have been the source of intense controversy throughout their history.<sup>34</sup> Over the course of the last ten

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campus and obtain a glimpse of college life, often with travel and housing expenses covered by the university.” *Id.* at 15, 28.

Support and retention programs are designed to close the gap in college retention rates by helping students of color adjust to predominantly white campus cultures and help keep them in school and successful. Examples of support programs include the following programs, when implemented race-consciously: “[p]re-enrollment summer bridge programs, post-matriculation tutoring programs, student centers, housing, graduation ceremonies, mentoring programs, and university funded organizations.” R. Richard Banks, *Race-Conscious Affirmative Action and Race-Neutral Policies in the Aftermath of the Michigan Cases*, in CHARTING THE FUTURE OF COLLEGE AFFIRMATIVE ACTION, *supra* note 22, at 35, 47.

29. Sara Hebel, *Court Rulings May Open the Door for More Use of Race in Student Aid*, CHRON. HIGHER EDUC. (Wash., D.C.), July 4, 2003, at S6.

30. *Geier v. Sundquist*, 128 F. Supp. 2d 519, 538 (M.D. Tenn. 2001) (quoting consent decree).

31. Hebel, *supra* note 29.

32. U.S. GEN. ACCOUNTING OFFICE, HIGHER EDUCATION: INFORMATION ON MINORITY-TARGETED SCHOLARSHIPS 10 (1994), available at <http://archive.gao.gov/t2pbat4/150617.pdf> [hereinafter GAO REPORT].

33. Scott, *supra* note 15, at 661.

34. To one scholar, race-conscious scholarships are controversial because of the emotional response that they evoke. She explains that such scholarships “are important because they have become a metaphor for the struggle African-Americans have engaged in for hundreds of years over the right of access to education at all levels. This struggle for access is simply part of the larger struggle for justice and equality.” Scott, *supra* note 15, at 695. For an interesting illustration of this long and contested history, see Rachel Spector, *Minority Scholarships: A New Battle in the War on Affirmative Action*, 77 IOWA L. REV. 307, 315 n.60 (1991) (setting forth the conflicted and inconsistent

years, this controversy has reached a climax. Affirmative action opponents, led by the ACRI and CEO, have initiated a coordinated campaign to eliminate the use of race in all university programs.<sup>35</sup> Roger Clegg, president of CEO and a lead architect of the campaign, claims to have contacted over one hundred colleges and universities in order to request that they terminate race-conscious programs.<sup>36</sup> As a result of these communications, Clegg claims that dozens of schools have closed their racially exclusive programs.<sup>37</sup> These efforts have transformed the landscape of race-conscious programming at American universities.<sup>38</sup> Indeed, as of 2004, CEO claimed that of the one hundred colleges and universities it had contacted, roughly seventy of them were persuaded either to end their affirmative action programs or to open access to the programs to all races.<sup>39</sup>

chronology of opinions issued by U.S. Department of Education's Office of Civil Rights on race-conscious scholarships from 1970 to 1989).

35. See Kendra Hamilton, *Truth and Consequences: In the Michigan Aftermath, the Real Fight Begins as Local Institutions Work to Apply the Supreme Court Ruling to Meet Their Campuses' Individual Needs and/or Restrictions*, BLACK ISSUES IN HIGHER EDUC. (Sept. 25, 2003), available at [http://findarticles.com/p/articles/mi\\_m0DXK/is\\_16\\_20/ai\\_108967471?tag=content;col1](http://findarticles.com/p/articles/mi_m0DXK/is_16_20/ai_108967471?tag=content;col1) ("The Center for Equal Opportunity . . . , which bills itself as 'the only think tank devoted exclusively to the promotion of colorblind equal opportunity and racial harmony,' has emerged as the pre-eminent combatant against race-conscious outreach and admissions policies in the post-Michigan era.").

36. Roger Clegg, *Time Has Not Favored Racial Preferences*, CHRON. HIGHER EDUC. (Wash., D.C.), Jan. 14, 2005, at B10 ("My own Center for Equal Opportunity has contacted well over a hundred colleges about illegal faculty discrimination and racially exclusive programs for students. We have filed complaints in some of those cases with the Office for Civil Rights, and have now also begun bringing such cases—where they involve state institutions—to the attention of the Justice Department.").

37. *Id.* ("[T]he overwhelming majority of colleges that we have contacted—Carnegie Mellon University, Harvard University, Indiana University, the Massachusetts Institute of Technology, Northwestern University, Princeton University, the University of Illinois at Urbana-Champaign, Williams College, Yale University, and dozens of others—have opened up racially exclusive programs to all students, regardless of race.").

38. See *infra* notes 80–82 and accompanying text.

39. Peter Schmidt, *Not Just for Minority Students Anymore*, CHRON. HIGHER EDUC. (Wash., D.C.), Mar. 19, 2004, at A17. But see Karen Miksch, *Stand Your Ground: Legal and Policy Justifications for Race-Conscious Programming*, in CHARTING THE FUTURE OF COLLEGE AFFIRMATIVE ACTION, *supra* note 22, at 57, 70–71 (explaining "I was able to confirm that 53 institutions had been contacted by the CEO and ACRI. I was never able to find the rest of the 100 institutions that the organizations claim they contacted, nor were they willing to provide the list. . . . Ultimately I was able to confirm that 71 programs at 53 institutions were changed or discontinued between 1995 to 2005."). See also Jonathan D. Glater, *Colleges Open Minority Aid to All Comers*, N.Y. TIMES, Mar. 14, 2006, at A1 (where Roger Clegg states that "since 2003 his center had sent 200 challenges to colleges and universities over race-based scholarships and other programs, warning of legal action if changes were not made. He [Clegg] said more than 150 institutions had broadened their programs in response."). Definitive answers are hard to come by, in part because "[n]either the Justice Department nor Education Department, nor organizations on all sides of the discussions over affirmative action, have gathered statistics tracking the trend." *Id.* What's more, "[f]irm data on how many institutions have modified their policies is elusive because colleges and institutions are not eager



This Part tells the story of the demise of race-conscious scholarships. Part II.B.1 provides examples of scholarship programs that have been either shut down or drastically re-organized. Part II.B.2 examines the actual communications between CEO, OCR, and colleges and universities, and reveals the manner in which so many schools have caved to CEO and OCR pressure. Finally, Part II.B.3 addresses the separate but important impact of statewide affirmative action bans.

### *1. Examples of Scholarships That Have Been Shut Down*

Washington University's John B. Ervin Scholars Program ("Ervin Program") is representative of the experiences at these institutions.<sup>40</sup> Until 2005, the Ervin Program provided full tuition and a \$2,500 annual stipend to "United States citizens who are African Americans."<sup>41</sup> The Ervin Program was "[n]amed in honor of the nationally renowned black educator, John B. Ervin [and designed to] recognize the intellectual, leadership, and service achievements of African-American students."<sup>42</sup> In addition to the tuition and scholarship money, Ervin Scholars "participate[d] in a program [including] orientation to the University, meetings with University and community leaders, academic support and advising, assistance in finding research and internship positions, and events with other Ervin Scholars and the program's director, among others."<sup>43</sup>

In response to CEO and OCR pressure about the Ervin Program,<sup>44</sup> Washington University signed a Resolution Agreement in 2005 that stated,

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to trumpet the changes." *Id.* "Travis Reindl, director of state policy analysis at the American Association of State Colleges and Universities, said hundreds, if not thousands, of scholarship and fellowship programs historically used race as a criterion." *Id.* According to the *New York Times*, "Mr. Reindl estimated that as many as half of the four-year colleges in the United States had reviewed or modified such programs." *Id.*

40. See Peter Schmidt, *From 'Minority' to 'Diversity': The Transformation of Formerly Race-Exclusive Programs May Be Leaving Some Students Out in the Cold*, CHRON. HIGHER EDUC. (Wash., D.C.), Feb. 3, 2006, at A24 (gathering data on race-conscious scholarships from numerous colleges and universities); Schmidt, *supra* note 39.

41. Description of John B. Ervin Scholarship, August 22, 2003 (on file with author). Washington University also implemented the Annika Rodriguez Scholarship, which was open only to Hispanic students and also provided full tuition. See Ancheta, *supra* note 28, at 30. Like the Ervin Program, the Rodriguez scholarship, in the same year, was opened to all races. *Id.* Today, Rodriguez Scholarships are awarded "based on academic performance, commitment to serving or working with underprivileged populations, and the ability to bring diverse people together." *Id.*

42. *Id.*

43. *Id.*

44. See *infra* Part II.B.2 for a description of the letter-writing exchange between Washington University, CEO, and OCR.

“Beginning with the University’s Class of 2009, and continuing for the term of this Agreement, the University will no longer select Ervin Program participants using the former, race-exclusive criteria.”<sup>45</sup> Accordingly, rather than consider race, the program now accepts:

U.S. citizens [who] have challenged themselves and excelled academically, can demonstrate leadership, have engaged in or shown a commitment to community service, can demonstrate their commitment to bringing diverse people together . . . , have demonstrated a commitment to serving historically underprivileged populations, and/or can demonstrate achievement and determination in the face of personal challenges.<sup>46</sup>

Opening the Ervin Program to nonminority students has had a large impact on the number of minority students served. In a letter sent from Washington University to the *Chronicle of Higher Education*, the university explained that in the 2005–06 school year (the first after the scholarship was opened), twelve of the forty-two Ervin Scholarships, or nearly thirty percent, were awarded to white students.<sup>47</sup>

This story has been repeated at colleges and universities throughout the United States.<sup>48</sup> To better understand the nature and range of race-based financial aid, the remainder of this section provides short descriptions of a small sample of programs.

At Saint Louis University (SLU), the Ernest A. Calloway Jr. scholarship once awarded thirty annual scholarships of \$11,000 per year to

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45. Resolution Agreement, May 13, 2005 (on file with author).

46. Washington University, John B. Ervin Scholars Program—All Undergraduate Schools, <http://admissions.wustl.edu/scholarships/programs/Pages/Ervin.aspx> (last visited Feb. 17, 2009). This revised selection criteria was established in the 2005 Resolution Agreement.

Roger Clegg, director of CEO, has suggested that depending on how the scholarship is implemented, even these criteria may be illegal.

Mr. Clegg . . . argues that colleges are still engaging in racial discrimination if they operate programs that require white and Asian applicants to come from disadvantaged backgrounds or show a commitment to diversity, but don’t make the same demands of black, Hispanic, or American Indian students.

If a program’s criteria on views toward diversity essentially amount to a requirement that applicants ‘sign a pledge of allegiance to political correctness,’ the program could be challenged on First Amendment grounds . . . .”

Schmidt, *supra* note 39.

47. Schmidt, *supra* note 40; *see also* Glater, *supra* note 39 (“Some white students are qualifying for the aid. . . . [In 2006], the first year since the [Ervin Program] change, 12 of the 42 first-year recipients are white.”).

48. For a list of examples, *see* Schmidt, *supra* note 39; Schmidt, *supra* note 40; Glater, *supra* note 39.

black students.<sup>49</sup> In 2004, under pressure from OCR, SLU terminated the program and replaced it with the Martin Luther King Jr. Scholarship Program (“King Scholarship”).<sup>50</sup> King Scholarships, valued at \$13,000 per year, are “granted to students who are committed to the promotion of diversity in our society and who demonstrate leadership in the classroom, on campus and in the greater community.”<sup>51</sup> In its first year, the King Scholars Program, significantly larger than the Calloway Scholarship before it, selected one American Indian, sixteen Asian Americans, thirty-two African Americans, ten Hispanics, and eighteen whites.<sup>52</sup> In its second year, it admitted two Alaskan Natives, nineteen Asian Americans, fifty-seven African Americans, twenty-nine Hispanics, and forty-five whites.<sup>53</sup>

The State University of New York (SUNY) once operated the Underrepresented Graduate Fellowship Program, which distributed \$6.2 million in financial aid to 500 students, and the Empire State Minority Honors Scholarship Program, which distributed \$649,000 a year to 898 students.<sup>54</sup> Prior to 2006, both programs—designed to recruit, enroll and retain students who were historically underrepresented at SUNY—were open only to black, Hispanic, and American Indian students.<sup>55</sup> In January 2006, however, the SUNY Board of Trustees “voted unanimously to expand the eligibility criteria”<sup>56</sup> by opening the programs to all races.

Southern Illinois University (SIU) once offered three fellowship programs: the Proactive Recruitment of Multicultural Professional for Tomorrow program, the Bridge to the Doctorate Fellowship program, and the Graduate Dean’s Fellowship Program, each reserved exclusively for women or members of minority groups.<sup>57</sup> In a November 4, 2005, letter to SIU, the Justice Department’s Civil Rights Division stated that the university, through its fellowships, had “engaged in a pattern or practice of intentional discrimination against whites, nonpreferred minorities, and males.”<sup>58</sup> Through months of legal discussions and investigations, SIU

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49. Schmidt, *supra* note 39.

50. *Id.*

51. Saint Louis University Undergraduate Admission, Martin Luther King, Jr. Scholarship, <http://www.slu.edu/x5175.xml> (last visited Feb. 17, 2009).

52. Schmidt, *supra* note 40. In these first two years, the scholarships were for \$8,000, not \$13,000.

53. *Id.*

54. Glater, *supra* note 39.

55. Schmidt, *supra* note 40.

56. *Id.*

57. Peter Schmidt, *Justice Dept. is Expected to Sue Southern Illinois University Over Minority Fellowships*, CHRON. HIGHER EDUC. (Wash., D.C.), Nov. 25, 2005, at A34.

58. *Id.* Schmidt notes that the case against SIU was “the first time that the Justice Department [as opposed to the DOE] has stepped into the fray . . . .” *Id.*

“strongly denied allegations of any intentional discrimination,” explaining that they have always felt that the fellowships in question were but a small part of an overall graduate assistance effort that allows thousands of students, from every imaginable culture and background, to pursue their degrees while working at Southern Illinois University.<sup>59</sup> Despite this passionate defense of its race-conscious programs, SIU signed a consent decree with the Department of Justice. As part of the decree, the university agreed to “[d]iscontinue any information that suggests that paid fellowship positions are restricted on the basis of race, national origin or sex.”<sup>60</sup> Today, therefore, SIU’s diversity fellowships, originally created for minorities and women, are open to whites and men.<sup>61</sup>

## 2. *The Letter Writing Campaign: Pressure Behind the Scenes*

CEO and ACRI, the driving forces behind almost all of these changes, have exerted this pressure via a letter-writing campaign.<sup>62</sup> In the typical case, CEO will send a letter to a university first requesting that it terminate its race-based program and, second, threatening to file a complaint with OCR if the university fails to comply. For example, in a joint letter from CEO and ACRI to Washington University, the authors state: “We request that you open the [Ervin Program] to all students regardless of skin color or where there [sic] ancestors came from.”<sup>63</sup> Two sentences later, they continue: “If we do not receive a satisfactory response from you [in three weeks time], we will file a formal complaint with [OCR] . . . .”<sup>64</sup>

Not all institutions have immediately complied with CEO’s initial request. For example, Washington University wrote a letter back to CEO/ACRI arguing that the Ervin Program is “intended to allow the

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59. Remarks by Dr. Glenn Poshard, President, Southern Illinois University, SIU Board of Trustees Meeting, Feb. 8, 2006, *available at* <http://news.siu.edu/news/February06/020806bot6001.jsp>.

60. *Id.*

61. Southern Illinois has tried, via race-neutral means, to preserve the original intent of its fellowships. For example, the Graduate Dean’s Fellowship is now open to “traditionally underserved individuals who have overcome social, cultural or economic conditions that have adversely affected their educational progress.” See Southern Illinois University, Graduate Dean’s Fellowship Application Material, *available at* [http://www.siu.edu/gradschl/grad-deans\\_fellowship.htm](http://www.siu.edu/gradschl/grad-deans_fellowship.htm) (last visited Feb. 17, 2009).

62. Peter Schmidt, *supra* note 40 (“Many of the colleges that have opened up race-exclusive programs have done so in response to letters of complaint from [CEO and ACRI]. ‘We are making a real effort to visit the Web site of every college and university in the country over the next year’ to look for evidence of race-exclusive programs, says the center’s Mr. Clegg.”).

63. Letter from Edward Blum, Dir. of Legal Affairs, ACRI, and Roger Clegg, Gen. Counsel, CEO, to Michael Cannon, Gen. Counsel, Washington Univ. (Mar. 17, 2003) (on file with author).

64. *Id.*

University to achieve the compelling interest of providing all of its students the educational benefits of a diverse student body” and thus “fully complies with current applicable law.”<sup>65</sup> Similarly, the Massachusetts Institute of Technology (MIT) responded to a CEO/ACRI complaint by explaining that “[t]he opportunities that MIT provides to underrepresented minorities are entirely consistent with the Federal Government’s efforts to further [the] compelling national purpose [of creating a diverse student body].”<sup>66</sup> SLU, responding to a CEO/ACRI letter about the Ernest A. Calloway Jr. Scholarship, maintained that “It is the University’s judgment that [Calloway Scholarships] represent lawful initiatives under current law . . . .”<sup>67</sup>

When colleges and universities disputed CEO/ACRI’s arguments, CEO/ACRI consistently honored its promise by filing a formal complaint with OCR. For example, with respect to SLU, CEO and ACRI wrote to OCR:

[W]e asked SLU to open up its racially and ethnically exclusive programs and scholarships to students of all skin colors . . . . SLU, however, has declined to do so.

We request that OCR investigate any of SLU’s racially and ethnically exclusive programs and scholarships and make clear to SLU that they must be made available to students on a nondiscriminatory basis, if the school is to continue to receive federal funding.<sup>68</sup>

Time and again, such outsider requests for formal OCR investigation were enough to convince universities to comply by either terminating their programs or, more commonly, by opening them up to all races. With respect to Washington University, OCR explained: “Prior to the completion of our investigation the University advised OCR of its intent to address the allegations of the complaint by adopting new eligibility criteria

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65. Letter from Michael R. Cannon, Gen. Counsel, Washington Univ., to Edward Blum, Dir. of Legal Affairs, ACRI, and Roger Clegg, Gen. Counsel, CEO (Apr. 10, 2003) (on file with author).

66. Letter from Jamie Lewis Keith, Senior Counsel, MIT, to Edward Blum, Dir. of Legal Affairs, ACRI, and Roger Clegg, Gen. Counsel, CEO (Mar. 15, 2001) (on file with author).

67. Letter from William R. Kauffman, Vice President and Gen. Counsel, Saint Louis Univ., to Edward Blum, Dir. of Legal Affairs, ACRI, and Roger Clegg, Gen. Counsel, CEO (Mar. 14, 2003) (on file with author).

68. Letter from Edward Blum, Dir. of Legal Affairs, ACRI, and Roger Clegg, Gen. Counsel, CEO, to Hon. Gerald Reynolds, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ. (Mar. 18, 2003) (on file with author).

for the Ervin Scholars Program . . . that *would not include race*.”<sup>69</sup> Indeed, the parties entered a formal resolution that resolved the complaint.<sup>70</sup> Similarly, after OCR inquiry, both SLU and MIT entered into resolution agreements with OCR that eliminated the use of race in their programs.<sup>71</sup>

According to one scholar, this pattern shows that “institutions appear to be responding to negative publicity and the threat of litigation without fully considering how current social science research and case law support their efforts.”<sup>72</sup> Karen Miksch conducted extensive research to determine why so many race-conscious programs were changing. She explained:

The most common reason given for changing a program was an investigation by the OCR, or a perceived threat that OCR would investigate the program. Nineteen percent of the programs provided “Pressure from advocacy groups” as a reason. In addition [to these reasons,] . . . staff reported an overall feeling that there was a hostile legal environment regarding race-conscious programs.<sup>73</sup>

The high-stakes risk of Title VI, in conjunction with the OCR’s general opposition to race-exclusive programming, helps to explain why so many institutions retreat in the face of a legal fight. First, Title VI, because it grants OCR the authority to deny federal funds to any recipient found to be in violation of the Act,<sup>74</sup> creates a strong incentive for universities under OCR investigation to avoid litigation at all costs. Under Title VI, if any part of an institution receives federal funding, the entire institution must comply or risk withdrawal of all funds.<sup>75</sup> Thus, “if the law school at State U. has a race-exclusive scholarship program that violates Title VI, then all federal aid to State U.—even aid to a program in the university completely unrelated to the law school—is in jeopardy of being terminated.”<sup>76</sup> Universities—especially large research institutions that

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69. Letter from Angela Bennett, Office Dir., Kansas City Office for Civil Rights, U.S. Dep’t of Educ., to Mark S. Wrighton, Chancellor, Washington Univ. (May 13, 2005) (on file with author) (emphasis added).

70. Resolution Agreement, Washington University in St. Louis and the U.S. Department of Education, Office for Civil Rights, No. 07042001 (May 13, 2005) (on file with author).

71. Schmidt, *supra* note 39.

72. Miksch, *supra* note 39, at 59.

73. *Id.* at 72. Miksch found that twenty programs were changed because of agency investigation or threat, nineteen because of pressure from an advocacy group, fifteen because of institutional review of a program, seven because of a complaint by an individual, four because of a hostile legal environment, three because of no funding, and sixteen for unknown reasons. *Id.* at tbl. 3-2.

74. Department of Education, Office for Civil Rights, Education and Title VI, <http://www.ed.gov/about/offices/list/ocr/docs/hq43e4.html> (last visited Feb. 28, 2009).

75. *Id.*

76. Kirk A. Kennedy, *Race-Exclusive Scholarships: Constitutional Vel Non*, 30 WAKE FOREST

depend on federal funding—would be reluctant to risk that funding on the outcome of litigation challenging OCR’s findings.

Second, both supporters and critics of affirmative action agree that OCR under the Bush Administration has been hostile to affirmative action.<sup>77</sup> Roger Clegg, general counsel of CEO, explained in 2004 that:

The Civil-Rights Office of the Education Department has demonstrated that it takes seriously the requirement in *Grutter* that admissions preferences be prohibited in circumstances where diversity is attainable by race-neutral means. It has published and is continuing to publish materials elaborating on those means. Likewise, it has stated that it views racially exclusive scholarships, internships, summer programs, and the like as “extremely difficult to defend.” It has pressured individual colleges and, most recently, the state of Wisconsin to open up such programs to students of all colors. The Justice Department’s Civil-Rights Division—headed by R. Alexander Acosta, who is no friend of affirmative action—has recently begun to investigate such programs itself . . . .<sup>78</sup>

Gary Orfield, director of the UCLA Civil Rights Project, explained:

No sooner was the ink dry on the [*Grutter*] decision . . . that [sic] opponents of affirmative action, who happened to control the US Departments of Education and Justice as well as the federal civil rights enforcement offices, began to narrow the interpretation of *Grutter*. . . . Federal civil rights officials strongly suggested that colleges were obliged to try non-racial strategies and claimed that such strategies were workable. In other words, the opponents of affirmative action attempted to interpret the law as if they had won the case.<sup>79</sup>

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L. REV. 759, 782 (1995).

77. See Schmidt, *supra* note 39 (“The current leaders of the civil-rights office [are] mostly staunch critics of affirmative action . . . .”); Peter Schmidt, *Excluding Some Races from Programs? Expect a Letter from a Lawyer*, CHRON. HIGHER EDUC. (Wash., D.C.), Mar. 7, 2003, at A22 (noting that Roger Clegg “called President Bush’s appointments to key Education Department positions dealing with civil rights ‘absolutely first-rate.’”).

78. Clegg, *supra* note 36.

79. Gary Orfield, *Introduction to CHARTING THE FUTURE OF COLLEGE AFFIRMATIVE ACTION*, *supra* note 22, at xi, xi. The *Chronicle of Higher Education* has reported that anti-affirmative action groups have an inside track at OCR. Indeed, “Two of the most recent additions to [OCR’s] staff, Hans Brader and Curt A. Levey, worked at the Center for Individual Rights, which helped represent the Michigan plaintiffs [in *Grutter*].” Jeffrey Selingo, *Michigan: Who Really Won?*, CHRON. HIGHER EDUC. (Wash., D.C.), Jan. 14, 2005, at A21; see also NAACP REPORT, *supra* note 23, at 77 n.76. Supporters of affirmative action have taken notice of OCR’s interpretation of *Grutter*. In a 2005 letter

These pressures have resulted in significant changes to race-conscious scholarship programs across the country. According to Miksch, fourteen schools recently renamed their programs, eleven discontinued them, and fifty opened their doors to all students.<sup>80</sup> Of those fifty, thirty-two no longer consider race in any way, but rather “look for students who are ‘committed to a diverse campus.’”<sup>81</sup> Another eleven programs “no longer consider race but consider socio-economic factors as a way to ensure a diverse student body.”<sup>82</sup> Finally, “only 7 continue to consider race as one factor in ensuring campus diversity.”<sup>83</sup> There is little doubt, therefore, that OCR interventions have exerted a strong impact on institutions’ willingness to implement race-conscious scholarships.

### 3. *The Growing Impact of Statewide Affirmative Action Bans*

State bans on affirmative action have also contributed to the decline in race-conscious scholarships. *Grutter* allows educational institutions to adopt race-conscious measures, but does not require them to do so. As a result, anti-affirmative action activists, led by Ward Connerly, chairman of ACRI, have launched campaigns to pass state laws that outlaw affirmative action in state programming.

The story of Michigan is emblematic. In November 2006, the voters of Michigan enacted Proposal 2, a ballot initiative—much like those enacted in California<sup>84</sup> and Washington<sup>85</sup> in the 1990s—that bans the use of race-

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to Secretary of Education Margaret Spellings, Theodore Shaw, President of the NAACP Legal Defense and Educational Fund (LDF), expressed “grave concern” that OCR was “undermining” the visions of *Grutter* and *Brown*. Letter from Theodore Shaw, Director-Counsel and President, NAACP LDF, to Hon. Margaret Spellings, Sec’y, U.S. Dep’t of Educ. (June 23, 2005) *available at* [http://www.naacpldf.org/content/pdf/gap/Letter\\_to\\_Education\\_Secretary\\_Spellings.pdf](http://www.naacpldf.org/content/pdf/gap/Letter_to_Education_Secretary_Spellings.pdf). According to Shaw, OCR was not helping universities to achieve student body diversity, but rather:

OCR is instead standing in the way. Presumably with the backing of [OCR], groups opposed to affirmative action have sent out . . . letters to colleges and universities across the nation threatening to file complaints with OCR if any and all race-conscious measures are not eliminated. Whether at the behest of these organizations or not, OCR coincidentally has been backing up these threats by opening investigations . . . creating a climate of fear and intimidation.

*Id.*

80. Miksch, *supra* note 39, at 73.

81. *Id.*

82. *Id.*

83. *Id.*

84. In 1996, California voters passed the California Civil Rights Initiative, also known as Proposition 209. Proposition 209 amended the state constitution by providing that “[t]he State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.” CAL. CONST. art. I, § 31(a). Notably, Proposition 209 allowed colleges “to



conscious measures by state and local government. In relevant part, Proposal 2 prohibits Michigan's public universities from "discriminat[ing] against, or grant[ing] preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."<sup>86</sup> As a result, Proposal 2 prohibits Michigan's public universities from considering race as a factor in admissions decisions, as constitutionally upheld in *Grutter*, as well as in certain non-admissions areas, such as financial aid.<sup>87</sup> Michigan State University explained that, whereas before Proposal 2 "individuals reviewing admissions applications were . . . provided with an applicant's complete file, sometimes including notation of an applicant's race . . . the process has been adjusted to mask such data so that it is not available to individuals reviewing applications."<sup>88</sup> With respect to assistance programs, Michigan State's Office of Racial Ethnic Student Affairs (ORESAs) "has embraced a broader and more inclusive mission

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continue to conduct diversity-based recruitment and outreach efforts and to collect statistical data about the participation of minorities and women in their programs." Toni Lester, *Contention, Context, and the Constitution: Riding the Waves of the Affirmative Action Debate*, 39 SUFFOLK U. L. REV. 67, 119 (2005).

As a result of Proposition 209, "[t]he number of black students at both Berkeley and U.C.L.A. plummeted, and at U.C.L.A. the declines continued throughout the next decade. . . . In 1997, the freshman class included 221 black students; [in 2006] it had only 100. In the region with easily the largest black population west of the Mississippi River, the top public university had a freshman class in which barely 1 in 50 students was black." David Leonhardt, *The New Affirmative Action*, N.Y. TIMES, Sept. 30, 2007 (Magazine), at 77-78. Further, "in 1997, Boalt Hall enrolled just one African American student in its entering J.D. class, compared to 20 in 1996," the year before Proposition 209 was implemented. Helen Hyun, *Falling Sky: Trends in Minority Access to Law Schools, Pre- and Post-Gratz and Grutter*, in CHARTING THE FUTURE OF COLLEGE AFFIRMATIVE ACTION, *supra* note 22, at 105, 115.

85. In November 1998, Washington voters passed Initiative 200, which restricts the use of race and ethnicity in public employment, education, and contracting decisions. "Since Initiative 200 (I-200) was passed . . . , the percentage of [underrepresented minority students] in each first-year class at [the University of Washington School of Law], the state's top public law school, has dropped from an average of 11% in 1996 to about 7% in 2004." *Id.*

86. MICH. CONST. art. I, § 26, cl. 1.

87. The initial effect of Proposition 2 was a large fallout in diversity numbers. The *Michigan Daily* reported that University of Michigan Law School's minority acceptance rates fell thirty-four percentage points after Proposal 2:

39.6 percent of underrepresented minority applicants considered before the ban on affirmative action took effect were admitted to the Law School. But after implementation of the law, only 5.4 percent of underrepresented minority applicants were admitted.

Over the same period, the acceptance rates for applicants who did not benefit from race-based preferences increased from 16.2 percent before the ban to 26.7 percent afterward.

Walter Nowinski, *Law School Sees Expected Fallout from Prop 2*, MICH. DAILY, June 11, 2007, at A8.

88. Diversity and Inclusion at MSU After Proposal 2 Frequently Asked Questions, Jan. 23, 2007, <http://president.msu.edu/prop2response/faqs/index.php> (on file with *Washington University Law Review*).

and has changed its name to the Office of Cultural and Academic Transitions. The ORESA Aide program has . . . assumed a broader mission and has changed its name to the Transition and Cultural Aide Program.”<sup>89</sup>

In assessing the legal landscape of race-based assistance programs, state ballot initiatives are no longer a fringe topic affecting a select few. As of 2009, Michigan, California, Washington, and Nebraska have passed affirmative action bans.<sup>90</sup> Writing before Nebraska’s 2008 ban, Peter Schmidt explained:

California, Michigan, and Washington, together account for about 17.7 percent of the nation’s population. If the five states being eyed by Mr. Connerly pass such measures, the share of the U.S. population living in states with such bans will rise to just over 25 percent. Add Florida—where the former Republican governor, Jeb Bush, curtailed affirmative-action preferences in state government through a 1999 executive order and subsequently persuaded the governing board of the state’s universities to follow suit—and the share of Americans living where public colleges cannot consider applicants’ race now stands at about 23.7 percent and could rise to just over 31 percent as a result of the 2008 vote.<sup>91</sup>

While Nebraska was the only state to pass an affirmative action ban in 2008,<sup>92</sup> the impact of state ballot initiatives should not be underestimated. If the campaign to enact such bans continues to spread, the interpretive

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89. *Id.* Further, the University changed its Affirmative Action statement from “MSU is an affirmative-action, equal opportunity *institution*” to “MSU is an affirmative-action equal-opportunity *employer*.” *Id.* (emphasis added). The University of Michigan explained on its website that a wide range of race-conscious programs, “including financial aid, outreach, and mentoring programs” consider race and therefore must be reviewed. Proposal 2 Information: Questions and Answers Regarding Proposal 2, Jan. 10, 2007, <http://www.vpcomm.umich.edu/diversityresources/prop2faq.html> (on file with *Washington University Law Review*).

90. In the 2008 election, Ward Connerly attempted to pass affirmative action bans in Arizona, Missouri, Oklahoma, Colorado, and Nebraska. While he succeeded in Nebraska, he lost to a popular vote in Colorado and failed to get on the ballot in Arizona, Missouri, and Oklahoma. These ballot failures were due largely to invalid signature issues. For example, On August 21, 2008, the Arizona Secretary of State’s office ruled that Connerly’s organization, the Arizona Civil Rights Initiative, did not have enough valid signatures to qualify for the ballot. Over 100,000 signatures were rejected for reasons such as missing or inaccurate information from signers, or signers who were not registered voters in the state. See NAACP Legal Def. & Educ. Fund, Inc., *Attempt to Block Access to Equal Opportunity Doomed in Arizona*, Aug. 21, 2008, <http://www.naacpldf.org/printable.aspx?article=1308>.

91. Peter Schmidt, *3 States Poised to Vote on Affirmative Action*, CHRON. HIGHER EDUC. (Wash., D.C.), July 18, 2008, at A17.

92. See *supra* note 90.

battle over *Grutter* may take second stage, as the real battle over race-conscious programming shifts to state and local political arenas.<sup>93</sup>

### III. LEGAL FRAMEWORK

The use of race in financial aid programs is governed by the Equal Protection Clause of the Fourteenth Amendment<sup>94</sup> and Title VI of the Civil Rights Act of 1964.<sup>95</sup> The Supreme Court has made clear that Title VI “proscribe[s] only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.”<sup>96</sup>

While the Fourteenth Amendment applies only to state actors, Title VI applies to any recipient of federal funds, public or private.<sup>97</sup> Thus, because Title VI is coextensive with the Equal Protection Clause, a university can avoid constitutional scrutiny only by showing that it does not accept federal funds.

Because private corporations, foundations, individual donors, and other outside entities are often involved in the funding and implementation of race-based scholarships and outreach programs,<sup>98</sup> the triggers for Title VI liability in this context are not always clear. According to one scholar, “[i]t is unlikely that a university can shield itself entirely from Title VI or constitutional review simply because the source of the funding is

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93. See Michele S. Moses, Patricia Marin, and John T. Yun, *Ballot Initiatives That Oppose Affirmative Action Hurt All*, CHRON. HIGHER EDUC. (Wash., D.C.), Oct. 10, 2008, at A39 (the debate over the use of race in higher education decision making “has increasingly moved from the courts to the political arena”).

94. The Equal Protection Clause provides that, “no State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

95. Title VI provides that, “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000(d) (2000).

96. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978) (alteration in original); see also *Nondiscrimination in Federally Assisted Programs*, 59 Fed. Reg. 8756, 8758 (Feb. 23, 1994) (“Title VI prohibits intentional classifications based on race and national origin to the same extent and under the same standards as the Equal Protection Clause.”) (citing *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582 (1983)).

97. According to OCR, the agencies and institutions covered by Title VI include: “50 state education agencies, their subrecipients, and vocational rehabilitation agencies; the education and vocational rehabilitation agencies of the District of Columbia and of the territories and possessions of the United States; 16,000 local education systems; 3,200 colleges and universities; 10,000 proprietary institutions; and other institutions, such as libraries and museums that receive ED funds.” Education and Title VI, *supra* note 74.

98. See Ancheta, *supra* note 28, at 32 (“[B]illions of scholarship dollars are distributed by non-university-affiliated organizations ranging from corporate sponsors, private foundations, professional and academic associations, unions, and nonprofits groups.”).

private.”<sup>99</sup> This is particularly true “if the university is charged with administering the program and with selecting the individuals to receive the funding.”<sup>100</sup> If a university does not exert sufficient control over the donating entity, however, Title VI should not apply.<sup>101</sup> Notably, legal concerns may remain even for institutions outside of Title VI’s reach. At the fringe of civil rights law today—and beyond the scope of this Note—is the applicability of 42 U.S.C. § 1981 to fully private race-based scholarships.<sup>102</sup>

Part III.A asks whether strict scrutiny need apply to race-based scholarships in general. Assuming that strict scrutiny does apply, Part III.B reviews both Supreme Court and DOE interpretations of the compelling interest and narrow tailoring prongs of strict scrutiny. The legal framework section concludes, in Part III.C, with a discussion of the importance of context in strict scrutiny analysis.

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99. *Id.* at 31. Notably, it takes only minimal amounts of federal funding to trigger Title VI liability. Indeed, one court has held that a university with a student body consisting of 221 students receiving benefits under federal assistance programs for veterans was a recipient of federal assistance under Title VI. *Bob Jones Univ. v. Johnson*, 396 F. Supp. 597, 602 (D.S.C. 1974).

100. Ancheta, *supra* note 28, at 31.

101. Even Roger Clegg, a leader in the anti-affirmative action movement, recently noted that public universities may survive Title VI challenges to race-based scholarships funded and administered by private nonprofit groups that are legally separate from the university. Andy Guess, *Race-Based Aid, After a Statewide Ban*, INSIDE HIGHER EDUC., Oct. 24, 2007, <http://www.insidehighered.com/news/2007/10/24/michigan>. One such organization, the Alumni Association of the University of Michigan, announced in October of 2007 that it would offer race-based scholarships to the University of Michigan. “Whether the Michigan plan passes legal muster comes mainly down to whether it is, in fact, completely separate from any state-affiliated entities.” *Id.* Clegg explained that, “If there’s no connection with the university . . . and if the organization is itself not considered a part of the state, and if this is potentially a gift, if there is no contractual issue, then [the Alumni Association] might be able to do this.” *Id.*

102. Section 1981 provides: “All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . .” 42 U.S.C. § 1981(a) (2000). The statute applies not only to private colleges and universities, but also to “non-university affiliated private foundations and organizations, so long as a contract is involved.” Ancheta, *supra* note 28, at 25. Because certain forms of financial aid, outreach, and support programs are established through contractual agreements—and because the Supreme Court has held that a contract for educational services is a contract for purposes of § 1981 (*see Runyon v. McCrary*, 427 U.S. 160, 172 (1976))—§ 1981 may apply to a broad range of purely private university actions. For analysis of this issue, see *Doe v. Kamehameha Schools/Bernice Pauahi*, 470 F.3d 827 (9th Cir. 2006) (en banc) (upholding, under § 1981, a private school system’s race-exclusive admissions program aimed at improving the educational opportunities of historically marginalized Native Hawaiians).

A. *Is Strict Scrutiny the Proper Standard of Review for Race-Conscious Scholarships?*

In *Adarand Constructors, Inc. v. Peña*,<sup>103</sup> the Supreme Court held that under the Equal Protection Clause racial classifications imposed by federal or state government actors are subject to strict scrutiny.<sup>104</sup> While *Adarand* “did not precisely define the term ‘racial classification’ for equal protection purposes, the plurality opinion described such classifications as burdening or benefiting individuals on the basis of race, or subjecting individuals to unequal treatment.”<sup>105</sup> Thus, under this description, “a racial classification that does not confer a benefit or impose a burden on an individual would not implicate the equal protection clause.”<sup>106</sup>

While this logic should save many race-conscious outreach and recruitment programs from strict scrutiny,<sup>107</sup> it is unlikely to save race-

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103. 515 U.S. 200 (1995).

104. *Id.* at 227. The Court explained that “any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.” *Id.* at 224.

105. *Honadle v. Univ. of Vt.*, 56 F. Supp. 2d 419, 427 (D. Vt. 1999) (quoting *Adarand*, 515 U.S. at 222, 224) (citation omitted).

106. *Id.* at 428. The *Honadle* court further notes that “*Adarand* involved an inducement to hire; it did not discuss race-conscious yet nonpreferential activities such as recruiting or other forms of outreach.” *Id.*

107. Numerous lower court decisions have held that strict scrutiny does not apply to race-conscious outreach and recruitment programs because they do not lead to unequal treatment. One court held that *Adarand* “supports a distinction between ‘inclusive’ forms of affirmative action, such as recruitment and other forms of outreach, and ‘exclusive’ forms of affirmative action, such as quotas, set asides, and layoffs.” *Honadle*, 56 F. Supp. 2d at 428 (quoting *Adarand*, 515 U.S. at 222, 224). *See also* Shufrod v. Ala. State Bd. of Educ., 897 F. Supp. 1535, 1551–52 (M.D. Ala. 1995) (when outreach programs “seek to ensure that as many qualified candidates as possible make it to the selection process” they are inclusive, cause no harm to third parties, and are thus not subject to strict scrutiny). Thus, “[a] public university may . . . be racially ‘aware’ or ‘conscious’ by . . . encouraging broader recruiting of racial and ethnic minorities, without triggering the equal protection clause’s strict scrutiny review. These activities do not impose burdens or benefits, nor do they subject individuals to unequal treatment.” *Honadle*, 56 F. Supp. 2d at 428.

Similarly, in 2002, a federal district court rejected an equal protection challenge to a City University of New York Law School policy that “specifies that the Law School strives to achieve diversity through recruiting efforts to attract a broad applicant pool including, among others, minority applicants.” *Weser v. Glen*, 190 F. Supp. 2d 384, 398 (E.D.N.Y.), *aff’d* 41 Fed. App’x 521 (2d Cir. 2002). The court held that race-conscious outreach and recruitment programs “directed at broader recruiting of minorities and women . . . [do] not constitute discrimination.” *Id.* at 399. Thus, the court explained that “[r]acial classifications that ‘serve to broaden a pool of qualified applicants and to encourage equal opportunity,’ but do not confer a benefit or impose a burden do not implicate the Equal Protection Clause.” *Id.* (quoting *Honadle*, 56 F. Supp. 2d at 427–28). As one commentator explained, when outreach and recruitment “do not typically impose the same level of burden that an admissions process can impose—compare . . . exclusion from the university with not receiving additional information through a race-sensitive outreach campaign—there may be no constitutional injury to trigger strict scrutiny.” Ancheta, *supra* note 28, at 22.

conscious financial aid programs. According to one pro-affirmative action manual, “[a] financial aid or scholarship program that takes into account a student’s race—either as an eligibility requirement or as a factor in the awarding process—will trigger strict scrutiny analysis because the program subjects persons to different treatment on the basis of their race.”<sup>108</sup> Unlike many outreach and recruitment programs, which seek only to expand the pool of qualified applicants, financial aid can be a decisive factor in a student’s decision to attend a given college, and thus a closer analogy to selective admissions in *Grutter* and *Gratz*.<sup>109</sup> The Supreme Court in *Parents Involved in Community Schools v. Seattle School District No. 1*<sup>110</sup> directly addressed the strict scrutiny issue. While the four members of the *Parents Involved* dissent would apply “a more lenient standard than ‘strict scrutiny’”<sup>111</sup> to race-conscious classifications that seek to include, as opposed to exclude, racial minorities,<sup>112</sup> the plurality made clear that race-conscious policies, no matter the motive, require strict scrutiny.<sup>113</sup> As Part IV explains, however, this does not mean that such scholarships, even when race-exclusive, are unconstitutional.

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In cases where strict scrutiny is not triggered by a race-conscious policy, “courts have not provided exact guidance on whether the policy is then subject to rational basis scrutiny or to intermediate scrutiny.” Angelo N. Ancheta, *Contextual Strict Scrutiny and Race-Conscious Policy Making*, 36 LOY. U. CHI. L.J. 21, 43 n.108 (2004). Ancheta explains: “Recent cases suggest that rational basis scrutiny becomes the default standard of review if strict scrutiny is not invoked, although one lower court has ruled that race-conscious policies involving elementary and secondary school assignment policies should meet the intermediate standard of review.” *Id.* (citing *Comfort ex rel. Neumyer v. Lynn Sch. Comm.*, 283 F. Supp. 2d 328, 364–66 (D. Mass. 2003)).

108. EQUAL JUSTICE SOCIETY, PRESERVING DIVERSITY IN HIGHER EDUCATION: A MANUAL ON ADMISSIONS POLICIES AFTER THE UNIVERSITY OF MICHIGAN DECISIONS 76 (2004) [hereinafter EJS MANUAL], available at <http://www.equaljusticesociety.org/compliancemanual>.

109. See *Banks*, *supra* note 28, at 44 (“Compared to recruitment and support programs, financial aid seems most analogous to admissions . . . Although many applicants may view getting accepted to a school as more important than receiving financial aid, the availability of financial aid will often, as a practical matter, determine whether an admitted student will be able to attend an institution.”); Ancheta, *supra* note 28, at 23 (“Financial aid can be a decisive factor in a student’s attending a college or graduate program . . . and the scarcity of dollars may make scholarships and other forms of aid highly competitive. Thus, financial aid policies may be tighter analogies to selective admissions procedures than outreach or recruitment.”).

110. 127 S. Ct. 2738 (2007).

111. *Id.* at 2819 (Breyer, J., dissenting).

112. *Id.* at 2817 (Breyer, J., dissenting). Under this standard, “the judge would carefully examine the program’s details to determine whether the use of race-conscious criteria is proportionate to the important ends it serves.” *Id.* at 2819.

113. *Id.* at 2764 (“Our cases clearly reject the argument that motives affect strict scrutiny analysis.”). For further discussion of the Supreme Court’s motives and strict scrutiny analysis, see *infra* notes 184–93 and accompanying text.

### B. *The Legal Framework for Strict Scrutiny Review*

The federal courts have not ruled on the constitutionality of race-conscious scholarships designed to promote student body diversity.<sup>114</sup> Nevertheless, the Supreme Court has established a general analytical framework applicable to a wide range of race-conscious policies and the U.S. Department of Education has adopted guidelines—which remain official policy as they have not been amended or rescinded—that directly address the constitutionality of race-conscious and even race-exclusive scholarships.

In *Grutter v. Bollinger*<sup>115</sup> and *Gratz v. Bollinger*,<sup>116</sup> the Court applied strict scrutiny to race-conscious university admissions programs. Under strict scrutiny, racial classifications can be constitutional “only if they are narrowly tailored measures that further compelling governmental interests.”<sup>117</sup> First, the Court found that student body diversity constitutes a compelling governmental interest and, second, it articulated a series of requirements under the narrow tailoring prong.

#### 1. *Compelling Interest*

In *Grutter*, the Supreme Court, relying in part on the extensive research conducted for the over sixty-five amicus briefs<sup>118</sup> filed in support of the University of Michigan, found that student body diversity is a compelling governmental interest because it: (1) has interpersonal and

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114. The case law on race-conscious financial aid is extremely sparse. In *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995), one of the only cases to rule on race-based scholarships since *Bakke*, the Fourth Circuit held that the University of Maryland’s race-exclusive Benjamin Banneker scholarship was unconstitutional because the university failed to provide sufficient evidence of the link between its past discrimination and contemporary racial problems—namely its poor reputation among African Americans and its racially hostile environment. While the *Podberesky* ruling is relevant to universities defending scholarships designed to remedy past discrimination, “the case is not likely to be a useful precedent for financial aid programs that are designed to promote the distinctly different interest in student body diversity [because it] focused on a remedial interest that was specifically linked to the past discrimination of the University of Maryland . . . .” Ancheta, *supra* note 28, at 23. Ancheta continued to explain that “[a] non-remedial scholarship program designed to promote diversity could be distinguished on basis of the different underlying interests and the specific type of program being employed.” *Id.*

115. 539 U.S. 306 (2003).

116. 539 U.S. 244 (2003).

117. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

118. Among others, the Court relied on briefs by the U.S. Military as well as business, professional, and military leaders. For a list of all of the amicus briefs filed in *Grutter*, see University of Michigan, A Case About Diversity, <http://www.umich.edu/pres/aate/amicus/> (last visited Feb. 17, 2009).

civic benefits;<sup>119</sup> (2) has educational benefits;<sup>120</sup> (3) better prepares students for work in an increasingly diverse world;<sup>121</sup> (4) improves the military's ability to provide national security;<sup>122</sup> and (5) enhances the political legitimacy of America's leaders.<sup>123</sup>

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119. The Court explained that diversity in higher education “promotes ‘cross-racial understanding,’ helps to break down racial stereotypes, and ‘enables [students] to better understand persons of different races. *Grutter*, 539 U.S. at 330 (alteration in original). Writing for the majority, Justice O’Connor cited the trial testimony of then-Michigan law professor Kent Syverud, who submitted several expert reports explaining that, “when a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no ‘minority viewpoint’ but rather a variety of viewpoints among minority students.” *Id.* at 319–20; see also Maureen T. Hallinan, *Diversity Effects on Student Outcomes: Social Science Evidence*, 59 OHIO ST. L.J. 733, 753 (1998) (studies reveal that “racial and ethnic diversity on college campuses promotes learning, increases understanding of racial groups and cultures, reduces racism and prejudice, and leads to cordial relationships between students of different racial and ethnic heritage”); Elizabeth Mertz et al., *What Difference Does Difference Make? The Challenge for Legal Education*, 48 J. LEGAL EDUC. 1 (1998) (finding increases to individual minority student participation when universities achieve a critical mass of minority students).

120. *Grutter*, 539 U.S. at 330 (“[S]tudent body diversity promotes learning outcomes . . .”). Neil Rudenstine, former president of Harvard University, has explained that the “fundamental rationale for student diversity in higher education [is] its educational value.” Patrick T. Terenzini et al., *Racial and Ethnic Diversity in the Classroom: Does It Promote Student Learning?*, 72 J. HIGHER ED. 509, 510 (2001) (alteration in original). Lee Bollinger, former president of the University of Michigan, has explained that “[a] classroom that does not have a significant representation from members of different races produces an impoverished discussion.” *Id.*

121. *Grutter*, 539 U.S. at 330 (diversity “‘better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals’”). Citing the amicus brief of the General Motors Corporation, the Court noted that “[t]hese benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.” *Id.* (citing Brief of General Motors Corporation as Amicus Curiae in Support of Respondents at 2, *Grutter*, 539 U.S. 306 (No. 02-241) (“Diversity in academic institutions is essential to teaching students the human relations and analytic skills they need to succeed and lead in the work environments of the twenty-first century.”)).

For an insightful critique of Justice O’Connor’s business diversity rationale, see Daria Roithmayr, *Tacking Left: A Radical Critique of Grutter*, 21 CONST. COMMENT. 191, 213 (2004) (“The Court also finds that diversity in education is compelling because it is good for business. Although benefits to business are not exclusively benefits to whites, it is important to note the Court’s marked shift from a rationale focusing on the benefits to non-whites of eliminating the vestiges of slavery or remedying past discrimination to focusing on benefits to business and the military.”).

*Bakke* and subsequent decisions undoubtedly encouraged those defending affirmative action in *Grutter* to use arguments couched in the language of “diversity,” as opposed to the kind of moral arguments grounded in the existence of past or present discrimination against blacks that characterized *Brown* and the first wave of the civil rights movement. Given the weight that Justice O’Connor’s opinion grants to the corporate and military briefs in *Grutter*, future advocates for racial justice in both the court of law and the court of public opinion will face strong pressure not only to argue in the language of diversity but also to justify diversity in terms of the efficient functioning of institutions and the market.

David B. Wilkins, *From “Separate is Inherently Unequal” to “Diversity is Good for Business”: The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1558 (2004).

122. *Grutter*, 539 U.S. at 331 (“[A] highly qualified, racially diverse officer corps . . . is essential



*Grutter's* compelling government interest in student body diversity was recently affirmed, albeit tenuously,<sup>124</sup> by the Supreme Court in *Parents Involved in Community Schools v. Seattle School District No. 1*.<sup>125</sup> In a 4-1-4 opinion, the *Parents Involved* Court held that voluntary K-12 school integration plans in Jefferson County, Kentucky, and Seattle, Washington, were not narrowly tailored to survive strict scrutiny. Despite the deeply fractured opinion, “all nine justices—in one form or another—affirmed the Court’s decision in *Grutter* that higher education’s interest in promoting the educational benefits of diversity can be compelling and can be pursued through narrowly tailored race-conscious means.”<sup>126</sup> In striking down voluntary integration plans, Chief Justice Roberts, in his plurality opinion, affirmed *Grutter's* pronouncement that “universities occupy a

to the military’s ability to fulfill its principal mission to provide national security.”). In making this point, Justice O’Connor relied heavily on a brief filed by former high-ranking officers and civilian leaders of the armed forces, including members of the Joint Chiefs of Staff, military academy superintendents, secretaries of defense, and several members of the U.S. Senate. The brief explained that “the military cannot achieve an officer corps that is *both* highly qualified *and* racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies.” *Grutter*, 539 U.S. at 331 (emphasis in original). See also Pamela S. Karlan, *Compelling Interests/Compelling Institutions: Law Schools as Constitutional Litigants*, 54 UCLA L. REV. 1613, 1625 (2007) (“As the [military] brief explained, ‘[t]he chasm between the racial composition of the officer corps and the enlisted personnel’ that persisted until the military adopted various forms of affirmative action ‘undermined military effectiveness’ by diminishing unit cohesion and perceptions of officer corps legitimacy.”) (alteration in original).

123. *Grutter*, 539 U.S. at 332. As the Court explained,

[U]niversities, and in particular, law schools, represent the training ground for a large number of our Nation’s leaders . . . .

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

*Id.*

124. While the Chief Justice affirmed *Grutter's* compelling interest in student body diversity, his opinion revealed deep animosity for race-conscious programming in general. This animosity has led some scholars to declare that *Parents Involved* (or *Meredith*, its companion case), despite its endorsement of *Grutter*, “puts race-based scholarships and admissions procedures in higher education at risk.” Lucie Small, Meredith, *Colorblind Constitutionalism, and the Impact on Higher Education*, 37 J.L. & EDUC. 453, 453 (2008). To Small, the colorblind rhetoric of the Roberts opinion “does not comport with higher education . . . scholarships designated specifically for minorities.” *Id.* Accordingly, she concludes that race-conscious scholarships “would likely not pass the strict standard of review advocated by [*Parents Involved*, but would pass] . . . under a more deferential standard of review that gives preference to state and university determinations . . . .” *Id.* at 454; see also *infra* note 133 (describing Ronald Dworkin’s view that *Parents Involved* implicitly overruled *Grutter*).

125. 127 S. Ct. 2738 (2007). For an in depth analysis of *Parents Involved*, see James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131 (2007).

126. ARTHUR L. COLEMAN, SCOTT R. PALMER & STEVEN Y. WINNICK, ECHOES OF BAKKE 3 (2007), available at [http://www.collegeboard.com/prod\\_downloads/diversitycollaborative/EchoesofBakke.pdf](http://www.collegeboard.com/prod_downloads/diversitycollaborative/EchoesofBakke.pdf).

special niche in our constitutional tradition,”<sup>127</sup> and within this niche they have “expansive freedoms of speech and thought”<sup>128</sup> to adopt race-conscious measures, as part of a “a broader effort to achieve ‘exposure to widely diverse people, cultures, ideas, and viewpoints.’”<sup>129</sup> In his controlling concurring opinion,<sup>130</sup> Justice Kennedy explained the continued need for race-conscious classifications:

Our Nation from the inception has sought to preserve and expand the promise of liberty and equality on which it was founded. Today we enjoy a society that is remarkable in its openness and opportunity. Yet our tradition is to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain. . . . The enduring hope is that race should not matter; the reality is that too often it does.<sup>131</sup>

The impact that *Parents Involved* will have on affirmative action in higher education remains unclear. To one expert, “[t]he rights of colleges to use race in admissions decisions for student body diversity had survived scrutiny by the most conservative Supreme Court in more than 70 years. Since the Supreme Court rarely takes such cases, the *Grutter* precedent might last for a while.”<sup>132</sup> Not all commentators agree, however, that *Grutter* survived *Parents Involved* intact.<sup>133</sup>

127. *Parents Involved*, 127 S. Ct. at 2754 (quoting *Grutter*, 539 U.S. at 329).

128. *Id.*

129. *Id.* at 2742 (quoting *Grutter*, 539 U.S. at 330).

130. James Ryan explains that Justice Kennedy’s opinion “appears controlling . . . because the four dissenters would uphold the Seattle and Jefferson County plans and would apply looser criteria to assess voluntary integration plans than would Justice Kennedy. A fortiori, they would uphold any plan that Justice Kennedy would approve. There are thus five votes for upholding some uses of race to achieve integration, but the only vote that really counts is Justice Kennedy’s.” Ryan, *supra* note 125, at 137.

131. *Parents Involved*, 127 S. Ct. at 2791 (Kennedy, J., concurring).

132. Gary Orfield, Erica Frankenberg & Liliana M. Garces, *Better Than Expected, Worse Than it Seems*, INSIDE HIGHER EDUC., July 24, 2007, <http://www.insidehighered.com/views/2007/07/24/orfield>.

133. For example, Professor Ronald Dworkin explained:

[Justice Roberts’] opinion—as Breyer and the other dissenters pointed out—was therefore an implicit overruling of *Grutter* because it rejected O’Connor’s understanding of strict scrutiny in favor of the cruder principle that all racially sensitive plans are harmful in themselves, an assumption that the Court had explicitly rejected in *Grutter* and long before.

. . .

Kennedy’s separate opinion is important because it means that only four justices, not the Court as a whole, have voted to overrule *Grutter*.

. . .

Roberts and his right-wing colleagues voted to overrule the recent *Grutter* decision by stealth—without conceding that they were overruling anything.

The Department of Education has also strongly affirmed the importance of student body diversity in higher education. In 1994, following notice and a significant comment period, the DOE issued a Notice of Final Policy Guidance (“Title VI Guidance” or “DOE Guidance”)<sup>134</sup> designed to “assist colleges in fashioning legally defensible affirmative action programs to promote the access of minority students to postsecondary education.”<sup>135</sup> According to the DOE,

A college should have substantial discretion to weigh many factors—including race and national origin—in its efforts to attract and retain a student population of many different experiences, opinions, backgrounds, and cultures—provided that the use of race or national origin is consistent with the constitutional standards reflected in Title VI.<sup>136</sup>

As *Grutter* found that colleges and universities have a compelling interest in student body diversity, and as the vast majority of colleges and universities justify their scholarships on “diversity” grounds, it is important to understand how the Court defines “student body diversity.” At the most basic level, the Court equates student body diversity with the enrollment of a “critical mass” of minority students.<sup>137</sup> Struggling in *Grutter* with the precise definition of critical mass, the Court deferred to the judgment of the university: according to one expert, “‘critical mass’ means ‘meaningful numbers’ or ‘meaningful representation,’ . . . a number that encourages underrepresented minority students to participate in the classroom and not feel isolated. . . . [T]here is no number, percentage, or range of numbers or percentages that constitute critical mass.”<sup>138</sup> Another

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Ronald Dworkin, *The Supreme Court Phalanx*, N.Y. REV. OF BOOKS, Sept. 27, 2007, at 92, 95–96; see also Small, *supra* note 124, at 457 (“*Grutter* and *Gratz* are in danger of being overruled and replaced by the new [*Parents Involved*] standard. [*Parents Involved*] totally embraced color blind judicial rhetoric. . . . Even the current higher education standard is at risk of being found unconstitutional if race is used in any way that can be construed as a tipping factor, maintaining a quota system, or having an indefinite duration.”).

134. See ARTHUR L. COLEMAN, SCOTT R. PALMER & FEMI S. RICHARDS, FEDERAL LAW AND FINANCIAL AID: A FRAMEWORK FOR EVALUATING DIVERSITY-RELATED PROGRAMS 13 n.10 (2005), available at [http://www.collegeboard.com/prod\\_downloads/diversitycollaborative/diversity\\_manual.pdf](http://www.collegeboard.com/prod_downloads/diversitycollaborative/diversity_manual.pdf). The Title VI Guidance is not a formal rule; the DOE has the authority to modify the rule as long as the changes are consistent with federal law.

135. Nondiscrimination in Federally Assisted Programs, 59 Fed. Reg. 8756 (Feb. 23, 1994). While the Title VI Guidance has not been repealed, it has been ignored by the DOE under President George W. Bush. See *infra* notes 148–51 for further analysis of the DOE Guidance.

136. Nondiscrimination in Federally Assisted Programs, 59 Fed. Reg. at 8757.

137. *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003).

138. *Id.* at 318 (quoting testimony of Erica Munzel, University of Michigan Director of Admissions).

expert testified that “when a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no ‘minority viewpoint’ but rather a variety of viewpoints among minority students.”<sup>139</sup> The Court does not offer a precise definition of “critical mass” diversity, and an analysis of the proper content of that definition is beyond the scope of this Note. For the moment, it is sufficient to know that by “student body diversity,” the Court really means some form of critical mass diversity that is left largely to colleges and universities to define. Notably, the compelling interest in student body diversity differs vastly from the original remedial rationale underlying race-conscious scholarships.<sup>140</sup>

## 2. *Narrow Tailoring*

The *Grutter* Court set forth four narrow tailoring requirements. First, the Court explained that, while race may be used as a plus-factor in admissions decisions, it cannot be the exclusive or even predominant factor.<sup>141</sup> Rather, each applicant must receive an individualized, holistic review, with race comprising only one element of the analysis.<sup>142</sup> Second,

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139. *Id.* at 319–20 (quoting testimony of Kent Syverud, Dean of Vanderbilt Law School).

140. Indeed, the Court’s definition of student body diversity is not inherently race-focused. The Court, describing the parameters of the compelling interest in student body diversity, explained that “[t]here are many possible bases for diversity admissions’ . . . [having] lived or traveled abroad, [being] fluent in several languages, hav[ing] overcome personal adversity and family hardship, hav[ing] exceptional records of extensive community service, and hav[ing] successful careers in other fields.” *Id.* at 338.

This definition has been met with harsh criticism as being overly broad and ahistorical. *See, e.g.,* Roithmayr, *supra* note 121, at 213 (“In *Grutter*, the compelling government interest that the Court uses to justify race-conscious admissions preferences is neither remedying past discrimination nor reducing societal discrimination, nor even benefitting the small numbers of students who are admitted via diversity programs. Rather, the Court finds a compelling interest in diversifying the classroom for the benefit of white students.”); Small, *supra* note 124, at 456–57 (2008) (explaining that *Grutter*’s conception of diversity “completely ignores the realities of racial inequality . . . . Under this definition, one could envision a school composed of all white males, so long as one student happened to be a former foster child from Appalachia who spoke German and Mandarin and another student was a former engineer who traveled throughout Europe and volunteered for the Peace Corps.”); Scott, *supra* note 15, at 672–73 (addressing the same definition of diversity before *Grutter*, and explaining that, while it may be true that all students benefit from being part of a diverse student body, “it is not [that] argument for diversity that makes the state’s interest compelling. What makes the interest compelling is the underlying situation which gave rise for the need to diversify. . . [namely] because access to education is critical to the elimination of the racially oppressed status of African-Americans.”).

141. *Grutter*, 539 U.S. at 336–37 (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 318 (1978)).

142. For an insightful critique of *Grutter*’s individualized review requirement, see Andrew Koppelman and Donald Rebstock, *On Affirmative Action and “Truly Individualized Consideration*, 101 NW. U. L. REV. 49 (2006). The authors, one of whom is the Associate Dean of Enrollment,

race-conscious admissions plans cannot unduly burden nonminority applicants.<sup>143</sup> As long as the admissions plan considers both racial and nonracial factors in a flexible way, the burden resulting from denial is unlikely to be undue because there is no right or entitlement to university admissions. Third, narrow tailoring requires “serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.”<sup>144</sup> Notably, this does not mean that the university must exhaust every possible race-neutral alternative. To the contrary, the Court deferred to the university’s good faith effort to consider race-neutral alternatives.<sup>145</sup> Finally, race-conscious admissions programs cannot be implemented on a permanent basis—this “assure[s] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself.”<sup>146</sup> Notably, the durational requirement does not require a fixed time limit; rather, it can be satisfied by sunset provisions or periodic reviews to determine whether the use of race is still necessary to achieve diversity.<sup>147</sup>

Applying these standards, the Court in *Grutter* upheld the University of Michigan Law School’s admissions policy, which considered race as one factor (along with life experience, personal background, LSAT scores, GPA, etc.) in admissions decisions. In *Gratz*, however, the Court struck down the University of Michigan’s undergraduate admissions plan because it was not narrowly tailored. Unlike the law school’s policy, the undergraduate policy utilized a point system that allocated a maximum of 150 points to any given applicant and automatically awarded students of color 20 points.<sup>148</sup> The Court held that the plan was not narrowly tailored

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Management, and Career Strategy at Northwestern Law School, argue from their experience that “[t]ruly individualized consideration is impossible.” *Id.* at 49. They explain:

The authors of this paper know something about the admissions process. Northwestern University School of Law has the most individualized law school admissions program in the country. We do not, however, delude ourselves that we are achieving perfect justice in our admissions decisions. We are making intelligent guesses, based on inevitably limited information, about the quality of our applicants. We are proud of the care with which we select our students. But we do not think that we are doing justice to the unique personalities of each applicant. No admissions process can do that. The Supreme Court has tried to make a vain dream into a constitutional requirement.

*Id.* at 49–50.

143. *Grutter*, 539 U.S. at 341.

144. *Id.* at 339.

145. *Id.* at 339, 340.

146. *Id.* at 342 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510 (1989)).

147. *Id.*

148. *Gratz v. Bollinger*, 539 U.S. 244, 255 (2003).

because the automatic assignment of points lacked the flexibility and individualized consideration that defined the law school policy. The Court explained that the “automatic distribution of 20 points [one fifth of the points needed to guarantee admission] has the effect of making ‘the factor of race . . . decisive’ for virtually every minimally qualified underrepresented minority applicant.”<sup>149</sup>

While the federal courts have not addressed the legality of race-conscious scholarships designed to promote student body diversity, the U.S. Department of Education has. With its Title VI Guidance, the DOE sought “to help clarify how colleges can use financial aid to promote campus diversity and access of minority students to postsecondary education without violating Federal anti-discrimination laws.”<sup>150</sup> The DOE’s express goal was to “encourage[] continued use of financial aid as a means to provide equal educational opportunity and to provide a diverse educational environment for all students.”<sup>151</sup> To meet this goal, the Title VI guidelines recognize three ways in which scholarships may be used to promote student body diversity:

First, a college may, of course, use its financial aid program to promote diversity by considering factors other than race . . . such as geographic origin, diverse experiences, or socioeconomic background. Second, a college may consider race or national origin with other factors in awarding financial aid if the aid is necessary to further the college’s interest in diversity. Third, a college may use race or national origin as a condition of eligibility in awarding financial aid if this use is narrowly tailored . . . .<sup>152</sup>

Although the Title VI Guidance does not carry the force of law and can be revoked at any time, it remains official policy because the DOE has never amended or rescinded it.<sup>153</sup>

The DOE has changed course since 1994 and is ignoring, if not completely contradicting, its Title VI Guidance. According to the *Chronicle of Higher Education*, OCR issued a statement in February 2003

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149. *Id.* at 272 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978)).

150. Nondiscrimination in Federally Assisted Programs, 59 Fed. Reg. 8756, 8756 (Feb. 23, 1994).

151. *Id.*

152. *Id.* at 8757.

153. In fact, the DOE has only reaffirmed it. See Letter from Judith A. Winston, Gen. Counsel, U.S. Dep’t of Educ., to College & Univ. Counsel (July 30, 1996), available at <http://www.ed.gov/print/about/offices/list/ocr/docs/dearcol.html> (“I am writing to reaffirm the Department of Education’s position that, under the Constitution and Title VI of the Civil Rights Act of 1964, it is permissible in appropriate circumstances for colleges and universities to consider race in making admissions decision and granting financial aid.”).

claiming—in direct conflict with its Title VI Guidance—that “generally, programs that use race or national origin as sole eligibility criteria are extremely difficult to defend.”<sup>154</sup>

On August 28, 2008, OCR issued a “Dear Colleague” letter, setting forth its interpretation of Title VI and the *Grutter* opinion.<sup>155</sup> Unlike the Title VI Guidance, which “encourage[d] continued use of financial aid as a means to provide equal educational opportunity and . . . a diverse educational environment,”<sup>156</sup> the 2008 OCR Letter casts greater uncertainty over race-conscious programming. According to one critical commentary, the 2008 OCR Letter serves to “truncate and overextend the

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154. See Miksch, *supra* note 39, at 61 (citing Peter Schmidt & Jeffrey R. Young, *MIT and Princeton Open 2 Summer Programs to Students of All Races*, CHRON. HIGHER EDUC. (Wash., D.C.), Feb. 21, 2003, at 31). Miksch explains that “[a]lthough the OCR statement is quoted in the *Chronicle* articles and in the CEO letters, the agency would not provide a copy of the prepared statement to the author.” *Id.* at 61 n.15 (citation omitted). Notably, CEO interpreted the word “programs” to include “minority scholarships and fellowships [as well as] recruitment, orientations, and academic-enrichment programs.” *Id.* (quoting Peter Schmidt, *Not Just for Minority Students Anymore*, CHRON. HIGHER EDUC. (Wash., D.C.), Mar. 19, 2004, at A17).

155. Letter from Stephanie J. Monroe, Assistant Sec’y for Civil Rights, to Colleagues, Aug. 28, 2008 [hereinafter 2008 OCR Letter].

156. Nondiscrimination in Federally Assisted Programs, 59 Fed. Reg. at 8756. The fact that OCR is directly contradicting the principles set forth in its Title VI Guidance—which firmly recognized that race-conscious scholarships are a permissible and, at times, necessary tool to achieve student body diversity—may give rise to a series of administrative claims. First, agency actions that are inconsistent with prior actions, when no good reason is articulated, may be arbitrary. As one court explained, “[a]n agency’s view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored . . . .” *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970). OCR has never amended or rescinded the Title VI Guidelines.

Further, the D.C. Circuit, in a controversial opinion, held that, “[o]nce an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking.” *Paralyzed Veterans of America v. D.C. Arena*, 117 F.3d 579, 586 (D.C. Cir. 1997).

Finally, in 2007, the Office of Management and Budget (OMB) issued a bulletin “intended to increase the quality and transparency of agency guidance practices and the significant guidance documents produced through them.” *Final Bulletin for Agency Good Guidance Practices*, 72 Fed. Reg. 3432 (2007). According to the bulletin, “[a]gency employees should not depart from significant guidance documents without appropriate justification and supervisory concurrence.” *Id.* at 3440. As OCR has ignored the Title VI Guidance, it has offered no justification for its significant departure from it.

OCR may be seeking to conceal this inconsistency by not placing the Title VI Guidance on its website. The OMB bulletin, which by its terms is not enforceable in court, *see id.* at 3439, states that “[e]ach agency shall maintain on its Web site—or as a link on an agency’s Web site to the electronic list posted on a component or subagency’s Web site—a current list of its significant guidance documents in effect.” *Id.* at 3440. OCR, in compliance with this standard, maintains a list of significant DOE guidance documents. U.S. Dep’t of Educ., Significant Guidance Documents, *available at* <http://www.ed.gov/policy/gen/guid/significant-guidance.html> (last visited Feb. 17, 2009). Despite including numerous guidance documents on higher education and civil rights on its list, OCR does not include the Title VI Guidance. *Id.*

*Grutter* framework in a manner that does not properly reflect the Supreme Court's decision."<sup>157</sup> For example, OCR emphasizes that racial classifications are "highly suspect" and interprets *Grutter* to stand for the principle that the "[u]se of race must be *essential* to an institution's mission and stated goals."<sup>158</sup> As explained in Part IV.D below, *Grutter* did not hold that the use of race must be essential.

Additionally, in challenging so many race-conscious assistance programs, OCR may be acting contrary to the DOE's goal under the federal No Child Left Behind Act (NCLB) of "closing the achievement gap between high- and low-performing children, especially the achievement gaps between minority and nonminority students."<sup>159</sup> Pointing out this paradoxical approach, the NAACP LDF concluded that "[i]t is inconsistent, at best, for the federal government to preach to the nation about closing the achievement gap between blacks and whites and then threaten to cut off the federal funds of educational institutions that are trying to make sure qualified African-American children receive a college education . . . ."<sup>160</sup>

### C. The Importance of Context in Strict Scrutiny Analysis

It is often stated that strict scrutiny is "strict in theory and fatal in fact."<sup>161</sup> Indeed, the Supreme Court's review of laws based on suspect classifications or infringing on fundamental rights reveals that "strict scrutiny would prove lethal to a statute challenged on Equal Protection grounds."<sup>162</sup> Recent challenges to race-conscious policies designed to remedy past discrimination and expand opportunities for racial minorities

157. NAACP Legal Def. and Educ. Fund, Inc., Statement of the NAACP Legal Defense Fund on Diversity in Higher Education: A Response to OCR's August 28, 2008 "Dear Colleague" Letter (Sept. 19, 2008), available at <http://www.naacpldf.org/printable.aspx?article=1323>.

158. 2008 OCR Letter, *supra* note 155 (emphasis added).

159. No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1001(3), 115 Stat. 1425, 1440 (2002).

160. NAACP REPORT, *supra* note 23, at 12. The report continued: "To recognize that 'the racial gap is real' . . . and to then intensify efforts to take race off the table . . . reflects a profound hostility towards the very goal of closing the [achievement] gap." *Id.*

Notably, NCLB is not the only federal law designed to promote racial equality by directly and explicitly considering race. Indeed, "[a] multitude of race-conscious policies have been enacted to promote racial equality: The Fair Housing Act, the Voting Rights Act, and No Child Left Behind, to name just a few. . . . [R]ace is already a valid and legitimate consideration throughout government policymaking." Banks, *supra* note 28, at 52.

161. Gerald Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (quotation marks omitted).

162. Ancheta, *supra* note 107, at 21.



confirm the rigor of strict scrutiny.<sup>163</sup> Yet, “no case—not *Adarand*, *Gratz*, *Grutter*, or any other—has ever held that the test of ‘strict scrutiny’ means that all racial classifications—no matter whether they seek to include or exclude—must in practice be treated the same.”<sup>164</sup>

Indeed, in its more recent opinions, the Court has affirmed that strict scrutiny can be strict in theory and not fatal in fact.<sup>165</sup> In *Adarand*, the Court recognized that the “fundamental purpose of strict scrutiny is to “take relevant differences” between “fundamentally different situations . . . into account.”<sup>166</sup> In *Grutter*, the Court “demonstrat[ed] that [it] meant what it said [in *Adarand*]”<sup>167</sup> when it held that “context matters when reviewing race-based governmental action under the Equal Protection Clause.”<sup>168</sup> The *Grutter* court explained that it is the “fundamental purpose” of strict scrutiny to “take ‘relevant differences into account.’”<sup>169</sup> Further, the Court explained that “[n]ot every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that

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163. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

164. *Parents Involved*, 127 S. Ct. at 2817 (Breyer, J., dissenting). Justice Breyer went on:

[C]ontexts differ dramatically one from the other. Governmental use of race-based criteria can arise in the context of, for example, census forms, research expenditures for diseases, assignments of police officers patrolling predominantly minority-race neighborhoods, efforts to desegregate racially segregated schools, policies that favor minorities when distributing goods or services in short supply, actions that create majority-minority electoral districts, peremptory strikes that remove potential jurors on the basis of race, and others. Given the significant differences among these contexts, it would be surprising if the law required an identically strict legal test for evaluating the constitutionality of race-based criteria as to each of them.

*Id.* at 2818.

165. The Supreme Court’s decisions in the race-conscious redistricting context further reveal the importance of context in strict scrutiny analysis. Pamela Karlan, discussing the Court’s redistricting jurisprudence in the three decades between *Baker v. Carr*, 369 U.S. 186 (1962), and *Shaw v. Reno*, 509 U.S. 630 (1993), explains:

Its decisions . . . suggest a nuanced understanding both of what triggers and of what satisfies strict scrutiny. The redistricting cases may flesh out the Court’s expressed wish in *Adarand*—“to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact.’” They suggest that strict scrutiny may be strict in theory, but rather pliable in practice.

Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569, 1572–73 (2002).

166. *Adarand*, 515 U.S. at 228.

167. *Parents Involved*, 127 S. Ct. at 2817 (Breyer, J., dissenting).

168. *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003).

169. *Id.*

particular context.”<sup>170</sup> In light of this holding, the *Grutter* court—noting that universities “occupy a special niche in our constitutional tradition,” and that their academic decisions are entitled a substantial degree of deference<sup>171</sup>—went on to apply a more relaxed version of strict scrutiny to uphold the race-conscious admissions plan.<sup>172</sup>

This contextual approach to strict scrutiny analysis is relevant for two interrelated reasons. First, *Grutter*’s substantial deference to university decision making highlights the point that race-conscious scholarships should be evaluated under a more relaxed strict scrutiny standard than the affirmative action contracting programs shot down in *Adarand* and *Croson* and the school district plans overruled in *Parents Involved*.<sup>173</sup> The *Grutter* court explained that, within their “special niche,” universities have “expansive freedoms of speech and thought” to adopt race-conscious measures as part of a broader effort to achieve student body diversity.<sup>174</sup> The Court further explained: “The freedom of a university to make its own judgments as to education includes the selection of its student body.”<sup>175</sup> A university’s effort to recruit, retain, and provide aid to minority students is a vital part of that selection process because it helps

170. *Id.*; see also Brian K. Landsberg, *Balanced Scholarship and Racial Balance*, 30 WAKE FOREST L. REV. 819, 829 (1995) (“The Supreme Court has navigated carefully in its consideration of permissible and impermissible uses of race. It has avoided mechanical formulae and blunderbuss rules, preferring instead a careful case-by-case consideration of race-conscious decisionmaking.”).

171. *Grutter*, 539 U.S. at 328–29. As Professor Pamela Karlan explained, what is striking about *Grutter* “is not that the Court thinks racial diversity within the student body of a selective public educational institution can be a compelling governmental purpose, but rather that it declares that racial diversity is compelling because a school thinks it is.” Karlan, *supra* note 122, at 1622.

172. Prior to *Parents Involved*, it was not clear if *Grutter*’s relaxed application of strict scrutiny was due to high levels of deference traditionally granted to colleges and universities, inclusive university affirmative action policies, or a combination of the two. In *Parents Involved*, a majority of the Justices rejected the distinction between inclusive and exclusive uses of race and affirmed *Grutter* because colleges and universities occupy a “special niche” in our constitutional tradition. Four Justices, however, provided a passionate dissent arguing, inter alia, that it is critical to distinguish between inclusive and exclusive policies. See *infra* note 179 and accompanying text.

173. As Pamela Karlan recently explained:

The context in which the Court hammered out the principle of strict scrutiny for all racial classifications was far removed from professional school admissions. Cases such as *Adarand* and [*Croson*] involved government contracting programs and race-based deviations from what would otherwise have been a highly stylized form of decisionmaking: reliance on formal, sealed bids. . . . Many government decisions—including, of course, admissions to public professional schools—are quite different. They involve multiple, soft factors. This has important implications for the application of strict scrutiny.

Karlan, *supra* note 122, at 1619.

174. *Grutter*, 539 U.S. at 329.

175. *Id.* (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978)).

“ensure that a diverse student body is actually enrolled and is maintained during the academic year, and not just admitted.”<sup>176</sup>

Second, the law remains divided on the issue of the standard of review for benign classifications that seek to include, as opposed to malicious classifications that seek to exclude. Chief Justice Roberts recently stated that “[o]ur cases clearly reject the argument that motives affect strict scrutiny analysis.”<sup>177</sup> Further, “[t]he reasons for rejecting a motives test for racial classifications are clear enough. ‘The Court’s emphasis on benign racial classifications suggests confidence in its ability to distinguish good from harmful governmental uses of racial criteria. History should teach greater humility . . . .’”<sup>178</sup> Yet four members of the Court strongly disagreed; Justice Breyer explained, “I have found no case that otherwise repudiated this constitutional asymmetry between that which seeks to *exclude* and that which seeks to *include* members of minority races.”<sup>179</sup> Turning to the importance of context in strict scrutiny review, Justice Breyer stated,

The upshot is that the cases to which [Roberts] refers, though all applying strict scrutiny, do not treat exclusive and inclusive uses the same. Rather, they apply the strict scrutiny test in a manner that is “fatal in fact” only to racial classifications that harmfully *exclude*; they apply the test in a manner that is *not* fatal in fact to racial classifications that seek to *include*.<sup>180</sup>

Even Judge Kozinski, “not generally known as a politically liberal judge,”<sup>181</sup> held that Seattle’s voluntary integration plan should not be subject to strict scrutiny. He explained: “When it comes to a plan such as [Seattle’s]—a plan that gives the American melting pot a healthy stir without benefitting or burdening any particular group—I would leave the decision to those much closer to the affected community . . . .”<sup>182</sup>

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176. THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., REAFFIRMING DIVERSITY: A LEGAL ANALYSIS OF THE UNIVERSITY OF MICHIGAN AFFIRMATIVE ACTION CASES, JOINT STATEMENT OF CONSTITUTIONAL LAW SCHOLARS 21 (2003) [hereinafter REAFFIRMING DIVERSITY]. See also Paul Horwitz, *Grutter’s First Amendment*, 46 B.C. L. REV. 461, 539 (2005).

177. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2764 (2007). See also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (“[A]ll racial classifications, imposed by [government,] must be analyzed by a reviewing court under strict scrutiny.”).

178. *Parents Involved*, 127 S. Ct. at 2765 (citing *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 609–10 (1990) (internal quotations omitted)).

179. *Id.* at 2815 (Breyer, J., dissenting).

180. *Id.* at 2817 (Breyer, J., dissenting).

181. Ryan, *supra* note 125, at 154.

182. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1196 (9th Cir. 2005) (Kozinski, J., concurring), *rev’d*, 127 S. Ct. 2738 (2007).

Similarly, Justice Stevens explained in *Adarand* that the law must recognize the difference between “a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination”<sup>183</sup> or, more vividly, “between a ‘No Trespassing’ sign and a welcome mat.”<sup>184</sup>

Thus, despite the *Parents Involved* conclusion that motive is irrelevant, the fact that four Justices disagree reveals that this is still a live issue that should not be ignored. Further, it is significant that, in the context of race-conscious financial aid programs, both factors—deference to universities and benign classifications—are present. As Angelo Ancheta explained:

A combination of benign motivations and historical deference to an institution might produce an inquiry . . . in which there is a minimal evidentiary burden imposed to demonstrate the institution’s compelling interest, and [in which] good faith can be presumed along several dimensions of narrow tailoring, including time limits, documenting the necessity of a policy, and considering viable alternative policies.<sup>185</sup>

#### IV. RACE-CONSCIOUS SCHOLARSHIPS ARE CONSTITUTIONAL

When a court applies strict scrutiny, it asks: (1) whether the goal of the policy is sufficiently important to constitute a “compelling governmental interest” and, if so (2) whether the policy is “narrowly tailored” to further

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183. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 243 (1995) (Stevens, J., dissenting).

184. *Id.* at 245 (Stevens, J., dissenting). Justice Stevens continued: “It would treat a Dixiecrat Senator’s decision to vote against Thurgood Marshall’s confirmation in order to keep African-Americans off the Supreme Court as on a par with President Johnson’s evaluation of his nominee’s race as a positive fact. It would equate a law that made black citizens ineligible for military service with a program aimed at recruiting black soldiers.” *Id.*

According to Justice Breyer, an originalist analysis of the Fourteenth Amendment supports Justice Stevens’ argument. As the Supreme Court explained in 1879, the purpose of the Fourteenth Amendment was to “secur[e] to a race recently emancipated . . . all the civil rights that the superior race enjoy.” *Strauder v. West Virginia*, 100 U.S. 303, 306 (1879). See also *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71 (1872) (“[T]he one pervading purpose found in [the Reconstruction amendments was] the freedom of the slave race . . .”). Citing *Strauder*, Justice Breyer recently explained that “the basic objective of those who wrote the Equal Protection Clause [was] forbidding practices that lead to racial exclusion. The Amendment sought to bring into American society as full members those whom the Nation had previously held in slavery.” *Parents Involved*, 127 S. Ct. at 2815 (Breyer, J., dissenting). Accordingly, “[t]here is reason to believe that those who drafted an Amendment with this basic purpose in mind would have understood the legal and practical difference between the use of race-conscious criteria in defiance of that purpose, namely to keep the races apart, and the use of race-conscious criteria to further that purpose, namely to bring the races together.” *Id.* at 2815.

185. Ancheta, *supra* note 107, at 51.

that interest.<sup>186</sup> The classifications will be constitutional “only if they are narrowly tailored measures that further compelling governmental interests.”<sup>187</sup>

### A. *Compelling Interest*

The creation of a diverse student body through a race-conscious admissions program, as upheld in *Grutter*, “implies that other policies designed to create that diversity should be upheld if they also comply with the constitutional requirements of narrow tailoring.”<sup>188</sup> In the vast majority of cases, the diversity-related interests to be achieved by race-conscious financial aid programs are similar, if not identical, to the diversity-related goals of race-conscious admissions policies. Thus, *Grutter*’s compelling interest in student body diversity recognized in the admissions context should apply equally to financial aid. As one scholar explained: “*Grutter* . . . suggests that universities ought to be able to rely confidently on their educational interest in student diversity in maintaining [such] scholarship programs.”<sup>189</sup> Put simply, if a university has a compelling interest in student body diversity and the authority to implement race-conscious admissions standards to achieve that interest, “surely it has an equal interest in ensuring that it also can ‘attract and retain’ those students who serve the educational mission of maintaining student diversity.”<sup>190</sup> Accordingly, in light of the fact that the college attrition rate for African Americans is significantly higher than for their white peers,<sup>191</sup> the preservation of the compelling interest in student body diversity cannot be satisfied at the point of admissions. In maintaining a diverse student body, it is race-conscious financial aid that can make the difference between minority students “continuing their studies or leaving school.”<sup>192</sup>

The DOE directly addressed the compelling interest issue in its 1994 Title VI Guidance and concluded that diversity is a legitimate justification for the implementation of a race-conscious scholarship. Discussing the use of financial aid to create diversity, the DOE explained that “a college should have substantial discretion to weigh many factors—including race and national origin—in its efforts to attract and retain a student population

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186. *Adarand*, 515 U.S. at 227.

187. *Id.*

188. Ancheta, *supra* note 28, at 20.

189. Horwitz, *supra* note 176, at 539.

190. *Id.*

191. *See supra* note 24.

192. GAO REPORT, *supra* note 32, at 10.

of many different experiences, opinions, backgrounds, and cultures.”<sup>193</sup> Accordingly, the strict scrutiny analysis should turn on whether the program in question is narrowly tailored.

*B. Narrow Tailoring: Scholarships That Consider Race as a Plus Factor*

Scholarships that consider race as one of many factors in the context of an individualized, holistic consideration<sup>194</sup> (analogous to the Michigan Law School admissions plan) should be upheld under a *Grutter* analysis as long as they meet the Court’s other narrow tailoring requirements. Indeed, *Grutter* “provides strong support for the use of race as a plus factor in financial aid and scholarship decisions because like admissions, these programs strongly influence the composition of the student body.”<sup>195</sup>

Affirmative action opponents, however, may argue that *Grutter* is limited to the admissions context and therefore cannot justify a race-conscious financial aid program. Chief Justice Roberts hinted at the viability of this approach in *Parents Involved*, when he went out of his way to distinguish higher education from the K-12 context.<sup>196</sup> By dismissing any parallels between the two contexts, the Chief Justice revealed that he, along with Justices Thomas, Scalia, and Alito, is prepared to read *Grutter* in the narrowest possible way. Because *Grutter* did not

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193. Nondiscrimination in Federally Assisted Programs, 59 Fed. Reg. 8756, 8756 (Feb. 23, 1994).

194. Examples of such scholarships include merit-based scholarships that consider race as a plus factor in a competitive selection process or need-based scholarships that consider race as a plus-factor by, for example, replacing a work-study requirement with a grant. See EJS MANUAL, *supra* note 108, at 80.

195. *Id.* See also COLEMAN, PALMER & RICHARDS, *supra* note 134, at 45 (“[I]t is obvious that if a scholarship is structured so that . . . race is one factor among others . . . and the consideration of race when making the award is pursuant to a whole-file, individualized review, then the practice is much more likely to be sustained as lawful—consistent with both the University of Michigan decisions and the Department’s Title VI Policy Guidance.”).

196. Chief Justice Roberts explained:

In upholding the admissions plan in *Grutter* . . . this Court relied upon considerations unique to institutions of higher education, noting that in light of “the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.” The Court explained that “[c]ontext matters” in applying strict scrutiny, and repeatedly noted that it was addressing the use of race “in the context of higher education.”

*Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2754 (2007) (citations omitted). The Chief Justice continued to explain that “[t]he Court in *Grutter* expressly articulated key limitations on its holding—defining a specific type of broad-based diversity and noting the unique context of higher education—but these limitations were disregarded by the lower courts in extending *Grutter* to uphold race-based assignments in elementary and secondary schools.” *Id.*

address financial aid, one can imagine at least those four Justices further confining *Grutter* to the admissions context alone.<sup>197</sup>

To counter this argument, colleges and universities must be prepared to show that their plus-factor scholarships are necessary to enroll a diverse student body. As one scholar explained:

Admitting a diverse group of students is only the first step towards achieving student body diversity in a given year. The other steps include: convincing a diverse group of students to accept the admission offer; encouraging that group of students to actually enroll and attend the school so that there is a critical mass; and ensuring that those students participate in the learning community and continue to participate through the years . . . .<sup>198</sup>

To prove this point in *Grutter*, the University of Michigan presented statistical evidence revealing that, if race were not considered as part of the admissions plan, “underrepresented minority students would have constituted 4 percent of the entering class in 2000 instead of the actual figure of 14.5 percent.”<sup>199</sup> Similarly, a plus-factor financial aid program should survive judicial scrutiny so long as a university can provide statistical evidence revealing that fewer minority students would enroll if the race-conscious scholarships were terminated.<sup>200</sup>

While race-based scholarships that mirror the *Grutter* admissions plan should not be hard to justify, race-exclusive scholarships, of which there were many,<sup>201</sup> present a more challenging narrow tailoring question and one which universities approach with caution.

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197. See Chris Chambers Goodman, *Beneath the Veil: Corollaries on Diversity and Critical Mass Scholarships From Rawls’ Original Position on Justice*, 13 WASH. & LEE J. CIV. RTS. & SOC. JUST. 285, 337 (2007) (“The U.S. Supreme Court roster has changed in the three years since *Grutter* and *Gratz*, and therefore if a race-conscious financial aid program was granted certiorari, the Court might follow reasoning other than that explained in the majority opinions, on the grounds that *stare decisis* is not implicated because of the differences between admissions and financial aid issues.”).

198. *Id.*

199. *Grutter v. Bollinger*, 539 U.S. 306, 320 (2003). See also WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 32 (1998) (color-blind admissions would reduce the rate of undergraduate admissions for African Americans at five selective institutions from forty-two percent of those applying to thirteen percent); Jordan J. Cohen, *The Consequences of Premature Abandonment of Affirmative Action in Medical School Admissions*, 289 J. AM. MEDICAL ASS’N 1143, 1148–49 (2003) (“[T]here is simply no alternative to the use of race-conscious decision making in medical school admission if our society is to have the benefit of a reasonably diverse physician workforce.”).

200. EJS MANUAL, *supra* note 108, at 80.

201. For example, the Ervin Program, Ernest A Calloway Jr. scholarship, SUNY scholarships and fellowships, and Southern Illinois fellowships were, at one point, all race-exclusive. See *supra* Part II.B.1.

### C. *Narrow Tailoring: Race-Exclusive Scholarships*

The constitutionality of race-exclusive scholarships will turn on whether they can be distinguished from the race-as-a-plus-factor admissions plan struck down in *Gratz*. The DOE has explicitly held that, in certain circumstances, “a college may use race or national origin *as a condition of eligibility* in awarding financial aid if this use is narrowly tailored . . . .”<sup>202</sup> What circumstances are required for a race-exclusive scholarship to be narrowly tailored? Keeping the contextual approach to strict scrutiny in mind, we turn to *Grutter*’s core narrow tailoring requirements for the answer.

#### 1. *Flexible, Individualized Consideration*

Taken together, *Grutter* and *Gratz* stand for the principle that race cannot be the exclusive or primary factor in an admissions decision. As the Court explained, “[W]hen using race as a ‘plus’ factor in university admissions, a university’s admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application.”<sup>203</sup>

This reasoning draws race-exclusive scholarships into question because, if nonminority students are excluded from basic eligibility, the scholarship may not provide the individualized, holistic review that both *Grutter* and *Gratz* require.<sup>204</sup> Thus, as *Grutter* held that a race-conscious admissions program would not be narrowly tailored if it “insulat[es] each category of applicants with certain desired qualifications from competition with all other applicants,”<sup>205</sup> race-exclusive programming of any kind may be hard to justify.<sup>206</sup>

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202. Nondiscrimination in Federally Assisted Programs, 59 Fed. Reg. 8756, 8757 (Fed. 23, 1994) (emphasis added).

203. *Grutter*, 539 U.S. at 336–37 (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 318 (1978)).

204. Discussing race-exclusive scholarships, Roger Clegg stated, “[s]tudents should be given individualized considerations per the Supreme Court decision [in *Grutter*], but that type of consideration is impossible if certain students are not even allowed to apply to programs.” Kinzie Goetz, *Minority Aid May Expand*, INDEP. COLLEGIAN, Mar. 23, 2006.

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

206. Indeed, Richard Banks explained that race-exclusive scholarships seem “to mirror the admissions quota or set-aside that the Court has unequivocally declared impermissible.” Banks, *supra* note 28, at 45.



However, recalling that the “very purpose of strict scrutiny is to take . . . ‘relevant differences into account,’”<sup>207</sup> there are important contextual distinctions between financial aid and admissions that weigh in favor of upholding race-conscious scholarships, even when similar admissions policies would be struck down.<sup>208</sup>

First, a race-exclusive scholarship implemented as an extension of a plus-factor admissions policy may not violate *Grutter* because, “by the time the institution makes its scholarship and financial aid decisions, the institution has already engaged in the individualized, nonmechanical, ‘meaningful . . . consider[ation]’ of a student and his or her potential to contribute to the diversity of the class . . . .”<sup>209</sup> The scholarship, in other words, is the means by which the university gives substance to a *Grutter*-type admissions policy. The financial aid is essential for the institution to realize its diversity goal; students can receive the aid only if they have met the standards of the *Grutter*-type plan.<sup>210</sup> Consider a school that admits students with physical disabilities but is unable to provide them with necessary accessible accommodations, such as ramps or elevators. To these students, admission will mean little if structural barriers prevent them from actually attending. The same is true with respect to financial aid: individual consideration under a *Grutter*-type admissions plan will ring hollow if the school does not provide the students with the resources needed to actually attend.

Second, for some institutions, race-exclusive scholarships are necessary to realize *Grutter*’s goal of student body diversity. According to

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207. *Grutter*, 539 U.S. at 334 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 228 (1995)). See also *Nondiscrimination in Federally Assisted Programs*, 59 Fed. Reg. at 8761 (“Whether a college’s use of race-targeted financial aid is ‘narrowly tailored’ to achieve . . . [diversity] involves a case-by-case determination that is based on the particular circumstances involved.”).

208. Banks, *supra* note 28, at 45; see also Amy Weir, *Should Higher Education Race-Based Financial Aid be Distinguished from Race-Based Admissions?*, 42 B.C. L. REV. 967, 967 (2001) (“Higher education admissions and financial aid offices, while similar in appearance, differ in fundamental ways. Because of their key differences, the constitutional issues triggered by the offices’ official use of race and ethnicity as a criterion in decisionmaking should be scrutinized differently.”).

209. EJS MANUAL, *supra* note 108, at 83.

210. See Goodman, *supra* note 197, at 336 (“Students seeking financial assistance already have been through the highly competitive admissions process, and thus the rules can be more relaxed for the allocation of financial aid to those already admitted students . . . .”); 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, 252 (2005) (“[F]inancial aid is only a conduit by which to reinforce admissions offers that in turn may be designed to attract and recruit a critical mass of diversity.”); Spector, *supra* note 34, at 333 (“[T]argeting scholarships on the basis of race may be necessary to assure that the diversity goals implemented at the admissions stage actually are achieved.”).

both the DOE<sup>211</sup> and the GAO,<sup>212</sup> race-exclusive scholarships can be essential to recruiting minority students, convincing those admitted to attend, and helping those enrolled to finish. In its Title VI Guidance, the DOE agreed with the comments of numerous colleges that, “the use of race . . . as a plus factor in awarding financial aid may be inadequate to achieve diversity. . . . [I]n some cases, it may be necessary to designate a limited amount of aid for students of a particular race or national origin.”<sup>213</sup> The DOE recognized numerous factual scenarios that could support this conclusion. For one, an institution’s “location, . . . reputation (whether deserved or not) of being inhospitable to minority students, or its number of minority graduates” may make it “unable to recruit sufficient minority applicants *even if race or national origin is considered as a positive factor in admissions and the award of aid.*”<sup>214</sup> In addition, a college that has admitted a “critical mass” of minority students “may find that, absent the availability of financial aid set aside for minority students, its offers of admission are disproportionately rejected by minority applicants.”<sup>215</sup> Universities implementing race-exclusive scholarships would therefore be wise, in light of the 2008 OCR Letter, to provide

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211. Nondiscrimination in Federally Assisted Programs, 59 Fed. Reg. at 8761.

212. According to the GAO:

Minority-targeted scholarships played an important role in the recruitment, retention, and graduation of racial or ethnic minority students . . . .

First, these scholarships provided a financial benefit that could influence minority students’ enrollment decisions. . . .

Second, [race-exclusive scholarships] helped with recruitment and retention by sending a message that the school was serious about wanting minority students to enroll and complete their degrees.

GAO REPORT, *supra* note 32, at 9–10.

213. Nondiscrimination in Federally Assisted Programs, 59 Fed. Reg. at 8761.

214. *Id.* (emphasis added). The DOE continued: “[T]he failure to attract a sufficient number of minority applicants who meet the academic requirements of the college will make it impossible for the college to enroll a diverse student body, even if race or national origin is given a competitive ‘plus’ in the admissions process.” *Id.*; see also GAO REPORT, *supra* note 32, at 9 (postulating that the elimination of minority-targeted scholarships would make it harder for some schools to recruit and retain minority students).

215. Nondiscrimination in Federally Assisted Programs, 59 Fed. Reg. at 8761. The GAO Report explained how race-exclusive scholarships help to avoid rampant rejection by minority students. According to the report, race-exclusive scholarships help to “achieve a critical mass of minority students, making the school a more attractive place to enroll for minority students [even those] not receiving these scholarships. This critical mass also meant that once minority students enrolled, they were less likely to feel isolated and more likely to persist in their studies.” GAO REPORT, *supra* note 32, at 9–10. Moreover, race-exclusive scholarships help with recruitment and retention “by sending a message that the school [is] serious about wanting minority students to enroll and complete their degrees. These scholarships, officials said, provided minority students with evidence of a school’s support for diversity—more tangible evidence than an affirmative action statement printed in a school recruitment brochure.” *Id.*

evidence demonstrating that race-conscious scholarships are necessary to realize *Grutter*'s goal of student body diversity.<sup>216</sup>

Accordingly, under certain circumstances, the lack of flexibility inherent in race-exclusive scholarships should not be fatal. This does not end the analysis, however, as institutions still must prove that race-exclusive scholarships do not impose an undue burden on nonminorities.

## 2. *Undue Burden on Nonminorities*

“To be narrowly tailored, a race-conscious admissions program must not ‘unduly burden individuals who are not members of the favored racial and ethnic groups.’”<sup>217</sup>

Notably, the Title VI Guidance states that “it is not necessary to show that no student’s opportunity to receive financial aid has been in any way diminished by the use of race-targeted aid. Rather, the use of race-targeted aid must not place an undue burden on students who are not eligible for that aid.”<sup>218</sup> To determine whether a scholarship imposes an undue burden, a court must analyze the scholarship’s place within the context of financial aid distribution at the university.

On the one hand, race-exclusive financial aid may impose a burden when it reallocates a fixed resource in order to benefit minorities at the expense of nonminorities. For example, the Title VI Guidance states that an unconstitutional burden would exist if a university “eliminat[ed] scholarships currently received by non-minority students in order to start a scholarship program for minority students . . . .”<sup>219</sup>

On the other hand, race-exclusive scholarships, under certain conditions, may not impose an unconstitutional burden. Whereas *Gratz*-style admissions programs have the effect of excluding applicants from a university, “the use of race-targeted financial aid . . . does not, in and of itself, dictate that a student would be foreclosed from attending a college solely on the basis of race.”<sup>220</sup> For example, if there are “sufficient

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216. See *infra* notes 252–54 and accompanying text for a discussion of OCR’s interpretation of *Grutter* as requiring the use of race to be “essential to an institution’s mission and stated goals.”

217. *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003) (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 630 (1990) (O’Connor, J., dissenting)).

218. Nondiscrimination in Federally Assisted Programs, 59 Fed. Reg. at 8762.

219. *Id.*

220. *Id.*; see also Goodman, *supra* note 197, at 342 (“Financial aid decisions do not place an ‘undue burden’ on the non-beneficiaries (here, the non-recipients of aid, or those who receive less aid than they would like) because the invitation to enroll already has been extended, and thus the applicant has the ability to attend the school, as long as he or she can work out the finances.”); Spector, *supra* note 34, at 330 (“Minority scholarship programs do not unduly harm nonminorities because they do

opportunities to obtain scholarship dollars through other university programs,”<sup>221</sup> a race-exclusive scholarship “would shut out students of other races only minimally, because the race-based assistance would represent a relatively minor portion of the entire pot of aid, and therefore would be narrowly tailored enough to withstand legal scrutiny.”<sup>222</sup>

When, however, are other opportunities to obtain scholarship dollars sufficient? The answer to this question depends on the unique facts of each case. According to the Equal Justice Society, a 1994 U.S. General Accounting Office (GAO) report<sup>223</sup> provides an example of the types of evidence institutions should gather to answer this question.<sup>224</sup> The GAO Report concluded that, while race-exclusive scholarships were numerous,<sup>225</sup> they accounted for only a small proportion of total scholarship dollars. According to the report, race-exclusive scholarships “represented no more than 5 percent of all undergraduate and graduate scholarships and scholarship dollars. For professional schools, these scholarships accounted for 10 percent of all scholarships and 14 percent of scholarship dollars.”<sup>226</sup> Further, “[o]nly a small percentage of minority undergraduate, graduate, and professional students received [race-exclusive scholarships]. . . . At all three education levels, less than 4 percent of racial and ethnic minority students received scholarships whose only criterion was race or ethnicity.”<sup>227</sup> With such a small percentage of scholarship money going to such a small number of students, the race-exclusive program arguably does not impose an unconstitutional burden

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not bar them from attending college or university. Many alternative financial aid programs exist which are not restricted to minority students. Furthermore, most students who receive financial aid, including minority students, get assistance from more than one source including various grant, loan and scholarship programs. A student who has been denied admission to an institution, however, cannot look to alternative sources for admission at that particular institution.”).

221. Ancheta, *supra* note 28, at 33–34.

222. Hebel, *supra* note 29. Notably, further research is needed to understand the burdens that race-exclusive scholarships impose on nonminority students. As Angelo Ancheta explains, “the burdens and costs imposed upon non-minority students must be better understood and measured. If the costs of exclusion or relative disadvantage are not significant or burdensome, then race-exclusive programs have a much better chance of being upheld.” Ancheta, *supra* note 28, at 34.

223. GAO REPORT, *supra* note 32.

224. EJS MANUAL, *supra* note 108, at 81. The report notes that an institution should “base this evidence on its own budget and financial statements” and that the GAO Report is simply “useful for thinking about the kinds of evidence to gather.” *Id.*

225. As of 1991–92, “[a]lmost two-thirds of 4-year undergraduate schools awarded at least one minority-targeted scholarship. At the post-graduate level, about one-third of graduate schools and nearly three-fourths of professional schools awarded at least one minority-targeted scholarship.” GAO REPORT, *supra* note 32, at 4.

226. *Id.* at 4.

227. *Id.* at 7.

on nonminorities. Defending two race-exclusive scholarship programs at SIU, Jerry D. Blackmore, the university's general counsel, embraced this approach:

[W]ith a combined annual budget of about \$200,000, [the two programs] "are only two of many" university programs that provide a total of more than \$12-million in financial assistance to more than 4,000 graduate students each year. To focus on the lack of white students among the 27 recipients of the Graduate Dean's fellowships without at least "noting the myriad of options available to all graduate assistants would simply be unconscionable."<sup>228</sup>

Accordingly, "[W]hile race-conscious admissions may shut out a student from a particular college, giving out aid based on race does not prevent nonminority students from getting financial assistance."<sup>229</sup> Thus, race-exclusive scholarships, unlike admissions quotas, are not per se unconstitutional; on the contrary, each scholarship must be evaluated "within the larger context of a university's overall allocation of scarce resources"<sup>230</sup> to determine whether an undue burden exists.<sup>231</sup>

Furthermore, the Title VI Guidance explains that nonminority students would not necessarily benefit from, and may even be hurt by, the elimination of race-exclusive scholarships. Unlike the finite number of admissions slots, "the amount of financial aid available to students is not

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228. Schmidt, *supra* note 57. Even the American Council on Education has found that race-based scholarships have little to no impact on white students:

"[T]he availability of minority directed financial aid [has not] denied nonminorities the assistance necessary to finance higher education. Typically, once an institution has made admissions decisions, the institution determines the type of financial aid that may be offered to students requesting it. In accordance with guidelines from OCR . . . colleges and universities have targeted scholarship and fellowship funds for minorities in such a manner that the financial aid program *as a whole* remains nondiscriminatory.

Spector, *supra* note 34, at 330 (quoting Letter from Robert H. Atwell, President, Am. Council on Educ., to John H. Sununu, White House Chief of Staff (Dec. 17, 1990) (on file with Iowa Law Review)) (emphasis added).

229. Jeffrey Selingo, *New Guidebook Will Help Race-Based Student-Aid Programs Avoid Straying From Supreme Court Rulings*, CHRON. HIGHER EDUC. (Wash., D.C.), Mar. 28, 2005 at A34.

230. Ancheta, *supra* note 28, at 33.

231. As Jonathan Alger, general counsel at Rutgers University, explained:

If . . . an institution has plenty of aid available for all students, regardless of race, race-conscious scholarships may have little or no impact on students who do not receive those awards. If financial-aid resources are scarce, however, then the burdens imposed by the consideration of race in such scholarships need to be considered carefully with that factor in mind."

Jonathan Alger, *Putting the Michigan Ruling into Practice*, CHRON. HIGHER EDUC. (Wash., D.C.), Feb. 25, 2005, at B28.

necessarily fixed . . . [and] may increase or decrease based on the functions it is perceived to promote.”<sup>232</sup> For example, “a college’s receipt of privately donated monies restricted to an underrepresented group might increase the total pool of funds for student aid in a situation in which, absent the ability to impose [a race-based] limitation, the donor might not provide any aid at all.”<sup>233</sup> With respect to its own resources, a college, in response to the barring of race-exclusive aid, may elect to rechannel the funds from financial aid “into other methods of [minority] recruitment.”<sup>234</sup> It is clear, therefore, that “a decision to bar the award of race-targeted financial aid will not necessarily translate into increased resources for students from non-targeted groups.”<sup>235</sup> To the contrary, it is possible that nonminority students benefit from race-exclusive scholarships; were such scholarships to disappear, there would be more students competing for the pool of general scholarship funds.

The argument against an undue burden can be further strengthened if the university in question claims to meet 100% of the demonstrated financial need of its students. For example, Columbia University states that it “meets 100% of the demonstrated financial need for all students”;<sup>236</sup> Bowdoin College “meet[s] the full calculated need of all enrolling students”;<sup>237</sup> and at Amherst College, “[o]ur financial aid meets your ‘full demonstrated need’—there is no ‘gap’ or unmet need in our aid awards.”<sup>238</sup> One source maintains that, as of March 2007, sixty-seven colleges “promise to meet full demonstrated financial need of all admitted students.”<sup>239</sup> Richard Banks explained that, “[i]n a financial aid program

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232. Nondiscrimination in Federally Assisted Programs, 59 Fed. Reg. 8756, 8762 (Feb. 23, 1994). Banks explains that “increased funding may dramatically expand [race-based assistance programs], in contrast to admissions where, for example, a school’s physical facilities may limit the size of the student body . . . .” Banks, *supra* note 28, at 43.

233. Nondiscrimination in Federally Assisted Programs, 59 Fed. Reg. at 8762.

234. *Id.*

235. *Id.*

236. Columbia University Office of Undergraduate Admissions—Financial Aid, <http://www.studentaffairs.columbia.edu/admissions/finaid/> (last visited Feb. 17, 2009).

237. Student Aid for Prospective Students, Bowdoin University, <http://www.bowdoin.edu/studentaid/> (last visited Feb. 17, 2009).

238. Amherst College Frequently Asked Questions, <http://www.amherst.edu/~finaid/firstyear/faq.html> (last visited Feb. 17, 2009).

239. Some examples include Amherst College, Antioch College, Brown University, Carleton College, College of the Holy Cross, Connecticut College, Emory University, Georgetown University, Grinnell College, Harvard University, Haverford College, Middlebury College, Northwestern University, Occidental College, Salem College, Smith College, Stanford University, Thomas Aquinas College, University of Virginia, Washington University in Saint Louis, Williams College, and Yale University. Carolyn Z. Lawrence, *Which Schools Meet Full Need?*, AdmissionsAdvice.com, Mar. 17,

that meets each student's demonstrated financial need and no more, a racial designation attached to any aid funds (perhaps at the behest of a donor) would influence the distribution of specific aid funds, but not the amount of aid available[,] . . . [so] no white student would be denied funding as a result of the [scholarship]."<sup>240</sup>

Overall, the burdens imposed on nonminority students in the financial aid context are "diffused and considerably less than in admissions decisions."<sup>241</sup> Accordingly, unlike a race-exclusive admissions policy (such as a quota), which cannot be narrowly tailored, a race-exclusive scholarship, when a university can show that it does not burden nonminorities, should survive strict scrutiny as long as it complies with the remaining narrow tailoring requirements.

### 3. Race-Neutral Alternatives

Narrow tailoring also "require[s] serious, good faith consideration of workable race-neutral alternatives *that will achieve the diversity the university seeks*."<sup>242</sup> Significantly, narrow tailoring "does not require exhaustion of every conceivable race-neutral alternative"<sup>243</sup> and a university need not consider "alternatives [that] would require a dramatic sacrifice of diversity [or] academic quality . . ."<sup>244</sup> There is a wealth of evidence revealing that, compared to race-exclusive programs, race-neutral programs like class-based affirmative action consistently reduce the rate of undergraduate and graduate admissions for racial minorities.<sup>245</sup> Because courts will defer to an institution's good faith effort to seek out race-neutral alternatives,<sup>246</sup> this requirement can be met as long as the

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2007, <http://collegehunt.blogspot.com/2007/03/which-schools-meet-full-need.html>. This list does not include "schools that meet full need for very close to 100% of students."

240. Banks, *supra* note 28, at 45. Notably, it might also be argued that when a university meets one hundred percent of student need, the justification for race-based scholarships *decreases*. If all needs are being met there is arguably no reason to go to the extreme of imposing a race-based classification.

241. REAFFIRMING DIVERSITY, *supra* note 176, at 2; *see also* Goodman, *supra* note 197, at 344 (compared to the burden of being denied admissions, the denial of race-based financial aid "is much lower, and farther from an 'undue' burden").

242. Grutter v. Bollinger, 539 U.S. 306, 339 (2003) (emphasis added).

243. *Id.*

244. *Id.* at 340.

245. *See, e.g.*, Goodman, *supra* note 197, at 326–27. The author cites numerous studies finding that affirmative action programs that use socioeconomic status, as opposed to race, are ineffective in increasing racial and ethnic diversity. She explains that "if socio-economic status becomes an important factor in admissions, it results in more lower-income Anglos and Asians being admitted, rather than increasing the number of admitted African American and Latino students." *Id.*

246. *See Grutter*, 539 U.S. at 343 ("We take the Law School as its word that it would 'like nothing

university can show that the alternatives in question are not sufficient to achieve the stated goal.<sup>247</sup>

#### 4. *Time Limits*

To be narrowly tailored, “race-conscious admissions policies must be limited in time.”<sup>248</sup> This applies to race-conscious scholarships because “all ‘race-conscious programs must have reasonable durational limits.’”<sup>249</sup> In the context of higher education, this requirement “can be met by sunset provisions . . . and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity.”<sup>250</sup> As with race-neutral alternatives, federal courts are likely to defer to the university as long as it makes a good faith showing. As *Grutter* explained, “We take the Law School at its word that it . . . will terminate its race-conscious admissions program as soon as practicable.”<sup>251</sup>

#### D. *Colleges and Universities Are Abandoning Constitutional Scholarships*

Colleges and universities need not succumb to OCR and CEO/ACRI because, as explained above, their pressure is founded on flawed legal reasoning. That reasoning, set forth in the 2008 OCR Letter, misunderstands and overstates the law set forth in *Grutter* and *Gratz*.

For example, according to OCR, the “use of race must be *essential* to an institution’s mission and stated goals.”<sup>252</sup> The Supreme Court has never held, however, that the use of race need be essential. To the contrary, the Court in *Grutter* stated that a school’s “educational judgment that [student body] diversity is essential to its educational mission is one to which we defer.”<sup>253</sup> The Court’s holding was that the use of race must be *narrowly tailored* to achieve the school’s interest in student body diversity. The

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better than to find a race-neutral admissions formula’ . . . .”); see also Ancheta, *supra* note 107, at 51 (“[G]ood faith can be presumed along several dimensions of narrow tailoring, including . . . documenting the necessity of a policy, and considering viable alternative policies.”).

247. See Ancheta, *supra* note 28, at 34 (“The necessity and effectiveness of minority-only programs and scholarships should be thoroughly documented if they are to survive legal challenges; the benefits of minority-only programs relative to plus-factor selection procedures or race-neutral policies must be demonstrated in order to show that the alternatives to minority-only programs are not truly workable.”).

248. *Grutter*, 539 U.S. at 342.

249. *Id.* (quoting Brief for Respondent Bollinger et al. at 32, *Grutter*, 539 U.S. 306 (No. 02-241)).

250. *Id.*

251. *Id.* at 343.

252. 2008 OCR Letter, *supra* note 155 (emphasis added).

253. *Grutter*, 539 U.S. at 328.



*Grutter* court does not state, let alone imply, that narrow tailoring requires the use of race to be essential.<sup>254</sup>

The 2008 OCR Letter reiterates that “[b]efore using race, there must be serious good faith consideration of workable race-neutral alternatives.”<sup>255</sup> *Grutter* did not hold, however, that institutions have the burden of proving that race-neutral alternatives are not workable; on the contrary, the Court required only that institutions consider workable race-neutral alternatives in good faith.<sup>256</sup> Thus, institutions that implement race-based scholarships “must seriously consider the alternatives but should not be required to prove that alternatives are not ‘workable.’”<sup>257</sup>

There is a disconnect, therefore, between *Grutter*’s endorsement of race-conscious classifications to achieve student body diversity and the widespread abandonment of both race-exclusive and race-as-a-plus-factor scholarships. Of the at least seventy-one programs that were challenged by CEO, the vast majority no longer consider race in any way; instead, the programs have either been terminated completely or refocused around socio-economic status or student “commitment to a diverse campus.”<sup>258</sup> Remarkably, of those seventy-one programs, “only 7 continue to consider race as one factor in ensuring campus diversity.”<sup>259</sup> It is clear, therefore, that “institutions are modifying their programs more than may be legally required due to fear of an OCR investigation or pressure from advocacy groups.”<sup>260</sup> No federal law or policy—not *Grutter*, not Title VI, not the Title VI Guidance—requires a university to terminate the use of race altogether; to the contrary, they each stand for the principle that, when carefully considered, race can be used to promote student body diversity.

## V. CONCLUSION

While the risk of losing federal funds under Title VI is undeniably high, so too is the risk that our nation’s institutions of higher education,

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254. The Court’s four narrow tailoring requirements (individualized consideration, race-neutral alternatives, undue burden, time limits) are explained in detail in Part IV.C, *supra*.

255. 2008 OCR Letter, *supra* note 155. CEO has made similar demands. In a November 2004 letter to the Wisconsin Department of Public Instruction, OCR stated that race-neutral alternatives can be adopted only when they “are workable and effective in achieving the recipient’s educational objectives.” Miksch, *supra* note 39, at 67 (quoting a November 18, 2004, OCR letter to the Wisconsin Department of Public Instruction and a May 13, 2005, OCR letter to Washington University).

256. *Grutter*, 539 U.S. at 339.

257. Miksch, *supra* note 39, at 68.

258. *See id.* at 73.

259. *Id.*

260. *Id.*

under pressure from just two small legal advocacy organizations, are surrendering their freedom to craft and retain their student bodies as they see fit. Despite *Grutter's* clear endorsement of race-conscious classifications to achieve student body diversity, efforts to achieve such diversity have been effectively obstructed by both private interest groups and the Department of Education. As this Note has made clear, colleges and universities are responding to these pressures by unnecessarily abandoning programs that are likely constitutional and, more often, unnecessarily eliminating all use of race from their financial aid programs.

After *Regents of the University of California v. Bakke*,<sup>261</sup> it was Justice Powell's lone concurrence that, for twenty-five years, governed the law of race-conscious programming in higher education. If Justice Kennedy's similarly situated *Parents Involved* concurrence commands similar staying power, then, perhaps, it is the best place to look for guidance. As Justice Kennedy stated, "[t]his Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children."<sup>262</sup> Because he sanctioned the use of race-conscious measures to promote such opportunity, the rationale supporting race-conscious scholarships remains viable.

Yet so far, institutions have been so quick to bow to CEO/ACRI and OCR pressure that the courts have not been called on to resolve the legal debate on race-conscious scholarships. Indeed, the de facto power to shut down race-conscious scholarships today rests in the hands of one government agency and two small anti-affirmative action advocacy groups.

While the risks are admittedly high, institutions implementing race-exclusive scholarships (and clearly race-as-a-plus-factor scholarships) need not fold to outside pressure in fear of adverse adjudication. As this Note makes clear, race-conscious scholarships in the mold of *Grutter* are likely constitutional and, while race-exclusive scholarships may be harder to defend, they are not per se unconstitutional. Institutions must look to the factors discussed in Part III above to decide if their specific scholarship programs can survive strict scrutiny. If universities really value race-

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261. 438 U.S. 265 (1978).

262. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2797 (2007).

conscious scholarships, they should do all that they can to stand together in defense of their programs, challenge their critics, and be prepared to let the courts decide.

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