FEDERAL LAW AND FINANCIAL AID: A FOUNDATION AND FRAMEWORK FOR EVALUATING DIVERSITY-RELATED PROGRAMS[1]

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I. INTRODUCTION

For decades, colleges and universities have wrestled with how to achieve their diversity-related educational goals in a manner that meets federal legal requirements. Since 2003, when the U.S. Supreme Court in *Grutter v. Bollinger* and *Gratz v. Bollinger* embraced Justice Powell's conclusion in *Bakke* that the educational benefits of diversity could justify limited race-conscious practices,[2] higher education officials across the country have renewed their focus on diversity-related programs. Working to ensure that their diversity-related programs are educationally and legally sound, higher education officials face the risk of either under- or over-reacting to the Supreme Court's opinions—under-reacting by seeing the University of Michigan's victory as a justification for simply maintaining their own race- or ethnicity-conscious programs (with insufficient analysis), or over-reacting by seeing the risks and complexities inherent in the University of Michigan cases as a justification for simply abandoning their own race- or ethnicity conscious programs (again with insufficient analysis). These extremes may, on the one hand, expose institutions to unwarranted legal risk and, on the other hand, unnecessarily undermine the achievement of educational diversity goals.

These risks are notably apparent when evaluating race- and ethnicity-conscious financial aid and scholarship policies, which are more widespread among colleges and universities than the use of race or ethnicity in admissions. Obviously, the 2003 U.S. Supreme Court decisions in *Gratz v. Bollinger* and *Grutter v. Bollinger*, which were the first Supreme Court pronouncements on the use of race- and ethnicity-conscious practices in higher education in a quarter of a century, are

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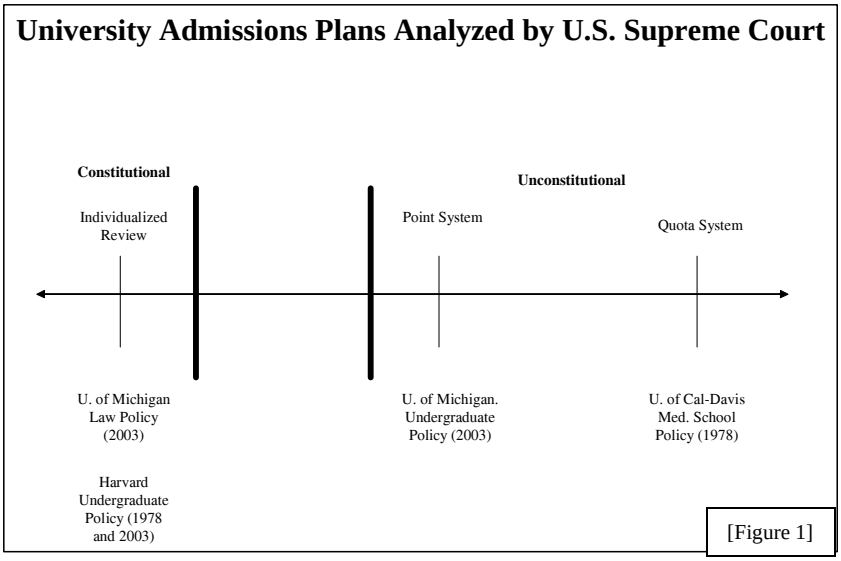
[2] *See Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

primary foundations analyzing those practices.[3] However, while those landmark decisions are valuable in their elaboration on the long-standing legal standards that govern the use of race and ethnicity when conferring education opportunities or benefits, nowhere do they mention (let alone analyze) financial aid or scholarship practices. Thus, higher education officials addressing race- and ethnicity-conscious financial aid and scholarship practices are operating in "the space" in which we know key principles that are likely transportable from the admissions context to the financial aid world, but which cannot provide definitive answers. [See Figure 1.] As Justice O'Connor noted in *Grutter*, "context matters."



[Figure 1]

That being said, the body of relevant case law and federal administrative policies and decisions provide significant information that can help guide institutions in their efforts to effectively and legally promote their interests in the educational benefits of diversity, including through the use of race- and ethnicity-conscious financial aid and scholarships.[4] At the same time, it should be noted that existing federal law does not provide all of the answers to all of the hard questions that higher education officials are likely to pose.

[3] Pursuant to the Equal Protection Clause of the United States Constitution, Title VI of the Civil Rights Act of 1964, and a post-Civil War federal statute (42 U.S.C. § 1981), the Court in those decisions upheld the University of Michigan Law School's admissions programs, while striking down the University of Michigan's undergraduate admissions program. In essence, those decisions: (1) affirmed that the educational benefits of diversity constitute a compelling interest that can justify the limited consideration of race in admissions decisions; and (2) emphasized the need for such admissions decisions to involve an individualized review of applicants (rather than the automatic award of points) in the pursuit of diversity goals.

[4] *See* The U.S. Department of Education's 1994 Title VI Final Policy Guidance (Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964 at 59 Fed. Reg. 8756 (February 23, 1994).

II. FEDERAL LAW AND FINANCIAL AID: AN OVERVIEW

In contrast to the numerous federal court opinions that addressed the use of race and ethnicity in university admissions over the course of the last decade, most notably including the U.S. Supreme Court's decisions in *Grutter* and *Gratz*, there are only two reported federal decisions involving challenges to race- or ethnicity-conscious financial aid or scholarships, *neither of which* involved arguments that the challenged policies were supported by the educational benefits of diversity. In 1994, the Fourth Circuit Court of Appeals in *Podberesky v. Kirwan,*[5] invalidated a race-exclusive scholarship program designed to remedy the present effects of past discrimination, on the grounds that the University of Maryland did not prove that the present effects it identified were caused by the University's own prior discrimination or that the scholarship program was designed to cure those present effects. And, in a case pre-dating *Bakke*, the District of Columbia federal district court in *Flanagan v. Georgetown College*[6] upheld a challenge to an affirmative action program at Georgetown's Law Center designed to increase enrollment at the law school of certain minority students by providing sixty percent of available scholarship funds to 11 percent of its students who were "minority." The District Court found that, while an affirmative action program could be appropriate to ensure that all persons were afforded the same opportunities or considered for benefits on the same basis, it was not permissible to allocate a scarce resource, such as financial aid, in favor of one race to the detriment of others.[7]

Despite the scarcity of case law specifically addressing race- or ethnicity-conscious financial aid and scholarships, the U.S. Department of Education in 1994 issued final policy guidance ("Title VI Policy Guidance") outlining the standards that its Office for Civil Rights ("OCR") would follow in its enforcement of Title VI of the Civil Rights Act of 1964.[8] Applying federal court

[5] 38 F. 3d 147 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995).

[6] 417 F. Supp. 377 (D. D.C. 1976).

[7] In addition, in *Pollard v. State of Oklahoma* (W.D. Okla., complaint filed October 20, 1998), a white male student at the University of Tulsa filed a class action suit against the Oklahoma State Regents for Higher Education in federal district court, challenging the legality of a scholarship program that conditioned awards based upon different test scores for members of different racial groups, and for men and women. The case was settled in 1998 before reaching a trial on the merits, and in June 1999, the Regents eliminated the race- and gender-specific features of the program.

[8] The Office for Civil Rights enforces several federal civil rights laws that prohibit discrimination in programs or activities that receive federal financial assistance from the Department of Education. Discrimination on the basis of race, color, and national origin is prohibited by *Title VI of the Civil Rights Act of 1964*; discrimination on the basis of gender is prohibited by *Title IX of the Education Amendments of 1972*; discrimination on the basis of disability is prohibited by *Section 504 of the Rehabilitation Act of 1973*; and discrimination on the basis of age is prohibited by the *Age Discrimination Act of 1975.* These civil rights laws enforced by OCR extend to all state education agencies, elementary and secondary school systems, colleges and universities, vocational schools, proprietary schools, state vocational rehabilitation agencies, libraries, and museums that receive U.S. Department of Education funds. Areas covered may include, but are not limited to: admissions, recruitment, financial aid, academic programs, student treatment and services, counseling and guidance, discipline, classroom assignment, grading, vocational education, recreation, physical education, athletics, housing, and employment. OCR also has enforcement responsibilities under *Title II of the Americans with Disabilities Act of 1990*, which prohibits discrimination on the basis of disability by public entities, whether or not they receive federal financial assistance. *See generally*,

precedent, the Department established five principles that would guide its Title VI analysis applicable to financial aid awarded in whole or part based on race or ethnicity. In this context, it is important to note the following:

- The five principles set forth by the Department (and summarized below) reflect the only available, comprehensive statement of federal policy applicable to the use of race or ethnicity in financial aid and scholarship decisions.[9]

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http://www.ed.gov/about/offices/list/ocr/index.html for a comprehensive description of OCR's mission and scope of authority.

[9] The five principles were based on a process involving significant comment, but could be modified by the Department, as long as changes were consistent with federal law.

The background of the Department's policy is the following:

In December of 1990, a Department official declared that "Title VI categorically prohibited colleges and universities from awarding scholarships on the basis of race." That declaration was soon followed by a press release announcing a substantially more tolerant policy on minority scholarships. Subsequently, Secretary of Education Lamar Alexander announced in a press conference that he had withdrawn both policy statements and indicated that [the Department of Education] would "continue to interpret Title VI as permitting federally funded institutions to provide minority scholarships." Then, on December 10, 1991, the U.S. Department of Education issued for notice and comment Proposed Policy Guidance on Title VI's applicability to race- and national origin-conscious scholarship awards. That guidance indicated that:

- The Department's few previous statements regarding race-exclusive scholarships were "inconsistent;"
- There had never been a "full policy review and clear set of principles" regarding the use of race-exclusive scholarships; and
- The Department would continue to interpret Title VI "as permitting race-based scholarships in a variety of instances."

See Washington Legal Foundation v. Alexander, 984 F.2d 483 (D.C. Cir. 1993).

In January of 1994, the Department issued its final policy guidance, which followed the publication of a report by the United States General Accounting Office: U.S. General Accounting Office, Report to Congressional Requesters: *Information on Minority Scholarships* (B-251634, January 14, 1994). That report, issued in response to a Congressional inquiry that occurred during the development of the U.S. Department of Education's Title VI policy, was designed to "inform policymakers about the current use and perceived benefits of [minority-targeted] scholarships." That report concluded:

- Although many schools used race- or ethnicity-conscious scholarships, a "relatively small proportion of scholarship dollars" were devoted to race- or ethnicity-conscious scholarships. At undergraduate schools, the proportion was about four percent.
- Higher education institutions reported that such scholarships were "valuable tools for recruiting and retaining" minority students. (They identified the help the scholarships provided in "overcom[ing] the traditional difficulties …in enrolling and graduating minority students, such as financial hardships and a perception of cultural isolation.")
- Some higher education officials concluded that such scholarships "help[ed] build a critical mass of minority enrollment and sen[t] a message that the school sincerely want[ed] to attract [minority] students."

See GAO Report at 11.

- No court of record has ever specifically addressed the principles and standards set forth in the Department's Title VI Policy Guidance, which is *non*-regulatory guidance.
- The Title VI Policy Guidance substantially pre-dates *Grutter* and *Gratz*, as well as other relevant legal developments (although the Title VI Policy Guidance relied substantially on Justice Powell's opinion in *Bakke*, which the Supreme Court in both *Grutter* and *Gratz* endorsed).

Having said that, the five principles set forth in the Department's Title VI Policy Guidance are the following:

1. **Financial Aid for Disadvantaged Students** – A college may make awards of financial aid to disadvantaged students without regard to race or national origin even if that means that these awards go disproportionately to minority students.

   Pursuant to Principle 1, the Department stated that higher education institutions are "free to define the circumstances under which students will be considered to be disadvantaged, as long as that determination is not based on race or national origin." The Department noted that such policies might have "a disproportionate effect on students of a particular race or national origin," but (consistent with Title VI and the 14th Amendment to the U.S. Constitution) disproportionate effect alone does not implicate strict scrutiny. The Department concluded by expressing:

   > [the] view that awarding financial aid to disadvantaged students provides a sufficiently strong educational purpose to justify any racially disproportionate effect the use of this criterion may entail. In particular, the Department believes that an applicant's character, motivation, and ability to overcome…disadvantage are educationally justified considerations…in financial aid decisions. Therefore, the award of financial assistance to disadvantaged students does not violate Title VI.

2. **Financial Aid Authorized by Congress** – A college may award financial aid on the basis of race or national origin if the aid is awarded under a Federal statute that authorizes the use of race or national origin.

   Pursuant to Principle 2, the Department recognized that "financial aid programs for minority students that are authorized by a specific federal law cannot be considered to violate another Federal law, *i.e.*, Title VI." The Department observed, however, that: (1) this principle would not insulate public colleges and universities from challenges pursuant to federal constitutional (versus statutory) principles; and (2) any federal

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The U.S. Department of Education subsequently concluded that the GAO report did "not indicate the existence of serious problems of noncompliance with the law in postsecondary institutions," finding that "race-targeted scholarships constitute[d] a very small percentage of the scholarships awarded to students at postsecondary institutions." *See* Title VI Policy Guidance at 8,756. *See also Financial Aid Professionals* at 18 (The College Board reported in 2002 (based on 1999-2000 data) that 47% of four-year public colleges, 43% of four-year private colleges and one-quarter of community colleges based their non-need awards (at least in part) on students' race or ethnicity.)

authorization of race-conscious financial aid programs would not "serve as an authorization for States or colleges to create their own [race-conscious aid] programs."

3. **Financial Aid to Remedy Past Discrimination** – A college may award financial aid on the basis of race or national origin if the aid is necessary to overcome the present effects of past discrimination.

   Pursuant to Principle 3, the Department adopted the long-standing position that the use of race- or ethnicity-conscious measures may be justified in the name of "ensuring the elimination of discrimination on the basis of race or national origin." In this context, the Department reaffirmed the applicability of strict scrutiny to such measures. In addition, the Department explained that while the use of race- or national origin-conscious financial aid measures might further remedial objectives based on court or administrative agency findings, such findings were not a necessary predicate of such aid. The Department concluded:

   > Allowing colleges to implement narrowly tailored remedial affirmative action if there is strong evidentiary support for it—without requiring that it be delayed until a finding is made by OCR, a court or a legislative body—will assist in ensuring that Title VI's mandate against discrimination based on race or national origin is achieved.

4. **Financial Aid to Create Diversity** – 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 a narrowly tailored means to achieve the goal of a diverse student body.

   Pursuant to Principle 4, and based on the application of principles derived from Justice Powell's opinion in *Bakke*, the Department concluded that a higher education institution can consider race and national origin as: (1) "one factor, with other factors, in awarding financial aid if necessary to promote diversity"; and (2) "as a condition of eligibility in awarding financial aid if it is narrowly tailored to promote diversity."[10]

   In this context, the Department observed that there were "important differences" between financial aid and admissions decisions that might affect relevant legal analyses regarding the use or race or ethnicity. Specifically, the Department noted that the burden on those students "excluded from the benefit conferred by the classification based on race" in

[10] The distinction between the two articulated standards is apparently premised upon the Department's presumption that "a college's use of race or national origin as a plus factor, with other factors, is narrowly tailored to further the compelling governmental interest in diversity, as long as the college periodically reexamines whether its use of race or national origin as a plus factor continues to be necessary to achieve a diverse student body." *Id. at n. 10.* Thus, while adopting both the necessity and periodic review prongs of narrow tailoring analysis for race-as-a-factor aid, the Department as a matter of its administrative enforcement responsibilities seems to have presumed flexibility and minimal adverse impact on non-qualifying students, based on the "as-a-factor" operation of such policies.

financial aid and scholarship decisions might be less severe than the burden associated with certain admissions decisions. For example, the Department observed:

- Unlike admissions policies which have "the effect of excluding applicants…on the basis of race," race-conscious 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."

- Unlike with respect to "the number of admissions slots," the amount of financial aid available to students is not necessarily fixed.

5. **Private Gifts Restricted by Race or National Origin** – Title VI applies to colleges and universities that award race-conscious financial aid and scholarships but does not apply to individuals or organizations that are not recipients of Federal financial assistance.

Pursuant to Principle 5, the Department affirmed that higher education institutions that award privately donated aid must ensure that their practices comport with Title VI principles (as "all of the operations of a college are covered by Title VI if the college receives any Federal financial assistance"), but that Title VI does not prohibit private, non-recipients of federal financial assistance from directly giving scholarships or other forms of financial aid to students based on their race or ethnicity.[11]

III. FEDERAL LAW AND FINANCIAL AID: STANDARDS AND ANALYSIS

A. Strict Scrutiny

Federal courts have consistently applied strict scrutiny to policies that confer benefits or opportunities based in whole or part on race or ethnicity. This is clearly true in cases where race or ethnicity is an express factor in the decision-making process. Thus, financial aid and scholarship policies that expressly include race or ethnicity as a factor in aid will likely trigger strict scrutiny. In addition, though less developed in the most relevant case law, strict scrutiny is also likely to be triggered by facially race- or ethnicity-neutral policies in cases where the intent of those policies is predominantly motivated by race or ethnicity.[12] In short, when financial aid or scholarship practices are facially discriminatory or when they reflect intentional (though facially neutral) discrimination, then strict scrutiny principles likely apply. (This conclusion should be distinguished from race or ethnicity-neutral policies that may have only a disparate impact based on race or ethnicity, which generally do not implicate strict scrutiny.)

[11] However, as discussed below, 42 U.S.C. § 1981 may apply to such conduct by non-recipients of federal funds.

[12] Policies that are neutral on their face may trigger strict scrutiny in the event that "discriminatory intent or purpose" is a motivating factor behind the policy. *See Vill. of Arlington Heights v. Metro. Housing Develop. Corp.*, 429 U.S. 252, 265 (1977); *Hunter v. Underwood*, 471 U.S. 222, 225 (1985). The impact of the questioned policy (whether, *e.g.*, it "bears more heavily on one race than another," *Washington v. Davis*, 426 U.S. 229, 242 (1976)), standing alone, is generally insufficient to demonstrate a constitutional violation, but it "may provide an important starting point" in the analysis. *Village 429 U.S.* at 266.

In addition, the status of the entity responsible for making the race- or ethnicity-conscious financial aid or scholarship decisions is unlikely to affect the level of legal scrutiny applied. The Fourteenth Amendment to the U.S. Constitution (which applies to "state actors" or public entities) is coextensive with Title VI of the Civil Rights Act of 1964 ("Title VI") (which applies to any recipient of federal education funds, public or private). Therefore, a college or university's status as public or private is in most cases unlikely to affect the determination regarding whether strict scrutiny applies to a particular policy or practice. Moreover, though an issue of continuing debate in the federal courts, strong arguments support the extension of strict scrutiny principles to purely private conduct pursuant to 42 U.S.C. §1981. That statute applies to both public and private entities (irrespective of their status as recipients of federal funds) in cases in which they make or enforce race- and ethnicity-conscious contracts.[13] (Several federal courts have ruled that scholarships conferred by colleges and universities are "contracts" within the meaning of §1981.)

A range of financial aid and scholarship practices may be race-or ethnicity-conscious, and, therefore, trigger strict scrutiny. They include both need-based aid and merit-based aid. Note also that the source of the aid in question (whether institutional or external aid) is unlikely to affect the application of strict scrutiny to the higher education institution awarding the aid, so long as that institution is the entity responsible for making the determination about which student receives the aid.

1. Need-based aid.

Need-based aid, which can include grants, scholarships, loans and work-study assistance, is designed to provide financial assistance to students based on the difference between their projected expense budget and the expected family contribution—typically determined by a need analysis formula. Need-based aid can be provided from many sources and can be subject to different administrative rules and standards,[14] as well as different institutional practices.

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[13] In both *Grutter* and *Gratz*, the U.S. Supreme Court ruled that the reach of 42 U.S.C. §1981 was the same as that of the U.S. Constitution's Equal Protection Clause (c*iting General Building Contractors Assn., Inc. v. Pennsylvania*, 458 U. S. 375 (1982)). In *Gratz*, the Court observed that §1981 "proscribes discrimination in the making or enforcement of contracts against, or in favor of, any race," and that a "contract for educational services is a 'contract' for purposes of §1981." n. 23. This position has been challenged as, among other things, non-binding dicta, in a recent Hawaii case, in which a federal district court has applied a standard less than strict scrutiny to a non-recipient private school pursuant to §1981.

[14] For example, federal student aid falls into three categories:

> Grants – financial aid that the student does not need to repay. Generally, the student must be an undergraduate, and the amount he/she receives depends on need, cost of attendance, and enrollment status (*i.e.*, part-time or full-time). Federal Pell Grants for the 2003-2004 award year (July 1, 2003 to June 30, 2004) ranged from $400 to $4,050. Federal Supplemental Educational Opportunity Grants (FSEOGs) ranged from $100 to $4,000.
>
> Work Study – money a student earns while enrolled in school that helps defray educational expenses. The Federal Work Study Program, available to both undergraduates and graduate students, encourages community service work and work related to one's course of study.
>
> Loans – borrowed money that one must repay with interest. Federal loans are available to both undergraduate and graduate students. Parents are also allowed to borrow to pay the educational expenses

As a general rule, to the extent that need-based aid decisions adhere exclusively to need-related criteria or formulas (which, by definition, do not consider distinctions based on race or ethnicity), then those decisions will not trigger strict scrutiny. In the event, however, that the consideration of race or ethnicity becomes a factor in an institution's need analysis and/or its corresponding decisions about the actual amount or mix of financial aid a student receives, then strict scrutiny will likely be triggered.

Strict scrutiny can apply in several ways. First, if the determination regarding who is eligible for need-based aid or what amount of aid is awarded is affected by consideration of the race or ethnicity of eligible students, then that determination is likely subject to strict scrutiny. For instance, if an institution applies different standards or "cut points" for students of different races when making determinations about the amount of aid students should receive, then strict scrutiny likely applies. Similarly, if an institution considers certain factors in the determination of need (such as home equity information or the ability of non-custodial parents to help fund the student's education) for some students and not others based on the students' ethnicity, then that practice is probably subject to strict scrutiny.

Second, once an initial determination regarding need is made, financial aid practices can also trigger strict scrutiny when they lead to different "packages" of aid (*e.g.*, a larger percentage of grants to loans within the overall aid package) based on race or ethnicity. Thus, if an institution awards a higher percentage of grants-to-loans to all of its Hispanic admittees when compared to all other admittees, for example, then that practice is likely to be subject to strict scrutiny.

In the context of these judgments, it is important to distinguish between practices that treat students differently based on race or ethnicity, and those that do not. For example, a higher education institution's decision to confer a preferential package to a particular student who happens to be black would be unlikely to trigger strict scrutiny in a situation where the practice:

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of their dependent undergraduate children. Federal Perkins Loans are offered by participating schools to students who demonstrate the greatest financial need (Federal Pell Grant recipients get top priority). These loans are repaid directly to the school. Stafford Loans are made to students and PLUS loans are made to parents through the William D. Ford Federal Direct Loan Program ("Direct Loan") and the Federal Family Education Loan Program ("FFEL"). Eligible Direct Loan students and Parents borrow directly from the federal government at participating schools. Direct Loans consist of Direct Stafford Loans, Direct PLUS Loans, and Direct Consolidation Loans. These loans are repaid directly to the U.S. Department of Education. FFEL Loans are guaranteed through private lenders. FFELs consist of Federal Stafford Loans, Federal PLUS Loans, and Federal Consolidation Loans.

To be eligible for any of the federal loans discussed above, a student must meet the following criteria: (1) demonstrate financial need, except for loan programs; (2) demonstrate qualification to enroll in postsecondary education (high school diploma, GED, *etc.*); (3) be enrolled or accepted for enrollment as a regular student working toward a degree or certificate in an eligible program; (4) be a U.S. citizen or eligible noncitizen; (5) have a valid Social Security Number, unless the student is from the Republic of the Marshall Islands, the Federated States of Micronesia, or the Republic of Palau; (6) meet satisfactory academic progress standards set by the post secondary school the student is attending; (7) certify that the student will use the financial aid for educational purposes and certify that the student is not in default on a federal student loan; (8) and comply with Selective Service registration requirements. *See The Student Guide: Financial Aid from the U.S. Department of Education* 2004-2005, http://studentaid.ed.gov/students/attachments/siteresources/StudentGuideEnglish2004_05.pdf

(1) was not pursuant to a more comprehensive policy reflecting such consideration for black students; (2) was not predominantly motivated by efforts to enhance the racial diversity on campus by attracting more black students; and (3) was, instead, a reflection of an effort to "meet the competition"—to match the kind of package that the student was offered from another higher education institution. In short, it is important to keep in mind that not all decisions that may positively affect students of particular racial or ethnic backgrounds are automatically transformed into race- or ethnicity-conscious decisions that are subject to strict scrutiny.[15]

2. Merit-based aid.

In contrast to need-based aid decisions, merit-based aid decisions (or scholarships) are designed to provide financial assistance to students based on certain characteristics or aspects of their background that are important to the awarding institution. Particular scholarship awards may, for instance, reflect a desire to attract students who exhibit advanced academic potential (as evidenced by test scores or class rank) or athletic skills; or to students who have a particular socio-economic background or race and ethnicity. Scholarships that are based upon a student's race or ethnicity in whole (race- or ethnicity-exclusive) or in part (race- or ethnicity-as-a-factor) are likely to be subject to strict scrutiny. Stated differently, when determining whether specific scholarships are likely subject to strict scrutiny, it does not matter if the scholarship operates as race- or ethnicity-exclusive or if it only includes consideration of race or ethnicity as one factor among others.[16] For example, if an institution offers a "Martin Luther King" scholarship, which includes the consideration of race or ethnicity among other factors such as community service and leadership, that scholarship will be subject to strict scrutiny just like a "State Scholars" scholarship, for which only underrepresented minority students are eligible.

3. External, private funding of race- and ethnicity-conscious scholarships.

Two basic issues arise regarding the application of strict scrutiny principles to circumstances in which higher education institutions receive external, private funding that is race- or ethnicity-conscious. First, from the standpoint of potential institutional liability pursuant to strict scrutiny, the issue to be addressed is whether the institution acts in such a way that the otherwise private race- or ethnicity-conscious conduct becomes the responsibility of the institution. Second,

[15] In this regard, questions have arisen about different treatment of students when conferring need-based financial aid, based on research that indicates students of a particular race or ethnicity are more likely to react predictably to increases or reductions in grant aid (*e.g.*, as the level of grant aid declines and work-study or loan aid increases, the group's enrollment declines). *See Cultural Barriers to Incurring Debt: An Exploration of Borrowing and Impact on Access to Postsecondary Education*, ECMC Group Foundation, March 2003, http://www.ecmcfoundation.org/documents/CulturalBarriersDocument.pdf (reporting that women and Hispanics have been found to have less favorable attitudes toward educational loans than men and Whites, and that minority students, in general, have been shown to be more sensitive to price and less willing to use educational loans to pay for college when making their college decisions). Although such research *might* affect ultimate judgments about federal compliance, it is unlikely that such research foundations would affect the initial determination regarding whether a specific practice is race- or ethnicity-conscious. Simply stated, if the policy or practice is race- or ethnicity-conscious, it will likely trigger strict scrutiny—regardless of the justification for the different treatment.

[16] When addressing these two categories of scholarships, it is important to distinguish between the questions of *whether* strict scrutiny principles apply in the first instance and *the result* of the application of those principles.

irrespective of potential institutional liability pursuant to strict scrutiny, another issue is whether the private action may subject the private donor to strict scrutiny.

First, in cases where higher education institutions are directly involved in the administration of private, externally funded scholarships, then those institutions are likely to be subject to strict scrutiny liability for those private practices, given their role in actively supporting those scholarships. In particular, Title VI prohibits discrimination "directly or through contractual or other arrangements" and "in the administration" of financial aid programs.[17] As applied by the U.S. Department of Education's Office for Civil Rights, potential Title VI liability (and, consequently, the application of strict scrutiny) extends to situations in which higher education institutions fund, administer, or significantly assist in the administration of private financial aid. In such cases, that action will likely be deemed to be "within the operations of the college" and, therefore, subject to strict scrutiny.[18]

U.S. Department of Education regulations highlight the kinds of practices that are likely to subject higher education institutions to potential liability pursuant to strict scrutiny for the operation of private race- or ethnicity conscious scholarships. These include:

- Institutional assistance in setting criteria for the selection of students eligible for the private scholarship;
- Institutional assistance in selecting qualifying students for the private scholarship; and
- Institutional assistance in supporting the external funder through advertising (beyond the general assistance provided to any outside entity that seeks to advertise its scholarship programs).[19]

Second, even where there is no issue of whether the higher education institution is providing significant assistance to the private scholarship award fund, issues arise regarding the potential strict scrutiny liability of the private entity itself (even though not a recipient of federal funds). As discussed above, federal courts (including, recently, the U.S. Supreme Court decisions in *Gratz* and *Grutter* have indicated that even private donors may be subject to strict scrutiny in cases where they make or enforce contracts (which may include scholarships) that discriminate

[17] 34 C.F.R. 100.3. The Department has also confirmed that "individuals or organizations not receiving Federal funds are not subject to Title VI." *See* Title VI Policy at n.12. Note, however, that OCR will examine the relationship among potential "external" funders or administrators to ensure that they are, in fact, separate from the higher education institution. In one case, OCR rejected under Title VI as "not a good choice" a proposal by a college to allow a separate foundation to administer race-conscious scholarships that were funded from another external source and that were deemed by OCR to raise Title VI concerns. OCR indicated that the college's "extensive ties" to the foundation were problematic. *See In Re Northern Virginia Community College*, Case No. 03962088 (August 1, 1997).

[18] At the same time, if scholarship programs are externally funded and administered—without significant assistance from the higher education institution—then that institution will not be subject to strict scrutiny review related to those programs. *See In re Northern Virginia Community College*, Case No. --- (August 1, 1997) (approving the transfer of the "administration and award" of race-conscious scholarships to a private entity, where the higher education institution also "returned the funds for the scholarships to the [external] donors.")

[19] *See* 34 C.F.R. 106.37.

based on race or ethnicity. Given the probable strict scrutiny standard that is triggered by 42 U.S.C. §1981, private funders should be advised of the likely need to evaluate their race- or ethnicity-conscious scholarships under the strict scrutiny standards described herein.

B. Compelling Interests

The mission-driven diversity-related interests to be achieved by financial aid and scholarships are similar (if not, in many cases, identical) to those associated with admissions practices. Thus, many of the principles regarding compelling interests that apply in the admissions context will likely apply to the financial aid and scholarship setting, as well.

Although there is no precise legal formula for determining whether a particular interest is compelling under strict scrutiny, case law confirms at least two interests that can be sufficiently compelling to justify a higher education institution's use of race or ethnicity in admissions and financial aid decisions. One is an institution's interest in remedying the present effects of its own prior discrimination (at least where such effects can be traced to its own discrimination).[20] The other is an institution's interest in securing the mission-based educational benefits of a diverse student body, which is the focus of this paper.

In *Grutter*, the U.S. Supreme Court resolved the issue that had vexed numerous federal courts for almost a decade, ruling that a university's interest in promoting the educational benefits of diversity can be sufficiently compelling to justify the limited consideration of race and ethnicity in admissions. The Court reached this conclusion based on several principles discussed below:

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20 Race- or ethnicity-conscious measures can be used to remedy the present and continuing effects of past discrimination, but only upon satisfying strict scrutiny standard with a "strong basis in evidence." (This evidence may—but need not in all cases—stem from court, legislative, or administrative findings of discrimination. *See* generally 59 Fed. Reg. 36 at 8759-60 (summarizing relevant Federal law).) The evidentiary burden for establishing a remedial justification, particularly with respect to the link between present race- or ethnicity-conscious policies and past discrimination, is very high.

Several federal courts have approved race-conscious or diversity-related financial aid or scholarship practices in a remedial context – *in federal cases involving compliance with higher education desegregation obligations* under the Equal Protection Clause of the U.S. Constitution or Title VI. They include:

- *Knight v. Alabama,* 900 F. Supp. 272, 357 (N.D. Al. 1995): The court ordered that the State of Alabama fund scholarships to be administered at HBCUs to assist in "the diversification of student bodies."

- *United States v. Louisiana,* 718 F. Supp. 499, 519 (E.D. La. 1989) vacated on other grounds: The court ordered that the State Board "develop a program of scholarships designed to attract other-race students to both primarily white and primarily black institutions," and that a "fixed percentage of each institution's overall operating budget" be set aside for this purpose. The court also ordered that the State Board establish a state-wide other-race scholarship program.

- *Geier v. Sundquist* (M.D. Tenn. 2001): As part of a consent decree with the U.S. Department of Justice, the State of Tennessee agreed to form a partnership with the University of Tennessee (UT) system and Tennessee Board of Regents (TBR) institutions "to increase the availability of financial aid for other-race students" attending UT and TBR institutions, and agreed to make funds available for five years to support "minority financial aid programs" in the UT system and at TBR institutions. (*See* U.S. Department of Justice settlement at www.usdoj.gov/crt/edo.)

1. **Deference: Colleges and universities are entitled to deference in their judgments that the benefits of diversity are essential to their mission, and federal courts should presume good faith by the given institution, absent a showing to the contrary.**

As a foundation for its ruling in *Grutter*, the Court recognized that higher education institutions "occupy a special niche in our constitutional tradition"—given the "important purpose of public education and the expansive freedoms of speech and thought associated with the university environment." As a result, the Court deferred to the University of Michigan's educational judgment that diversity was essential to its mission, presuming "good faith on the part of the university…absent a showing to the contrary."

Thus, based on the Court's analysis, it is clear that the interest in diversity first articulated by Justice Powell in his *Bakke* opinion and then embraced by the Court in *Grutter* is an educational, mission-driven interest. The Court in *Grutter* confirmed, in fact, the importance of diversity interests being aligned with educational goals that were "at the heart" of the University of Michigan's mission—an important foundation for the Court affirming the interest as compelling. As a consequence, higher education institutions should clearly ensure that educational benefits associated with diversity on their campuses are established as part of their mission, and that their race- and national origin-conscious financial aid and scholarship policies are fully aligned with those goals.

2. **Real Benefits: Abundant evidence establishes that the educational benefits of diversity (including enhanced learning, improved civic values, and better preparation for the workforce) are "substantial" and "not theoretical but real."**

Having determined that the educational benefits of diversity were, in fact, mission-driven, the Court *in Grutter* then evaluated the educational benefits of diversity asserted by the University of Michigan. Based on evidence that diversity among its students enhanced learning outcomes, improved the preparation of students for a diverse workforce and society, and supported the preparation of students as professionals, the Court concluded that those benefits were, in fact, "substantial" and "real." As a foundation for that conclusion, the Court observed that campus diversity helped promote cross-racial understanding, break down stereotypes, and enable students to better understand persons of different races.

The University of Michigan's development and use of evidence was a crucial factor in its successful defense of its admissions policy. Indeed, the Supreme Court cited extensive evidence in the record in support of its conclusion, including:

- Testimony by professors that a diverse student body produced better, more enlightening classroom discussions and enhanced learning;

- Numerous expert and research studies—some institution-specific and some more general—demonstrating the asserted educational benefits of diversity; and

- Evidence provided by other parties regarding the importance of diversity in numerous contexts (including the military and the workforce), which were associated with the role and mission of higher education and supportive of the University of Michigan's claims.

Thus, when evaluating relevant information that can support positions advancing the educational benefits of diversity, higher education officials should consider the relevance of both institution-specific and more general research and data that relates to their efforts to achieve educational goals associated with diversity. Although the Supreme Court did not specifically address the question regarding the threshold that an institution must meet in order to have sufficient evidence regarding its educational interests in diversity, the University of Michigan cases can be reasonably read to suggest that higher education officials should ensure that there is a sufficient institution-specific basis in evidence (that may be complemented by other more general research) supporting the diversity interests that the institution is advancing.

3. Critical Mass: Higher education institutions may define their diversity goals with reference to the aim of achieving a "critical mass" of underrepresented students—a flexible numerical goal associated with the educational benefits the institution seeks to achieve.

The Court in the University of Michigan cases also affirmed that higher education institutions may define their diversity goals with respect to the aim of enrolling "a critical mass" of underrepresented students. In the view of the Court, this "critical mass" goal is defined with specific "reference to the educational benefits that diversity is designed to produce." Notably, Justice O'Connor did not describe critical mass with any precision, other than to reference trial testimony that it meant "meaningful numbers" or "meaningful representation" or "a number that encourages underrepresented minority students to participate in the classroom and not feel isolated."[21] (At the same time, Justice O'Connor carefully distinguished the "goal of attaining a critical mass of underrepresented minority students" from an impermissible quota.)

In reaching these conclusions, the Court confirmed that the educational interests served by race- and ethnicity conscious admissions practices cannot exclusively be those related to race and ethnicity, observing that the University's goal was not to assure "some specified percentage of a particular group merely because of its race or ethnic origin," but rather to achieve "the

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[21] *Grutter*, 539 U.S. at 318; s*ee also* Larry White, *One Year After the Michigan Cases: What Are We Doing? (With Special Emphasis on Provocative Questions Raised or Left Unanswered By the Michigan Cases)* (Unpublished, 2004) at 20. A very enlightening discussion of the antecedents and underpinnings of the critical mass theory are chronicled by Mr. White, *see id.* at 21-28.

Note that the critical mass theory put forth by the University of Michigan was a central point of contention within the Court, with four justices highly critical of the concept. In particular, Justice Rehnquist challenged the fact that a different critical mass might exist for different sub-populations, as the University of Michigan maintained: "… From 1995 through 2000, the Law School admitted between 1,130 and 1,310 students. Of those, between 13 and 19 were Native American, between 91 and 108 were African-Americans, and between 47 and 56 were Hispanic. If the Law School is admitting between 91 and 108 African-Americans in order to achieve 'critical mass,' thereby preventing African-American students from feeling 'isolated or like spokespersons for their race,' one would think that a number of the same order of magnitude would be necessary to accomplish the same purpose for Hispanics and Native Americans. … [O]ne would have to believe that the objectives of 'critical mass' … are achieved with only half the number of Hispanics and one-sixth the number of Native Americans as compared to African-Americans. But [Michigan officials] offer no race-specific reasons for such disparities. Instead, they simply emphasize the importance of achieving 'critical mass,' without any explanation of why that concept is applied differently among the three underrepresented minority groups." *Id*. at 365-66.

educational benefits that diversity is designed to produce."[22] Thus, there were sufficient foundations for the Court to embrace the University of Michigan's conceptualization of diversity according to a critical mass theory, which established concrete goals (but not rigid quotas) linked to the educational interests in diversity.

Based on the Court's analysis, higher education officials should ensure that their diversity related interests are not merely associated with race or ethnicity, and that appropriate goals associated with educational interests are established. The Court in the University of Michigan cases did not mandate that higher education institutions define their diversity goals based on the theory of critical mass, to be sure, but it offered that theory as one legally acceptable way to conceptualize diversity goals.

4. **Access and Equity: Higher education institutions—and corresponding pathways to leadership—must be visibly open and accessible to students from all backgrounds (including students of all races and ethnicities) in order for higher education institutions to serve their fundamental role.**

Finally, in affirming the University of Michigan's position regarding the educational benefits of diversity, Justice O'Connor expanded on the traditional diversity rationale and stressed the importance of students from all racial and ethnic groups having access to public universities and law schools. According to the Court:

> "[T]he diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity…[E]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective….And, '[n]owhere is the importance of such openness more acute than in the context of higher education.' Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized….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…..[L]aw schools 'cannot be effective in isolation from the individuals and institutions with which the law interacts.'"[23]

Emphasizing the importance of access to public law schools in this regard (but with principles that may apply more broadly), she continued:

> Access…must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may

[22] At the same time, polices established in the name of diversity are unlikely to survive strict scrutiny when the goals themselves are "too amorphous" or "too ill defined" to reflect authentic—and compelling—institutional interests.

[23] *Grutter*, 539 U.S. at 331-32.

> participate in the educational institutions that provide the training and education necessary to succeed in America.[24] Thus, colleges and universities might consider the way in which principles of access and equity may complement their goals regarding the educational benefits of diversity. In addition, in cases where the educational benefits of diversity may not, in fact, provide an appropriate justification for a race- or ethnicity-conscious financial aid or scholarship practice, higher education officials may consider the potential that principles of access and equity, standing alone, might provide a compelling justification for those practices.

Thus, colleges and universities might consider the way in which principles of access and equity may complement their goals regarding the educational benefits of diversity. In addition, in cases where the educational benefits of diversity may not, in fact, provide an appropriate justification for a race- or ethnicity-conscious financial aid or scholarship practice, higher education officials may consider the potential that principles of access and equity, standing alone, might provide a compelling justification for those practices.[25]

[24] *Grutter*, 539 U.S. at 332-33.

[25] Though some judicial hostility to expanding that list is apparent, *see Grutter,* 539 U.S. at 395 *(Kennedy dissenting)* (approving consideration of race in "this one context"); *see Grutter,* 539 U.S. at 349-378 *(Thomas dissenting)* (expansive discussion of hostility to racial classifications); *see also City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94 (1989),* the U.S. Supreme Court in the University of Michigan decisions did not address (and, therefore, did not rule out) other interests that might justify race-conscious practices in the higher education context. Moreover, in its race-conscious financial aid policy, the U.S. Department of Education declined to "foreclos[e] the possibility that there may be other bases [in addition to remedial and diversity-related interests] on which a college may support its consideration of race or national origin in awarding financial aid." Title VI Policy Guidance at n.1.

C. Narrow Tailoring

Under the strict scrutiny standard, not only must the ends of an institutional policy be compelling, but also the "fit" between ends and means must be exact in the sense that race and ethnicity must be used in the most limited way possible consistent with the compelling interest advanced by the higher education institution. Thus, the third question that an institution must address is whether the institution's effort to achieve its compelling interest is specifically and narrowly framed to accomplish that purpose."[26]

In cases where a higher education institution seeks to achieve the educational benefits of diversity through race- and ethnicity-conscious financial aid or scholarship policies, the particular way in which race and ethnicity are used must be limited—with those factors used only as absolutely necessary to promote that interest. The reason that federal courts demand this "tight fit" between the ends (*e.g.*, the educational benefits of diversity) and the means is to ensure that "there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."[27]

The U.S. Supreme Court has indicated that the *way* in which the narrow tailoring analysis is framed is very much tied to the particular interest advanced. With respect to a higher education admissions policy designed to promote the educational benefits of diversity, the Court in *Grutter* said: The narrow-tailoring inquiry "must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education."[28] That principle would govern financial aid and scholarship practices, just as it does in the admissions setting.

Given the similarity of the interests advanced by financial aid and scholarships, on the one hand, and admissions decisions, on the other, the Supreme Court's framework likely provides an appropriate foundation against which to evaluate financial aid and scholarship practices. Notably, however, given the differences in the nature of the benefits conferred, there may be important distinctions in how the Court's framework is actually applied in the financial aid and scholarship settings.

As reflected in various federal court opinions, narrow tailoring factors should not be viewed or applied in a rigid mechanical way, but rather, they should be considered in light each other, as part of a comprehensive assessment. It is possible for instance, that the relative strength of one or more factors might offset weaker support related to another of the narrow tailoring factors.[29]

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[26] *Grutter*, 539 U.S. at 333.

[27] *Grutter*, 539 U.S. at 333. *See also Gratz*, 539 U.S. at 270 ("Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.")

[28] *Grutter*, 539 U.S. at 334.

[29] *See* Walter Dellinger, Assistant Attorney general, Office of Legal Counsel, U.S. Department of Justice, "Memorandum to General Counsels Re: *Adarand*, June 28, 1995.

The Court's framework for determining an institution's use of race or ethnicity is as limited as possible in advancing diversity-related interests focused on the following factors:

1. **Flexibility: Is the use of race or ethnicity sufficiently flexible to ensure individualized consideration of all students? More specifically, does the use of race: (1) ensure competitive consideration among all students (and not operate as a quota, which insulates certain students from competition with others); and (2) 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?"**

The federal requirement that race- and ethnicity-conscious policies be sufficiently flexible was, in the context of the University of Michigan's goal of achieving the educational benefits of diversity, the single most important factor distinguishing the Court's acceptance of the University of Michigan Law School's admissions policy from its rejection of the undergraduate admissions process. Building on Justice Powell's *Bakke* opinion, the Court focused its inquiry into the flexibility of the admissions programs on two elements: (1) whether the use of race or ethnicity ensured competitive consideration among all students (thereby not operating as an impermissible quota, insulating certain students from competition with others); and (2) whether the use of race or ethnicity ensured that each applicant was "evaluated as an individual and not in a way that [impermissibly] made an applicant's race or ethnicity the defining feature of his or her application."[30]

Under federal law, race- and ethnicity-conscious policies may not operate as quotas—insulating certain candidates from competition with others based on certain desired qualifications, and imposing a "fixed number or percentage [of students based on certain characteristics] that must be attained or that cannot be exceeded."[31] By contrast, so long as such policies operate in a way that permits competitive consideration among all applicants, higher education institutions may establish and seek to attain flexible goals (requiring, in operation, "only a good faith effort…to come within a range demarcated by the goal itself").[32] In sum, "some attention to numbers" can be appropriate so long as relevant practices do not operate to insulate certain students from comparison with others based on race or ethnicity.

Moreover, in the context of efforts to achieve the educational benefits of diversity, federal law requires that race- and ethnicity-conscious policies advancing the educational benefits of diversity be flexible enough to take into account all pertinent elements of educational diversity (not merely race and ethnicity) that each applicant may bring to an institution. As a result, and as the Court in the University of Michigan cases explained, applicants' files in the admissions process should be subject to a "highly individualized, holistic review," with "serious

[30] *Grutter*, 539 U.S. at 337. In this context, the Court squarely rejected the claim that pursuing individualized consideration where the program was capable of providing that kind of review was impractical. The Court said: The existence of "administrative challenges does not render constitutional an otherwise problematic system." *Gratz*, 539 U.S. at 275.

[31] *Grutter*, 539 U.S. at 335.

[32] *Grutter*, 539 U.S. at 335.

consideration" to "all the ways an applicant might contribute to a diverse educational environment." In short, admissions practices must not result in an applicant's race becoming "the defining feature of his or her application."[33]

In its rejection of the University of Michigan's undergraduate admissions program, in which 20 points (out of a possible total of 150) were "automatically" assigned to "every single applicant from an underrepresented minority group" (defined by the University of Michigan), the Court set forth several clearly impermissible characteristics of that point system:

- Certain applicants received an admissions advantage based on nothing more than their status as an underrepresented minority;
- The operation of the point system made "race a decisive factor for virtually every minimally qualified underrepresented minority applicant;" and
- The point system precluded meaningful comparisons and evaluations of how students' "differing backgrounds, experiences, and characteristics" might benefit the institution.

The Court's emphasis on the need for flexible, individualized review in the admissions process has several implications related specifically to questions that have arisen regarding financial aid and scholarships.

First, and perhaps most predominantly, questions have arisen regarding the use of race- and ethnicity-exclusive scholarships—scholarships that, by definition, condition the award of aid on a student being a member of a particular racial or ethnic group. As an initial matter, it is obvious that if a scholarship is structured so that, for example, race is one factor among others (such as community service, special talents, or academic promise), 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. At the same time, there is no federal case or Department rule that categorically rejects race- or ethnicity-exclusive aid under strict scrutiny standards.[34] In fact, the Department's Title VI Policy Guidance expressly includes race- and ethnicity-exclusive aid among the kinds of practices that can be sustained under Title VI, *if* they satisfy strict scrutiny. Moreover, in its discussion of race- and ethnicity-exclusive aid, the Department highlighted the many comments received from colleges and universities during the development of its Title VI Policy Guidance, which indicated that "the use of race or national

[33] *Grutter,* 539 U.S. at 337.

[34] Although the admissions policies operate differently than financial aid and scholarship policies and therefore are distinguishable on potentially numerous fronts (*see* Title VI Policy Guidance; *see also* Justice O'Connor in *Grutter* "Context matters when reviewing race-based governmental action under the Equal Protection Clause"), it is important to recognize that the University of Michigan Court's rejection of a point system in an admissions context (in which underrepresented minorities were awarded 20 points out of a possible total of 150 points based on a range of academic and non-academic factors) provides support for arguments that race- or ethnicity-exclusive practices are highly suspect and unlikely to survive strict scrutiny.

origin as a plus factor in awarding financial aid may be inadequate to achieve diversity…[and] in some cases, it may be necessary to designate a limited amount of aid for students of a particular race or national origin." It stated that certain circumstances might justify race- or ethnicity-exclusive aid, including: (1) When a college or university could not recruit sufficient minority applicants to meet their goals, even with race- or ethnicity-as-a-factor programs; (2) when a disproportionate number of minority applicants rejected offers of admission; and (3) when special challenges existed with respect to graduate programs, where "almost all" students might be able to establish financial need.[35]

Perhaps more to the point, the core principles set forth by the Court suggest (in a manner very much in line with the Department's Title VI Policy Guidance) that higher education officials should evaluate—and sustain—any race- or ethnicity-conscious aid policy *only if* they can establish that the exclusive nature of that policy is necessary to achieve their goals and that no less extreme or categorical use of race or ethnicity will allow the institution to achieve its goals.[36]

In addition, the manner in which the strict scrutiny analysis operates suggests clearly that financial aid and scholarship practices should be evaluated in the context of all other policies and practices that are designed to operate in tandem as part of the effort to achieve diversity goals. As a consequence, the prospect that the use of race in financial aid or scholarship practices might result in less burden on non-qualifying students than other uses of race or ethnicity should not be ignored. For instance, and as the Department has suggested, a race-conscious scholarship may in fact impose less burden on non-qualifying students than an otherwise lawful race-conscious admissions policy. Therefore, in some contexts, it is possible that the limited use of race-exclusive aid to achieve clear and compelling diversity goals might in fact operate as the less discriminatory alternative.

Finally, the need for an independent, individualized review in the award of race- or ethnicity-conscious financial aid may be less significant to the legal sustainability of such programs where the given financial aid program is part of a lawfully administered admissions program that includes a holistic, individualized review of all applicants (based on the standard established by the Supreme Court in *Grutter*). In fact, while there is no direct legal authority on point, in cases where race or ethnicity are considered in admissions as part of an individualized review that is

[35] *See* Title VI Policy Guidance at 8,761.

[36] In *Florida Atlantic University*, Case No. 04-90-2067, OCR in 1997 specifically approved of a scholarship program "restricted to black applicants on the basis of their race" in the context of a resolution that recognized that transforming the program to one involving "race-as-a-plus-factor" (if successful in meeting diversity interests) could "strengthen the legal support" for the program. In that case, OCR cited as support for its conclusion the following evidence:

- Black students indicated that they could not have attended the University without the aid in question;
- The State of Florida Board of Regents found that "black student recruitment and retention [were] heavily dependent upon financial assistance programs" and the provision of financial aid was "among one of the most important criteria [for] black college-bound high school seniors in choosing a college;"
- The University had implemented "numerous non-race exclusive measures," which were successful in recruiting students of other races and ethnicities, but "not…as successful in recruiting black students;" and
- Only 7-8% of the University's scholarship financial aid was allocated to race-targeted programs, and there was "no indication that these programs created an undue burden" on the University's ability to offer scholarship aid to non-minority students.

linked to financial aid, it is possible to construct an argument under which such financial aid policies should not independently be subjected to strict scrutiny at all, such as where admissions policies assign admittees to priority levels (*e.g.*, tier 1, tier 2) and financial aid decisions are made to insure certain matriculation rates at each of those levels. In this broader, enrollment management approach, the admissions and priority determinations would be subject to strict scrutiny, but the particular financial aid decisions might not be.

2. Necessity: Is the consideration of race or ethnicity necessary to achieve the institution's compelling interests? In other words, have race-neutral programs or strategies been considered and, where appropriate and feasible, tried?

As with other elements of the narrow tailoring analysis, the necessity of maintaining race- or ethnicity-conscious financial aid and scholarship policies must be evaluated in the context of the goals the institution seeks to achieve with those practices. Specifically, race and ethnicity may be used as factors in financial aid and scholarship decisions only to the extent necessary to achieve the institution's compelling interest—in many cases, the educational benefits of diversity within its student body. In this context, federal courts have demanded that institutions give "serious, good faith consideration [to] workable race-neutral alternatives that will achieve the diversity they seek."[37] In the higher education context, in particular, the Supreme Court in *Grutter* admonished that higher education institutions "draw on the most promising aspects of …race neutral alternatives as they develop"—specifically pointing to experimentation in states where race- and ethnicity-conscious admissions practices had been banned as a matter of state law. Depending on the mission of the program involved and the circumstances of that institution, a college or university may consider factors such as the following (either in lieu of, or in addition to, the consideration of race or ethnicity), which *may not* be subject to strict scrutiny:

- Demonstrated experience with and/or commitment to working with historically underserved or underprivileged populations;
- Graduation from a historically black college or university or other minority-serving institutions;
- Experience living and working in diverse environments;
- First generation in one's family to attend college or graduate school;
- Individuals who have overcome substantial educational or economic obstacles;
- Socioeconomically disadvantaged students;
- Students from rural or inner-city areas; and

[37] *Grutter*, 539 U.S. at 339 (internal citations omitted).

- Students from school districts that have been historically underrepresented at the university.

Importantly, the need to consider (and try, as appropriate) race- or ethnicity-neutral alternatives to race- or ethnicity-conscious practices does not mean that an institution must exhaust "every conceivable race-neutral alternative…[or] choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups." In short, federal courts will not require that institutions face the Hobson's choice—choosing between their diversity goals and other institutional goals.[38] Instead, they must evaluate the implementation of their diversity goals and ensure the appropriate consideration of race-neutral alternatives in the context of other related institutional goals.

In the context of financial aid and scholarships, it is important, that the specific race- and ethnicity-conscious practices at issue actually help the institution achieve its goals. If in fact they fail in that endeavor, those practices are likely to be rejected as not narrowly-tailored. A decision by OCR makes this points, expressly. In *In re Northern Virginia Community College*, OCR evaluated a scholarship program that was designed to enhance student diversity on campus by "improving retention and graduation rates of minority students." The relevant evidence indicated, however, that the scholarship program had no effect on those rates; thus, OCR concluded that the program was not necessary to achieve the college's goals and violated Title VI. Elaborating on its conclusion, OCR stated that the fact that minority students might have lower graduation rates than others did not, standing alone, justify the scholarship program. Instead, OCR found, the college was obligated to demonstrate "the relationship between [its race-conscious] scholarships and the graduation rates of minority students," as well as the connection between minority students' graduation rates and the college's diversity goals. Because it failed with respect to both issues, OCR required a modification of the challenged program.[39]

3. Burden: Does the operation of the race- or ethnicity-conscious policy minimize harm to members of non-favored racial or ethnic groups? Stated differently, does the policy unduly burden individuals who are not members of the favored racial and ethnic groups?

Under federal law, race- and ethnicity-conscious policies must not "unduly burden individuals who are not members of the [policy's] favored racial and ethnic groups."[40] As a general rule, the

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[38] The Court in *Grutter* specifically rejected any notion that the University of Michigan was obligated to consider: (1) adopting a lottery system (which would have eliminated the nuanced individual consideration of applicants and "sacrifice[d] all other educational values"); (2) lowering admissions standards (which, as a "drastic remedy," would have required the University to "become a much different institution and sacrifice a vital component of its educational mission"); and (3) implementing percentage plans (which did not appear to "work for graduate and professional schools" and might have precluded "individualized" student assessments necessary to achieve a student body that was "diverse along all the qualities valued by the university").

[39] *In Re Northern Virginia Community College*, Case No. 03962088 (August 1, 1997).

[40] *Grutter*, 539 U.S. at 341 quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 630 (1990) (O'Connor, J., dissenting).

less severe and more diffuse the burden on individuals who do not benefit from a race- and ethnicity-conscious policy, the more likely the policy will pass legal muster. As the Supreme Court in the University of Michigan cases recognized, for example, the use of race and ethnicity as "plus" factors in admissions in the context of an "individualized consideration" of all applicants would not disqualify non-minority applicants from competing for every seat in the class and does not result in undue harm to non-minority candidates.

With respect to financial aid and scholarships, in particular, the Department in its Title VI Policy Guidance distinguished financial aid and admissions practices on this point. It recognized that race- and ethnicity-conscious 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" and that "[i]n contrast to the number of admissions slots, the amount of financial aid available to students is not necessarily fixed." In the overall analysis of whether a particular aid practice may meet narrow tailoring requirements, and consistent with Justice O'Connor's admonition that "context matters" when making strict scrutiny judgments, these principles have several implications for financial aid and scholarship policies.

First, the total amount of financial aid (need- and merit-based) available for other, non-qualifying students should be determined. If in fact, the amount of the race- or ethnicity-conscious program (when coupled with similar programs, by race or ethnicity) represents only a fraction of the total aid available to all students, then arguments may exist to support the position that the "burden" on non-qualifying students is small and diffuse, supporting a finding of legal compliance.[41]

Second, in cases where race- or ethnicity-conscious aid is provided from external sources, but once received by the higher education institution is merely "pooled" with all other comparable aid (either need- or merit-based), strong arguments can be made regarding the minimal burden of that practice. In fact, when a college or university does not confer race- or ethnicity-conscious aid pursuant to a separate qualifying program, but rather (1) includes that earmarked funding as part of a larger, pool of money available for all students who meet certain (race- and ethnicity-neutral) criteria and (2) then matches the funding to eligible students based on race or ethnicity once race-neutral qualifying decisions have been made, then an argument can be made that such practice does not confer benefit basis on race or ethnicity and should not be subject to strict scrutiny at all.

Third, and somewhat relatedly, the question of what would occur if the race- or ethnicity-conscious aid were eliminated may bear on the burden question. For instance, and as suggested by the Department in its Title VI Policy Guidance, if the effect of such aid is to expand the pool of dollars available to students—and the elimination of race or ethnicity as a factor would result in the withdrawal of that funding in its entirety—then making the case that the race- or ethnicity-conscious aid operates to unduly burden a non-qualifying student may be more of a challenge.

[41] Notably, the Department in its Final Title VI Guidance framed the question as one whether the effect of the use of race or ethnicity (in this case, for minority students) was "sufficiently small and diffuse so as not to create an undue burden on [non-qualifying, majority students'] opportunities to receive financial aid." Title VI Policy Guidance at 8,757.

In the Department's words: "[A] decision to bar [a race-targeted] award…will not necessarily translate into increased resources for students from non-targeted groups."[42]

4. End Point and Periodic Review: Is the use of race or ethnicity in the policy limited in time, with a logical end point? Has a process for periodic review and evaluation been established so that the continuing need for race- and ethnicity-conscious practices can be determined in light of federal legal standards?

The Supreme Court in the University of Michigan decisions, recognizing that a "core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race," ruled that "all governmental use of race must have a logical end point." In the context of higher education, the Court established that this durational requirement" can be met by sunset provisions and "periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity."[43]

To ensure that race is used only to the extent necessary to further an interest in the educational benefits of diversity, an institution must therefore regularly review its race- and ethnicity-conscious policies to determine whether its use of race or ethnicity continues to be necessary, and if necessary, if the policies merit refinement in light of relevant institutional developments. (Periodic review can be especially important in light of the changing racial and ethnic demographics of the nation's youth and the potential changes over time to institutional missions and goals.) Such periodic reviews may show that an institution's interest in educational diversity is attainable without the use of race and ethnicity or with uses of race and ethnicity that are less restrictive than current practices.

With respect to financial aid and scholarship practices (very much like those in admissions), it is important that higher education institutions establish a process of review and evaluation, which should include a record of relevant issues considered and decided. In many educational contexts, and certainly within the realm of enrollment management, federal courts do not profess to be experts, and they look for opportunities to defer to methodical and research-based educational decisions (much as Justice O'Connor did in *Grutter).*

[42] Title VI Policy Guidance at 8,762.

[43] Notably, the Court did not establish a sunset requirement as one applicable in all cases. In fact, no such policy existed at the University of Michigan's Law School, and that policy was ruled to be lawful under federal non-discrimination laws.

IV. THE PROCESS OF INSTITUTIONAL SELF ASSESSMENT: AN OUTLINE OF CRITICAL ACTION STEPS

A. In general

When it comes to the use of race- and ethnicity-conscious policies, including financial aid and scholarship policies, process matters—and it matters a lot. It is important that each institution administer a thorough and thoughtful process to reach good policy decisions. Also, as a matter of federal law, it is also crucial to establish a process that will support deference to educational judgments shaping those policy decisions.[44]

Although the standards regarding race- and ethnicity-conscious practices are unique, they do not fundamentally change the basic steps of strategic planning that higher education officials should pursue when developing institutional policies of a more general nature: establish clear and concrete goals; devise strategies to achieve those goals; and evaluate results following policy implementation, and make changes, as necessary. In fact, understood at the broadest level, the strict scrutiny analysis centers precisely on these elements.

1. ***Establishing clear goals.*** Higher education institutions must be able to justify their race- and ethnicity conscious programs with compelling interests, which are clearly defined and central to the achievement of the institutions' educational goals.
2. ***Devising appropriate strategies.*** Higher education institutions must be able to demonstrate that the means used to achieve their compelling ends are in fact designed and implemented in ways that are tailored to advance those goals.
3. ***Reviewing and evaluating results.*** Higher education institutions must periodically evaluate their programs to ensure continued compelling interests and the implementation of appropriate strategies advancing those interests; and they must make changes when necessary (for instance, as institutional goals change or as evidence indicates that policies are not having the desired effect).

First and foremost in terms of process, an institution's pursuit of diversity-related goals and its analysis of race- or ethnicity conscious policies should reflect a strong institutional commitment. Although that commitment can take many forms, the importance of support from the highest levels of the institution (as well as throughout the institution) cannot be underestimated—for at least three fundamental reasons: First, in cases where diversity interests are implicated, the policy goals must be mission-related. Without a strong connection to the core institutional mission, such policies are less likely to be deemed by federal courts as compelling to the institution. Second, the design and implementation of such policies cannot be evaluated in a vacuum, consistent with prevailing legal standards. In other words, an examination limited to all financial aid policies is unlikely to suffice in an effort to establish that a particular race-conscious financial aid policy is narrowly-tailored. Rather, all policies that support relevant diversity goals

[44] Federal courts addressing a wide range of legal challenges in the education setting have, in fact, repeatedly inquired about the foundations (both in terms of process and substance) supporting positions advanced by higher education institutions. Nowhere is this focus more visible than in the context of race- and ethnicity-conscious policies and practices, where the requirement of "periodic review" is a specific element of the narrow tailoring standard that must be satisfied in order to demonstrate compliance with federal law.

are likely to be important—including admissions and student affairs policies, among others. Third, without the necessary institutional support, the challenge of administering an appropriately resourced process of rigorous, periodic review of race- and ethnicity-conscious policies becomes more daunting. And, absent that process, race- and ethnicity-conscious financial aid and scholarship policies are at substantially greater risk of successful legal challenge.

B. Action Steps

It is critical that higher education institutions establish a systemic process by which to periodically review their diversity goals, policies, and results—all in the context of educational, research, and legal developments. The law demands no less.

Although the law has not spelled out the details of what may be involved in such as review, higher education institutions can follow the series of practical steps described below, which are designed to ensure a focus on the right questions in the right way with the right people—with the goal of achieving the right result: Legal compliance and educational soundness.

1. INVENTORY: Know Your Programs.

The first phase of any effective programmatic review will involve the collection and assembly of all relevant information related to the issues to be addressed. Individuals who have relevant institutional expertise or history should be included in conversations to ensure the development of a comprehensive, fact-based initial inventory of diversity-related policies. As part of this initial effort, institutions should ensure that the particular uses of race and ethnicity within discrete policies and programs are well understood.

KEY QUESTIONS

1. Have you assembled all written policies and procedures related to the provision of student financial assistance?

2. For each policy document, can you:

- Identify each committee and the name and title of each person that was involved in its development, with copies of related meeting minutes; and

- Locate copies of documents related to all reviews of each financial aid policy document after its adoption, and identify staff that conducted each review.

3. Have you assembled all documents that define or regulate financial aid, including faculty resolutions, policy documents, candidate rating sheets, grids or matrices, and written guidelines for staff involved in financial aid decisions?

Source: Derived from *OCR Title VI Information Request*

A critical facet of the information gathering phase will involve the inventory all race- and ethnicity-conscious policies. The law's demand that institutions evaluate viable race-neutral alternatives (as well as policies that may achieve the same compelling ends by a less extensive use of race or ethnicity) highlights the need for institutions to include all policies or programs designed to support of institutional diversity goals. Thus, even if an institution's particular focus or concern may relate to specific scholarship policies, information regarding *all* relevant policies and programs should be included in an initial inventory—including, for instance, all admissions, financial aid, outreach, recruitment, and retention policies that bear on diversity goals.

With respect to financial aid and scholarship programs, in particular, officials should ensure that all need- and merit-based policies and programs are included in the inventory. Higher education officials should also include externally-funded race- or ethnicity-conscious programs in cases where the higher education institution supports (through, *e.g.*, the administration of the program) the operation of those programs. These may include scholarship programs that are funded by private sources, as well as programs that are authorized and funded by federal or state law.

KEY QUESTIONS

1. If admissions and financial aid are used to pursue diversity objectives:

- Can you identify the diversity objectives pursued by the admissions and/or financial aid programs?

- Can you describe the relationship between how the admissions process pursues diversity objectives and how the university uses financial aid to pursue diversity objectives?

2. Can you describe the relationship between how diversity objectives are pursued in the financial aid program and efforts to attract, enroll, and retain a diverse student body through recruitment, retention and other programs?

Source: Derived from *OCR Title VI Information Request*

2. ASSEMBLE: Establish an Inter-Disciplinary Team.

Personnel are a key facet of an effective initial inventory and assessment of diversity-related policies. Therefore, higher education institutions should assemble (both in the short term and as part of a longer term strategic planning process) an inter-disciplinary team that can effectively evaluate the relevant policies and programs in light of institutional goals (and legal requirements).

The composition of an institution's evaluation team should be carefully considered. In particular, the team should include representatives of specific programs and of institutional perspectives that have a bearing on diversity-related goals and strategies (from the top, down). Also, individuals who can help assemble the research bases upon which policies can be evaluated should be included. In addition, because the use of race or national origin in financial aid or scholarships

(as elsewhere) inevitably raises questions of federal (and frequently state) legal compliance, lawyers with an understanding of these issues should be included in the process.

Higher education officials should also consider the extent to which decisions regarding the establishment of diversity goals and the corresponding the use of race or ethnicity in financial aid and scholarships merit broader public engagement. In many cases, broader community input (including, for instance, perspectives of employers of university graduates) can be useful as part of the ongoing process of policy development and evaluation.

3. JUSTIFY: Ensure the Existence of Clearly-Defined, Mission-Driven Diversity Goals—Supported by Evidence.

As federal law makes abundantly clear, race- and ethnicity-conscious policies will only survive under strict scrutiny if the justifications for those policies are well developed and supported by evidence.

Higher education officials should ensure that their educational goals are clearly stated and understood. In the context of diversity goals, in particular, there must be clarity regarding what kind of student body the institution wants to attract (and why) and how the institution conceptualizes (or defines) its objectives. (As explained above, the critical mass theory is one avenue that colleges and universities may consider when defining their diversity goals.) Ultimately, given the obligation to ensure that race- and ethnicity-conscious measures are limited in time, higher education officials should be able to define success with respect to their goals, and know it when they've achieved it.

As explained above, federal law should affirm sound educational judgments. By definition, those judgments should have a solid empirical foundation, with clear and relevant supporting evidence. The sources of evidence can be (and likely will be) many, including:

- Institution-specific policies, including relevant mission statements and strategic goals;
- Institution-specific research and analysis (e.g., student surveys, student data, etc.), including information that reflects assessments about the relative need for and success of the policies in question;
- Social science research (regarding, for example, the educational benefits of diversity) that supports institution-specific goals; and
- Statements or opinions by institutional leaders, professors, students, and employers, which are based on actual experience and which shed light on the educational foundations that support the institution's diversity-related goals.

In the end, the totality of the evidence should support conclusions that race- and ethnicity-conscious policies and practices are supported by compelling interests, which are mission-driven.

KEY QUESTIONS

1. Can you identify the mission-driven diversity interests associated with your race- and ethnicity-conscious financial aid and scholarship policies?

2. How do you define diversity, and how do you know it when you see it?

3. Do you have evidence that educational benefits of diversity at your institution are the result of your race- and ethnicity-conscious financial aid and scholarship policies?

4. How are the goals of your financial aid and scholarship policies aligned with other policies (including, for example, admissions and student affairs policies), and do you know how they work together to achieve your goals?

Adapted from Coleman and Palmer, *Diversity in Higher Education: A Strategic Planning and Policy Manual (College Entrance Examination Board, 2004)*

4. ASSESS: Evaluate the Design and Operation of the Policies In Light of Institutional Goals

Once relevant information has been gathered regarding an institution's race- and ethnicity-conscious policies, and institutional goals are clearly defined and grounded in relevant evidence, the design and operation of those programs should be periodically evaluated in light of narrow-tailoring standards, with the over-arching aim being to ensure that the use of race or ethnicity is as limited as possible given the compelling institutional interests that those policies promote. This means that race- and ethnicity-conscious policies must be:

- As flexible as possible with regard to the use of race or ethnicity, given institutional aims;
- Necessary, in light of possibly viable race-neutral alternatives;
- Of minimal burden to non-qualifying students, based on race or ethnicity; and
- Periodically reviewed and evaluated against legal standards, with the goal of ultimately eliminating the use or race or ethnicity when institutional goals can be met and sustained without such policies.

KEY QUESTIONS

1. How do you know that the race- and ethnicity elements of your financial aid and scholarship policies are necessary for you to achieve your diversity related goals? What evidence supports your conclusion?

2. Have all feasible race-neutral alternatives been tried or considered—including those outside the realm of financial aid and scholarships? What were the bases for adopting or rejecting those alternatives? How thoroughly were the alternatives evaluated, and against what criteria?

KEY QUESTIONS, cont'd.

3. Is the consideration of race or ethnicity in the policy sufficiently flexible? In cases where race or ethnicity is a condition of financial aid or scholarship eligibility, can you establish that race- or ethnicity-as-a-factor policies would not as effectively help achieve your diversity goals?

4. What is the impact of your race or ethnicity-conscious financial aid and scholarship policies on non-qualifying students? Are otherwise eligible students denied aid because of their race or ethnicity?

5. How frequently do you review and evaluate your race- and ethnicity-conscious financial aid and scholarship policies? Does that review involve multiple institutional stakeholders who examine those policies in light of clear educational goals and relevant legal rules?

Adapted from Coleman and Palmer, *Diversity in Higher Education: A Strategic Planning and Policy Manual (College Entrance Examination Board, 2004)*

5. ACT: Take Necessary Action Steps.

Over time, a review of outcomes of race- and ethnicity-conscious efforts (in light of institutional goals) should lead to appropriate adjustments—to ensure that policies and practices are in fact materially advancing goals in appropriate ways and that, when goals are met, relevant policies and practices are modified to reflect changes in circumstances.

V. CONCLUSION

As reflected in this paper, Federal law can help higher education institutions make educationally smart and legally sound decisions, by shaping key questions that should be included as part of a strategic planning and policy development process associated with diversity goals. While many legal questions about various financial aid and scholarship practices remain, effective institutional planning and analysis can help minimize legal risk without sacrificing core goals—including diversity-related goals.

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