Protecting Race-Exclusive Scholarships from Extinction With an Alternative Compelling State Interest

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INTRODUCTION

In the wake of the Michigan affirmative action companion cases,[1] public universities are left roiling in a sea of uncertainty, questioning the validity of the use of race in any of their programs and policies. While the Supreme Court only examined the use of racial classifications in affirmative action admissions programs in the Michigan cases, the holdings from those cases have also impacted race-conscious and race-exclusive scholarship programs. While race-conscious programs continue to bold constitutionally defensible ground, race-exclusive programs are in greater danger of being dismantled, and are thus the focus of this article.

Over the last three decades, the Supreme Court has established a trend of applying the rights embodied in the Equal Protection Clause with a view of society as a collection of "Knowing Individuals."[2] Under such a view, individuals are seen as autonomous and independent, and are treated as individuals without regard to race or other such immutable characteristics.[3] Programs that acknowledge individuals as being part of a group or classification are strictly scrutinized under this view. Under the current trend, administrators of race-based student financial aid programs are "opening up [their] programs to students of all races in response to threats of legal action."[4] If the Department of Education's Office for Civil Rights (OCR) receives even one complaint regarding a race-based program, it may require the school to open the program to all prospective students and cease considering race as a factor.[5]

However, race-conscious and race-exclusive scholarship programs provide invaluable support and aid to minority students in the pursuit of higher learning. Without such programs, many qualified minority students may be unable to attend a higher-learning institution, thus denying all students the benefits of a more diverse student body. While most race-based scholarship programs have succumbed to the pressure to be racially neutral, at least one such program has resisted. There may be some hope for preserving such a program despite the race-neutral tendencies of the Supreme Court.

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1. Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003).

2. *See* KEVIN BROWN, RACE, LAW AND EDUCATION IN THE POST-DESEGREGATION ERA: FOUR PERSPECTIVES ON DESEGREGATION AND RESEGREGATION 103 (2005).

3. *See generally id.* at 103–28 (discussing the discourse of colorblind individualism).

4. Peter Schmidt, *U. of Wisconsin Vows to Defend an Aid Program Based on Race*, CHRON. HIGHER EDUC., Apr. 22, 2005, at A29.

5. *See id.*

This hope lies in the distinction between the specific goals of affirmative action admissions policies and race-based scholarship programs. Because the actual compelling interest is crucial in the strict scrutiny analysis, those defending the use of race as a factor in scholarship programs must be careful to highlight the particular interest that is the goal of the program. Realizing the educational benefits of a diverse student body is the compelling interest of non-remedial affirmative action admissions policies, and this may be effectuated by admitting a critical mass of minority students. However, the objective of achieving critical mass, in itself, effectuated by using scholarships to attract and retain a sufficient number of minority students, should be the compelling interest of race-based scholarship programs. By shifting attention from diversity to critical mass, the courts will be able to narrow the focus of the strict scrutiny analysis in regard to the use of race in scholarship programs. This shift is the focus of this article.

First, this Note will briefly discuss strict scrutiny review generally, followed by an account of the current jurisprudence with respect to affirmative action admissions policies that attempt to achieve the compelling state interest of diversity. Due to a sparse jurisprudence directly relating to race-based scholarship programs and the strong analogy between such programs and affirmative action admissions policies, the Department of Education stated that "using an approach that [has] been approved by the Supreme Court as narrowly tailored to achieve diversity in the admissions context also would be permissible in awarding financial aid."[6] Part II will discuss additional existing guidelines within which race-based programs must operate to ensure constitutional integrity. Part III discusses why race-exclusive scholarship programs are necessary. Part IV discusses the OCR's actions against a race-based scholarship following a complaint. Part V considers possible defenses available to a race-exclusive scholarship program under the existing guidelines. Part VI will conclude by showing that achieving critical mass itself in order to realize the educational benefits of diversity should be a compelling enough state interest to allow well-tailored race-exclusive scholarship programs to pass the strictest scrutiny by the courts.

I. CURRENT STATUS OF RACE IN ADMISSIONS

A. Strict Scrutiny Review

"[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."[7] Dispelling a long-standing maxim, Justice O'Connor stated in *Grutter* that "[s]trict scrutiny is not 'strict in theory, but fatal in fact.'"[8] A compelling state interest is the first requirement when applying a strict scrutiny analysis for the use of racial classifications. The Supreme Court has established a limited number of interests that rise to the level of being a compelling governmental interest. The Court must determine that the interest is sufficiently

6. Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964, Notice of Final Policy Guidance, 59 Fed. Reg. 8756, 8761 (Feb. 23, 1994).

7. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

8. Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (quoting *Adarand*, 515 U.S. at 237).

laudable to outweigh the injury to individuals' Equal Protection guarantees as annunciated by the Fourteenth Amendment to the Constitution. The use of racial classifications inherently causes injury to these guarantees, and thus the Court must carefully consider the reason for the use of such classifications.

Once a compelling governmental interest is furnished for the use of racial classifications, a court will examine the means used to achieve the interest. More specifically, a court will look to whether the means are "narrowly tailored to achieve [the] significant governmental purpose."[9] When analyzing the narrowly tailored aspect of the use of a racial classification, a court will examine several criteria: whether the classification is minimally intrusive, whether race-neutral means[10] would serve about as well as the racial classification,[11] whether the use of the classification is given a limited duration,[12] and whether the use of the classification is periodically reevaluated to determine whether it is still necessary.[13] If the court is satisfied that the use of racial classifications is sufficiently limited under these criteria such that the injury incurred by the use of such classifications is no greater than necessary to achieve the compelling governmental interest, then the racial classification will pass strict scrutiny review.

B. Jurisprudence on the Use of Race as a Factor in Admissions

While the Supreme Court has not had the opportunity to specifically address race-based scholarship programs and no lower court has applied the Supreme Court's affirmative action jurisprudence to race-based scholarship programs, the Court's affirmative action jurisprudence in the context of college admissions provides some insight into how the Court might treat such programs.[14] Therefore, setting out the Court's guidelines for using racial classifications in admission policies will assist in the later consideration of the constitutionality of race-based scholarship programs.

Even private universities do not escape the strict scrutiny of the Supreme Court's equal protection analysis for racial classifications:

> The *Grutter* and *Gratz* cases also reaffirm the Supreme Court's earlier rulings that institutions which are covered by Title VI of the Civil Rights Act of 1964, the federal statute prohibiting discrimination on the basis of race or national origin by

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9. Adarand Constructors, Inc. v. Pena, 16 F.3d 1537, 1547 (10th Cir. 1994), *vacated*, 515 U.S. 200 (1995).

10. Some of the race-neutral alternatives to racial classifications include using socioeconomic status, geographical location (but not national location), and diverse experiences. Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964, Notice of Final Policy Guidance, 59 Fed. Reg. at 8762.

11. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 n.6 (1986).

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

13. *Id.*

14. BINGHAM MCCUTCHEN LLP, MORRISON & FOERSTER LLP, & HELLER EHRMAN WHITE & MCAULIFFE LLP, PRESERVING DIVERSITY IN HIGHER EDUCATION: A MANUAL ON ADMISSIONS POLICIES AND PROCEDURES AFTER THE UNIVERSITY OF MICHIGAN DECISIONS 75 (2004), *available at* http://www.equaljusticesociety.org/compliancemanual/Preserving_Diversity_In_Higher_Education.pdf.

> recipients of federal funding, are subject to standards mandated under the Equal Protection Clause when they adopt race-conscious policies.[15]

To pass strict scrutiny review, a race-conscious program must first have a compelling state interest.[16] Diversity is the compelling interest most often used to defend affirmative action admissions programs. Justice Powell first announced that diversity was a compelling state interest for admissions programs in *Regents of the University of California v. Bakke*.[17] However, in *Grutter* Justice O'Connor clarified the actual compelling state interest:

> The Law School's interest is not simply "to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin." That would amount to outright racial balancing, which is patently unconstitutional. Rather, the Law School's concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce.[18]

In other words, the educational benefits derived from maintaining a diverse student body are the actual compelling state interest of the affirmative action admissions policy. With this understanding, and for the sake of simplicity, the interest will hereinafter be referred to as "diversity."

With diversity set as the compelling state interest, the inquiry then turns to the means used to achieve that diversity.[19] While the Court found a rigid quota system unconstitutional, it distinguished rigid quotas from a floating critical mass target.[20] Justice Powell recognized in *Bakke* that a university must provide a reasonable learning environment for minority students in order to fully realize the benefits of diversity.[21] In *Grutter*, the Court agreed with the characterization of "critical mass" as the point at which a sufficient number of minority students are present to ensure that a particular minority student will not feel like a representative of her race and will be willing to participate in class. In other words, "critical mass" is the point at which the school fully realizes the educational benefits of diversity.[22] Critical mass is not a "number, percentage, or range of numbers or percentages,"[23] and is therefore distinguishable from a quota system. Therefore, universities can freely consider race as a "plus" factor when evaluating applicants in order to attain the necessary critical mass that provides all students with the educational benefits of a diverse student body.[24]

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15. REAFFIRMING DIVERSITY: A LEGAL ANALYSIS OF THE UNIVERSITY OF MICHIGAN AFFIRMATIVE ACTION CASES 2 n.6 (2003), *available at* http://www.civilrightsproject.harvard.edu/policy/legal_docs/Diversity_%20Reaffirmed.pdf.

16. *See Grutter*, 539 U.S. at 333.

17. 438 U.S. 265, 315 (1978).

18. 539 U.S. at 329–30 (quoting *Bakke*, 438 U.S. at 307).

19. *Bakke*, 438 U.S. at 315.

20. *Id.* at 335–36.

21. *Id.* at 323–24.

22. *Grutter*, 539 at 318, 330.

23. *Id.* at 318.

24. *Id.* at 334. *But see* Gratz v. Bollinger, 539 U.S. 244, 271–75 (2003) (holding that a mathematical and non-individualized point system does not satisfy the narrowly tailored aspect of the Court's strict scrutiny analysis). Furthermore, some courts refused to accept Justice

II. EXISTING GUIDELINES FOR CONSTRUCTING CONSTITUTIONAL RACE-BASED SCHOLARSHIP PROGRAMS

While the Court's analysis of race-conscious admissions programs may provide some guidance, the focus of this Note is on how the Court will treat race-exclusive scholarship programs. As previously mentioned, the Supreme Court has never directly addressed this question, but some authority has been published to establish guidelines for considering race in scholarship programs.

In 1994, the Department of Education released a notice of final policy guidance in the Federal Registry[25] to guide universities in the process of constructing race-conscious or race-exclusive scholarships that comply with the Equal Protection Clause[26] and Title VI of the Civil Rights Act of 1964.[27] The Department of Education listed the following factors to analyze the use of racial classification in scholarship programs:

> Among the considerations that affect a determination of whether awarding race-targeted financial aid is narrowly tailored to the goal of diversity are (1) whether race-neutral means of achieving that goal have been or would be ineffective; (2) whether a less extensive or intrusive use of race or national origin in awarding financial aid as a means of achieving that goal has been or would be ineffective; (3) whether the use of race or national origin is of limited extent and duration and is applied in a flexible manner; (4) whether the institution regularly reexamines its use of race or national origin in awarding financial aid to determine whether it is still necessary to achieve its goal; and (5) whether the effect of the use of race or national origin on students who are not beneficiaries of that use is sufficiently small and diffuse so as not to create an undue burden on their opportunity to receive financial aid.[28]

Though not binding precedent for any court, the Department of Education based these factors on multiple rulings of the Supreme Court.[29] Under the existing system, the OCR will order programs that do not comply with the factors listed above to alter their policies.[30] If the university makes changes that satisfy the OCR, no legal action is filed, and the courts never have a chance to consider the constitutionality of the program and deliver holdings to establish guiding precedent.

Powell's opinion as binding or controlling. *See generally* Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996) (holding that a university may only consider race in admissions policies if it is attempting to remedy its own previous racial discrimination). However, the Supreme Court overruled *Hopwood* when it endorsed Justice Powell's opinion. *Grutter*, 539 U.S. at 325.

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

26. U.S. CONST. amend. XIV, § 1.

27. 42 U.S.C. §§ 2000d–2000d-7 (2000).

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

29. *See id.* at 8762.

30. Peter Schmidt, *Education Department Pressures Wisconsin to Open Scholarship Program to White Students*, CHRON. HIGHER EDUC., Dec. 3, 2004, *available at* http://www.admin .colostate.edu/caucus/documents/wisconsinscholarship.pdf.

Until quite recently, no university had challenged a decision by the OCR.[31] In the face of such a long list of considerations, coupled with a general fear of litigation and the Supreme Court's current view of society, it is not surprising that universities do not appear to hold out hope for maintaining challenged scholarship programs.[32] There may be , however, for the continued survival of these programs. While both race-conscious and race-exclusive programs are subject to OCR review, this Note focuses on defenses available for race-exclusive programs.

In its notice of final policy, the Department of Education stops short of completely prohibiting race-exclusive scholarship programs, recognizing that "important differences" exist between admissions policies and scholarship programs, and stating that a case-by-case analysis for race-exclusive scholarship programs is appropriate.[33] However, even in the case-by-case analysis, the OCR clearly maintains discretion in balancing the benefits of a race-exclusive program against the narrow-tailoring requirement. A major difficulty for any university utilizing such a program will be proving that alternative means of achieving a diverse student body are insufficient. For instance, the Department of Education has suggested using socioeconomic status instead of race as a factor in awarding scholarships in order to disproportionately advantage minority students.[34] In sum, although the Department of Education has granted case-by-case review of race-exclusive scholarship programs, the OCR maintains broad discretion to open race-exclusive scholarships to all races.

III. THE LOGIC IN ALLOWING RACE-EXCLUSIVE SCHOLARSHIP PROGRAMS

Although the focus of this Note is not on admissions, the admissions process figures heavily in the argument supporting the continued existence of race-exclusive scholarships. Aside from the recruiting aspect, scholarships often only become an issue after students have survived the admissions gauntlet. In the case of a university using an affirmative action admission policy, scholarship consideration occurs after the use of race in an individualized consideration of each applicant during the admissions process. If a university used a race-conscious admissions policy to obtain a critical mass of minority students, the university will then be faced with another difficult task:

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31. *See* Schmidt, *supra* note 4.

32. The focus of this Note is limited to the private right of action generated by section 601 of the Civil Rights Act of 1964. Civil Rights Act of 1964 § 601, 42 U.S.C. 2000d (2000). However, it is important to note that this is not the sole threat that forces open race-based scholarship programs. Section 601 examines the discriminatory intent of the racial classification. *See id.* Section 602 grants federal agencies the power to form regulations that implement the provisions of § 601, including the proscription of all classifications which cause a disparate impact. 42 U.S.C. § 2000d-1. Thus, a program that passes constitutional muster within the context of a § 601 complaint may not be constitutional under § 602 regulations. The Act allows the federal government to withhold federal funding from universities that do not comply with such regulations. Ultimately, if a federal agency, such as the Department of Justice, chooses to implement regulations that bar racial classifications completely, whether a court would find that a race-based scholarship program passed strict scrutiny within the context of a § 601 complaint becomes a moot point. For further discussion of this distinction, see BROWN, *supra* note 2, at 239–42.

33. Nondiscrimination in Federally Assisted Programs, 59 Fed. Reg. at 8761–62.

34. *Id.* at 8757.

turning admission into attendance. Because the use of race as a factor was an acceptable means of admitting minority students, it seems only logical that using race as a factor in awarding scholarships to actually enroll and retain these same students would also be acceptable. Not all universities, however, use affirmative action admissions policies. Yet even in those universities, the educational benefits of a diverse student body are an important aspect of each student's education, and race-based scholarship programs provide necessary assistance in attracting and retaining the minority students who are needed to achieve those benefits.

"[N]umerous studies show that student body diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.'"[35] After *Grutter*, the Supreme Court left no question that diversity is a laudable quality in a university's student body. Though a university may be permitted to use race as a plus factor when considering individual applicants, this alone will not suffice to ensure a diverse student body. Even if a university can admit a critical mass of minority students, admission is not attendance. The minority students that are admitted, whether through normal admissions or through affirmative action admissions policies used to help attain a diverse student body, may not attend the university due to financial restrictions or superior financial aid offered at a different university. "One of the most important determinants for the majority of student enrollment decisions is the receipt of financial aid."[36]

Race-exclusive scholarship programs assist universities in attracting, enrolling, and retaining admitted minority students. The Department of Education considered such an argument, and then agreed with commentators that financial difficulties could lead to disproportionate rejections of admission by minority applicants.[37] An additional problem facing universities attempting to attain a diverse student body occurs when a university is incapable of attracting a sufficient number of minority applicants to attain a diverse student body. The Department of Education also recognized this argument and decided that such a situation may warrant a race-exclusive scholarship program designed to attract minority applicants.[38] Therefore, race-exclusive scholarships have a recognized place and function within a university attempting to generate a diverse student body, and should not fall victim to further dismantling at the hands of the OCR.

IV. HOW RACE-EXCLUSIVE SCHOLARSHIP PROGRAMS ARE DISMANTLED

Since the guidelines were published in the Federal Registry in 1994, either in response to threats of filing complaints with the Department of Education's OCR or in negotiations with the OCR itself, many universities have opened their race-exclusive scholarship programs to all races.[39] However, many race-exclusive scholarship

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35. Grutter v. Bollinger, 539 U.S. 306, 330 (2003) (quoting Brief for American Educational Research Ass'n et al. as Amici Curiae in Support of Respondents at 3, Grutter v. Bollinger, 539 U.S. 306 (2003) (Nos. 02-241, 02-516), 2003 WL 398292).

36. Geier v. Sundquist, 128 F. Supp. 2d 519, 538 (M.D. Tenn. 2001).

37. *See* Nondiscrimination in Federally Assisted Programs, 59 Fed. Reg. at 8761.

38. *Id.*

39. *See* Bryan A. Keogh, *10 Universities Cut Programs for Minorities: Summer Sessions Faced Legal Threats*, CHI. TRIB., May 7, 2003, at C1, *available at* http://aad.english.ucsb.edu/docs/may.2.1.html; Schmidt, *supra* note 4; Schmidt, *supra* note 30.

programs crumble before the OCR ever gets involved. The OCR will only respond to official complaints filed against a program.[40] These complaints come from a variety of sources, including students rejected by the program, retired economics professors,[41] and organizations and groups actively targeting race-exclusive programs.[42] But even a threat to file a complaint with the OCR often suffices to convince a university to change a race-exclusive program.[43] Princeton University and the Massachusetts Institute of Technology both folded their minority scholarships without an OCR investigation,[44] while negotiations with the OCR following an investigation eventually resulted in the Wisconsin Department of Public Instruction opening its minority scholarship.[45] Universities and other programs concede race-exclusive scholarship programs without ever undergoing an investigation or defending their programs designed to help minority students pursue higher education.

When the OCR investigates a complaint and determines that the program should be changed, administrators of the program will be hard-pressed to convince the OCR that the program should remain race-exclusive. When the OCR investigated a complaint against the Minority Precollege Scholarship Program in Wisconsin ("the Program"), the OCR refused to compromise.[46] Kevin Ingram, the director of the Program, attempted a host of arguments in defense of the race-exclusive requirement,[47] but the OCR was not convinced.[48] In the end, the OCR forced Mr. Ingram to rename the Program and substitute socioeconomic status for race when considering applicants.[49]

Recently, Wisconsin again grabbed the race-exclusive scholarship spotlight, but for a completely different reason. The University of Wisconsin has decided to defend a race-exclusive scholarship program after a retired economics professor from the university filed a complaint with the OCR.[50] The Ben R. Lawton Minority Undergraduate Grant Program ("Lawton Grant") was established under state law, and, according to university spokesman Douglas Bradley, the university officials "have no plans to change the program's eligibility requirements," since "[t]hey believe they are

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40. *See* Department of Education, Office for Civil Rights, Questions and Answers on OCR's Complaint Process, http://www.ed.gov/about/offices/list/ocr/qa-complaints.html (last visited Feb. 10, 2006). Again, it is important to note that this discussion is limited to § 601 of the Civil Rights Act of 1964, but that potential initiatives enacted by federal agencies under § 602 of the Act also form a powerful threat to race-based scholarship programs.

41. Nahal Toosi, *UW Grant for Minority Students Is at Issue*, MILWAUKEE J. SENTINEL, Apr. 14, 2005, at B3, *available at* 2005 WLNR 5898888.

42. Keogh, *supra* note 39.

43. *Id.*

44. *Id.*

45. Schmidt, *supra* note 30.

46. Kevin Ingram, the director of the Program, argued against compromise, citing the benefit to minority students of the existing program, the inadequacy of socioeconomic status as an alternative factor, and the limited scope of his outreach program. Telephone Interview with Kevin Ingram, Dir., Wis. DPI Pre-Coll. Scholarship Program (Mar. 2, 2005) [hereinafter Interview with Kevin Ingram].

47. *Id.*; *see supra* note 46.

48. Interview with Kevin Ingram, *supra* note 46.

49. *Id.*

50. *See* Schmidt, *supra* note 4.

on solid legal ground."[51] Though the OCR is still investigating the complaint, it seems that this case may find its way into the court system, providing an opportunity for a court to consider the constitutionality of race-exclusive scholarships and establish binding precedent for all minority scholarships.

V. DEFENDING RACE-EXCLUSIVE PROGRAMS UNDER EXISTING GUIDANCE

If the University of Wisconsin does defend the Lawton Grant in court after an adverse OCR finding, it will need substantial evidence to convince the court to continue allowing the university to run a race-exclusive scholarship program. Without any guiding precedent focused on the constitutionality of race-exclusive scholarships, the university will be forced to guess what the courts will do. That guess need not be uninformed, however. The university can always consult the Supreme Court's affirmative action admissions policies cases for a reasonable glimpse at what type and amount of evidence will convince the courts to allow a race-exclusive scholarship program to continue. Under such precedent, the argument for maintaining a race-exclusive scholarship program to promote diversity is a thin one. The Supreme Court focused on the need for individualized consideration with race functioning as a "plus" factor, which would certainly not be possible for a race-exclusive program. [52]

However, the differences between admissions and scholarships establish a rift between the two that may lead the courts to treat and analyze the two differently. As previously mentioned, the Department of Education's policy guidance *does* state that race-exclusive scholarships may still be necessary in some cases to maintain a diverse student body.[53] Further, the Supreme Court itself noted the need to apply tailored consideration to various issues, finding that the "inquiry must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education,"[54] and also that "the very purpose of strict scrutiny is to take such 'relevant differences into account.'"[55] Therefore, the strict scrutiny analysis of scholarship programs need not be identical to that which is applied to race-conscious admissions programs due to the inherent differences between the two. Through careful tailoring, the possibility exists that a race-exclusive scholarship program could pass a strict scrutiny analysis.

Recent manuals compiled by teams of lawyers and academics can also provide guidance to aid universities and others in structuring a defense for race-exclusive scholarship programs. The Civil Rights Project at Harvard University (the "Project") released a manual suggesting that race-exclusive scholarship programs are not automatically unconstitutional in light of relevant precedent, but that "narrow tailoring would require greater attention to the burdens imposed on non-minorities, as well as the availability of alternative policies."[56] The Project also suggests that those defending

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51. *Id.*

52. *See* Grutter v. Bollinger, 539 U.S. 306, 334 (2003).

53. Department of Education, Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964, Notice of Final Policy Guidance, 59 Fed. Reg. 8756, 8762 (Feb. 23, 1994).

54. *Grutter*, 539 U.S. at 333–34.

55. *Id.* at 334 (quoting Adarand Constructors v. Pena, 515 U.S. 200, 228 (1995)).

56. THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., JOINT STATEMENT OF CONSTITUTIONAL

such programs will need less than the Court's traditional "strong basis in evidence" requirement, but, in light of the extensive evidence submitted to the Court by briefs of amici curiae and the trial record, the Court will still require some evidence to support the chosen compelling interest.[57]

Another manual, *Preserving Diversity in Higher Education*, (the "Manual") was published by the Equal Justice Society.[58] The Manual furnishes more detail on the subject of race-exclusive scholarship programs aimed at creating diversity, and serves as the launching point for the new potential compelling interest. The authors of the Manual point to important limitations and constructions useful in constructing a constitutional race-exclusive scholarship program, such as explicitly limiting the amount of funds designated for race-exclusive use, limiting the availability of the race-exclusive scholarship to those programs or schools within the university that are underrepresented by minorities, and highlighting the ability of race-exclusive scholarships to entice minority students to apply if the university is incapable of attracting a sufficient number of minority applicants to achieve a diverse student body.[59] Additionally, the authors of the Manual highlight the fact that scholarships are awarded "*after* deciding to admit," and thus, for universities using affirmative action admission policies, the individualized consideration required under *Grutter* has already been done by the time scholarship considerations begin, further supporting the legitimacy of using race-exclusive scholarships after admission.[60] Even for those universities that do not use affirmative action admissions policies, the harm inflicted on non-minority students by the use of racial classifications is inherently lesser than the harm done by affirmative action admissions programs. For admissions programs, the use of race affects the larger group of applicants, while racial classifications used for financial aid awards are limited to the smaller group of admitted students. *A fortiori*, if the Court was willing to allow the use of race classifications in admissions policies, racial classification should be permissible for scholarship programs as well.

VI. ACHIEVING CRITICAL MASS: AN ALTERNATIVE COMPELLING STATE INTEREST

As stated by Justice O'Connor in *Grutter*, "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause."[61] The Manual also refers to the necessity of narrowly tailoring the means chosen to achieve the specific compelling interest.[62] The actual compelling interest used to justify the use of racial classification must be narrowly defined. The Manual actually lists critical mass as a lesser included goal of diversity, but spends little time expounding the distinction between diversity and critical mass.[63] That distinction forms the basis of the alternative compelling interest for defending race-exclusive scholarships.

LAW SCHOLARS, REAFFIRMING DIVERSITY: A LEGAL ANALYSIS OF THE UNIVERSITY OF MICHIGAN AFFIRMATIVE ACTION CASES 18 (2003), *available at* http://www.civilrightsproject.harvard.edu/policy/legal_docs/Diversity_%20Reaffirmed.pdf.

57. *Id.* (internal quotation marks omitted).

58. BINGHAM MCCUTCHEN LLP, ET AL., *supra* note 14.

59. *Id.* at 83–84.

60. *Id.* at 83 (emphasis in original).

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

62. BINGHAM MCCUTCHEN LLP, ET AL., *supra* note 14, at 83.

63. *See id.*

While realizing the educational benefits of a diverse student body by means of enrolling a critical mass of minority students is the compelling state interest of affirmative action admissions policies, actually admitting, enrolling, and retaining the critical mass required to achieve the educational benefits of diversity could be the compelling state interest of race-exclusive scholarships. A court has never considered the idea of critical mass itself being a compelling interest, but there is strong evidence to distinguish admissions from scholarships and the different interests that each serves. If the Supreme Court could be convinced to adopt the achievement of critical mass itself as a compelling interest, race-exclusive scholarship programs would have a powerful defense for their continued existence.

As the Manual and the Department of Education's Federal Registry notice both conclude, a university needs to actually admit *and* retain a sufficient number of minority students in order to realize the benefits of diversity. [64] A goal of race-exclusive scholarships is to change admittance into attendance and retention—in other words, to actually achieve and maintain a critical mass.[65] Logically, when a university seeks to achieve the educational benefits derived from a diverse student body, the university should admit more minority students than are required to achieve a critical mass with the understanding that some students will not accept the invitation to attend. Those universities that do not use affirmative action admissions policies would still benefit from scholarship programs that are aimed at enrolling and retaining a particular subsection of the admitted students. A race-conscious, and particularly a race-exclusive, scholarship program will focus on actually convincing admitted students to attend, thus aiding in the achievement of the critical mass required to realize the benefits of diversity. By shifting attention from diversity to critical mass itself, a court will have a more focused view of the actual goal which race-exclusive scholarships attempt to achieve. Although the shift may seem insubstantial, it is essential to ensure that the strict scrutiny analysis is appropriately focused.

If a court is willing to interpret the language of *Grutter* as implying that achieving critical mass is a compelling state interest, race-exclusive scholarship programs would still need to be narrowly tailored. The analysis of the tailoring will likely follow a similar structure to the Department of Education's published considerations listed in Section II.[66] Working backwards, the use of race must not create an undue burden on those who are not beneficiaries of the program.[67] A university can demonstrate this by showing the small percentage of race-exclusive scholarship programs in relation to the number of race-neutral scholarships. "[I]n contrast to the number of admissions slots, the amount of financial aid available to students is not necessarily fixed."[68] Since the realm of scholarships is more expansive than that of admissions, this factor should be easier to satisfy for scholarships than it was for admissions. Evidence showing the expansiveness of available financial aid in comparison to the minute fraction reserved for minorities should suffice.

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64. Department of Education, Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964, Notice of Final Policy Guidance, 59 Fed. Reg. 8756, 8761 (Feb. 23, 1994); BINGHAM MCCUTCHEN LLP, ET AL., *supra* note 14, at 83–84.

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

66. *See supra* text accompanying note 28 (quoting 59 Fed. Reg. at 8757).

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

68. *Id.* at 8762.

The next requirement, regular reassessment, can also be easily met by a regularly scheduled assessment of whether the programs are still necessary. By limiting the number of available race-exclusive scholarship programs and providing for the termination of any program that is no longer necessary to achieve critical mass, a race-exclusive scholarship program can satisfy the second consideration. These two factors are rather easily surmounted; however, the other three may prove more difficult.

A third requirement is "whether the use of race or national origin is of limited extent and duration and is applied in a flexible manner . . . ."[69] While limited extent and duration seem to merely echo the previous two requirements, the "applied in a flexible manner"[70] requirement seems problematic. Race-exclusive scholarships are inherently inflexible to a degree. Perhaps this could be partially overcome by granting scholarships to all underrepresented minorities rather than to one particular minority group. Another potential solution would be to focus on particular schools within the university and grant scholarships within particular schools, such as granting scholarships to Caucasian students who major in African-American Studies. Ultimately, the OCR did state that some race-exclusive scholarships may be necessary, so this requirement is not fatal.

The next factor to consider is "whether a less extensive or intrusive use of race . . . in awarding financial aid as a means of achieving [critical mass] has been or would be ineffective."[71] If the minority students were receiving a sufficient amount of financial aid without the use of race as a factor, race would be an unnecessary consideration in awarding scholarships. However, given the fact that so many universities currently use race-based scholarships in one form or another in addition to any socioeconomic-based scholarships that may apply, minority students clearly would not receive sufficient financial aid unless scholarship programs are allowed to consider race as a factor when awarding financial aid. Thus, the question becomes whether race-conscious scholarship programs could function as an equivalent substitute for race-exclusive programs.

Race-conscious scholarships are not as effective at achieving critical mass as race-exclusive scholarships. Many colleges and universities submitted comments to the Department of Education claiming that race-conscious scholarship programs were inferior to race-exclusive scholarships for a number of reasons.[72] In addition to the ability to convince admitted minority students to attend and assist those students in completing their education, race-exclusive scholarship programs also assist the university in recruiting minority students.[73] Without the ability to attract and recruit minority students, some universities are incapable of actually admitting and enrolling a critical mass of minority students.[74] Additionally, universities would need more race-conscious scholarship programs in order to generate the same number of minority financial awards that a small and limited number of race-exclusive programs could provide. However, due to limitations of available resources, universities cannot afford to create a sufficient number of race-conscious scholarship programs to equal the breadth of minority financial awards generated by a smaller number of race-exclusive

69. *Id.* at 8757.
70. *Id.*
71. *Id.* at 8762.
72. *Id.* at 8761.
73. *See id.*
74. *See id.*

scholarship programs. Race-conscious scholarships are less capable of attracting, admitting, and retaining a sufficient number of minority students to achieve critical mass as well as could race-exclusive scholarships. As the Court has noted, alternative means of achieving a compelling state interest should serve the interest "about as well," as racial classification.[75] Race-conscious scholarships are incapable of meeting this requirement, when compared to race-exclusive scholarships.

Justice Kennedy advanced another argument that can be used to effectively undercut the distinction between race-conscious and race-exclusive pursuits of critical mass through the use of scholarship programs. In his dissent to *Grutter*, Kennedy presented an interesting view of the majority's holding.[76] By allowing a university to use affirmative action programs to achieve a critical mass, the Court essentially allowed race to become the outcome determinative factor in a certain percentage of admissions.[77] As Justice Kennedy indicates, most of the applicants to a given university will be admitted without any consideration of race.[78] The University of Michigan Law School set its critical mass in the range of thirteen to fourteen percent.[79] As indicated by Kennedy, the Law School admits eighty to eighty-five percent of its class based on merit alone.[80] After admitting this percentage of students, the Law School will stop standard merit admittance in order to assess the proximity to critical mass achieved through the normal admissions process. If only a small percentage of the admitted applicants are members of a minority group, the university must now admit a sufficient number of minority applicants for the remaining fifteen to twenty percent of seats in order to meet the established critical mass. If race is only used as a minor factor, more non-minority students will be admitted, limiting the available spots for the remaining minority applicants that will be crucial to achieving critical mass. At some point, race must become so great a factor as to "likely [become] outcome determinative for many members of minority groups."[81] Therefore, "[a]t this point the numerical concept of critical mass has the real potential to compromise individual review."[82] For a certain percentage of students, race nearly becomes the only considered factor for admittance. This reality bears resemblance to a quota system allowing a certain percentage of race-exclusive admission.

Although the Court allowed the school in *Grutter* to continue using race-conscious admissions policies in pursuit of critical mass, Kennedy's dissent highlighted the inevitably outcome-determinative nature of the program. Even if a school precisely followed the majority's analysis, in order to achieve critical mass the school would be reach a point during admissions decisions at which race becomes an outcome determinative factor for the remaining seats. Despite this inevitable outcome, the

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75. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 n.6 (1986) (quoting Kent Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 579 (1975)).

76. Grutter v. Bollinger, 539 U.S. 306, 389 (2003) (Kennedy, J., dissenting).

77. *See id.*

78. *Id.*

79. *See id.* at 389–90.

80. *See id.* at 389.

81. *Id.*

82. *Id.*

majority affirmed such a practice. Kennedy's dissent eviscerated the majority's requirement of individualized consideration by describing the reality of the situation.

Justice Kennedy's dissent displays the outcome determinative nature of using a critical mass standard to determine the weight of each applicant's race in the consideration for admittance. However, the Court went on to uphold the use of critical mass despite Justice Kennedy's insight. Apparently, diversity—and thus the need to achieve critical mass—may be so compelling an interest as to outweigh the harm done by allowing race to be a large, if not outcome determinative, factor in affirmative action admissions policies. Because the Court essentially authorized outcome determinative consideration of race in admissions in pursuit of critical mass, one could infer that the Court would allow the lesser harm of using race-exclusive scholarships to further aid in achieving that critical mass.

The final consideration under the Department of Education's guidelines is whether a race-neutral alternative would be as effective.[83] As previously mentioned, the most common substitute for race in scholarship consideration is socioeconomic status. Using socioeconomic status as a substitute for race in pursuing a diverse student body should be offensive to even the most casual observer. To support such an alternative, one must assume that considering applicants based on their socioeconomic status will provide results similar or identical to using race as a factor in awarding scholarships. The implication underlying this argument is that by helping poor students, minority students are inherently disproportionately advantaged. The odious nature of this substitution does not stop at the implication that minorities are inherently poor.

By focusing on race, a university can grant scholarships or admission to minority students who are near, though somewhat below, the normal merit level associated with standard merit admission or scholarship award. These are the most sought-after minority students, since they have nearly achieved the merit levels the university normally considers acceptable for admission or award of financial aid. Even if awards based on socioeconomic status rather than race do have the actual effect of increasing the diversity of the student body, such programs are logically more inclined to draw from applicants who attended inferior primary and secondary schools, and thus are less prepared for the rigors of university learning. By pulling primarily under-prepared minority students through socioeconomic considerations in lieu of racial consideration, a university will likely see a lower completion rate among such a group. Not only will the minority students who nearly meet the merit requirements of the university contribute to the diversity of the student body, but they will also be far more likely to succeed in the higher education setting.

Furthermore, a university is free to establish socioeconomic-based scholarships for the laudable goal of educating those who could clearly not afford the education. Such programs do contribute to the diversity of a student body. As Justice Powell stated in *Bakke*, "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."[84] Thus, while using socioeconomic status as a factor may disproportionately benefit racial minorities, the educational benefits derived

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83. Department of Education, Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964, Notice of Final Policy Guidance, 59 Fed. Reg. 8756, 8757 (Feb. 23, 1994).

84. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978).

from racial diversity are distinct from those of socioeconomic diversity. Though scholarships based on socioeconomic status also benefit diversity, they should remain separate from those programs aimed at enhancing racial diversity.

However apparent the inefficacy of substituting socioeconomic status for race may seem, a court of law a will not likely be swayed by general observations. A court will require documentation and evidence to prove that the race-neutral means are not as effective in practice. "This documentation might include statistical projections of enrollment or retention based on variations in the types of race-conscious and race-neutral policies that could be employed."[85] When either race-exclusive or race-conscious considerations are utilized in awarding scholarships in order to promote diversity, the administrators of a scholarship can ensure that a particular number (in the case of race-exclusive programs) or at least a reasonable percentage (in the case of race-conscious programs) of minority students will receive financial aid, helping a university to attain the critical mass of minority students needed to realize the educational benefits of diversity. However, if a school substitutes socioeconomic status for race, minority students will not necessarily receive a similar percentage of financial aid as they might receive from scholarships utilizing race classifications. Statistical documentation does exist to support the argument that socioeconomic status is not a viable substitute for race consideration in scholarship awards.

Those who support the substitution of socioeconomic status for race are quick to point to studies such as the one conducted by Andrew Hacker in his book *Two Nations: Black & White, Separate, Hostile, Unequal.* Hacker found that 45.7 percent of black students and 46.1 percent of Hispanic students come from families earning less than $30,000, while only 11.8 percent of the families of white students were earning below $30,000 from 2001–02.[86] This data seems to indicate that socioeconomic status is a viable substitute for racial classification. Nearly half of the black and Hispanic applicants would fall into the low-income category, creating eligibility for socioeconomic-based scholarships. However, need is not the sole factor considered in awarding aid through a scholarship that considers socioeconomic status. Universities must also consider merit.

By accounting for merit, scholarship programs that substitute socioeconomic status for race as a factor will not award aid to minority students nearly as often as would a scholarship utilizing race as a factor. When separated by race, the average SAT scores of low-income students demonstrate the deficiency of using socioeconomic status in place of race. The average SAT score for white low-income students in 2000 was 973, while Hispanic and black low-income students scored 789 and 825 on average respectively.[87] Since scholarship programs generally consider socioeconomic status in conjunction with merit, whites would disproportionately acquire scholarships through such programs.[88] Because white students score higher in the merit category, their applications would outweigh those of other minority students who also fall into a low-income category. If the purpose of any particular scholarship is to create diversity in the student body by helping minority students afford the costs of education, this

85. BINGHAM MCCUTCHEN LLP, ET AL., *supra* note 14, at 84.

86. ANDREW HACKER, TWO NATIONS: BLACK & WHITE, SEPARATE, HOSTILE, UNEQUAL 165 (1st Scribner trade pbk. ed. 2003).

87. *Id.* at 164.

88. *Id.*

method clearly fails to achieve that goal. Using race as a factor or awarding aid exclusively to minority students is substantially more effective at realizing diversity through enrolling a critical mass than using socioeconomic status as a substitute.

When considering the sufficiency of evidence to justify the use of race over race-neutral factors in *Grutter*, the Supreme Court provided some indication as to what amount of evidence would be sufficient to justify the use of race over other race-neutral alternatives. In defense of the race-based admissions policies in *Grutter*, Dr. Stephen Raudenbush, an expert in educational analysis, provided the Court with research indicating that if race had not been used as a factor in admissions, far fewer minority students would have been admitted to the University of Michigan's Law School.[89] If race had not been used as a factor in admissions, minority students would have accounted for only four percent of the entering class of 2000; because race was considered, however, minority students accounted for just over fourteen percent of those admitted.[90] Since the Court upheld the school's use of race in admissions decisions, it must have found that a ten percent increase in minority admittance was sufficient evidence to justify the use of race in the school's admissions program. A scholarship program considering race in awarding aid should collect similar data to justify the use of race over other race-neutral alternatives.

Furthermore, many scholarships and grants already exist to help financially disadvantaged individuals attend institutions of higher education. These programs serve to provide a socioeconomically diverse student body. Race-based scholarships serve a different need, the establishment of an *ethnically* diverse learning environment. "[It is an] indisputable social fact that race and ethnicity can significantly affect life experience—just as socioeconomic status and geographic origin can significantly affect life experience."[91] Replacing race-based scholarships with socioeconomic-based scholarships would deprive universities of a tool specifically designed to further the compelling state interest of achieving an ethnically diverse student body. While socioeconomic- or "need"-based scholarships serve an important function, they do not serve the purpose of promoting a racially diverse student body "about as well" [92] as race-based scholarships. Therefore, such scholarships should not replace the use of race as a factor in awarding financial aid.

To summarize, the use of racial classifications is reviewed by the courts under the strictest scrutiny. Under this strict scrutiny review, the courts will examine whether a compelling state interest exists for the use of racial classification, and whether that use is narrowly tailored to the specified interest. The language in *Grutter* can be read to hold either that attaining a diverse student body is the compelling interest, as enunciated by Justice Powell in *Bakke*, or, paraphrasing Justice O'Connor, it can be read to hold that the compelling interest is achieving the educational benefits of a diverse student body by enrolling a critical mass of underrepresented minority students. In the second interpretation, enrolling a critical mass is an inherent necessity for

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89. Grutter v. Bollinger, 539 U.S. 306, 320 (2003).

90. *Id.*

91. Brief of the State of Maryland et al. as Amici Curiae in Support of Respondents at 18–19, Grutter v. Bollinger, 539 U.S. 306 (2003) (Nos. 02-241, 02-516).

92. Wygant v. Jackson Bd. of Educ, 476 U.S. 267, 280 n.6 (1986) (quoting Kent Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 579 (1975)).

realizing these benefits, and should itself be considered a compelling interest. In turn, race-exclusive scholarships are a crucial part of the means used to achieve this compelling interest. As this section has demonstrated, alternatives to race-exclusive scholarships are not nearly as effective at attracting, enrolling, and retaining the necessary critical mass of minority students, and race-exclusive scholarships can be carefully constructed so as to satisfy all the criteria of the Court's narrow tailoring requirements. Therefore, by shifting the focus from diversity to critical mass, race-exclusive scholarships have a powerful new defense against constitutional scrutiny.

CONCLUSION

In this Note I have discussed the existing jurisprudence regarding race-exclusive scholarship programs, and I have introduced an alternative argument for defending such programs against constitutional attack. Scholarship programs and admissions policies are two distinct stages with distinguishable goals in the process of admitting and retaining students. Under strict scrutiny analysis, the means of achieving a compelling interest must be narrowly tailored to that particular interest. While the focus of affirmative action admissions policies is to achieve the compelling state interest of diversity by means of achieving a critical mass, the focus of race-based scholarship programs is to actually retain the critical mass necessary for diversity by means of distributing financial aid to minority applicants. By limiting the extent and duration of use of race-exclusive scholarships in the process of attracting and retaining a critical mass of minority students, universities can narrowly tailor such programs to achieve the compelling interest of critical mass. Therefore, limited use of the race-exclusive scholarships can be a narrowly tailored means of achieving the compelling state interest, should the Court adopt critical mass as a compelling state interest.

Because most race-exclusive scholarships have folded rather than face legal action, the courts have yet to consider the constitutionality of race-exclusive scholarships. But now the administrators of one such program have chosen to defend it, and they will need strong arguments to convince the Court to allow the continued use of race as an exclusive factor for awarding scholarships. This Note has examined the limited efficacy of alternative means to achieving this compelling state interest, including using race-conscious rather than race-exclusive scholarship programs. Race-exclusive scholarships are simply the most effective means of achieving this goal. By offering a limited amount of financial aid exclusively to minority students and only doing so if the programs continue to be necessary to ensure that critical mass is realized, universities would be able to attract and retain more of the minority students needed to achieve critical mass and provide the benefits of diversity to all of the attending students.

Ultimately, race-exclusive scholarship programs must not be too quick to fold to outside pressures. The Supreme Court must have an opportunity to hear arguments and see evidence supporting the continued existence of such programs in order to establish guiding precedent. The power to shut down race-exclusive programs is currently vested in the hands of an administrative office, and it will continue to be unless universities resist the OCR and defend their race-exclusive scholarship programs in the court system. Race-exclusive scholarship programs are an integral part of a university's ability to attract, admit, and retain minority students who bring a diversity of experience to the university environment and enhance the higher learning experience for all. These programs must continue to ensure diversity in higher education, and

those defending them must be creative and persistent in order to protect race-exclusive scholarship programs from extinction.