

# SHOULD HIGHER EDUCATION RACE-BASED FINANCIAL AID BE DISTINGUISHED FROM RACE-BASED ADMISSIONS?

**Abstract:** Higher education admissions and financial aid offices, while similar in appearance, differ in fundamental ways. Because of their key differences, the constitutional issues triggered by the offices' official use of race and ethnicity as a criterion in decisionmaking should be scrutinized differently. Courts and agencies that have considered race-based financial aid programs have, however, applied the same strict scrutiny test used in prior admissions cases. The author tracks the evolution of race-based financial aid and scholarships, and then explores the growing need for privately donated financial aid dollars. She then argues that given the pressures currently placed on the financial aid process, schools should be allowed to accept privately restricted donations for race-based scholarships.

## INTRODUCTION

In the field of higher education, admissions programs and financial aid programs may appear to have similar functions, but they differ in important ways.<sup>1</sup> At most colleges and universities they constitute two distinct offices and the programs promote different political agendas and operate under different institutional pressures that dictate their separate courses of action.<sup>2</sup> Because of these fundamental differences between admissions and financial aid, the legal issues triggered by their official use of race and ethnicity should be scrutinized differently by the courts.

Title VI of the Civil Rights Act of 1964 states that no one should be denied benefits because of race, color, or national origin.<sup>3</sup> Title VI draws its power from the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.<sup>4</sup> Congress has passed

---

<sup>1</sup> See Daren Bakst, *Race-targeted Financial Aid: Untangling the Legal Web*, STUDENT AID TRANSCRIPT, Winter 2000, at 4.

<sup>2</sup> See *id.*; see generally Nat'l Assoc. of College Admissions Counselors, at <http://www.nacac.com>; Nat'l Assoc. of Student Financial Aid Administrators, at <http://www.nasfaa.org> (representing two distinct groups of professionals in the higher education community).

<sup>3</sup> See Civil Rights Act of 1964, Title VI, 42 U.S.C. § 2000d (1998).

<sup>4</sup> See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978) (Powell, J., plurality opinion).

legislation that says any institution receiving any federal financial aid, for any program within the institution, must comply with Title VI.<sup>5</sup>

When colleges and universities use race or ethnicity as a criterion for admissions or financial aid, the policy will be reviewed by a court under strict scrutiny.<sup>6</sup> The only Supreme Court case to deal with racial criteria in admissions, *Regents of the University of California v. Bakke*, held that a dual admission system, with a quota for the number of minority students to be admitted, was unconstitutional.<sup>7</sup> At the same time, a plurality of the Court said that obtaining a diverse student body was a compelling state interest that, in some circumstances, could justify race-based admissions.<sup>8</sup>

Diversity as a justification in financial aid decisions has not been heard by the Supreme Court, so the issue remains open.<sup>9</sup> Critics maintain that the only government interest sufficient to justify the dissemination of scholarship money on the basis of race is remedying the present effects of past discrimination.<sup>10</sup> This view says that the mere presence of continuing effects of past discrimination are not enough to justify race-exclusive scholarships under the Fourteenth Amendment.<sup>11</sup> To pass constitutional muster universities must demonstrate that a causal relationship exists between the present effect and the past discrimination.<sup>12</sup> Under this view, universities that offer race-based scholarships without specifically identifying the discriminatory effect the scholarships are designed to eliminate will fail the Supreme Court's narrow tailoring requirement.<sup>13</sup>

Commentators have argued that narrow tailoring involves four factors.<sup>14</sup> First, non-racially motivated remedies must be explored.<sup>15</sup> Second, if a university decides that a racial remedy is required it must

---

<sup>5</sup> See 42 U.S.C. § 2000d-4a; Gus Douvanis, *Is There a Future for Race-Based Scholarships?*, C. BOARD REV., Fall 1998, at 22. Even though the case law and discussion focus on public schools, it should be noted that Title VI of the Civil Rights Act of 1964 applies to all private colleges and universities that receive federal funds. See Douvanis, *supra*, at 21.

<sup>6</sup> See *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 818 n.6 (E.D. Mich. 2000).

<sup>7</sup> See 438 U.S. at 271-72.

<sup>8</sup> See *id.* at 320.

<sup>9</sup> See *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994) (*Podberesky II*).

<sup>10</sup> See Kirk A. Kennedy, *Race-Exclusive Scholarships: Constitutional Vel Non*, 30 WAKE FOREST L. REV. 759, 771 (1995).

<sup>11</sup> See *id.* at 771.

<sup>12</sup> See *id.* at 771-72.

<sup>13</sup> See *id.* at 779.

<sup>14</sup> See William E. Thro, *The Constitutional Problem of Race-Based Scholarships and a Practical Solution*, 111 EDUC. L. REV. 625, 633 (1996).

<sup>15</sup> See *id.*

be temporary and flexible to changes in the student population.<sup>16</sup> Third, there must be a numerical relationship between the remedy and the relevant population, more than just an assumption that minority representation at the university should reflect the minority population as a whole.<sup>17</sup> Lastly, the racial remedy may not favor one racial group over another and it must still be possible for members of another race to achieve the benefit of financial aid.<sup>18</sup>

The alternate view, which this Note advocates, is that race-exclusive scholarships may be used to overcome the effects of past discrimination and that diversity is a compelling state interest that meets the demands of strict scrutiny.<sup>19</sup> Part I of this note discusses the race-based admissions decisions, which provide the legal background for analyzing financial aid.<sup>20</sup> Part II tracks the evolution of race-based financial aid and, in particular, scholarships.<sup>21</sup> Part III explores the economics of higher education and the growing need in American higher education for privately donated financial aid dollars.<sup>22</sup> Part IV analyzes the pressures placed on the financial aid process and argues that schools should be allowed to accept privately restricted donations for race-based scholarships.<sup>23</sup>

## I. RACE AND ADMISSIONS DECISIONS

For over twenty years, the use of racial preferences in higher education admissions has been both debated and protested.<sup>24</sup> In 1978, in *Regents of the University of California v. Bakke*, the United States Supreme Court held that the University of California at Davis Medical School could consider race in its admission decisions, but that the school's dual admissions system was unconstitutional.<sup>25</sup> The school was operating a special admissions program, with a separate committee, and no minimum grade point average for the special candidates,

---

<sup>16</sup> See *id.*

<sup>17</sup> See *id.*

<sup>18</sup> See *id.* at 633-34.

<sup>19</sup> See Brian K. Landsberg, *Balanced Scholarship and Racial Balance*, 30 WAKE FOREST L. REV. 819, 821-22 (1995).

<sup>20</sup> See *infra* notes 24-77 and accompanying text.

<sup>21</sup> See *infra* notes 78-127 and accompanying text.

<sup>22</sup> See *infra* notes 128-168 and accompanying text.

<sup>23</sup> See *infra* notes 169-213 and accompanying text.

<sup>24</sup> See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000).

<sup>25</sup> See 438 U.S. at 271-72.

and no comparison between the special and general candidates.<sup>26</sup> The quota of special applicants to be admitted was determined by a faculty vote.<sup>27</sup> In order to qualify as a special candidate, applicants had to indicate they wished to be considered a member of a minority group, defined as Black, Chicano, Asian, or American Indian.<sup>28</sup> Justice Powell wrote the opinion of the court and, concurring with one of two four Justice pluralities, said that the use of a dual, quota system to choose a student body with a specific percentage of students who are of a certain race or ethnicity was facially invalid and violated the Fourteenth Amendment's Equal Protection Clause.<sup>29</sup>

The decision did not ban racial preference programs entirely.<sup>30</sup> Justice Powell, concurring with the other four Justice plurality, held that the university could, in some circumstances, consider race as one factor for admissions.<sup>31</sup> In a separate plurality opinion, Justice Powell stated that the goal of a diverse student body was constitutionally permissible in higher education because the State has a substantial interest in a diverse educational environment.<sup>32</sup>

The Supreme Court considered racial preferences in a non-educational context in 1989, in *City of Richmond v. J.A. Croson, Inc.*<sup>33</sup> *Croson* held that the city of Richmond's set-aside program for awarding construction projects to minority contractors violated the Equal Protection Clause.<sup>34</sup> The Court applied strict scrutiny and concluded that although the nation's history of discrimination may have contributed to a lack of job opportunities for Blacks, that history did not create a compelling government interest that justified racial quotas.<sup>35</sup> The court said defining present injuries based on amorphous claims of past societal discrimination was sheer speculation, which would al-

---

<sup>26</sup> See *id.* at 275.

<sup>27</sup> See *id.*

<sup>28</sup> See *id.* at 274.

<sup>29</sup> See *id.* at 307.

<sup>30</sup> See *Bakke*, 438 U.S. at 326 (Brennan, White, Marshall, & Blackmun, JJ., concurring in part).

<sup>31</sup> See *id.*

<sup>32</sup> See *id.* at 320.

<sup>33</sup> See 488 U.S. 469, 476 (1989).

<sup>34</sup> See *id.* at 511. The city of Richmond required contractors who were awarded a city construction contract to subcontract 30% of the amount to at least one Minority Business Enterprise. See *id.* at 477-78. The set-aside plan did not apply to minority owned contractors who were awarded city contracts. See *id.* Minority group members were defined as U.S. citizens who are Black, Spanish-speaking, Orientals, Indians, Eskimos or Aleuts. See *id.*

<sup>35</sup> See *Croson*, 488 U.S. at 499.

low local governments to create racial preferences in any field based on statistical generalizations.<sup>36</sup>

The *Croson* Court also discussed whether the program was narrowly tailored to meet the city's interests, but found it was almost impossible to assess since the Richmond plan was not linked to identified, specific discrimination.<sup>37</sup> The Court noted that there was no evidence that the city had previously considered a race-neutral means to increase minority participation in city contracts.<sup>38</sup> Moreover, the Court noted that choosing a specific set-aside number appeared to be impermissible racial balancing, based on the general assumption that minorities choose a trade in proportion to their representation in the local population.<sup>39</sup> Based on these findings, the Court also was concerned with the inclusion of racial groups that may have never suffered from discrimination in the construction industry in Richmond.<sup>40</sup> The Court held that the city had failed to show a compelling interest to justify the use of race in awarding public contracts.<sup>41</sup>

Though not involving higher education, *Croson* began a line of cases that influenced later admissions cases.<sup>42</sup> The race-preference debate returned to higher education admissions in 1996 when the United States Court of Appeals for the Fifth Circuit, in *Hopwood v. Texas* (*Hopwood II*), held that the University of Texas School of Law could not use race as a factor for admission in order to achieve a diverse student body.<sup>43</sup> The Fifth Circuit panel held that the consideration of race or ethnicity for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment.<sup>44</sup> The court further held that the school's alleged purposes of combating the perceived effects of a hostile environment, alleviating the law school's poor reputation in the minority community, and eliminating any present effects of past discrimination by educational institutions other than the law school also failed to qualify as compel-

---

<sup>36</sup> See *id.*

<sup>37</sup> See *id.* at 507.

<sup>38</sup> See *id.*

<sup>39</sup> See *id.*

<sup>40</sup> See *Croson*, 488 U.S. at 506 (such as Aleuts, a native Alaskan ethnicity).

<sup>41</sup> See *id.* at 505.

<sup>42</sup> See, e.g., *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (*Hopwood II*); *Johnson v. Board of Regents*, 106 F. Supp. 2d 1362 (S.D. Ga. 2000).

<sup>43</sup> See 78 F.3d at 962. In *Hopwood I*, the court affirmed the district court's denial of intervention sought by several minority groups. See *Hopwood v. Texas*, 21 F.3d 603, 606 (5th Cir. 1994).

<sup>44</sup> See *Hopwood II*, 78 F.3d at 944.

ling state interests.<sup>45</sup> The court rejected the portion of Justice Powell's *Bakke* opinion which stated that diversity is a compelling state interest, claiming that it represented only a plurality holding and was therefore not binding.<sup>46</sup> The court interpreted *Croson* to hold that the only state interest sufficiently compelling to justify racial classifications is remedying current effects of past discrimination.<sup>47</sup> Accordingly, the court held that the use of race or ethnicity only to achieve racial heterogeneity, even as one of a number of factors, was unconstitutional.<sup>48</sup>

In a decision similar to *Hopwood II*, in July 2000, the United States District Court for the Southern District of Georgia ruled, in *Johnson v. Board of Regents*, that the University of Georgia's admissions procedure of awarding bonus points for minority applicants violated Title VI of the Civil Rights Act.<sup>49</sup> The district court said that student body diversity as a compelling state interest is not binding precedent, and therefore it cannot overcome Title VI's prohibition against racial discrimination.<sup>50</sup>

In contrast, the United States Court of Appeals for the Ninth Circuit declined to follow the Fifth Circuit's *Hopwood II* reasoning. Rather, a Ninth Circuit panel held in December 2000, in *Smith v. University of Washington Law School*, that race could be used as a factor in educational admissions decisions, even when not done to remedy past discrimination.<sup>51</sup> The Ninth Circuit affirmed the district court's reliance on Justice Powell's plurality opinion in *Bakke*.<sup>52</sup> The court acknowledged that much has changed since *Bakke* was decided in 1978, and cases such as *Croson* are evidence that the Supreme Court has not looked upon race-based factors with favor.<sup>53</sup> Nonetheless, the court

---

<sup>45</sup> See *id.* at 962.

<sup>46</sup> See *id.* at 944.

<sup>47</sup> See *id.* at 944-45.

<sup>48</sup> See *id.* at 945-46. Following *Hopwood II*, the Fifth Circuit, over the dissent of the Chief Judge, and six Circuit Judges, denied an en banc rehearing. See *Hopwood v. Texas*, 84 F.3d 720 (5th Cir. 1996). The dissenters argued that the panel opinion in *Hopwood II* went out of its way to break ground that the Supreme Court itself had been careful to avoid and overruled *Bakke*. See *id.* at 721-23. The dissenters rejected the panel's decision not to treat Justice Powell's decision in *Bakke* as precedent. See *id.* The Supreme Court denied certiorari, stating that since the university had long since discontinued the contested admissions policy the issue was moot. See *Texas v. Hopwood*, 518 U.S. 1033 (1996).

<sup>49</sup> See 106 F. Supp. 2d, at 1375. The University of Georgia system was a three-layered indexing point system that awarded 0.5 racial points for non-whites and 0.25 gender points for males during the second layer of the system. See *id.* at 1365.

<sup>50</sup> See *id.* at 1369, 1375.

<sup>51</sup> See 233 F.3d 1188, 1200-01 (9th Cir. 2000).

<sup>52</sup> See *id.* at 1196.

<sup>53</sup> See *id.* at 1200.

reasoned that the Supreme Court has neither re-addressed the issue of university admissions nor indicated that Justice Powell's opinion is no longer good law in the area of higher education.<sup>54</sup> Therefore, the Ninth Circuit held that the Fourteenth Amendment does permit university admission programs to consider race for other than remedial purposes, and that educational diversity is a compelling governmental interest that meets the demands of strict scrutiny of race-conscious measures.<sup>55</sup>

Nine days later, the United States District Court for the Eastern District of Michigan, in *Gratz v. Bollinger*, also held that diversity constitutes a compelling state interest in higher education justifying the use of race as one factor in the admissions process.<sup>56</sup> The University of Michigan claimed they had a compelling interest in the educational benefits that result from a diverse student body.<sup>57</sup> They did not attempt to justify the policy on remedial grounds.<sup>58</sup> The court analyzed *Bakke* and found that five Justices, for separate and unrelated reasons, held that when done properly, a university may take race into account in admissions.<sup>59</sup> The district court noted that *Hopwood II* is the only appellate decision rejecting diversity as a compelling interest, and that it did so in the face of strong dissent from a substantial minority of the active judges on the Fifth Circuit.<sup>60</sup> The district court was not convinced that recent Supreme Court precedent establishes that racial considerations to attain a diverse student body can never constitute a compelling interest under strict scrutiny.<sup>61</sup> Therefore, the district court upheld the University of Michigan's current admissions program.<sup>62</sup>

---

<sup>54</sup> See *id.*

<sup>55</sup> See *id.* at 1201.

<sup>56</sup> See 122 F. Supp. 2d at 820.

<sup>57</sup> See *id.* at 816; see also Patricia Gurin, *Expert Report for University of Michigan, Gratz v. Bollinger*, (No. 97-75321), *Grutter v. Bollinger*, (No. 97-75928), at Summary and Conclusions 2, available at <http://www.umich.edu/~urel/admissions/legal/expert/summ.html> (expert reports on the value of diversity) (last visited Sept. 14, 2001); Thomas J. Surge, *Expert Report for University of Michigan, Gratz v. Bollinger*, (No. 97-75321), *Grutter v. Bollinger*, (No. 97-75928), at XIII Conclusion 1, available at <http://www.umich.edu/~urel/admissions/legal/expert/sugru13.html> (last visited Sept. 14, 2001).

<sup>58</sup> See *id.* at 816 n.5; see also Gerald R. Ford, Editorial, *Inclusive America, Under Attack*, N.Y. TIMES, Aug. 8, 1999.

<sup>59</sup> See *Gratz*, 122 F. Supp. 2d at 819.

<sup>60</sup> See *id.* at 821 n.10.

<sup>61</sup> See *id.* at 821.

<sup>62</sup> See *id.* at 831.

A week after *Gratz*, in *Hopwood v. Texas* (*Hopwood III*), the United States Court of Appeals for the Fifth Circuit reversed the district court's permanent injunction against racial considerations in the University of Texas Law School's admission program saying a permanent injunction conflicted with *Bakke*.<sup>63</sup> The court, however, refused to hold that diversity as a compelling state interest was binding under *Bakke*.<sup>64</sup> In the third appeal of this case, the State argued that *Hopwood II* erred by rejecting the university's compelling interest in remedying present effects of past discrimination by the university itself and the Texas education system as a whole.<sup>65</sup> It also argued that the university had a compelling interest in obtaining a diverse student body.<sup>66</sup> The Fifth Circuit refused to consider the state's remedial past discrimination argument.<sup>67</sup> Although the court agreed that *Hopwood II* went beyond Supreme Court precedent, it held that the decision was not clearly erroneous.<sup>68</sup>

The Fifth Circuit next considered the university's argument that diversity is a compelling government interest.<sup>69</sup> The state argued that the *Hopwood II* holding rejecting diversity as a compelling interest created a new rule of law despite the Supreme Court's reluctance to do so.<sup>70</sup> The Fifth Circuit agreed, but noted that a federal appeals court may create a new rule of constitutional law without error when strong evidence for it exists in the Supreme Court's rulings on the point.<sup>71</sup> The Fifth Circuit declined to follow the Ninth Circuit's holding in *Smith*, which had considered Justice Powell's diversity as a compelling state interest argument from *Bakke* to be binding Supreme Court precedent.<sup>72</sup>

Finally, the Fifth Circuit reviewed the injunction entered by the district court forbidding the law school from taking race into consideration in the admission of students.<sup>73</sup> Although the injunction was reversed for procedural reasons, the court gave a second reason for

---

<sup>63</sup> See 236 F.3d 256, 276-77, 282 (5th Cir. 2000) (*Hopwood III*).

<sup>64</sup> See *id.* at 282.

<sup>65</sup> See *id.* at 260, 273.

<sup>66</sup> See *id.*

<sup>67</sup> See *id.* at 274.

<sup>68</sup> See *Hopwood III*, 236 F.3d at 274.

<sup>69</sup> See *id.*

<sup>70</sup> See *id.*

<sup>71</sup> See *id.*

<sup>72</sup> See *id.* at 275 n.66.

<sup>73</sup> See *Hopwood III*, 236 F.3d at 276.

reversing and remanding the case to the district court.<sup>74</sup> The Fifth Circuit said that the district court's permanent injunction, which forbids the use of racial preferences for any reason, went beyond the holding of *Hopwood II* and conflicted with *Bakke*, because five Justices in *Bakke* had said race could be used in some circumstances.<sup>75</sup>

In March 2001, the United States District Court for the Eastern District of Michigan, held in *Grutter v. Bollinger*, that the University of Michigan Law School's admission policy was unconstitutional and a violation of Title VI.<sup>76</sup> The district court rejected Justice Powell's diversity rationale concluding that the achievement of racial diversity is not a compelling state interest because it is not a remedy for past discrimination.<sup>77</sup>

## II. RACE AND FINANCIAL AID

The controversy over race-based financial aid programs began in the Department of Education (DOE), the agency that oversees the enforcement of Title VI.<sup>78</sup> In 1990, the DOE Assistant Secretary for Civil Rights issued a statement that race-based scholarships were unconstitutional and illegal under Title VI of the Civil Rights Act of 1964.<sup>79</sup> Under criticism from the White House, the DOE withdrew its position on race-based scholarships.<sup>80</sup> No further position was taken on the issue, pending a report from the Government Accounting Office on the frequency and use of such scholarships.<sup>81</sup> That report, issued in 1994, showed that only a small portion of scholarships were awarded based on racial or ethnic background.<sup>82</sup> At the undergraduate and graduate level, minority-targeted scholarships accounted for less than five percent of all scholarships and scholarship dollars in 1991-92.<sup>83</sup>

---

<sup>74</sup> See *id.*

<sup>75</sup> See *id.* at 276-77.

<sup>76</sup> See *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 872 (E.D. Mich. 2001).

<sup>77</sup> See *id.* at 847-50.

<sup>78</sup> See Kennedy, *supra* note 10, at 779.

<sup>79</sup> See *id.* at 779, 780-81.

<sup>80</sup> See Elizabeth Shogren, *In U.S. Reversal, Minority-Based Scholarships OK*, L.A. TIMES, Feb. 18, 1994, at A1.

<sup>81</sup> See *id.*; B. Denise Hawkins, *Michael Williams: Angst, Confusion over Race-Based Scholarships Unfounded*, BLACK ISSUES IN HIGHER EDUC., Feb. 23, 1995, at 16.

<sup>82</sup> See REPORT TO CONGRESSIONAL REQUESTERS, U.S. GENERAL ACCOUNTING OFFICE, GAO/HEHS-94-77, HIGHER EDUCATION INFORMATION ON MINORITY-TARGETED SCHOLARSHIPS 1 (1994) [hereinafter MINORITY-TARGETED SCHOLARSHIPS]; Wendy Brown-Scott, *Unpacking the Affirmative Action Rhetoric*, 30 WAKE FOREST L. REV. 801, 815-16 (1995).

<sup>83</sup> See MINORITY-TARGETED SCHOLARSHIPS, *supra* note 82, at 4.

In response to this report, in 1994, the DOE issued final policy guidelines addressing race-based scholarships in higher education.<sup>84</sup> The guidelines interpreted Title VI of the Civil Rights Act and relevant case law and declared that race-based financial aid is permissible to remedy past discrimination or to create diversity.<sup>85</sup> The guidelines maintained that a college seeking to create an intellectually diverse learning environment 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.<sup>86</sup> However, such use of race or national origin must be narrowly tailored to achieve a diverse student body.<sup>87</sup> The policy guidelines further stated that a college may use race or national origin as a condition of eligibility in awarding financial aid if it is necessary to promote diversity and does not unduly restrict access to financial aid for students who do not meet the race-based eligibility criteria.<sup>88</sup> Types of financial aid available to students include scholarships, grants, loans, fellowships, and work-study.<sup>89</sup>

By the time the final policy guidelines were issued, the courts had begun to address the issue of race-based scholarships.<sup>90</sup> In 1994, in *Podberesky v. Kirwan*, the United States Court of Appeals for the Fourth Circuit held that a race-exclusive merit scholarship program at the University of Maryland at College Park (UMCP) was unconstitutional.<sup>91</sup> The *Podberesky* plaintiff, a Hispanic student, challenged a merit-based scholarship program that was reserved solely for African-American students.<sup>92</sup> The school argued that the scholarship program was established as part of a desegregation plan for UMCP to comply with the Civil Rights Act of 1964.<sup>93</sup> The Office of Civil Rights approved a desegregation plan that included offering race-exclusive financial

---

<sup>84</sup> See Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964, 59 Fed. Reg. 8756 (Dep't. Educ. Feb. 23, 1994).

<sup>85</sup> See *id.* at 8756-57.

<sup>86</sup> See *id.* at 8757.

<sup>87</sup> See *id.*

<sup>88</sup> See *id.*

<sup>89</sup> See *Focus on Financial Aid: Words To Know*, STEPS TO COLLEGE, (Jan./Feb. 2001), available at [http://www.nacac.com/p&s\\_steps.html](http://www.nacac.com/p&s_steps.html) [hereinafter *Words*].

<sup>90</sup> See *Podberesky v. Kirwan*, 38 F.3d 147, 151 (4th Cir. 1994) (*Podberesky II*).

<sup>91</sup> See *id.* at 161.

<sup>92</sup> See *id.* at 152.

<sup>93</sup> See Anne Wells & John L. Strobe, Jr., *The Podberesky Case and Race-Based Financial Aid*, J. OF STUDENT FIN. AID, Winter 1996, at 35.

aid as a way to attract and retain minority students.<sup>94</sup> The scholarship program was then voluntarily established by UMCP in 1978 as one way to comply with the plan.<sup>95</sup>

The Fourth Circuit, applying strict scrutiny, held that race-conscious remedial measures are constitutional only if the proponent of the measure provides strong evidence for its conclusion that remedial action is necessary, and that action is narrowly tailored to meet the remedial goal.<sup>96</sup> The court, relying on *Croson*, found that to justify its race-based scholarship program, the university must prove that the program addressed the present effects of past discrimination and that those effects are of sufficient magnitude to justify the program.<sup>97</sup>

The university claimed that four present effects of past discrimination existed at UMCP.<sup>98</sup> They claimed: (1) the university had a poor reputation within the African-American community; (2) African-Americans were underrepresented in the student population; (3) African-American students who enrolled at the university had low retention and graduation rates; and, (4) the atmosphere on campus was perceived as hostile to African-American students.<sup>99</sup> The court found that while racial tensions exist generally at institutions of higher learning, these tensions and attitudes are not sufficient grounds for using a race-conscious remedy at UMCP.<sup>100</sup> The Fourth Circuit rejected the University's arguments, reasoning that the program was not narrowly tailored to remedy past discrimination, and in fact resembled racial balancing, which the Supreme Court struck down in *Croson*.<sup>101</sup> Drawing on some of the criteria the Supreme Court addressed in *Croson*, the Fourth Circuit held that the scholarship program was not narrowly tailored because it benefited high-achieving African-American students, and the court said high-achievers, whether African-American or not, have not been the subject of past discrimination.<sup>102</sup> Furthermore, since some scholarships were awarded to non-Maryland residents, the program was not narrowly tailored to increase the number of qualified African-American Maryland residents attending UMCP.<sup>103</sup>

---

<sup>94</sup> See *id.* at 34.

<sup>95</sup> See *Podberesky II*, 38 F.3d at 151.

<sup>96</sup> See *id.* at 153.

<sup>97</sup> See *id.*

<sup>98</sup> See *id.* at 152.

<sup>99</sup> See *id.*

<sup>100</sup> See *Podberesky II*, 38 F.3d at 155.

<sup>101</sup> See *id.* at 160.

<sup>102</sup> See *id.* at 158.

<sup>103</sup> See *id.* at 159.

Following *Podberesky* the future of race-based scholarships in the United States was in doubt, and states took different steps to conform with the legal climate.<sup>104</sup> The Colorado Attorney General, for example, issued guidelines to that state's twenty-eight public colleges that they should no longer provide race-specific scholarships, nor should they select students to receive such scholarships from outside sources.<sup>105</sup> The Texas Attorney General told state colleges and universities not to award race-exclusive scholarships, then rescinded the order and told them not to change their financial aid programs until there was a clear national standard.<sup>106</sup> The Board of Regents of the University of California System discussed whether to ban racial preferences in financial aid; Oregon's colleges and universities put tighter restriction on race-based tuition waivers.<sup>107</sup> Other universities decided not only to continue to offer race-based scholarships, but are proposing to increase their scope.<sup>108</sup> In October 2000, the University of Washington announced a \$65.6 million program aimed at providing financial aid to underrepresented minority students.<sup>109</sup> The Washington Attorney General will review the plan, but the university believes it will survive because it is funded entirely by private scholarships, grants, and fellowships.<sup>110</sup>

At least two Michigan colleges, Ferris State and Grand Valley State University, see the *Gratz* decision as a sign that they can continue offering race-based scholarships.<sup>111</sup> Neither school has used race for admissions purposes, but both see race-based scholarships as a way of boosting the number of minority students on campus.<sup>112</sup> The director of the Florida Education Fund stated that many educators believe awarding race-based scholarships is the right thing to do, and officials

---

<sup>104</sup> See Scott Jaschik, *Minority Scholarships in a New Light*, CHRON. OF HIGHER EDUC., Nov. 9, 1994, at A30.

<sup>105</sup> See Paulette V. Walker, *Avoid Race-Based Scholarships, Colorado Official Advises Colleges*, CHRON. OF HIGHER EDUC., Jan. 5, 1996, at A34.

<sup>106</sup> See Jeffrey Selingo & Stephen Burd, *Texas Attorney General Rescinds Opinion Barring Race-Exclusive Scholarships*, CHRON. OF HIGHER EDUC., Sept. 17, 1999, at A44.

<sup>107</sup> See Peter Schmidt, *Univ. of Cal. Regents Will Discuss Idea of Ending Minority Scholarships*, CHRON. OF HIGHER EDUC., May 17, 1996, at A36; Kim Strosnider, *Oregon Agrees to Change Its Program of Tuition Waivers for Minority Students*, CHRON. OF HIGHER EDUC., Jun. 20, 1997, at A32.

<sup>108</sup> See *UW Announces Proposal for Minority Scholarship*, NEWS TRIBUNE (Tacoma, Wa.), Oct. 23, 2000, at B2 [hereinafter *UW*].

<sup>109</sup> See *id.*

<sup>110</sup> See *id.*

<sup>111</sup> See Dave Murray, *W. Michigan Colleges Eye Impact of U-M Ruling*, GRAND RAPIDS PRESS (Michigan), Dec. 14, 2000, at A21.

<sup>112</sup> See *id.*

from some states commented they would continue their programs until challenged and told to desist.<sup>113</sup> The American Council on Education advised colleges and universities not to change any financial aid policies, and the Washington Legal Foundation said it would be "virtually impossible" for colleges to meet the legal standard set by the Fourth Circuit to justify race-based scholarships.<sup>114</sup> To avoid DOE complaints and possible lawsuits, some institutions are devising alternatives, such as first in family to attend college scholarships, to try to keep a diverse student body without using race as a factor in their financial aid decisions.<sup>115</sup> Some educators warn that replacing race-based scholarships will cause minority enrollment to plummet.<sup>116</sup>

Due to confusion in the higher education community following *Podberesky*, in 1996, the General Counsel for the U.S. Department of Education issued a letter to college and university counsel reaffirming the department's final policy guidelines on race-based scholarships in higher education.<sup>117</sup> The letter stated that it is permissible, in certain circumstances, for colleges and universities to consider race in making admissions decisions and granting financial aid.<sup>118</sup> Within the mid-Atlantic states that comprise the Fourth Circuit, the DOE rules are governed by the DOE's interpretation of *Podberesky*.<sup>119</sup> In 1996, a white student filed a complaint with the DOE's Office for Civil Rights challenging five small race-based scholarships at Northern Virginia Community College (NVCC).<sup>120</sup> The DOE found the scholarships were unacceptable given the legal climate of the Fourth Circuit following *Podberesky*.<sup>121</sup> NVCC felt that the scholarships were targeted because 39% of the student body was minority, whereas the school's service population was only 25% minority.<sup>122</sup> Unlike in *Podberesky*, the funds

---

<sup>113</sup> See Joan Morgan, *Colleges Say They'll Stay the Minority Scholarship Course*, BLACK ISSUES IN HIGHER EDUC., Nov. 17, 1994, at 14.

<sup>114</sup> See Scott Jaschik, "No" on Black Scholarships, Supreme Court Won't Second Guess Ruling Against Race-Exclusive Awards, CHRON. OF HIGHER EDUC., June 2, 1995, at A25.

<sup>115</sup> See Ben Gose, *A 'First' for Scholarships*, CHRON. OF HIGHER EDUC., Feb. 24, 1995, at A37.

<sup>116</sup> See *id.*

<sup>117</sup> See Letter from Judith A. Winston, U.S. Department of Education General Counsel, to College and University Counsel, available at <http://www.ed.gov/offices/OCR/docs/dearcol.html> (July 30, 1996).

<sup>118</sup> See *id.*

<sup>119</sup> See Charles Dervarics, *College Ends Race-Based Scholarship at Behest of Education Department*, BLACK ISSUES IN HIGHER EDUC., Nov. 13, 1997, at 16.

<sup>120</sup> See Elizabeth Frengel, *Using Race-Based Scholarships to Promote Campus Diversity*, COMMUNITY C.J., Dec. 1998/Jan. 1999, at 21.

<sup>121</sup> See Dervarics, *supra* note 119, at 16.

<sup>122</sup> See *id.* at 17.

for the impermissible scholarships were provided by private donors and were merely administered by the college, which selected the students receiving the scholarships.<sup>123</sup> The Office of Civil Rights said the race-based scholarships could only continue if the private donors administered the funds without assistance from the community college.<sup>124</sup> This outcome was in direct conflict with NVCC's mission of diversity and its function as a pipeline of diversity to surrounding four-year schools; schools that on average do not have minority enrollments that are representative of their service area.<sup>125</sup>

Like NVCC, many colleges and universities believe that diversity is not only a compelling interest, but is essential to the success of American higher education and our democratic society.<sup>126</sup> However, without a clear national standard to follow, many institutions are reviewing their financial aid policies and individual scholarships to ensure they can withstand legal challenges.<sup>127</sup>

### III. FINANCING HIGHER EDUCATION

Because many institutions and prospective students value a diverse student body, many colleges and universities feel that they need to award race-based types of financial aid in order to compete in a competitive educational market.<sup>128</sup> The United States General Accounting Office has concluded that rising tuition may deter many students from attending college.<sup>129</sup> For those who do attend, the debt loads students and their families assume may increasingly affect students' career decisions, their parents' life-styles while their children attend college, and students' life-styles after they complete college.<sup>130</sup> Between 1981 and 1995, the cost of tuition at public four-year colleges and universities increased at a rate almost three times faster than in-

---

<sup>123</sup> See *id.* at 16.

<sup>124</sup> See *id.*

<sup>125</sup> See Frengel, *supra* note 120, at 21.

<sup>126</sup> See *Policy Endorsement by Colleges & Universities, On The Importance of Diversity*, CHRON. OF HIGHER EDUC., Feb. 13, 1998, available at <http://www.umich.edu/~urel/admissions/support/statemnt.html> (last visited Sept. 14, 2001) [hereinafter *Policy Endorsement*].

<sup>127</sup> See Jaschik, *supra* note 104, at A30.

<sup>128</sup> Irvin W. Bodolsky, *That Was Then; This Is Now: What Has Changed in Student Financial Aid?*, STUDENT AID TRANSCRIPT, Winter 2000, at 19.

<sup>129</sup> See REPORT TO CONGRESSIONAL REQUESTERS, U.S. GENERAL ACCOUNTING OFFICE, GAO/HEHS-96-154, HIGHER EDUCATION TUITION INCREASING FASTER THAN HOUSEHOLD INCOME AND PUBLIC COLLEGES' COSTS 61 (1996) [hereinafter *Costs*].

<sup>130</sup> See *id.*

creases in the median household income, making attendance at these institutions less affordable for many students.<sup>131</sup> Increases in federal grant aid have not kept up with tuition increases, so many college students and their parents are relying more heavily on loans and personal finances to cover costs, frequently making financial aid packages a deciding factor for students choosing a school.<sup>132</sup>

Schools are trying to reduce this burden by increasing the amount of financial aid to students.<sup>133</sup> Public college expenditures for scholarships and fellowships experienced the highest rate of growth of all budget expenditure items between 1981 and 1994.<sup>134</sup> In school year 1980–81, schools spent \$219 per student; by 1993–94, this amount had grown to \$759, an increase of \$540 per student or 247%.<sup>135</sup> This financial aid expenditure now constitutes as much as 25–30% of a school's tuition revenue, as compared with 10–15% spent in the early 1980s.<sup>136</sup> The average amount of financial aid awarded in 1995–96 was \$6,832 per full-time, full-year undergraduate student.<sup>137</sup> The portion of the total average award that is non-federal financial aid was \$3,883.<sup>138</sup> When financial aid awards are broken down by race, including whites, the amounts awarded are similar, except for Asian American/Pacific Islanders who, on average, receive more aid.<sup>139</sup>

A school's net expenditures for scholarships are reduced by funds received from the federal government and private sources for scholarships and fellowships.<sup>140</sup> Private sector aid is increasingly important to help students attend post-secondary schools.<sup>141</sup> The private sector can supply a flexible source of needed funds to aid both middle-income students, who rely heavily on loans, and low-income students, who still may not receive enough financial aid to actually afford

---

<sup>131</sup> See *id.* at 6.

<sup>132</sup> See *id.*

<sup>133</sup> See *id.* at 5.

<sup>134</sup> See *Costs*, *supra* note 129, at 33.

<sup>135</sup> See *id.*

<sup>136</sup> See William C. Nelsen, *Student Aid From the Private Sector: Dramatic Increases Are Possible*, *CHRON. OF HIGHER EDUC.*, Oct. 22, 1999, at B4.

<sup>137</sup> See NAT'L CENTER FOR EDUC. STATISTICS, NCES 2000–01, *DIGEST OF EDUCATION STATISTICS*, 1999 Table 322 (2000) [hereinafter *Education*].

<sup>138</sup> See *id.*

<sup>139</sup> See *id.* For white, non-Hispanic, \$3,848, for black, non-Hispanic, \$3,739, for Hispanic, \$3,328, for Asian American/Pacific Islander, \$5,200, and for American Indian/Alaskan Native students, \$3,792. See *id.*

<sup>140</sup> See *Costs*, *supra* note 129, at 33.

<sup>141</sup> See Nelsen, *supra* note 136, at B4.

tuition.<sup>142</sup> In 1995-96, degree-granting institutions awarded over \$13 million in scholarships and fellowships.<sup>143</sup> Of that amount, almost \$5 million was provided by donor-restricted funds.<sup>144</sup> Public degree-granting institutions awarded over \$2.6 million in scholarships and fellowships from restricted funds, while their private counterparts awarded \$2.3 million in scholarships and fellowships from restricted funds.<sup>145</sup>

Private sector aid may be in the form of annual unrestricted donations to a college's general budget that may be used for any purpose—including student financial aid—or restricted donations to establish endowed scholarships and fellowships as permanent additions to a school's financial aid budget.<sup>146</sup> There is more than one type of scholarship, race-based or otherwise, which can be established.<sup>147</sup> First, there are scholarship programs, similar to the program at issue in *Podberesky v. Kirwan*, where the institution selects the recipient and funds the scholarship.<sup>148</sup> Second, there are scholarships where a private donor partially funds the program and selects the recipient, but the institution provides additional funding.<sup>149</sup> Third, there are scholarships where the funding is from a private donor, but the institution selects the recipient.<sup>150</sup> Lastly, there are scholarships that are totally funded by a private organization, and the recipient is selected solely by the private organization.<sup>151</sup>

Since the Fourteenth Amendment applies only to state action, it must be determined which of the above types of scholarships and corresponding institutional activities constitute state action and might be impermissible under Title VI.<sup>152</sup> Allocating resources in a particular way constitutes governmental or state action.<sup>153</sup> Commentators suggest that the source of funding is less important than the entity that is responsible for administration and selection of students.<sup>154</sup> In advising colleges and universities, experts seem to believe the first three types

---

<sup>142</sup> See *id.*

<sup>143</sup> See *Education*, *supra* note 137, at Table 328.

<sup>144</sup> See *id.*

<sup>145</sup> See *id.*

<sup>146</sup> See Nelsen, *supra* note 136, at B4.

<sup>147</sup> See Thro, *supra* note 14, at 626.

<sup>148</sup> See *id.*

<sup>149</sup> See *id.* at 626-27.

<sup>150</sup> See *id.* at 627.

<sup>151</sup> See *id.*

<sup>152</sup> See Thro, *supra* note 14, at 627.

<sup>153</sup> See *id.*

<sup>154</sup> See Dervarics, *supra* note 119, at 16.

of scholarships do constitute state action.<sup>155</sup> The fourth type of scholarship does not involve state action; essentially, accepting money to be credited toward a particular student is no different than receiving a tuition payment.<sup>156</sup>

Without a clear legal standard for privately endowed scholarships, colleges and universities may find it risky to solicit the funds they need, at a time when they are most likely to be successful.<sup>157</sup> Until the year 2011, the United States will witness the largest transfer of wealth in the history of the world, as the World War II generation leaves their accumulated wealth to their baby boomer children and those charitable organizations towards which they feel the greatest affinity.<sup>158</sup> In 1995, slightly more than 20% of charitable givers donated to education.<sup>159</sup> In 1997-98, 54% of donations to colleges and universities came from alumni and other individuals.<sup>160</sup> If all types of race-based financial aid were declared unconstitutional, it might mean that schools would be forced to turn down restricted donations that could help support their growing financial aid budgets.<sup>161</sup>

It is not just individuals who make charitable contributions to colleges and universities; corporations are a major source of higher education funding.<sup>162</sup> Many businesses are directing philanthropic dollars toward institutions that seem most likely to supply them with minority employees.<sup>163</sup> In defending its admissions programs in *Gratz v. Bollinger* and *Gutter v. Bollinger*, the University of Michigan received widespread support from corporate America.<sup>164</sup> Some of the corporations that filed amici briefs with the District Court for the Eastern District of Michigan included General Motors, 3M, Dow Chemical, Eastman Kodak, General Mills, Intel, Johnson and Johnson, Kellogg, Sara Lee, and Texaco.<sup>165</sup> The briefs explained the relationships the corporations have been creating with Michigan, as well as other universities,

---

<sup>155</sup> See, e.g., Douvanis, *supra* note 5, at 22; Thro, *supra* note 14, at 627.

<sup>156</sup> See Thro, *supra* note 14, at 627-28.

<sup>157</sup> See Jaschik, *supra* note 104, at A30; THE POLITICS OF WEALTH AND INEQUALITY 73 (Richard Ratcliff et al. eds., 1995) [hereinafter POLITICS].

<sup>158</sup> See POLITICS, *supra* note 157, at 73.

<sup>159</sup> See Education, *supra* note 137, at Table 30.

<sup>160</sup> See *id.* at Table 348.

<sup>161</sup> See Costs, *supra* note 129, at 5.

<sup>162</sup> See Nelsen, *supra* note 136, at B4.

<sup>163</sup> See Peter Schmidt, *How Michigan Won Corporate Backing for Its Defense of Affirmative Action*, CHRON. OF HIGHER EDUC., Nov. 24, 2000, at A21.

<sup>164</sup> See *id.*; *Gutter v. Bollinger*, 137 F. Supp. 2d 821, 872 (E.D. Mich. 2001); *Gratz v. Bollinger*, 122 F. Supp. 811 (E.D. Mich. 2000).

<sup>165</sup> See *Gratz*, 122 F. Supp. 2d at 813.

to promote diversity in both higher education and the workplace.<sup>166</sup> The companies fund scholarships and provide internships and mentoring programs, which helps the institutions recruit and retain minority students.<sup>167</sup> The companies argued that diversity in higher education is so vital to their efforts to hire and maintain a diverse work force that the United States government has a compelling interest in allowing colleges to use affirmative action.<sup>168</sup>

#### IV. DIVERSITY AS A COMPELLING STATE INTEREST

The ultimate question in higher education race-based financial aid is whether the admissions cases will ultimately control all institutional activity, or if the interests of financial aid are sufficiently distinct from admissions to warrant a separate standard.<sup>169</sup> Most important to an institution's academic mission and economic health is whether schools will be able to utilize the resources of private donations that wholly fund a race-based scholarship that the institution simply administers and awards as part of a comprehensive financial aid system.<sup>170</sup> In the first sentence of *Podberesky*, the Fourth Circuit states that the issue in the case is whether UMCP could maintain a race-exclusive scholarship that it had *voluntarily* established.<sup>171</sup> The scholarship program in *Podberesky* was funded using both state and private funds.<sup>172</sup> *Podberesky* was a fact-specific case.<sup>173</sup> It may be that *Podberesky* stands for the proposition that to prevent impermissible state action, colleges and universities should not voluntarily set aside state money to support some students over others.<sup>174</sup>

In the case of NVCC, the DOE, not a federal court, interpreted *Podberesky* to say the privately funded scholarships were impermissible.<sup>175</sup> Since a non-profit organization must legally adhere to donor restrictions when a charitable contribution is accepted, NVCC was forced to return the donations that established two of its scholar-

---

<sup>166</sup> See Schmidt, *supra* note 163, at A21.

<sup>167</sup> See *id.*

<sup>168</sup> See *id.*

<sup>169</sup> See Jaschik, *supra* note 104, at A30.

<sup>170</sup> See *id.*

<sup>171</sup> See *Podberesky v. Kirwan*, 38 F.3d 147, 151 (4th Cir. 1996) (emphasis added) (*Podberesky II*).

<sup>172</sup> See Wells & Strobe, *supra* note 93, at 34.

<sup>173</sup> See *Podberesky II*, 38 F.3d at 151; *Podberesky v. Kirwan*, 956 F.2d 52, 54 n.1 (4th Cir. 1992) (*Podberesky I*).

<sup>174</sup> See *Podberesky II*, 38 F.3d at 151; *Podberesky I*, 956 F.2d at 54 n.1.

<sup>175</sup> See Dervarics, *supra* note 119, at 16.

ships.<sup>176</sup> Even under *Podberesky*, schools should be allowed to accept privately restricted donations, where the institution only awards the money as part of a comprehensive financial aid program that does not discriminate.<sup>177</sup> This does not deny students access to financial aid as a whole and it is not voluntarily established by the university.<sup>178</sup> Therefore, private restricted donations, administered by the university, should not violate Title VI or the Equal Protection Clause of the Fourteenth Amendment.<sup>179</sup>

Even though there seems to be broad-based support for race-based scholarships, programs that promote diversity in higher education have come under attack.<sup>180</sup> Proving the need for race-based scholarships in order to remedy the current effects of past discrimination at a college or university is difficult.<sup>181</sup> To avoid this difficulty, colleges and universities could use race-neutral criteria when awarding scholarships.<sup>182</sup> One criticism of this approach from within the higher education community is that race-neutral approaches to financing education for racial minorities are generally not effective and that minority-targeted scholarships are essential to remedy the current effects of discrimination.<sup>183</sup> Even if the remedial reasons for race-based scholarships can be shown, the narrow tailoring requirement means that the racial remedy may not favor one group over another and it must still be possible for members of another race to achieve the benefit of financial aid.<sup>184</sup>

The argument against race-based scholarships is that once the institution selects a recipient or administers the funds, state action has occurred and the Equal Protection Clause and Title VI become implicated.<sup>185</sup> But, in the case of financial aid, the students have already competed equally for admission and most full-time students receive some type of financial aid.<sup>186</sup> No one is denied the benefits of a financial aid package from their college or university simply because

---

<sup>176</sup> See *id.* at 17.

<sup>177</sup> See *Podberesky II*, 38 F.3d at 151.

<sup>178</sup> See *id.*

<sup>179</sup> See *UW*, *supra* note 108, at B2. But see *Douvanis*, *supra* note 5, at 30; *Thro*, *supra* note 14, at 627.

<sup>180</sup> See *Frengel*, *supra* note 120, at 19.

<sup>181</sup> See *id.* at 22.

<sup>182</sup> See *Thro*, *supra* note 14, at 635.

<sup>183</sup> See *Brown-Scott*, *supra* note 82, at 815.

<sup>184</sup> See *Thro*, *supra* note 14, at 633-34.

<sup>185</sup> See *id.* at 627.

<sup>186</sup> See *Education*, *supra* note 137, at Table 321.

of their race.<sup>187</sup> Many scholarships exclude some students from consideration, like those based on academic major or athletic ability, but that does not mean the university is excluding those students from consideration for financial aid as a whole.<sup>188</sup> Once admitted, all qualified students are offered the best financial aid package the school can provide, but no student is entitled to aid, much less to the same aid as everyone else, even those similarly situated.<sup>189</sup>

The total amount of financial aid a student is eligible to receive is determined by the institution using data collected by the federal government in the Free Application for Federal Student Aid (FAFSA).<sup>190</sup> Most schools shift their dollars within the maximum award range for each student, so if a student receives a scholarship, most schools will offer that much less from other institutional funds.<sup>191</sup> Therefore, even if the *Podberesky* plaintiff had received one of the race-exclusive scholarships, he likely would have been denied some other type of aid or had the rest of his aid package reduced by the amount of the scholarship.<sup>192</sup> His total financial aid package could not have gone over what the institution had determined he was eligible to receive based on his FAFSA.<sup>193</sup> Though it will be administered in an individualized fashion, most students, from every race and ethnic background, will benefit from some form of financial aid.<sup>194</sup> Therefore, unlike the plaintiff in *Bakke* where denial of admission arguably equals a lost individual benefit to attend the university, in financial aid situations like *Podberesky* there is no preferential benefit given or lost because the student has financial aid options other than donor restricted scholarships.<sup>195</sup>

The prevalent reason given by colleges and universities for continuing race-based scholarships is the educational benefits gained from increased diversity on campus.<sup>196</sup> Diversity is considered essential to the learning process of all students, in preparing students for the

---

<sup>187</sup> See Civil Rights Act of 1964 Title VI, 42 U.S.C. § 2000d; *Focus on Financial Aid: Myths & Misconceptions*, STEPS TO COLLEGE (Jan./Feb. 2001) available at [http://www.nacac.com/p&s\\_steps.html](http://www.nacac.com/p&s_steps.html) (last visited Sept. 14, 2001) [hereinafter *Myths*].

<sup>188</sup> See *Words*, *supra* note 89.

<sup>189</sup> See Bodofsky, *supra* note 128, at 19.

<sup>190</sup> See *Focus on Financial Aid: The Basics*, STEPS TO COLLEGE (Jan./Feb. 2001) available at [http://www.nacac.com/p&s\\_steps.html](http://www.nacac.com/p&s_steps.html) (last visited Sept. 14, 2001).

<sup>191</sup> See Nelsen, *supra* note 136, at B4.

<sup>192</sup> See *id.*

<sup>193</sup> See *Myths*, *supra* note 187.

<sup>194</sup> See Bodofsky, *supra* note 128, at 21.

<sup>195</sup> See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 305 (1978); *Words*, *supra* note 89.

<sup>196</sup> See Frengel, *supra* note 120, at 22.

workplace, and in preparing students to become active members in our democratic society.<sup>197</sup> For many students, college is one of the few places in American society where they can interact with students from different backgrounds, learn from each other, understand differences, and dissolve racial stereotypes.<sup>198</sup> Empirical analysis shows a consistent pattern of positive relationships between learning, democracy outcomes and diversity in higher education.<sup>199</sup> Students who experience the most racial and ethnic diversity on campus, formally and informally, show the greatest engagement in active thinking and growth in intellectual engagement, motivation, and intellectual and academic skills.<sup>200</sup> A racially diverse student body also plays a fundamental role in equipping students for meaningful participation in democracy.<sup>201</sup> Students educated in diverse settings are more motivated and better able to participate in a complex and increasingly heterogeneous society.<sup>202</sup>

One way for schools to ensure that they are able to attract and retain diverse students is through privately funded, race-based scholarships.<sup>203</sup> Over half the donations received by colleges and universities come from alumni and other individuals.<sup>204</sup> The alumni of an institution may be in the best position to understand that diversity is a compelling interest for their institution.<sup>205</sup> They know, especially older alumni, that there was discrimination during the years of their attendance.<sup>206</sup> If now, the university creates a mission that includes enhancing diversity and it is supported by private donations, it is because the university and the donors understand the value of diversity in preparing students for a heterogeneous society.<sup>207</sup>

Race-based scholarships also contribute to a better-educated and more prepared workforce.<sup>208</sup> This is especially true at community colleges where workforce preparation is usually part of the mission statement.<sup>209</sup> Students educated in a diverse setting are seen by corpo-

---

<sup>197</sup> See *Policy Endorsement*, *supra* note 126.

<sup>198</sup> See *Surge*, *supra* note 57, at XIII Conclusion 1.

<sup>199</sup> See *Gurin*, *supra* note 57, at Summary and Conclusions 2.

<sup>200</sup> See *id.*

<sup>201</sup> See *id.*

<sup>202</sup> See *id.*

<sup>203</sup> See *Brown-Scott*, *supra* note 82, at 815.

<sup>204</sup> See *Education*, *supra* note 137, at Table 348.

<sup>205</sup> See *Ford*, *supra* note 58.

<sup>206</sup> See *id.*

<sup>207</sup> See *id.*; *Frengel*, *supra* note 120, at 22.

<sup>208</sup> See *Frengel*, *supra* note 120, at 22.

<sup>209</sup> See *id.*

rate leaders as the best prepared to enter the workforce and colleges and universities acknowledge their unique role in preparing graduates to enter this diverse workforce.<sup>210</sup> Unlike the remedial setting, diversity in higher education is a permanent interest, it is not a remedy.<sup>211</sup> Unlike the remedial setting, where the need for remedial action must end once the current effects of past discrimination end, the need for diversity is perpetual.<sup>212</sup> Therefore, under this view, endowed donor restricted scholarships will be the most effective way to meet the perpetual need for diversity in higher education.<sup>213</sup>

### CONCLUSION

*Podberesky v. Kirwan* was a very fact-specific case. It is certainly not binding precedent outside the Fourth Circuit, and whether it even applies to all types of scholarships within the Fourth Circuit is unclear. It would be in the best interests of our democratic society and our nation's future, economically as well as socially, to continue to allow private donors to establish race-based scholarships. This will allow institutions of higher education the academic freedom to administer these funds and to maintain a student body that encourages learning and enhances democracy. It will allow colleges and universities some budgetary relief and help to slow the demand for increased tuition revenue. Finally, it will help to build a strong economic future for America by creating a better-prepared, educated, and diverse workforce that can compete and understand the issues of our society.

AMY WEIR

D

---

<sup>210</sup> See Schmidt, *supra* note 163, at A21; *Policy Endorsement*, *supra* note 126.

<sup>211</sup> See *Gruetz v. Bollinger*, 122 F. Supp. 811, 823-24 (E.D. Mich. 2000).

<sup>212</sup> See *id.* at 824.

<sup>213</sup> See *UW*, *supra* note 108, at 633.