

# NACUANOTES

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## TOPIC:

## RACE-CONSCIOUS FINANCIAL AID AFTER THE UNIVERSITY OF MICHIGAN DECISIONS

### INTRODUCTION:

In the 2003 University of Michigan admissions cases [\[1\]](#), the U.S. Supreme Court held that diversity is a compelling interest in higher education, and that race is one of a number of factors that can be taken into account in admissions to achieve the educational benefits of a diverse student body [\[2\]](#). In light of these decisions, many colleges and universities have been examining whether and to what extent race, color, or national origin (among other factors) can be considered in awarding financial aid [\[3\]](#). Race-exclusive scholarship programs in particular--i.e. programs that are limited to members of specific groups based on race, color or national origin (as distinguished from other race-conscious programs in which race is one of many non-exclusive factors)--continue to be a focus of challenges by certain advocacy and public interest groups [\[4\]](#). This Note will address the impact of the University of Michigan decisions on race-conscious and race-exclusive financial aid and scholarship programs.

### DISCUSSION:

Under the Equal Protection Clause of the Fourteenth Amendment (which applies to public institutions), as well as Title VI of the Civil Rights Act of 1964 (which applies to programs and activities at public and private colleges and universities that receive federal financial assistance), any consideration of race, color or national origin [\[5\]](#) is subject to strict judicial scrutiny--i.e., the institution must have a "*compelling interest*" to justify the consideration of race, and the race-conscious program must be "*narrowly tailored*" to meet that interest.

When applying the strict scrutiny standard in the University of Michigan cases, the Supreme Court stated that "context matters." Thus, while the basic legal principles set forth by the Court in the Michigan cases apply to financial aid as well as admissions programs, the specific context of such programs is relevant when applying these principles. For example, financial aid differs from admissions in that an overall financial aid program may consist of many scholarships, grants, loans, or other forms of support from myriad public and private sources. In reviewing financial aid programs, therefore, individual scholarships need to be reviewed within the larger context of a school's overall financial aid program--keeping in mind the principles discussed below.

In 1994, the U.S. Department of Education issued policy guidance on race-targeted financial aid [\[6\]](#). Although this guidance preceded the Michigan cases and is simply an interpretation of the law, it contains a thorough analysis of legal principles applicable to such programs. In conjunction with the Supreme Court's decisions in the Michigan cases as well as other subsequent legal developments, the policy guidance provides a helpful starting point for analyzing race-targeted financial aid programs. In addition to scholarships and financial aid financed with institutional funds, privately funded scholarships may be subject to Title VI requirements if a college or university administers, or provides significant assistance to, the privately funded programs [\[7\]](#).

### Compelling Interest Test

After the University of Michigan cases, colleges and universities should be prepared to articulate the legal bases for *any* race-conscious programs in accordance with their educational mission and objectives. As is true of race-conscious admissions policies, race-conscious financial aid policies today are usually premised on an interest in achieving the educational benefits of a diverse student body [\[8\]](#). In the Michigan cases, the Court noted that student body diversity enhances student learning and better prepares students to work and live in an increasingly diverse workforce and society. As noted in an earlier

NACUANOTE [9], however, institutions utilizing race-conscious admissions or financial aid policies should take steps to document their own considered judgment on the educational benefits of diversity.

### **Narrow Tailoring Test**

In its decisions, the Supreme Court set forth a number of considerations to take into account in determining whether an admissions program is narrowly tailored to meet a compelling interest in diversity. These considerations are set forth below *in italics*, along with some suggestions on how to address them in the context of race-conscious financial aid programs.

*Race can be one of many "plus" factors in the admissions context, but all pertinent elements of diversity should be considered in such programs.*

- Given the importance of financial aid in recruiting and retaining students, an institution's financial aid programs should support and be consistent with its efforts in admissions.
- The institution should have a consistent and coherent rationale for the groups and individuals who receive consideration of race as a plus factor in the award of financial aid, as well as for excluding others (e.g., based on its pools of applicants or admitted students, service area demographics, mission, etc.). For example, if race is a plus factor for some minority groups, but not for Asian-American students, the institution may want to be able to demonstrate that it has sufficient numbers of qualified Asian-American students in its applicant pool already so as to make the use of such a plus factor unnecessary.

*Race cannot be the predominant criterion in admissions.*

- Similarly, race should not be the predominant criterion in an institution's overall financial aid program.
- Not all diversity-related factors necessarily need to be given the same weight, however--their relative weights should depend on the particular circumstances of an institution's applicant pool and student body. For example, an institution may seek geographic as well as racial diversity, but its applicant pool may already contain sufficiently high numbers of qualified students from geographically diverse backgrounds such that it is not necessary to provide any additional weight to that criterion (whereas the pool does not contain the same level of diversity in terms of race).

*Race cannot be considered in an automatic or mechanical manner in admissions (e.g., by awarding a specific number of points to members of particular racial groups).*

- In awarding financial aid, therefore, institutions may want to avoid automatically assigning students points or dollars based solely on race.

*Quotas, set-asides and separate tracks based on race are unconstitutional. Institutions may, however, seek a "critical mass" of students from underrepresented groups.*

- In awarding financial aid, colleges and universities should take care not to set aside a fixed portion of their overall financial aid budget for members of particular racial groups regardless of other qualifications. "Racial balancing" to reflect the exact percentages of various groups in the population at large should be avoided.
- Institutions should also not create separate tracks for majority and minority students in evaluating financial aid packages.

*Race-neutral alternatives must be considered, although an institution need not try and fail at every race-neutral alternative.*

- In reviewing race-conscious financial aid programs, institutions should be prepared to demonstrate that "race-neutral" alternatives--and/or alternatives in which race is taken into account to a lesser extent--would not produce the same level of racial diversity they seek without compromising other institutional goals and values. The U.S. Department of Education has issued two sets of guidelines describing "race-neutral" alternatives in financial aid and other areas for colleges and universities to consider [\[10\]](#).
- Institutions are not required to sacrifice academic excellence or other educational goals in order to achieve race neutrality.
- Colleges and universities may consider other non-race-based factors that foster legitimate educational goals, even if such factors turn out to disproportionately favor minority students [\[11\]](#). Such factors might include, for example: socioeconomic or educational disadvantage; demonstrated experience with, or commitment to, serving or working with historically underserved or underprivileged populations; geographic diversity (including students from rural or inner-city areas that might be underrepresented on campus); or being in the first generation of a family to attend college or graduate school.

*The use of race as a "plus" factor must not unduly harm other students.*

- In evaluating an overall financial aid program, an institution should consider the extent to which its consideration of race adversely affects the ability of other students (who do not receive this "plus" factor) to obtain financial aid or to have their financial need met. The less the overall burden on other students, the easier it will be to justify some consideration of race in particular scholarships [\[12\]](#).

*Programs in which race is a factor must be subject to sunset provisions or periodic review.*

- Race-conscious programs should be reviewed periodically in light of an institution's changing needs and circumstances. It is particularly important for institutions to set up periodic review processes for financial aid programs--in part because many scholarships are administered on a continuing basis year after year.

### **Application to Restricted Gifts**

Some race-conscious or race-exclusive financial aid programs are funded by restricted gifts from donors. Following review, and depending upon the terms of the restrictions, individual donors may need to be approached and asked to change specific gift terms to preserve the legal status of the scholarship [\[13\]](#). Where the donors of restricted funds are deceased, a probate court proceeding to modify the gift may be required. Where modification of the restricted gift is refused, whether by the donor or by the probate court, the institution may need to consider turning the restricted scholarship program over to totally private administration.

### **CONCLUSION:**

The basic legal principles in the recent U.S. Supreme Court decisions in the University of Michigan cases apply to race-conscious financial aid programs as well as admissions. Institutions wishing to continue or implement race-conscious financial aid programs will want to review their overall financial aid programs in light of the factors outlined above, while also carefully inventorying each individual scholarship they administer to ensure its terms pass constitutional muster. In light of the factors set forth by the Supreme Court, race-exclusive financial aid and scholarship programs pose a more difficult set of challenges than do programs

that use race simply as a "plus" factor, and may be more difficult to defend. Institutions will want to give these programs careful assessment. Some aspects of this issue are not well-settled, especially in light of the continuing efforts by advocacy groups noted earlier to bring race-conscious programs under further administrative or judicial scrutiny. Therefore institutions are well-advised to continue to be alert to further legal developments.

## FOOTNOTES

## RESOURCES FOR COUNSEL:

### Constitution and Statutes:

- [Fourteenth Amendment, U.S. Constitution](#)
- [Title VI of the Civil Rights Act, 42 U.S.C. §2000d \(race, color, and national origin\)](#)

### Regulations and Guidance:

- [34 C.F.R. Chapter 100 \(race, color, and national origin\)](#)
- [U.S. Department of Education policy guidance on race-targeted financial aid, 59 Fed. Reg. 8756 \(Feb. 23, 1994\)](#)
- U.S. Department of Education, Office for Civil Rights, "[Achieving Diversity: Race-Neutral Alternatives in American Education](#)" (2004) and "[Race-Neutral Approaches in Postsecondary Education: Innovative Approaches to Diversity](#)" (2003)

### Court Decisions:

- [Grutter v. Bollinger et al.](#), 123 S. Ct. 2325 (2003)
- [Gratz v. Bollinger et al.](#), 123 S. Ct. 2411 (2003)
- [Podberesky v. Kirwan](#), 38 F.3d 147 (4th Cir. 1994), cert. denied, 514 U.S. 1128 (1995)

### Additional Resources:

- [Race-Conscious Admissions and Financial Aid Programs](#), NACUA publication (Elizabeth Meers and William Thro; publication date May 2004)
- Alger, Jonathan & Snyder, Donna J. "[Donated Funds and Race-Conscious Scholarship Programs After the University of Michigan Decisions](#)" (NACUA CLE Workshop Outline, April 23, 2004)
- Dively, Mary Jo, "[Donated Funds and Race-Conscious Scholarship Programs After the University of Michigan Decisions](#)" (NACUA CLE Workshop Outline, April 23, 2004)
- "[Preserving Diversity in Higher Education: A Manual on Admissions Policies and Procedures After the University of Michigan Decisions](#)," Bingham McCutchen LLP, Morrison & Foerster LLP, Heller Ehrman White & McAuliffe LLP (2004)
- Coleman, Arthur L. & Scott R. Palmer, "[Diversity in Higher Education: A Strategic Planning and Policy Manual Regarding Federal Law in Admission, Financial Aid, and Outreach](#)," College Entrance Examination Board (2d ed. 2004)

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