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## BENEATH THE VEIL: COROLLARIES ON DIVERSITY AND CRITICAL MASS SCHOLARSHIPS FROM RAWLS' ORIGINAL POSITION ON JUSTICE

Chris Chambers Goodman

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# BENEATH THE VEIL: COROLLARIES ON DIVERSITY AND CRITICAL MASS SCHOLARSHIPS FROM RAWLS' ORIGINAL POSITION ON JUSTICE

*Chris Chambers Goodman\**

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### A Thought Experiment:

Imagine that you are beige. Everyone you know is beige, and everyone from the highest positions of power to the lowest depths of squalor, is beige. A directive comes down from the Supreme Ruler, mandating that everyone choose a color for compulsory skin tinting. What color would you choose? What meaning, if any, would you attach to skin color in those circumstances? When the tinting process has been completed, must a color hierarchy begin to emerge?

### I. Introduction

In his supremely influential work *A Theory of Justice*,<sup>1</sup> John Rawls identifies the "original position," in which all actors are behind a "veil of ignorance," such that no one knows what qualities, attributes, privileges, and abilities each person might hold.<sup>2</sup> This veil of ignorance as to differences provides the first level playing field, a vacuum even, from which all can discuss and debate issues of fairness and justice without any influence of self interest or self preservation.<sup>3</sup> Rawls posits that certain principles of justice would emerge from this position, and that those principles are eminently fair.<sup>4</sup>

There is a nascent debate on the fairness of race conscious financial aid, scholarships and other targeted financial resources available to students of color in institutions of higher learning. In *Grutter v. Bollinger*,<sup>5</sup> the United States Supreme Court determined that diversity is a compelling interest in education, which can justify race conscious university and law school admissions, and the Court identified some parameters for evaluating

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<sup>1</sup> JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

<sup>2</sup> *See id.* at 136–37 (explaining the assumption behind the original position is that the "parties are situated behind a veil of ignorance" where they "do not know certain kinds of particular facts").

<sup>3</sup> *See id.* at 139 (stating that because "no one knows his situation in society nor his natural assets, . . . no one is in a position to tailor principles to his advantage").

<sup>4</sup> *See id.* at 12 (stating "the fundamental agreements reached in [the original position] are fair").

<sup>5</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003) (finding that the University of Michigan Law School's race conscience admission policy did not violate the Equal Protection Clause). In *Grutter*, the Court considered an affirmative action plan used by the University of Michigan Law School. *Id.* at 315. Rather than using strict quotas, the school used an individualized approach by looking at the entire applicant and considering diversity as a factor. *Id.* The Court found that the school had a compelling interest in the educational benefits which would accompany diversity, and found that the plan was narrowly tailored to this goal. *Id.* at 343.

whether such a program is sufficiently narrowly tailored to satisfy the *Grutter* version of strict scrutiny.<sup>6</sup> Yet since *Grutter*, the debate persists in the financial aid aspect of university policies. Questions remain regarding whether universities can or should continue to use race conscious financial aid programs, scholarships and other financial assistance in efforts to foster, promote and maintain the diversity that now constitutes an acceptable pedagogical interest. For example, the Office of Civil Rights of the Department of Education (OCR) has begun investigating universities who maintain race conscious scholarship programs with circumscribed guidelines.<sup>7</sup> Other organizations, such as the Pacific Legal Foundation, have threatened litigation if race conscious programs are not voluntarily discontinued.<sup>8</sup> Many universities have succumbed to this pressure in the interests of avoiding conflicts with the Title VI federal funding requirements that provide some justification for curtailing or limiting race conscious scholarship programs.<sup>9</sup> While race conscious admissions programs are justified using diversity as a compelling interest, is there some fundamental difference that renders the pursuit of such programs unfair in the financial aid context?

This Article examines the inherent fairness of race conscious financial aid and scholarship programs within the analytical framework set forth by John Rawls. It considers the extent to which these policies would be

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<sup>6</sup> See *id.* at 334 (finding that a narrowly tailored program may not use a quota system but may consider race as a positive factor in reviewing an application).

<sup>7</sup> See, e.g., U.S. DEP'T OF EDUC., OFFICE OF CIVIL RIGHTS, *ACHIEVING DIVERSITY: RACE-NEUTRAL ALTERNATIVES IN AMERICAN EDUCATION* (2004) (outlining guidelines for several race-neutral alternatives in financial aid).

<sup>8</sup> See, e.g., PacificLegal.org, *Ending Preferences*, <https://www.pacificlegal.org/?mvcTask=topic&id=3> (last visited July 17, 2007) (explaining the organization's Operation End Bias, which uses litigation to stop California from using racial preferences in employment and education) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); see also JONATHAN ALGER, NATIONAL ASS'N OF COLLEGE AND UNIVERSITY ATTORNEYS, *RACE-CONSCIOUS FINANCIAL AID AFTER THE UNIVERSITY OF MICHIGAN DECISIONS* (2004), available at [http://www.nacua.org/nacualert/memberversion/RaceConsciousFinAid/RaceConscious\\_FinancialAid\\_Word3.doc](http://www.nacua.org/nacualert/memberversion/RaceConsciousFinAid/RaceConscious_FinancialAid_Word3.doc) (describing factors that institutions who wish to maintain race conscious financial aid must follow in order to pass constitutional muster).

<sup>9</sup> See, e.g., Kendra Hamilton, *Truth and Consequences: In the Michigan Aftermath, the Real Fight Begins as Local Institutions Work to Apply the Supreme Court's Ruling to Meet Their Campuses' Individual Needs and/or Restrictions*, BLACK ISSUES IN HIGHER EDUCATION, Sept. 25, 2003, at 1 (stating that numerous institutions, including Princeton, Massachusetts Institute of Technology, Iowa State University, University of Virginia, and University of Delaware all phased out race-conscious programs or opened them up to all students following the Supreme Court's decision in *Grutter v. Bollinger*); Jeffrey Salingo, *The Broad Reach of the Michigan Cases*, THE CHRONICLE OF HIGHER EDUCATION, Jan. 31, 2003, at 21 (noting that Rice University also discarded racial preferences in financial aid, only to see a remarkable decrease in the number of minority applicants. In the first year the university instituted the changes, the number of African-American students in the first year class dropped by 46%, while the number of Hispanic students dropped by 22%).

considered fair by rational actors in the "original position," which John Rawls used as a launching point for a discussion of justice and fairness.

Section II of this Article provides an overview of Rawls' theories of justice and fairness and identifies two corollaries on financial aid in higher education that would emerge from the original position behind the veil of ignorance. The first corollary relies upon the equality of opportunity notion of the traditional "need-based" financial aid rule and posits that it would be "just" to give those who need financial assistance to enroll in higher education whatever financial assistance they need. This section explains why the traditional merit rule would not be the preferred standard and explores alternative conceptions of merit. The second corollary contemplates that regardless of financial need, those groups underrepresented in higher education are entitled to additional assistance as well and further proposes that the additional assistance can take many forms, not the least of which is financial.

Section III of the Article examines how the two corollaries meet the standards of existing civil rights laws, including the Department of Education's guidelines on financial assistance; the *Podberesky*<sup>10</sup> decision of the Fourth Circuit, which provided a test for analyzing race based scholarship programs in 1994; and the *Grutter* and *Gratz*<sup>11</sup> cases on diversity as a compelling interest in higher education. This section also considers the extent to which discrimination currently exists in some financial aid and scholarship policies and practices and examines how any such current discrimination can be remedied using race conscious measures. The section concludes with a discussion of the acceptable parameters and the limitations of the diversity rationale in this context.

Section IV recommends a specific Diversity Scholarship Program with a Critical Mass Scholarship component, which would provide a stronger mechanism for achieving and maintaining racial and ethnic diversity in

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<sup>10</sup> *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994) (finding that the University failed to show that its programs were narrowly tailored to meet its objectives). In *Podberesky*, the court considered the merit-based scholarship program established only for African American students at University of Maryland at College Park. *Id.* at 151. Podberesky challenged this scholarship program because he was ineligible for consideration under the program because he was Hispanic even though he met all other requirements for consideration. *Id.* at 152. The court examined the University's goals and found that the scholarship program was not narrowly tailored to accomplish its objectives. *Id.* at 161.

<sup>11</sup> *Gratz v. Bollinger*, 539 U.S. 244 (2003) (finding that the point system used by the University of Michigan violated the Equal Protection Clause). In *Gratz*, plaintiffs challenged the University of Michigan's undergraduate admissions program. *Id.* at 257-58. Using a point system, the program gave 20 points to racial minorities. *Id.* at 257. The Court found that the program was not narrowly tailored to achieve the goal of diversity and found that it violated the Equal Protection clause. *Id.* at 276.

higher education. This section also examines the narrow tailoring factors from *Grutter*, *Podberesky* and other authorities, to demonstrate how this particular scholarship program not only would satisfy the *Grutter* version of strict scrutiny but also could survive a challenge presented to the current Supreme Court roster. The Article concludes by summarizing how the Diversity Scholarship Program complies with Rawls' theories of justice and fairness.

## *II. John Rawls' Theory of Justice and the Corollaries That Likely Would Emerge*

### *A. A Brief Synopsis of Rawls' Theory of Justice*

John Rawls' influential work, *A Theory of Justice*, provides useful tools for analyzing the permissible parameters of race conscious financial aid programs in a post-*Grutter* world. His conception of the "original position" is a hypothetical situation, which he defines as the "appropriate initial status quo."<sup>12</sup> Rawls assumes an original equality of persons in this pre-existence state of being.<sup>13</sup> From this position of equality behind the "veil of ignorance," the parties discuss and debate principles of justice.<sup>14</sup> This veil "ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances."<sup>15</sup> Rawls postulates that "the fundamental agreements reached in [the original position] are fair."<sup>16</sup> From this original position, Rawls suggests that two principles of justice necessarily would emerge.

The first principle of justice that would result is that "each person has equal rights to the most extensive basic liberty compatible with similar liberty for others."<sup>17</sup> Rawls' second principle of justice states that "social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all."<sup>18</sup> This theory relies upon "serial order,"

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<sup>12</sup> RAWLS, *supra* note 1, at 12.

<sup>13</sup> *See id.* ("Among the essential features of this situation is that no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities.").

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* "Since all are similarly situated and no one is able to design principles to favor his particular consideration, the principles of justice are the result of a fair agreement or bargain." *Id.*

<sup>17</sup> *Id.* at 60.

<sup>18</sup> *Id.*

with "the first principle prior to the second," he states.<sup>19</sup> "This ordering means that a departure from the institutions of equal liberty required by the first principle cannot be justified by, or compensated for, greater social and economic advantage."<sup>20</sup> Thus, equal rights to the most extensive yet compatible basic liberty must always be that first goal. Nevertheless, there will be social and economic inequalities resulting from an equal right to basic liberty due to the "unequal faculties" of men.<sup>21</sup> For instance, if all persons are free to engage in commerce, those who are better at selling goods, or making deals, eventually may end up with more money and higher social status. Social and economic inequalities result from equal liberties because the input (innate or learned talent or skill) is unequal. For this reason, the second principle is necessary to help guide the inevitable situation of inequality.<sup>22</sup>

In analyzing the second principle, Rawls explains that "there is no injustice in the greater benefits earned by a few provided that the situation of persons not so fortunate is thereby improved."<sup>23</sup> In fleshing out the definitions of the phrases "everyone's advantage" and "open to all," he refines the second principle to reflect that the social and economic inequalities must be "(a) to the greatest benefit of the least advantaged and (b) attached to offices and positions open to all under conditions of fair equality of opportunity."<sup>24</sup>

### *B. What Would Be the Original Position on Financial Aid and Scholarships?*

If we begin from Rawls' "original position," would the same principles of justice specifically apply to financial aid and scholarship allocations for underrepresented groups? Some commentators have suggested that Rawls has no applicability to questions such as this because his theory addresses "fair institutional structures, not the fairness of

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<sup>19</sup> *Id.* at 61.

<sup>20</sup> *Id.*

<sup>21</sup> See THE FEDERALIST NO. 10 (James Madison) 78 (New American Library, 1961) (stating "the protection of these [unequal] faculties is the first object of government").

<sup>22</sup> RAWLS, *supra* note 1, at 63 (explaining the "serial ordering of the principles" does not "permit exchanges between basic liberties and economic and social gain"). "The general conception of justice imposes no restrictions on what sort of inequalities are permissible; it only requires that everyone's position be improved." *Id.* at 62.

<sup>23</sup> *Id.* at 15.

<sup>24</sup> *Id.* at 83.



individual distributional choices."<sup>25</sup> Others suggest that individuality is a central concern for Rawls.<sup>26</sup> One scholar suggests that "Rawls framework is particularly *à propos* for analyzing the claims of affirmative action opponents."<sup>27</sup> He notes the following: "[The] claim is that race consciousness violates a fundamental understanding of equality and justice. Rawls provides us with a mechanism for evaluating that claim."<sup>28</sup>

Rawls provides some clear examples of individual conduct in the fairness calculation, which suggest that his theory does apply to some individual conduct. For instance, Rawls explains how to ensure that an individual divides a cake equally: tell him that he must divide the cake into twelve slices, and that he will receive the twelfth slice after everyone else has selected his or her own.<sup>29</sup> In this situation, any bigger pieces mean some pieces will be smaller, and assuming everyone likes cake, the smallest piece will be the last one left.<sup>30</sup> If our cake cutter likes cake, "he will divide the cake equally, since in this way he assures for himself the largest share possible."<sup>31</sup> If he makes any piece that is less than 1/12<sup>th</sup> of the whole, that is surely the piece that will be left for him.

Panagia likely would disagree with this application of Rawls' theory, explaining it is just as likely that under the veil of ignorance "lurk both the

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<sup>25</sup> Vicki Been, *What's Fairness got to do with it? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1048 (1993); see also Giancarlo Panagia, *Tot Capita Tot Sententiae: An Extension or Misapplication of Rawlsian Justice*, 110 PENN. ST. L. REV. 283, 284, 287-300 and accompanying notes (2005) (discussing Rawls' definition of justice and applying it to "the world of environmental injustice created in the poor and minority neighborhoods of our nation").

<sup>26</sup> See Guy-Uriel E. Charles, *From Brown to Grutter: Affirmative Action and Higher Education in the South, "Affirmative Action and Colorblindness from the Original Position"*, 78 TUL. L. REV. 2009, 2023 (2004). Charles explains:

At first glance, Rawls' theory appears to be profoundly individualistic. He notes that '[e]ach person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override.' Justice, Rawls instructs us, does not allow the few to subsidize the welfare of the many. Consequently, Rawls's [sic] theory is a very rights-oriented theory. Individuals possess certain basic political rights that cannot be curtailed. However, Rawls's theory is not completely individualistic. Rawls maintains that although 'justice as fairness begins by taking the persons in the original position as individuals, or more accurately as continuing strands, this is no obstacle to explicating the higher-order moral sentiments that serve to bind a community of persons together.' Rawls notes that the 'primary subject of the principles of social justice is the basic structure of society, the arrangement of major social institutions into one scheme of cooperation.' Thus, it is social institutions that are the aim of the principles of justice.

*Id.* at 2023-24 (quoting RAWLS, *supra* note 1, at 3-4, 54, 55).

<sup>27</sup> *Id.* at 2027.

<sup>28</sup> *Id.*

<sup>29</sup> RAWLS, *supra* note 1, at 85.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

danger of a free-for-all and a tragedy of the commons" in which rational actors would gamble on ending up better off, and therefore might choose an unequal distribution that does not maximize the position of the least well off.<sup>32</sup> Under Panagia's view, the cake cutter may choose an uneven distribution of cake, gambling that someone either will not notice, or does not like cake as much and will choose the smallest piece.

Professor Mari Matsuda has an interesting critique, explaining that "[g]iven the limited knowledge Rawls would attribute to deliberators in the original position, their choice does seem inevitable."<sup>33</sup> Matsuda continues: "This inevitability, however, arises from the very abstraction Rawls created. It is not a separate truth."<sup>34</sup> In fact, Matsuda posits that the reason one common conception of justice emerges from behind the veil of ignorance is simply that "[t]here is really only one person on the abstract side of the veil of ignorance, because everyone there has the same limited information."<sup>35</sup> Matsuda's objection is that: "[U]navoidably the person behind the veil is John Rawls. Abstraction never achieves the clarity of vision that Rawls promises."<sup>36</sup> Instead, the critique continues, Rawls has concocted a theory based on assumptions that are so constricted that they cannot explain normative behavior.<sup>37</sup>

While no one can provide a definite answer to the question of which principles would be considered just in the original position under the veil of ignorance, if we proceed from Rawls' assumption that equality is a more rational choice under the veil of ignorance, then the cake cutter analogy holds true. Shifting from cake to education, if none of the actors knew what her academic aptitude, abilities, or interests would be, and if none of the actors knew what her financial resources, wealth, economic class and level of frugality would be, two corollaries or refinements of Rawls' second principle likely would emerge.

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<sup>32</sup> See Panagia, *supra* note 25, at 287 and accompanying notes (internal citations and footnotes omitted) (explaining Rawls' "biggest misconception . . . is the drive of each representative").

<sup>33</sup> Mari J. Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice*, 16 N.M. L. REV. 613, 616 (1986).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 617.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

### C. The First Corollary

So let us examine the first corollary, by assuming Rawls is correct in stating that under the veil of ignorance, without knowing one's abilities, aptitudes and propensities, one's interest would simply be to maximize the position in which one may end. Because that position may be the worst position, one's incentive is to maximize the lot of the worst or least well off in society. Applying this summary to the area of higher education, the least well off could be any of the following: (a) those that do not have the intelligence, (b) those that do not have the financial resources, or (c) those that do not have the interest, to pursue higher education. A rational actor, who may not have the intelligence to pursue higher education, would shy away from a traditional merit based system. Someone else may not have the interest, and so our rational actor likely would shy away from any sort of mandatory education program. Others may not have the financial resources, and thus our rational actor likely would avoid a program where access to education was contingent upon ability to pay.

This rational actor likely would embrace a program that provided financial assistance to those who needed it. This is the basis for the first corollary: that it would be "just" to provide financial assistance for those who need financial assistance to enroll in higher education. Providing need based financial aid, such that those with the most need get the most aid, satisfies the first clause of Rawls' revised formulation of the second principle as an economic inequality that provides the greatest benefit to the least (financially or economically) advantaged; therefore, it is a corollary that is likely to emerge.

Does this corollary satisfy the fairness principle? It is fair to give more money to those who need it to attend school and to decline to give money to those who have sufficient financial resources to attend school because, in Rawls' view, "there is no injustice in the greater benefits earned by a few provided that the situation of persons not so fortunate is thereby improved."<sup>38</sup> Here, those not so fortunate in terms of financial resources would be improved by permitting them to pursue the goal of obtaining higher education. One commentator agrees, stating: "[a] simple Rawlsian criterion might give compensatory resources to those who are least advantaged even if that ran into problems of individual abilities, interests, and motivation,

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<sup>38</sup> RAWLS, *supra* note 1, at 15.

leading back to individual characteristics and optimal individual behavior."<sup>39</sup> Those who were more fortunate in terms of finances would not be harmed because they can use their own money to afford college if that is the choice that they want to make, assuming they have the interest and aptitude as well. In fact, many schools operate on this principle already in their allocations of financial aid subsidies, though there is significant variance in the price students actually pay, depending on the wealth and ranking of the educational institution.<sup>40</sup> Thus, on balance, a need-based financial aid rule satisfies the fairness principle.

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<sup>39</sup> Gordon Winston, *Economic Stratification and Hierarchy Among U.S. Colleges and Universities*, at Williams College, Nov. 2000, DP No. 58, at 26. The author states:

[T]he average student attending a top decile private college gets a subsidy of almost \$24,000 a year while the average student in a school at the bottom of the private sector gets about \$3,000. It is significant, too, that the range of subsidy differentials is much narrower in the public than in the private sector, perhaps predictably. Students in the top decile in the private sector get a subsidy that's almost eight times that given in the bottom public decile; students in the top public decile get a subsidy that's a bit less than three times that given in the bottom decile.

*Id.* at 7. Later, he states: "Indeed that, probably, is the most dramatic single measure of disparity in Table 1: that the student going to—to take the extremes—a top decile public institution pays twelve cents for a dollar's worth of educational resources while the student going to a bottom decile private school pays 71 cents." *Id.* at 9.

<sup>40</sup> Catharine Hill, Gordon Winston, and Stephanie Boyd, *Affordability: Family Incomes and Net Prices at Highly Selective Private Colleges and Universities*, at Williams College, Jan. 2004, No. 66r. The authors state:

Affordability, then, is judged by the net price (net tuition) that students actually pay for a year of college, relative to their family incomes. It's been popular in the press to report schools' sticker prices—the maximum price they charge—relative to US median family income, implying that a family at that level will spend a significant fraction of its total income to send one child to college—66% at the typical school in this study. But that's highly misleading because a student from a median income family won't pay the sticker price at a school with need-based financial aid—his average *net* price at these selective schools in 2001-02, in fact, was \$11,556, which is just 34% of their average sticker price and 23% of the US median family income.

*Id.* at 4 (emphasis in original).

Our data, then allow us to compare the price each student actually paid, net of financial aid grant, with his family's income. So, on the one hand, we can report the net prices paid by low income students and how they compare with their families' incomes and, on the other, we can describe schools' pricing policies across the range of family incomes as the prices charged their students differ for different incomes.

*Id.* The study notes that the "least severe increase in income share with rising income is at the coed colleges, but even there, low income students pay 36% of their family incomes, on average, while lower-middle income students pay 22% and that share persists to the highest incomes." *Id.* at 15. The authors

*D. What About Traditional Notions of Merit for Financial Aid Allocations?*

Why would the rational actor avoid the traditional notions of merit as a criterion for awarding financial aid? While some commentators would suggest that the rational actor may choose to gamble,<sup>41</sup> it is more likely that she would hedge her bets in the same way that the cake cutter did. Because that actor would not know her place in terms of intelligence, she would want to maximize the opportunity available to the last in line. Thus, she would want to expand the traditional conception of merit to include a variety of skills, talents and abilities, to put her in the best possible position once she learns what talents she will possess.

On the issue of merit and preferences, Ronald Turner describes a bake sale protesting affirmative action policies where white male students were charged a dollar for a donut, with the price dropping a quarter for women, another quarter for Latinos and another quarter for African Americans.<sup>42</sup> The point of the story was to illustrate "the resentment and anger felt by many opponents of affirmative action" when others get benefits seemingly without any regard for their individual merits.<sup>43</sup> Another point of the story is more subtle: those who cannot afford to pay a dollar for the donut should get the donut for less, but how much one can afford is not solely, or even closely, based on race or ethnicity or gender.<sup>44</sup>

If we evaluate the bake sale from a financial aid perspective, it suggests that students of color pay less for the same good—the benefits that

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also note that the "most direct effect of wealth on pricing, then, is simply that the wealthier school can set a lower average net price and, other things being equal, offer the lowest prices to its low income students. That's the direct connection between institutional wealth and net price." *Id.* at 18. Winston also notes: "It's interesting—to return to the fact noted above—that there appears to have been a rather Rawlsian protection of students at the bottom of the public sector hierarchy during the tax revolt of the '80s as their subsidies were kept high and their price/cost ratios were kept low." Winston, *supra* note 39, at 26.

<sup>41</sup> See Panagia, *supra* note 25, at 287 and accompanying text (positing that Rawls' theory of an emergent egalitarian social contract from behind the veil of ignorance fails to account for the possibility that the rational actors could gamble on the likelihood of their own success and therefore choose to maximize the income of the richest members of society rather than distribute wealth equitably).

<sup>42</sup> See Ronald Turner, *The Too-Many-Minorities and Racegoating Dynamics of the Anti-Affirmative-Action Position: From Bakke to Grutter and Beyond*, 30 HASTINGS CONST. L.Q. 445, 506–07 (2003) and notes 298–300 (relating an anecdote about a controversial bake sale on the campus of Southern Methodist University, meant to illuminate the divisive nature of affirmative action, where the price of baked goods was determined by the race and sex of the customer).

<sup>43</sup> *Id.* at 507 and accompanying notes.

<sup>44</sup> Although, on average, women earn less than men, and people of color earn less than Anglos when working in the same positions, so perhaps there is some more principled basis for this price difference, which would be beyond the scope of this article.

flow from a diverse student body—for which the Anglo students pay more.<sup>45</sup> The bake sale also recognizes the explicit but inaccurate dichotomy in race conscious aid—that those for whom race is not a component of the selection criteria often are considered to be more "deserving" than those for whom race is such a component.

### *1. Merit Aid Diminishes Diversity*

Many schools and more than a dozen states have merit-based financial aid programs, which have resulted in a shift of funds away from poor and minority students towards more affluent white students.<sup>46</sup> Orfield explains that when the money for education is "from an extremely regressive tax—a state lottery that drew money disproportionately from poor and minority players—blacks and Latinos would end up paying a substantial part of the cost of educating more affluent white students, who would have gone to college even if they had not had the additional financial incentive."<sup>47</sup>

Orfield articulates several reasons why need based aid is preferable to merit based aid for those interested in preserving access to higher education for people of color. Primarily, financial aid is a way to "make certain that we do not decide access to college on the basis of family income and wealth."<sup>48</sup>

A second reason to prefer need based aid over merit based aid is commonly stated as "the students with the highest scores and grades are usually from better-off families and are most likely to go to college without any aid."<sup>49</sup> "Furthermore," he states, "the 'neutral' measures of merit are

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<sup>45</sup> A polarizing argument can be made that the Anglos contribute less to the benefits that flow from a diverse student body, and absorb more from those benefits, and therefore their increased consumption of the good justifies the higher price they must pay.

<sup>46</sup> GARY ORFIELD, *Foreword*, in *WHO SHOULD WE HELP? THE NEGATIVE SOCIAL CONSEQUENCES OF MERIT AID SCHOLARSHIPS*, xi (Donald E. Heller & Patricia Marin, eds., 2002).

<sup>47</sup> *Id.* at xi.

<sup>48</sup> *Id.* at xii. Orfield continues:

[i]n a society where all the growth of income goes to those with education beyond high school and equal access to education is the only tool we have for making things fair, we have to make college possible for all who can benefit. Otherwise, we may lock in inequality from generation to generation and perpetuate the kinds of deeply rooted class structures that have troubled older societies. In our society, of course, these structures would tend to perpetuate racial inequality as well.

*Id.*

<sup>49</sup> *Id.*

actually very strongly related to unequal family background."<sup>50</sup> The third reason is the rise in tuition costs compared to family income over the past two decades.<sup>51</sup> For these reasons, as more fully described in the report through an analysis of various merit aid programs, Orfield concludes: "[i]t is clear that many of the goals of these programs, especially those that involve increasing access to college, are not being met. Instead, these programs are increasing already existing inequities in higher education."<sup>52</sup> He continues: "[a]s brought to light by these studies, merit aid programs are, at best, not meeting their promises. At their worst, they are locking an increasing number of students out of college."<sup>53</sup>

In her contribution to Orfield's report titled *Merit Scholarships and the Outlook for Equal Opportunity in Higher Education*, Patricia Marin explains:

[T]he twelve states that have broad-based merit scholarship programs with no income cap awarded a combined \$863 million in merit awards during the 2000-01 academic year, almost three times the \$308 million these states provided in need-based aid. Unfortunately, because of the definitions of 'merit' employed, as well as the logistics of these programs, many of the students who have the greatest financial need are passed over, effectively increasing existing disparities in college participation for minority and low-income students.<sup>54</sup>

Marin concludes, "the students least likely to be awarded a merit scholarship come from populations that have traditionally been underrepresented in higher education."<sup>55</sup> Marin admits that more information is needed.<sup>56</sup> She recognizes that colleges and universities are

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at xiii.

<sup>53</sup> *Id.*

<sup>54</sup> Patricia Marin, *Merit Scholarships and the Outlook for Equal Opportunity in Higher Education*, in WHO SHOULD WE HELP? THE NEGATIVE SOCIAL CONSEQUENCES OF MERIT AID SCHOLARSHIPS, 111, 113 (Donald E. Heller & Patricia Marin, eds. 2002).

<sup>55</sup> *Id.* at 114.

<sup>56</sup> *Id.* She explains that:

[W]e need to know more about these effects. While these studies increase our understanding about the merit aid programs examined, additional research is needed on specific student populations as well as other state merit aid programs not included in this report. The reality of higher education is that there is not room for ill-conceived policies that do more harm than good, no matter how popular they may be. The future of our youth, and ultimately our society, is at stake. Policies must focus on expanding access and developing the talent of *all* our future citizens. This means that policymakers must

aware of the importance of valuing various criteria in deciding to admit applicants.<sup>57</sup> Such criteria include high school record, extra-curricular activities, teacher recommendations, essays and test scores.<sup>58</sup> In this way, she suggests, a range of criteria should be used in giving merit scholarships.<sup>59</sup>

The reliance on merit aid not only results in a disparity between high and low income students but also in racial stratification as well. The Harvard Civil Rights Project report also evaluated programs in Florida and Michigan.<sup>60</sup> The authors note that:

[S]ignificant achievement gaps between white and Asian American students on one hand, and Hispanic and African American students on the other, and between high SES students and low SES students, have been identified. These gaps persist regardless of what specific learning outcome is measured, or whether the analysis is conducted at the level of individual students within schools or at the level of the schools themselves.<sup>61</sup>

In studying scholarship award distributions, this study confirmed Orfield's point that more scholarships "are going to students in high schools with higher college-participation rates (before implementation of the merit scholarship programs)."<sup>62</sup> Thus, the authors conclude that merit-based scholarships are likely to have a lesser impact on college access as compared to need-based scholarships.<sup>63</sup>

Another chapter in this report reached a similar conclusion: that students given merit-based scholarships are unlikely to be members of

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take additional factors into consideration in using funds that are going to merit aid programs.

*Id.* (emphasis in original).

<sup>57</sup> *Id.* at 115.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 115–16.

<sup>60</sup> Donald E. Heller, & Christopher J. Rasmussen, *Merit Scholarships and College Access: Evidence from Florida and Michigan*, in WHO SHOULD WE HELP? THE NEGATIVE SOCIAL CONSEQUENCES OF MERIT AID SCHOLARSHIPS, 25, 27 (Donald E. Heller & Patricia Marin, eds. 2002).

<sup>61</sup> *Id.* at 30.

<sup>62</sup> *Id.* at 33.

<sup>63</sup> *Id.*; see also Susan Dynarski, *Race, Income and the Impact of Merit Aid*, in WHO SHOULD WE HELP? THE NEGATIVE SOCIAL CONSEQUENCES OF MERIT AID SCHOLARSHIPS, 73, 87 (Donald E. Heller & Patricia Marin, eds. 2002) (asking whether merit aid widens racial and economic gaps in college attendance or whether the peculiarities of the Georgia program to blame for this effect). She answers that "the many low-income youth who were not eligible for HOPE [merit scholarships in Georgia] would have seen their schooling costs *increase*, since they faced increases in tuition prices and cuts in grants but received no countervailing benefit from the program." *Id.* (emphasis in original).



populations who have been underrepresented in higher education.<sup>64</sup> The authors explained that:

As these [merit] programs crowd out need-based scholarship programs, which traditionally have focused their awards on students who required financial assistance to attend college, it is likely that college access among lower income students will suffer. Merit scholarship programs are likely to exacerbate, rather than help remedy, college enrollment gaps in the United States.<sup>65</sup>

The gap in enrollment can be directly addressed through the second corollary as described in Section E, *infra*.<sup>66</sup>

## 2. *Even Among the Elite Universities, Merit Based Aid Diminishes Diversity.*

Through the 1980s, The Overlap Group was a financial aid consortium of the Ivy league schools, seven sister colleges, Amherst, Williams, MIT and a few others, who had an agreement to cooperate on need-based financial aid guidelines.<sup>67</sup> William Bowen, the former President of Princeton, had testified that low income students would suffer if the cooperation was prohibited, and then diversity would diminish as a result. Nevertheless, the Department of Justice filed a lawsuit, accusing the Overlap of operating an illegal cartel. The other defendants settled, and MIT took the case to trial. Roger Banks, of Harvard's Admissions office, explains that "the climate is now riddled with suspicion."<sup>68</sup> The article goes on to state: "[c]learly the academic need rule was being eroded by consideration of academic merit as well as racial consideration. Yet all the institutions involved persisted in their denials that financial aid awards were based on decisions other than academic need."<sup>69</sup>

All of this means less aid for the less "meritorious," and less aid for the more needy, which can result in less diversity. Perhaps the Ivy League Schools will begin to offer merit based scholarships now that the Overlap can no longer meet to conform financial aid awards to students admitted to

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<sup>64</sup> Heller & Rasmussen, *supra* note 60, at 35.

<sup>65</sup> *Id.*

<sup>66</sup> See *White v. Engler*, 188 F. Supp. 2d 730 (E.D. Mich. 2001) (challenging the legality of racial disparities in scholarship awards in Michigan).

<sup>67</sup> *The New Bidding War for High-Scoring Students Causes Selective Colleges to Be Less Diverse*, J. OF BLACKS IN HIGHER EDUC., No. 30, 15–16 (Winter 2000–2001) [hereinafter *New Bidding War*].

<sup>68</sup> *Id.* at 16.

<sup>69</sup> *Id.*

more than one Ivy league school. According to Jim Tilton, Yale's director of undergraduate financial aid:

[R]ecent differences between financial aid offers to students accepted at Yale and at other Ivy schools suggest that the price wars the old system was designed to avoid may already be at hand. 'Some of the packages I've seen weren't based on need but on merit.' He says flatly. 'Things have changed in the Ivy group.'<sup>70</sup>

Another article notes that since the discontinuation of Ivy Overlap in the early 1990s, significantly fewer students of color have enrolled at previously participating schools.<sup>71</sup> Another study reveals an interesting twist on merit and need based aid in the aftermath of the Overlap group meetings, finding that before the antitrust lawsuit, "100 points on the verbal SAT generated an increase in grants of 303 dollars" while "after the antitrust action, 100 points on the verbal SAT generated 884 dollars in grant money."<sup>72</sup> Hoxby also notes that "need calculation became slightly more generous for students with higher scores."<sup>73</sup> One article describes the conclusions of Professor Hoxby's study as follows:

[T]he amount of aid available to poor students remained about the same. At the same time, the amount of aid available to middle- and upper-middle class students grew substantially. Since the halt of the Overlap meetings, tuition revenues have continued to rise. Thus it is clear that the schools were enrolling more students who were able to pay all or part of their comprehensive fees.<sup>74</sup>

The article further describes Professor Hoxby's ultimate conclusion as follows:

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<sup>70</sup> Marc Wortman, *Can Need-Blind Survive*, YALE ALUMNI MAGAZINE, Oct. 1993, available at [www.yalealumnimagazine.com/issues/93\\_10/admissions.html](http://www.yalealumnimagazine.com/issues/93_10/admissions.html).

<sup>71</sup> Elbert L. Robertson, *Antitrust as Anti-Civil Rights? Reflections on Judge Higgenbotham's Perspective on the "Strange" Case of United States v. Brown University*, 20 YALE LAW & POL'Y REVIEW 399, 423 (2002).

<sup>72</sup> Caroline M. Hoxby, *Benevolent colluders? The Effects of Antitrust Action on College Financial Aid and Tuition* 33 (Nat'l Bureau of Econ. Research, Working Paper No. 7754, 2000), <http://www.nber.org/papers/w7754> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

<sup>73</sup> *Id.* at 34.

<sup>74</sup> *New Bidding War*, *supra* note 67, at 16.

[I]f the trend continues, the number of poor students who are able to attend these elite schools will decrease significantly. According to Hoxby, these schools may continue to admit just as many blacks as they have in the recent past. But these students are more likely to be middle-class blacks from suburbia rather than African Americans from the rural South or from low-income families in the inner city.<sup>75</sup>

This increase in generosity suggests that merit is playing a role in financial aid determinations among the "Overlap" colleges, which include Ivy League schools.<sup>76</sup> At the same time, the rate of increase of Latino and African American representation slowed, though an increase still was noted.<sup>77</sup>

Nevertheless, some colleges are holding fast to the policy of not awarding merit-based awards.<sup>78</sup> Rawlings, as president of Cornell, chaired a group of presidents from 28 leading colleges, who:

[R]eaffirmed their commitment to provide financial aid based on financial need and endorsed a comprehensive set of principles for the fair determination of a family's contribution to the cost of securing an undergraduate education. The group decided: most fundamental of these principles is that financial need should be the principal determinant of institutional aid awards.<sup>79</sup>

<sup>75</sup> *Id.*

<sup>76</sup> See Wortman, *supra* note 70 (stating that "Merit scholarships may not be limited to non-Ivy schools for long," and quoting financial aid officers' allegations that some financial aid packages offered to students from other Ivy League schools appear to be based on merit, rather than need, given the financial information submitted by the applicant to both Ivy league schools).

<sup>77</sup> Hoxby, *supra* note 72, at 35.

<sup>78</sup> See *Rawlings-Led Group Affirms Commitment To Need-Based Financial Aid*, CORNELL CHRONICLE, July 12, 2001, at 1, available at [http://www.news.cornell.edu/chronicle/01/7.12.01/568\\_aid.html](http://www.news.cornell.edu/chronicle/01/7.12.01/568_aid.html) (describing the commitment of 28 leading colleges and universities to making need-based, rather than merit-based financial aid determinations).

<sup>79</sup> *Id.* at 1. The article goes on to say:

In 1994, Congress created an antitrust exemption (Section 568 of the Improving American's Schools Act) that sanctioned efforts by eligible institutions, i.e., those practicing need-blind admissions, to discuss and agree upon common principles of financial aid need-analysis. In enacting Section 568, Congress recognized the value of need-based aid and the fact that students will benefit from colleges and universities working together to develop policies that enhance access to higher education. In early 1999, the 568 Presidents' Working Group, an ad hoc group of college and university presidents, was formed under the umbrella of this general legislation. These presidents share a belief in the primacy of need-based financial aid, and a common concern about the steady erosion of public confidence in a financial aid system that aspires to be both understandable and fair. All of their institutions practice need-blind admissions. The group, formed initially under the leadership of Rawlings, who continues as its chair, and then-President Harry Payne of Williams College, limited the purview of its work to

The federal government may provide an incentive for universities to abide by a need-based rule. Federal financial aid guidelines encourage (how strongly we need to determine) universities to adhere to a requirement that any student receiving federal aid must receive only need-based, and not merit aid.<sup>80</sup> Professor Hoxby writes:

It is worth noting that the federal government encourages colleges to use need-based aid by dictating that any student who receives one dollar of federal aid must *only* receive need-based aid. This rule effectively puts a tax on any college that make[s] extensive use of merit aid even though the population of students it serves is somewhat needy.<sup>81</sup>

To the extent that the need-based rule continues to be widely used, diversity will not diminish as much as under the traditional merit rule. However, because many consider merit to be the fairest way to allocate scarce educational resources in the affirmative action debate, it is worth exploring how alternative views of merit can satisfy the principles of justice.

#### *E. Alternative Conceptions of Merit and the Second Corollary*

In the *Grutter* case, the University of Michigan addressed the issue of pursuing both excellence and diversity, arguing that an either/or choice was no choice at all.<sup>82</sup> The Court agreed that the University's academic freedom permitted it to strive to achieve both excellence and diversity.<sup>83</sup> Similarly, allocating too much financial aid assistance into merit-based aid and away from need-based aid may erode that quality of diversity and excellence that elite universities such as Michigan wish to continue to achieve. So the next question becomes: can we define merit in a way that does not diminish socio-economic and racial diversity?

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strengthening need-based aid programs. Their recommendations are designed to bring greater clarity, simplicity and fairness to the process of assessing each family's ability to pay for college.

*Id.*

<sup>80</sup> See generally, Hoxby, *supra* note 72.

<sup>81</sup> Hoxby, *supra* note 72, at 9.

<sup>82</sup> Brief for Respondents at 13, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241); University of Michigan Brief, 2003 U.S. S. Ct. Briefs LEXIS 157 at 13.

<sup>83</sup> *Grutter*, 539 U.S. at 309.

If we return to the "original position" with a rational actor beneath the "veil of ignorance,"<sup>84</sup> that actor likely would choose as broad a chance as possible for being included in the distribution of educational resources. Thus, she would embrace a notion of merit that includes all types of talents and skills, thereby maximizing her chances of possessing one of whatever talents happened to be favored. Now, one could say that she would deny a merit-based rule altogether, regardless of how broadly merit was to be defined, in the interest of preserving the widest possibility for qualifying in case she had no talents or skills at all. However, elite institutions will find a way to distinguish applicants, and thus it is unlikely that a no-merit rule would survive for long.

In effect, universities have always provided differential pricing to attract the different types of students that they want to enroll in their schools.<sup>85</sup> Some of the most sought after types of students include: those who will be good in the classroom, those who will be illustrious or wealthy alumnae, students who look good in the brochures, those they want for the orchestral or drama programs, and athletes to take their teams to victory. Academic scholarships are simply another way to get good students to attend one school instead of another.<sup>86</sup> Athletic scholarships are simply another way to get students who are great athletes to attend one school instead of another.<sup>87</sup> Need-based aid is simply another way to get students who are less wealthy to attend one school instead of another. Race-based scholarships are simply another way to provide a financial incentive for students of color to attend one school, instead of another. Thus, every bit of scholarship and financial aid is about diversity in one form or another, and the broader the definition of diversity, the more inclusive these financial assistance policies can be.

### 1. Merit as Value, Not Dessert

The story of the bake sale, from Section D above, has broader implications for race-based scholarships and financial aid, especially when we revise the hypothetical to be more descriptive of reality. The question is

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<sup>84</sup> See generally, RAWLS, *supra* note 1.

<sup>85</sup> See Hill et al., *supra* note 40, at 2–3 (considering charitable pricing implicit in need-based grants); see also Thomas J. Graca, *Diversity—Conscious Financial Aid After Grutter and Gratz*, 34 J.L. & EDUC. 519, 522–25 (2005) (discussing how colleges and universities employ cost-benefit analysis to discount their tuition and fees based on their motivation to retain prospective students).

<sup>86</sup> See Graca, *supra* note 85, at 522 (explaining that merit-based scholarships are often based on a school's need for a diversely-talented student body).

<sup>87</sup> *Id.*

not how much each person pays for a donut, but rather, how much each person (representing a graduate school, for instance), is willing to pay for a particular type of donut. If your school has an abundance of cream-filled donuts, you may not want any more, even though they are still your favorite. As a result, your school may buy more cream-filled donuts only if they are inexpensive, and you have some room left for them. On the other hand, the chocolate cake donuts with chocolate icing are the ones every school wants, so you are willing to pay more for that kind of donut. Since the cream-filled donuts still are your favorite, the best tasting donuts in your view, then you will resume buying the cream-filled donuts if the chocolate donuts get too expensive. The cream-filled donuts are no more "deserving" of purchase, and the chocolate donuts are no less "deserving" of purchase. It is all a matter of taste and preference. In much the same way, universities can, and do, set their "price points" for the students they want to enroll based in part on taste and preference.<sup>88</sup>

Maurice Dyson explains an alternative view of merit as "value," which permits diversity factors to be considered for the value to the university as well.<sup>89</sup> He states that:

The notion of 'merit' as one's demonstrated ability or achievement is but one basis for judicial deference to a university-driven mission where the value of diversity is an alternative, but legitimate, aim. As opposed to merit, the notion of 'value' in this context signifies a sense of worth in usefulness or importance to the university.<sup>90</sup>

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<sup>88</sup> The donut analogy bears out in the way need-based financial aid dollars are allocated, because schools with more income from wealthier students can afford to pay more (in scholarship aid) to non-wealthy students. As an illustration of how universities allocate financial aid dollars, Hill, Winston & Boyd note:

In the extreme, a school with only a few low and lower-middle income students can afford to be very generous to them, giving them low net prices, while a school with a higher proportion of low income students could be so generous only at a higher cost. A high share of high income students cuts the cost of a progressive pricing policy not so much by providing more revenues, but more importantly by reducing the draw by low income students on limited non-tuition resources.

Hill et al., *supra* note 40, at 19.

<sup>89</sup> See Maurice Dyson, *Towards an Establishment Clause Theory of Race-Based Allocation: Administering Race-Conscious Financial Aid after Grutter and Zelman*, 14 S. CAL. INTERDISC. L.J. 237, 261 (2005) (noting how universities value diversity in their admissions and financial aid determinations).

<sup>90</sup> *Id.* at 261.

Dyson then explains that, to the extent that "the intrinsic conception of merit exists entirely in the domain of individual capacity to leverage academic ability or achievement, it is an incomplete picture."<sup>91</sup> If we reconceptualize merit to include adding value to the educational institution, then all financial aid and scholarships become "merit-based," or conversely, even merit aid will be considered "value-based" instead.

Author Thomas Graca also suggests this step.<sup>92</sup> Graca begins by identifying a crucial difference between the way students perceive merit aid—as rewards for their academic achievements in the past—with how colleges perceive merit aid—for self-interested reasons, as an inducement for students with particular skills, talents and attributes to attend one university over some other.<sup>93</sup> For universities, strong athletes increase the likelihood of championships, as well as "media and licensing rights," and strong academic credentials "bolster" the universities' reputations.<sup>94</sup> Graca summarizes the bottom line as follows: "Merit-based financial aid is awarded not to reward the past achievements of prospective students. Instead, institutions of higher education award merit-based financial aid in exchange for a benefit that the university anticipates receiving in return."<sup>95</sup> Based on this reasoning, athletic scholarships, which many universities offer, already constitute a form of "merit aid."

Thus, Graca concludes that "because all of an institution's 'merit-based' aid is in fact based on value rather than merit, it can only follow that the value of diversity is as worthy a value as any other."<sup>96</sup> Diversity can include immutable characteristics such as race and ethnicity, characteristics that students have little control over, such as religion, family history, adversities overcome and SES status, and purely mutable characteristics, such as developed skills and expertise, extra-curricular and occupational

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<sup>91</sup> *Id.* He continues:

For when we say there is an extrinsic value to diversity, we are essentially saying that value is always relative to the utility and significance any given candidate brings to the table. But even here, the distinction collapses very often in the admissions context. It does so also in the context of financial aid decisions where the value of an applicant to a college or university determines whether and to what extent a prospective candidate may receive merit-based aid. There is still little in the way of a definitive entitlement.

*Id.*

<sup>92</sup> See Graca, *supra* note 85, at 523–34 (explaining that "merit-based" financial aid is based not on an applicant's intrinsic "merits," but rather their external "value" to an institution of higher education).

<sup>93</sup> *Id.* at 521–23.

<sup>94</sup> *Id.* at 522–23.

<sup>95</sup> *Id.* at 523.

<sup>96</sup> *Id.* at 524.

experiences, languages, and other factors. A defensible diversity plan should be designed in a way that:

[A]ll applicants have the capacity to have had unique experiences that would allow them to contribute to the diversity of an institution's student body. So, an appropriate diversity-conscious financial aid structure doesn't do undue harm to disfavored groups because everyone has the potential to be a part of the favored group(s).<sup>97</sup>

When all of these factors are considered for diversity scholarships and financial aid, the program will be more likely to satisfy the narrow tailoring factors to justify some consciousness of race in financial aid considerations to further the compelling interest in diversity of all types.

## 2. Increasing Value by Diversifying

The second corollary is not quite self-evident but logically emerges from the "original position" focused on financial aid.<sup>98</sup> Let us trace through the argument for the second corollary. From the "veil of ignorance,"<sup>99</sup> our rational actor does not know whether she will feel comfortable in the environment of higher education (or elite higher education to make the point more clearly). Some people will be part of the majority, and others will be part of the various minority factions. Because of the veil of ignorance, our rational actor does not know into which category she will fall. This uncertainty will lead her, like the cake slicer, to divide up the "good" of education, equally, to ensure that the last piece left over is as big as possible. Hence, the second corollary would state that the greatest benefits should go to groups underrepresented in higher education. If one were to consider the open door of admission to constitute "fair equality of opportunity," then pursuing diversity can continue, using just inequalities, based on the first clause of the original version of Rawls' second principle, that social and economic inequalities are permissible if "reasonably expected to be to everyone's advantage"<sup>100</sup> Rawls' second principle of justice, as described above, states: "Social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b)

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<sup>97</sup> *Id.* at 529.

<sup>98</sup> *Supra* notes 7–16 and accompanying text.

<sup>99</sup> *Id.*

<sup>100</sup> RAWLS, *supra* note 1, at 60



attached to positions and offices open to all."<sup>101</sup> The United States Supreme Court has declared that "the benefits that flow from a diverse student body" are real, and important enough to constitute a compelling government interest, an interest that can justify a race-conscious admissions program.<sup>102</sup> The existence of a diverse student body, and particularly a critical mass of students from the various diverse groups, provides benefits to students of all colors, regardless of a particular students' level of contribution to that diversity. All students benefit from a diverse learning environment.<sup>103</sup> Therefore, the inequality that results from diversity-enhancing programs inures to "everyone's advantage," and thus satisfies the second principle of justice as a "just" inequality.

Additional incentives, like outreach and retention programs, simply will be another inequality that fosters diversity to everyone's advantage, and therefore will be just and justified. These additional benefits also can be financial. Thus, equality of opportunity, the starting point for Rawls, could give way to equality of access, or equality of attendance, and the arguments for these points as they relate to financing higher education are explored below.

Admittedly the rationale for the second corollary extends farther than Rawls suggested, or perhaps even intended, because it assumes that there is some "good" or benefit to advanced education. Rawls does not seek to assign the "good" in his original position and, in fact, suggests that it does not matter what the good is.<sup>104</sup> Even if one does not know what is "good," he posits that these principles will govern the division of whatever is later determined to be good when the veil is lifted and positions are assigned.<sup>105</sup>

Thus, the inequalities that must exist among educational opportunities would be considered "just" according to Rawls, if those who received the better education used it for the betterment of society, which can be shown by helping the least fortunate members of that society.<sup>106</sup> This

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<sup>101</sup> *Id.*

<sup>102</sup> Grutter, 539 U.S. at 343.

<sup>103</sup> *Id.* at 330; *see also* Brief for Amicus Curiae 65 Leading Businesses in Support of Respondent, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 399056, \*1 (explaining that employers have an interest in hiring employees who have experienced diversity in their educational backgrounds); Brief of the Society of American Law Teachers as Amicus Curiae in Support of Respondents, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 U.S. S. Ct. Briefs LEXIS 215, \*19 (noting the increase in "cultural capital" among those with diverse social contacts); and Brief of American Law Deans Association as Amicus Curiae in Support of Respondents, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 U.S. S. Ct. Briefs LEXIS 221, \*6 (arguing that diversity in education enriches the perspective and experience of the student body as a whole).

<sup>104</sup> RAWLS, *supra* note 1, at 12.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 100-01.

understanding has interesting ramifications for financial aid allocations. Still, as public institutions lessen diversity funding, those students in the bottom decile receive less aid in terms of subsidies, and thus they pay more as a percentage of family income for their education. Benefiting the least well-off is being done through admissions, but not through financial aid.<sup>107</sup>

Nevertheless, to the extent that merit plus social good is the new measuring stick for financial aid, however, the underrepresented may obtain some benefit (for those who are more interested in returning to serve their communities of color after school or graduate school), but the benefit will not give a boost to enough of the underrepresented to change their status. For instance, UCLA School of law performed an experiment with a public interest program to capture students who fulfill this type of merit-plus qualification level.<sup>108</sup> This author was a member of the committee that selected students for admission to the program and was somewhat surprised by the results. In the aftermath of SP-1 and SP-2,<sup>109</sup> and Proposition 209,<sup>110</sup> there were very few applicants of color, and even fewer who met the GPA and LSAT criteria to be considered for admission to this program at UCLA law.<sup>111</sup> Thus, the "merit plus social good" standard did not produce a racial and ethnically diverse student population.

### 3. Maximizing Under-represented Groups

Rawls' discussion of the second principle provides additional support for the second corollary on under-representation. That second principle recognizes that some inequality is bound to occur.<sup>112</sup> Rawls defines

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<sup>107</sup> The benefit then can become illusory, but this takes us back to the need based aid issue discussed in Section D above.

<sup>108</sup> See Gary Blasi, *Creating a Program in Public Interest Law & Policy at a Public Law School*, in EDUCATING FOR JUSTICE: SOCIAL VALUES & LEGAL EDUCATION, 107, 107–28 (Jeremy Cooper & Louise Trubek, eds., 1997) (describing the UCLA Law admissions program, its goals, results and accomplishments in the early years).

<sup>109</sup> See The Regents of the University of California, Policy Ensuring Equal Treatment: Admissions (SP-1) (July 20, 1995), available at <http://www.berkeley.edu/news/berkeleyan/1995/0830/text.html> (banning preferences based on race, ethnicity, or gender in the University admissions decisions); The Regents of the University of California, Policy Ensuring Equal Treatment: Employment and Contracting (SP-2) (July 20, 1995), available at <http://www.berkeley.edu/news/berkeleyan/1995/0830/text.html> (banning preferences based on race, ethnicity, or gender in the University's employment and contracting processes).

<sup>110</sup> See CAL. CONST. art. I, § 31 (2007); see also Blasi, *supra* note 108, at 113 (describing Proposition 209, or the California Civil Rights Initiative as legislation which prohibits the consideration of "race or gender in admissions decisions").

<sup>111</sup> Blasi, *supra* note 108, at 107–28.

<sup>112</sup> RAWLS, *supra* note 1, at 100–02.

injustice as "inequalities that are not to the benefit of all," and the benefit of all includes raising up the least advantaged, as discussed above.<sup>113</sup> Thus, the first corollary's inequality of providing need-based financial aid benefits to the least advantaged and will be a "just" inequality.<sup>114</sup> Similarly, providing additional support for those who are underrepresented will be a "just" inequality because it lifts up the least advantaged to increase their representation in higher education.

This theory provides a justification for racial and ethnic affirmative action, but how does that lead to race conscious financial aid? The simplistic answer is that students from underrepresented groups are being admitted to the elite institutions, yet remain underrepresented in those elite institutions, and thus something more must be done. Some are precluded by financial resources, and the need-based projections assist some, but not all in this category. Others have not developed the interest in elite education, and still others have not developed the aptitude to compete for enrollment at the most elite institutions.

Regardless of the reasons, the social and economic inequality that results from under-education "does not provide the greatest benefit to the least advantaged," and while it is "attached to positions and offices open to all, "that openness is not under conditions of "fair equality of opportunity." Thus, "under-education" or under-representation in elite and semi-elite educational institutions is not a "just inequality;" under-representation is an "unjust inequality." The most meritorious under this conception of justice would be those who are least represented, and the principles of justice are not being realized as to those among us. Financial incentives are one way to address the fairness of the so-called equal opportunity. For instance, current mechanisms for evaluating SES and financial need are not an adequate or accurate reflection of a family's ability to afford the price tag for higher education, because they do not consider wealth, inherited wealth, net worth and real property holdings (or do so in a way that hides the severe differences in wealth among admitted students).<sup>115</sup>

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<sup>113</sup> *Id.* at 62, 83.

<sup>114</sup> Another author has suggested an alternative conception that Rawls would tolerate under-representation as long as the least advantaged benefits from that under-representation. "A less simplistic Rawlsian critique criterion would tolerate initial disparities, favoring the highly talented and energetic so long as their productivity eventually served the least advantaged. Indeed, Lehman's objections to the winners in the present system could be seen as deriving from an inadequate trickle down to the less fortunate members of society" *Id.* Winston, *supra* note 39, at 26. In conclusion, the author notes: Winston's response seems to still consider the traditional notion of merit, with a minor expansion to include those who intend to do good work on behalf of others, or on behalf and for the benefit of, society. *Id.*

<sup>115</sup> See William C. Kidder, *In The Rise of the Testocracy [sic]: An Essay on the LSAT, Conventional Wisdom, and the Dismantling of Diversity*, 9 TEX. J. WOMEN & L. 167, 184 (2000) ("Since

For this reason, what seems to be above the level of need-based aid, may in fact be necessary aid for the student to actually be able to afford to attend the school. How many middle class and upper middle class students (by current SES standards) are precluded from attending their first choice schools because the financial aid package was inadequate, despite being based on a formula that is supposed to be fair and provide financing opportunities to all to the extent that they need it?<sup>116</sup>

Outreach and retention programs are other ways to address the fairness of equal opportunity. In much the same way that merely unchaining the hobbles at the starting line does not give a "fair equality of opportunity" to the runner,<sup>117</sup> opening the door to admission at institutions of higher learning does not give a "fair equality of opportunity" to the matriculating student. Without fairness at the entry level, the resulting inequalities are unjust. For these reasons, the second corollary requires maximizing underrepresented groups. After evaluating the legality of these corollaries under existing law, this Article then presents a blueprint for a Diversity and Critical Mass Scholarship Program.

### *III. Would These Corollaries Satisfy Existing Anti-Discrimination Laws?*

The United States Supreme Court has not ruled specifically on the parameters of race-conscious financial aid and scholarships. While the number of students affected by such aid is not great, the policy is important to understand in the context of the continuing evolution of equal protection doctrine. As of 1993, the year before the *Podberesky* decision, the number of students affected by race-conscious scholarships was small with only less than a thousand out of 45,000 programs using race as a sole criterion.<sup>118</sup> This

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parental wealth—and not parental educational attainment, income or occupational status—is the best predictor of children's wealth, leaving net worth out of a SES index can significantly underreport the SES differences associated with racial/ethnic group membership."). Furthermore, Kidder states: "[W]ithin each ethnic group, students from upper-SES backgrounds had higher LSAT scores than those with upper-middle-SES backgrounds; and so on." *Id.* at 185.

<sup>116</sup> One discrepancy in the formula arises because SES is not based simply on wealth. Wealth is simply one measure that goes into determining SES. Other measures that are used to determine SES include education, income and the make-up of the neighborhood.

<sup>117</sup> Lyndon Johnson, President of the United States, Commencement Address at Howard University (June 1965), <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650604.asp> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

<sup>118</sup> See Kara Pate, *The Legality of Race-Exclusive Scholarship*, 2 KAN. J. L. & PUB. POL'Y 91, 91 (1993) ("It has been estimated that any alteration of the current policy could affect as many as 45,000 scholarships targeted for students of a particular race or national origin. Another source estimates that

number has diminished significantly in the past decade.<sup>119</sup> Still, the issue is a potent political one, and there are two important legal authorities to consider: (1) the *Podberesky* decision of the Fourth Circuit,<sup>120</sup> and (2) the Department of Education (DOE) Guidelines as revised in part based on the *Podberesky* decision.<sup>121</sup>

#### A. *Podberesky v. Kirwan*

In *Podberesky*, the Fourth Circuit addressed the issue of race-conscious financial aid and scholarship programs.<sup>122</sup> The *Podberesky* court evaluated the University's argument that its Banneker scholarship program was narrowly tailored to "remedy the present effects of past discrimination."<sup>123</sup> The court considered "whether the program actually furthers a different object from the one it is claimed to remedy."<sup>124</sup> The court rejected the University's contention that its goal to attract high achieving African American students would be sufficient to justify sustaining the program because those high achievers were not the "group against which the university discriminated in the past."<sup>125</sup> At the time of this decision in 1994, remedying past discrimination was the only certain compelling interest for race-based programs because the diversity rationale still was in dispute.<sup>126</sup>

Another criticism of the Banneker scholarship program was that applicants who were not residents of the state of Maryland were permitted to apply for the scholarship. This reality conflicted with the actual expressed goal of increasing the number of qualified African American Maryland residents who attend the school.<sup>127</sup> The court further criticized the reference pool relied upon by the district court in its analysis of the under-

4,404 scholarship programs use minority status as one of several factors in awarding financial aid amounting to approximately \$131.8 million. Race is the sole criterion of eligibility, however, in only an estimated 742 programs serving about 3,000 students.").

<sup>119</sup> See Hamilton, *supra* note 9, at 1 (stating that despite race-conscious admissions being upheld in the Michigan law school decision, there has been a decrease in race-conscious programs in higher education institutions).

<sup>120</sup> *Podberesky v. Kirwan*, 38 F.3d 147, 161 (4th Cir. 1994).

<sup>121</sup> Nondiscrimination in Federally Assisted Programs, 59 Fed. Reg. 8756 (Dep't of Educ. Feb. 23, 1994) [hereinafter DOE Guidelines].

<sup>122</sup> *Podberesky*, 38 F.3d at 147.

<sup>123</sup> *Id.* at 158.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (stating that remedying past discrimination is a compelling state interest).

<sup>127</sup> See *Podberesky*, 38 F.3d at 159 ("[I]t is obvious that awarding Banneker Scholarships to non-residents of Maryland is not narrowly tailored to correcting the condition that the University argues, that not enough qualified African-American Maryland residents attend at College Park.").

representation of African Americans at the school.<sup>128</sup> The court reasoned: "the reference pool must factor out, to the extent practicable, all nontrivial, non-race-based disparities in order to permit an inference that such, if any, racial considerations contribute to the remaining disparity. This the District Court simply has not done."<sup>129</sup> The court concluded: "we are thus of the opinion that, as analyzed by the district court, the program more resembles outright racial balancing than a tailored remedy program. As such, it is not narrowly tailored to remedy past discrimination. In fact, it is not tailored at all."<sup>130</sup>

The *Podberesky* court also found there was little, if any, connection between lower retention rates of African American students and the race-conscious scholarship program, despite evidence that some students work and live off campus with long commutes, which contributes to their attrition rates.<sup>131</sup> The court determined that "if there is some connection between the two, the university has not made any attempt to show that it has tried without success, any race-neutral solutions to the retention problem. Thus, the university's choice of a race-exclusive merit scholarship program as a remedy cannot be sustained."<sup>132</sup> The court held that the Banneker program violated both the Equal Protection Clause and Title VI of the Civil Rights Act of 1964.<sup>133</sup>

After *Podberesky*, various states took steps to address the race-based scholarship issue.<sup>134</sup> For instance, the Colorado Attorney General guidelines

<sup>128</sup> See *id.* (describing the reference pool as arbitrary because it neglected to account for "eligible African-American high school graduates who either (1) chose not to go to any college; (2) chose to apply only to out-of-state colleges; (3) chose to postpone application to a four-year institution; (4) voluntarily limited their admission applications to Maryland's predominantly African-American institutions").

<sup>129</sup> *Id.* at 160.

<sup>130</sup> *Id.*

<sup>131</sup> See *id.* at 161 ("The causes of the low retention rates submitted both by *Podberesky* and the University and found by the district court have little, if anything, to do with the Banneker Program.").

<sup>132</sup> *Id.* at 161.

<sup>133</sup> See Burt M. Fealing, *Race-Based Scholarships—Podberesky v. Kirwan*, 38 *F.3d* 147 (4th Cir. 1994), 12 HARV. BLACKLETTER L.J. 177, 183 (1995) ("Although the court in *Podberesky* has created a somewhat difficult standard for race-based scholarships to overcome in order to survive strict scrutiny analysis . . . this does not necessarily mean that public institutions of higher education are prohibited from using financial resources to combat hostile racial attitudes on campus through increased racial diversification. There are various options institutions such as UMCP [University of Maryland at College Park] can pursue to overcome negative racial perceptions which can often lead to the under representation of minorities while simultaneously conforming to judicial mandates.").

<sup>134</sup> See Amy Weir, *Should Higher Education Race-Based Financial Aid Be Distinguished from Race-Based Admissions?*, 42 B.C. L. REV. 967, 978 (2001) (describing the steps taken by several states to confront the race-based scholarship issue).

stated that race-conscious scholarships no longer should be provided.<sup>135</sup> In Texas, an order to stop offering such scholarships was later rescinded in the absence of a "clear national standard."<sup>136</sup> Oregon put "tighter restriction on race-based tuition waivers."<sup>137</sup> And the University of Washington announced the private funding of a new program with substantial resources to assist underrepresented minority students.<sup>138</sup> Some Michigan colleges and universities used race-based scholarships when they did not use race as a factor for admissions.<sup>139</sup>

### *B. The Department of Education Policy Guidance and Remedies for Past Discrimination*

In the aftermath of *Podberesky*, the DOE issued a policy guidance to clarify some uncertainty in the permissible uses of race-conscious financial aid.<sup>140</sup>

Principle 3 permits using financial aid to remedy past discrimination.<sup>141</sup> No formal finding is required as long as the university is prepared to demonstrate to a court that "there is a strong basis in evidence for concluding that the college's action was necessary to remedy the effects of its past discrimination."<sup>142</sup> If this baseline is established, a university may use unrestricted funds as well as restricted donor funds in these remedial efforts.<sup>143</sup> The question then becomes how broadly the department defines its *own* past discrimination. The easy case involves schools that were race-exclusive in the past. Those schools are obvious past perpetrators of discrimination. But, how can current financial aid policies be a means of remedying the effects of that discrimination? One might suggest that the current policies would be a sort of atonement for past sins,<sup>144</sup> which could be

<sup>135</sup> See *id.* at 978 ("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>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> See *id.* at 978 and accompanying notes ("In October 2000, the University of Washington announced a \$65.6 million program aimed at providing financial aid to underrepresented minority students.").

<sup>139</sup> See *id.* at 978 (stating that at least two Michigan colleges continue offering race-based scholarships even though neither school has used race for admissions purposes).

<sup>140</sup> See generally, DOE Guidelines, *supra* note 121.

<sup>141</sup> *Id.* at 8757.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> See Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 95-96 (1985) ("The problem with sin as the predicate for affirmative action is thus that it keeps alive protests about windfalls to nonvictims and injustice to innocents.").

a necessity in the process of remediation. However, the use of race-specific financial assistance in the year 2007 will not be narrowly tailored because the specific victims—those who were denied admission solely because of their race—are not being helped by the current financial aid awards. Thus, the race-based financial aid policy will fail to satisfy the DOE guidelines, *Podberesky*, and most importantly, strict scrutiny.

In criticizing the use of race-based scholarships justified on remedial grounds, one author indicates that "universities that offer minority-exclusive scholarships without specifically identifying the discriminatory effect the scholarships are designed to eliminate would be vulnerable to summary judgment because the program will not be narrowly tailored. Equally as important, if a court cannot determine whether the remedy bears a close relationship to the present effects of prior discrimination, then the program will likely be destined to fail the narrowly tailoring requirement."<sup>145</sup> He also discusses the *Flannigan*<sup>146</sup> case against Georgetown where the court found that a policy "which awarded sixty percent of the available financial aid to the eleven percent of the students who were racial minorities violated the nondiscrimination provisions of Title VI."<sup>147</sup>

To meet the narrowly tailored requirement for race-based financial aid policies and to preserve race-conscious financial aid policies, a university could pursue a path that links the past discrimination to current remedial efforts. One way to ensure the requisite close link is by considering current, instead of past, discriminatory practices. To the extent that a university currently is perpetrating racial discrimination in some way, immediately ceasing that practice and providing a remedy for it should satisfy the close fit between means and end. If the remedy is otherwise narrowly tailored, then it may survive a legal challenge and strict judicial scrutiny. Several areas where universities may be engaging in current racial and ethnic discrimination are discussed below.

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<sup>145</sup> Kirk A. Kennedy, *Race-Exclusive Scholarships: Constitutional Vel Non*, 30 WAKE FOREST L. REV. 759, 779 (1995).

<sup>146</sup> See *Flanagan v. President and Directors of Georgetown College*, 417 F. Supp. 377, 384 (D.D.C. 1976) (concluding that Georgetown and the Law Center were required to refrain from discriminating on the basis of race when they accepted federal financial assistance for the construction of the Law Center). In *Flanagan*, a student brought a civil rights suit against the university, alleging racial discrimination in award of financial assistance to students of federally funded legal center. *Id.* at 378. The district court of the District of Columbia found that the evidence that showed that sixty percent of the available financial aid was awarded to eleven percent of the students who were racial minorities was sufficient to show the university's liability for discriminatory action, but that evidence was insufficient to determine damages. *Id.* at 385.

<sup>147</sup> Kennedy, *supra* note 145, at 784.



### 1. Remedying Current SAT and AP Discrimination

Universities are understandably uncomfortable with admitting to any current racial discrimination, in this more enlightened era, but there are several areas that could be a good starting point for a critical self-analysis by university general counsels' offices who wish to justify race-conscious financial aid programs on remedial grounds. For instance, universities can begin with the SAT and high school Grade Point Average (GPA). There is evidence that the SAT has a racial bias.<sup>148</sup> While there is much debate over the existence and extent of any racial bias in the SAT,<sup>149</sup> when schools continue to use the SAT as a dominant factor in assigning indices for admission, students are being admitted in part based on what some perceive to be a discriminatory means. Similarly, most colleges consider high school GPA in their admissions decisions and award additional points for certain scores in Advanced Placement (AP) courses. Many high schools track students into and out of AP courses, based in part on their race or ethnicity, and many schools with larger percentages of students of color also have a smaller percentage of AP courses to offer to those students.<sup>150</sup> Thus, GPAs and the indices associated with them are assigned in a process that incorporates some racial discrimination. Many universities then offer additional financial incentives to students with high indices based on their combined SAT and enhanced GPA numbers. The aid arguably is awarded on a discriminatory basis.

This is not to suggest that all consideration of the SAT scores and high school grades that provide extra points for AP classes is discrimination

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<sup>148</sup> See, e.g., Roy O. Freedle, *Correcting the SAT's Racial and Social Class Bias: A Method for Re-estimating SAT Scores*, 72 HARV. ED. REV. 3 (2002) ("The SAT has been shown to be both culturally and statistically biased against African Americans, Hispanic Americans, and Asian Americans.").

<sup>149</sup> See *id.* at 1 (discussing the search for an equitable ethnic representation in colleges over the past several decades). Freedle and Kostin, cognitive psychologists, used a measure called the Differential Item Function (DIF) to study ethnic bias on standardized tests. *Id.* at 3. Their research showed that "Whites students tend to score better on *easy* items and African-Americans on *hard* items." *Id.* A bias is created, in part, because the SAT scores each item with equal weight, whether easy or hard. *Id.* at 4. Further, there is evidence of an "unintended but persistent cultural and statistical bias" in the verbal section of the SAT that adversely affects African Americans. *Id.* at 3. As a result of this bias, scores of non-white students are negatively affected. *Id.*

<sup>150</sup> See Jeanne Oakes, Director of UCLA's Institute for Democracy, Education & Access, Address at The Education Exchange (Nov. 21, 2003), <http://www.idea.gseis.ucla.edu/projects/ejc/download.html> (showing that in schools where African-American and Latino students comprised more than 70% of the population, the average number of AP courses offered was 3.8, whereas in schools where African-American students and Latino students comprised less than 30% of the population, the average number of AP courses offered was 5.3) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

or is wrong. There is no dispute that the SAT and high school GPA indices are based at some level on academic aptitude, but we need to consider whether that method also has racial implications that might amount to more than disparate impact discrimination.<sup>151</sup>

If the universities are therefore awarding financial aid and scholarships on a discriminatory basis, then halting that oblique discrimination would be the starting point. Next, each university can craft a remedy for its own immediately past discrimination. That remedy can include race-conscious financial aid and scholarship awards. While the fit would be a close one, and the means would seem to be an appropriate one, the tougher analysis is in the under- and over-inclusiveness of the remedy, as well as its duration. How long does one need to provide race-conscious merit aid to remedy past racial discrimination in the award of merit aid? In the first few years of the remedial program, the actual victims of past discrimination in this area can be helped by the remedy if they are still students enrolled at the university. After a few years, though, all those who were awarded aid for at least one year under the previous (arguably discriminatory) system would have graduated, or otherwise left the school, and therefore would not benefit from the remedial measure.

At this point, the fit would be less close, and the duration of the program may be limited. Although there is no requirement that the only beneficiaries be actual victims of that university's own past discrimination to satisfy the narrowly tailored requirement, the more attenuated the link, the less likely the program will continue to pass constitutional scrutiny.

## *2. Remedying Current Faculty Offspring Scholarship Discrimination*

Financial aid for faculty children is another avenue that the general counsels' offices should pursue to ferret out potentially racially discriminatory policies. First, one must gather the statistics on the diversity levels of the faculty at various points over the university's history, and then analyze the percentage of faculty children who have received aid. If statistics are available on the race or ethnicity of the faculty children, then it would be easier to determine how much of the financial aid set aside for

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<sup>151</sup> For instance, is there a colorable claim that the heavy reliance on these two factors that have a racially disparate impact at some level constitutes intentional discrimination to the extent that these policies are adopted in part "because" they keep "less qualified" minority applicants from ever being offered "merit scholarships" or merit financial aid? Other researchers have addressed these questions, which are beyond the scope of this article.

faculty offspring is being awarded to students of color. The easy case would find non-actionable disparate impact discrimination, but an argument can be made that past intentional discrimination against people of color for faculty positions resulted from recruiting standards and policies that were designed to preserve or increase the university's prestige at the expense of otherwise qualified applicants of color. If that recruiting standard artificially limited the pool of qualified faculty of color, then it would in turn also shrink the available pool of faculty offspring of color who would be eligible for the special scholarships and financial aid.

The final step in remedying this problem involves increasing scholarship funds for which students of color could compete. It may be more difficult to define the eligible class of students in a way that avoids under- and over-inclusiveness. One way is to ensure a proper fit between the means and the end is to limit the scholarships to offspring of professors who applied for and were denied employment at the particular educational institution. This would be a very small group for most universities, and thus both the burdens and benefits of this program would be marginal.

### 3. Remedying Current Legacy/Alumnae Offspring Discrimination

A similar rationale applies to financial aid for "alumnae offspring," also known as legacies. If, in the past, the university discriminated in admissions against applicants of color, that action decreased the pool of alumnae of color. Having fewer alumnae of color also decreased the pool of "offspring of alumnae of color" who would be eligible to receive special legacy scholarships and financial aid. In admissions, the legacy preference "works largely to the benefit of whites, [and] in Bowen and Bok's study, legacy preferences had a sizable effect on admission rates within the SAT intervals where black-white gaps in admission rates were largest."<sup>152</sup> Legacy preferences likely have an important effect on financial aid decisions as well. Decreasing the legacy preference for admissions would have an adverse effect on universities because alumnae expect a bit of a preference for their offspring.<sup>153</sup> However, as children of alumnae generally are more affluent

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<sup>152</sup> Goodwin Lui, *The Causation Fallacy*, 100 MICH. L. REV. 1045, 1069 (2002).

<sup>153</sup> See Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521, 537 (2002) ("For example, when Columbia, in the 1960s, eliminated preference for legacies, alumni contributions fell drastically. Columbia soon returned to the prior policy. This tilt in favor of alumni, who attended school when few or no blacks did, is also a tilt towards whiteness, and will continue to be until the children of affirmative action students start applying in substantial numbers.").

than other categories of admitted students, revising any legacy preference for financial aid would have a less deleterious effect.<sup>154</sup>

Each of these current programs could be discriminating on a racial or ethnic basis and could provide a justification for remedial race-conscious financial aid. The next question to explore is whether Rawls' theory allows for this kind of remedy. Without knowing which race one will belong to and which race will be favored and which will not, most rational actors in the original position under the veil of ignorance would not select as a corollary to the second principle that a particular race or ethnicity be favored or disfavored, and thus a race-specific rule for financial aid determinations would not emerge from beneath the veil of ignorance. Instead, equality based on race would be the "just" expectation and inequalities based on race would not be considered just because such inequalities would violate the first principle of the most extensive liberty consistent with a similar liberty for others.<sup>155</sup> However, the remedial aid could be justified in a different way under Rawls' theory. When the members of a particular under-represented racial group are the least advantaged, providing financial aid for them specifically would be permitted as a justified inequality because it raises the level of the least among us. Thus, the aid would not be based on race, but rather on under-representation and the second corollary and would be considered fair on that basis.

The diversity rationale fits more readily within Rawls' Theory of Justice and may provide a more palatable justification for race-conscious financial aid, and so to that issue we now turn.

### *C. The Department of Education Policy Guidance and Principle Four: Diversity, and Narrow Tailoring*

In 1994, the DOE amended Principle Four to provide details on the permissible parameters of race-conscious financial aid and scholarship programs in the midst of the diversity debate and the controversy over the *Podberesky* case. The Policy Guidance in Principle Four allows the use of

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<sup>154</sup> See Wortman, *supra* note 70, at 4–5 ("According to admissions officers, another factor should be added to the equation. Despite the highest admissions rate of any single bloc of candidates, fewer children of alumni now attend the College than in the past. . . . But whatever the reason, there is a financial implication, because alumni children typically come from families with substantially higher incomes than the rest of the population."); see also Kidder, *supra* note 115, at 184 (stating that parental wealth is the best predictor of children's wealth).

<sup>155</sup> See Charles, *supra* note 26, at 2027–35 (arguing that colorblindness would not be the rule that would emerge from the original position, based on the primary principle of liberty as extensive as possible without curtailing the liberty of others).

race if it is narrowly tailored and necessary to further an interest in diversity without undue restrictions on aid for students who do not meet the racial criteria.<sup>156</sup>

The revised Principle Four permits an "award of financial aid on the basis of race or national origin if the aid is necessary to overcome the effect of past discrimination . . . provided that the use of race or national origin is consistent with the constitutional standards reflected in Title VI, *i.e.*, that it is a narrowly tailored means to achieve the goal of a diverse student body."<sup>157</sup> Moreover, private gifts restricted by race or national origin can be administered only if "that aid is consistent with the other principles in this policy guideline."<sup>158</sup>

The revised Principle Four further states the following:

[A] college should have substantial discretion to weigh many factors--including race and national origin--in its efforts to attract and retain a student population of many different experiences, opinions, backgrounds, and cultures--provided that the use of race or national origin is consistent with the constitutional standards reflected in Title VI, *i.e.*, that it is a narrowly tailored means to achieve the goal of a diverse student body . . . . When using race as a factor, it must further the interest in diversity and also be narrowly tailored such that it is necessary to further that interest and does not unduly restrict access to financial aid for students who do not meet the race-based eligibility criteria.<sup>159</sup>

In analyzing comments to the proposed changes in the policy document, the DOE explained that a case by case analysis for race targeted financial aid programs will not result in the failure of all such programs to pass constitutional and Title VI scrutiny.<sup>160</sup> The comments also recognize the important differences between the financial aid decisions that do not necessarily preclude a student from attending the college and admissions decisions that do.<sup>161</sup>

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<sup>156</sup> DOE Guidelines, *supra* note 121, at 8757; *see also* Bingham McCutchen LLP, Morrison & Foerster, LLP, and Heller Ehrman White & McAuliffe, LLP, *Preserving Diversity in Higher Education, A Manual on Admissions Policies and Procedures After the University of Michigan Decisions*, 78–80 (2004),

[http://www.equaljusticesociety.org/compliancemanual/Preserving\\_Diversity\\_In\\_Higher\\_Education.pdf](http://www.equaljusticesociety.org/compliancemanual/Preserving_Diversity_In_Higher_Education.pdf) (summarizing the DOE policy guidance from the Federal Register) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

<sup>157</sup> DOE Guidelines, *supra* note 121, at 8757.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 8761.

<sup>161</sup> *Id.* at 8762.

In considering the narrowly tailoring issue, the Policy Guidance recommends looking at the following five factors:

(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.<sup>162</sup>

Some Commentators reduce the Policy Guidance's narrowly tailored requirements to four factors:

1. the state must explore possible race neutral remedies and approved race-based remedies only when necessary; 2. a race-based remedy must be flexible and temporary; 3. there must be statistical correlation between the race-based remedy and the appropriate population; and 4. the race-based remedy must not prefer one minority to the exclusion of others.<sup>163</sup>

Bednark also addresses the issue that there may be a contradiction in the narrow tailoring factor that requires a temporary program or an observable endpoint.<sup>164</sup> Because of the long history of discrimination and the shorter duration of efforts to remedy that problem, that time constraint could be considered arbitrary and therefore would not satisfy the narrowly tailored requirement. In addition, to the extent a University did not meet the arbitrary time frame, the program might be subject to additional scrutiny and perhaps curtailment.<sup>165</sup>

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<sup>162</sup> *Id.* at 8757.

<sup>163</sup> B. Andrew Bednark, *Preferential Treatment: The Varying Constitutionality of Private Scholarship Preferences at Public Universities*, 85 MINN. L. REV. 1391, 1399 (2001).

<sup>164</sup> *Id.* at 1414.

<sup>165</sup> *See id.* at 1415–16 (stating how courts will disfavor institutions that differentiate between minority groups).

The factor for not preferring one minority over another also seems to foster a potential contradiction inherent in any diversity-based rationale for race-based action. If diversity is the goal, then allowing any group to be "too large" lessens overall diversity, and then additional members of that group are no longer useful to the goal of maintaining diversity. Those additional members should no longer be "preferred" if maximizing diversity remains the articulated goal. When members of one group are no longer preferred, and other groups retain their preferred status, is the "no preference for one minority over another" principle being violated? Considering the specific language of this factor, the answer is no. The group that has become "too large" should no longer be considered a minority in the diversity equation. Therefore, the principle of not preferring one *minority* group over another *minority* group is not implicated. Like the other non-minority group (the majority), sufficient representation for diversity purposes has been achieved, and at that point, any further race or ethnicity based advantage to that group no longer would be narrowly tailored to serve the compelling interest in diversity. If the preference no longer is properly tailored, then it must be discontinued.

This does not mean that all efforts toward that group must be halted. While the recruiting efforts can be curtailed, retention efforts still should be made to ensure that representation continues at adequate levels. When it is time to consider applications for the next year's entering class, then the financial aid professionals should exercise their judgment to determine whether additional race-based aid is needed to maintain that level, or whether some diminishing of the race based aid for that group can be accomplished without lessening the number of enrolled students. With this system, each group is simply being measured against itself, and no single minority group is being preferred over another. This system also satisfies the "no undue harm" factor that other commentators address.<sup>166</sup> The only preference is among inadequately represented groups in our diversity calculus.

Some creative scholarship criteria suggested by other scholars could violate the principle of not preferring one minority group over another. If schools are using SES diversity to help meet their actual goal of diversifying the school on racial and ethnic grounds, those schools may be performing intentional racial discrimination with a race neutral mechanism. Dyson suggests that targeting scholarships around other attributes, such as people with sickle cell anemia, or Black studies majors, would provide greater

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<sup>166</sup> See, e.g., Graca, *supra* note 85, at 525 (explaining that "undue harm" is one of the narrowly tailored diversity considerations in the financial aid structure).

diversity of African Americans without being explicitly race based.<sup>167</sup> Still, it is likely that the racial intent to prefer members of a particular racial group would exist, and thus such criteria may be criticized as an illegitimate use of race nonetheless. Dyson notes that the DOE policy guidelines implementing Title VI "were read to prohibit discrimination that is the result of differential treatment, as well as that resulting from facially neutral policies and practices that have an impermissible disparate adverse impact."<sup>168</sup> The impermissible disparate impact would be the dearth of Anglos eligible to compete for scholarships based on sickle cell status or majoring in African American studies.

#### D. The Narrowly Tailoring Factors Post-Grutter

*Grutter* and *Gratz* announced that a diverse student body is a sufficiently compelling interest to justify some race-conscious admissions decisions, thus adding to the previously acknowledged compelling interest of remedying past discrimination.<sup>169</sup> Despite the fact that the rationale to justify the need for race-conscious programs has expanded slightly to include diversity issues, the narrowly tailored requirement remains a significant hurdle for many programs; *Podberesky* is still the most significant precedent case on the narrowly tailoring aspect of the strict scrutiny test in the financial aid context.<sup>170</sup> Girardeau Spann surmises "*Grutter* might now authorize the use of minority scholarships, such as those invalidated by the Fourth Circuit in *Podberesky v. Kirwan* as a means of getting minority students actually to attend the schools that admitted them in the hope of increasing diversity."<sup>171</sup> Spann further recognizes, however, that "*Grutter*'s insistence on ensuring that all students be able to compete for all seats may be read to preclude the use of minority scholarships . . . [because] a program cannot insulate one category of applicants from competition with all other applicants."<sup>172</sup>

<sup>167</sup> Dyson, *supra* note 89, at 245–46.

<sup>168</sup> *See Id.* at 246 (discussing the regulations at 34 C.F.R. Part 100 and how the regulation is interpreted to prohibit discrimination that is the result of differential treatment).

<sup>169</sup> *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003).

<sup>170</sup> *See, e.g., Eisenberg v. Montgomery County Pub. Schs.*, 197 F.3d 123, 128 (4th Cir. 1999) (denouncing a school district policy on the basis that, in certain circumstances, race was the only factor considered, despite the District Court's finding that diversity was a compelling interest); *Wessmann v. Gittens*, 160 F.3d 790, 808–09 (1st Cir. 1998) (emphasizing the need for narrowly tailoring by stating that "noble ends cannot justify the deployment of constitutionally impermissible means").

<sup>171</sup> Girardeau A. Spann, *From Brown to Bakke to Grutter: Constitutionalizing and Defining Racial Equality*, 21 CONST. COMMENT. 221, 228 (2004).

<sup>172</sup> *Id.* at 228 n.46.



As discussed above, the DOE Policy Guidance recommends looking at six factors when evaluating the narrowly tailored analysis.<sup>173</sup> In analyzing the issue of narrow tailoring of race-conscious scholarship programs, Dyson also articulated six "indispensable characteristics" to pass strict scrutiny under *Grutter* and *Gratz*.<sup>174</sup> Those factors, which race-based scholarships must meet, are the following:

- (1) individualized comparison of applicants; (2) the absence of mechanistic formulas; (3) the goal of achieving a 'critical mass' of underrepresented minorities; (4) doing no undue harm to members of groups not favored by the system; (5) a continuing exploration of race-neutral alternatives; and (6) a realistic time limit.<sup>175</sup>

Because these factors from the various sources described above overlap, the section below evaluates all of the factors in relation to the scholarship recommendation that this Article proposes.

#### *IV. A Narrowly Tailored Scholarship Recommendation*

In light of the *Podberesky*, *Grutter*, DOE, Dyson and Bednark factors discussed above, this article recommends that universities interested in maintaining and increasing student diversity offer "diversity scholarships." Several public and private institutions already offer diversity scholarships, including San Diego State University, Yale University, Penn State University, University of Wisconsin, Colorado University, Mercer, Whitman College, Pierce College, and Pepperdine University. These diversity scholarships would consider all the ways that students can contribute to diversity, including but not limited to, gender, socio-economic status, special musical talent, artistic talent, athletic ability, and religious affiliation (at religiously-affiliated universities).

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<sup>173</sup> See DOE Guidelines, *supra* note 121, at 8757 (describing the six factors as the following: "(1) whether race-neutral means of achieving a goal have been or would be ineffective; (2) whether a less extensive or intrusive use of race or national origin 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 re-examines the use of race or national origin and awarding financial aid to determine whether it is still necessary to achieve its goal; and (5) whether the effective use of race or national origin on students who are not beneficiaries of that use is sufficiently small and diffuse so as to not create an undue burden on their opportunity to receive financial aid").

<sup>174</sup> Dyson, *supra* note 89, at 250–51.

<sup>175</sup> *Id.* See also Graca, *supra* note 85, at 525–26 (depicting the same six factors used for analyzing narrowly tailored factors).

One major difference between the diversity scholarships currently offered and those recommended here is the following: *high intellectual aptitude would be another component of diversity instead of being segmented out as "merit" or "honor" scholarships.* The justification for including traditional merit as but one component of diversity recognizes that many universities, especially those with enforced grading curves, need students who are high performers but also need students who perform at a lower level of academic achievement. In addition, those schools that do not enforce a specific grade curve still need to fill their student body with an adequate number of tuition paying students. If these universities could do so with only the highest achieving students, they might choose to do so. The competition of other schools, however, means that these schools must take some students who have less than their optimum numerical indicators. Thus, a school can use diversity scholarships to balance out the incoming SAT averages of its entering classes. Because the diversity scholarships would be open to all students, these scholarships would not be race-exclusive or race-determinative, and therefore would not trigger *Grutter's* strict scrutiny.

To avoid being disingenuous about what it is sought to be accomplished—an increase in diversity, including, and perhaps even especially, racial and ethnic diversity—this recommendation, while similar to that made by Graca,<sup>176</sup> augments his proposal by adding a race-conscious component for consideration as well. Sub-section B below analyzes how the race-conscious component of this scholarship recommendation holds up under the narrowly tailoring analysis.

*A. Factor One: Whether a Race Neutral Alternative Has Been or Would Be Ineffective*

Diversity Scholarships could bypass strict scrutiny if the scholarships were awarded on a race-neutral basis. To guarantee race neutrality in the decision-making process, the selection committee would have to forego any consideration of the applicant's race or ethnicity. Thus, the committee could consider factors such as past obstacles students have overcome and their ability to contribute to the classroom learning, as well as what this applicant can contribute to a diverse learning environment. If, however, the applicant's race or ethnicity is a factor that is considered explicitly, then the process is no longer a race-neutral one, and the process

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<sup>176</sup> See generally Graca, *supra* note 85.

must submit to the strict scrutiny analysis. It would be ironic if diversity evolved to exclude race and ethnicity as factors, which it must if the approach is to be a race-neutral one. To the extent that race and ethnicity are not considered by the selection committee, then the diversity scholarships would be easy to justify, but would they be effective in promoting all kinds of diversity?

One article explained that "race neutral policies," such as need-blind admissions policies and the increase in student financial budgets, have helped to increase the diversity levels of entering classes at Brown and Harvard, for instance.<sup>177</sup> That author also recognized William G. Bowen's suggestion that:

[T]he most 'privileged' colleges and universities . . . consider moving beyond 'need-blind' admissions and giving a positive boost to the admissions chances of well-qualified candidates from poor families and from families with no college-going history.' Such a boost would be equivalent to 'putting a 'legacy thumb' on the scale' or even 'substituting some of these candidates for recruited athletes.'<sup>178</sup>

The types of diversity promoted here are socio-economic and we must examine the extent to which increasing that type of diversity also increases racial and ethnic diversity.

### *1. SES Factors Are Not Effective in Increasing Racial and Ethnic Diversity*

Many proponents of using socio-economic status as a viable race neutral policy to increase diversity without explicitly relying on race are perhaps overly optimistic. As noted in a report on the modified diversity program at UCLA School of Law in the aftermath of the Regents' decisions,<sup>179</sup> and Proposition 209,<sup>180</sup> if socio-economic status becomes an

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<sup>177</sup> See Marcia G. Synnott, *The Evolving Diversity Rationale in University Admissions: From Regents v. Bakke to the University of Michigan Cases*, 90 CORNELL L. REV. 463, 503 (2005) (explaining some statistics on diversity and financial aid). Synnott's article was part of the symposium entitled *Revisiting Brown v. Board of Education: 50 Years of Legal and Social Debate*, see *id.* at 503-04 and accompanying notes 330-40 (describing that Ivy League colleges have increased student financial aids to help students pay tuition costs).

<sup>178</sup> See *id.* at 504 (quoting William G. Bowen, Grutter: *Where Do We Go From Here?: The Impact of the Supreme Court Decisions in the University of Michigan Affirmative Action Cases*, J. Blacks Higher Educ. 80 (Summer 2004)).

<sup>179</sup> See Policy Ensuring Equal Admissions, Office of the Secretary to the University of California Board of Regents, July 20, 1995, <http://aad.english.ucsb.edu/docs/SP-1.html> (stating various decisions regarding admission criteria into the UC School system) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

important factor in admissions, it results in more lower-income Anglos and Asians being admitted, rather than increasing the number of admitted African American and Latino students.<sup>181</sup>

This discrepancy between socio-economic and racial diversity levels is largely due to two factors. First, there are more Anglos in the nation, and therefore more in the lower SES brackets than other groups in terms of absolute numbers.<sup>182</sup> Also, to the extent that a significant group of Asian applicants are from families who recently immigrated to the United States, that group might include a higher percentage of students who also fall into the lower SES categories.<sup>183</sup> The second factor is that very few African Americans and Latinos from low SES backgrounds meet the threshold minimum GPA and LSAT scores to be considered for enrollment at a school such as UCLA School of Law.<sup>184</sup> Only by significantly lowering admissions criteria could an increase in SES diversity result in a notable increase in racial and ethnic diversity.

Moreover, many African American students whose LSAT scores are competitive for a law school like UCLA do not have a low SES score.<sup>185</sup> Greenberg states the following:

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<sup>180</sup> See Cal. Const. art. I, § 31 (adopting Proposition 209, which prohibits discrimination against, and preferential treatment based on, race or ethnicity, in the area of public education).

<sup>181</sup> See Rick Sander, *Experimenting with Class-based Affirmative Action*, 47 J. LEGAL EDUC. 472, 497–98 (1997) (noting that Anglos and Asian Americans both increased in their numbers among admittees and matriculants and that those who were admitted were very likely to attend once admitted); see also Dyson, *supra* note 89, at 244 and accompanying notes ("Indeed, some will claim that financial aid grants based upon economic need, rather than race, are more suitable race-neutral alternatives. This stance, however, fails to recognize that most studies relying on socio-economic indicators alone have proved ineffectual in maintaining previous levels of racial diversity, and largely tend to benefit low socioeconomic whites instead of racial minorities.").

<sup>182</sup> Sander, *supra* note 181, at 497.

<sup>183</sup> *Id.*

<sup>184</sup> See Linda Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions Decision*, 72 N.Y.U. L. REV. 1, 52–53 (1997) ("Evaluation of the SES data, in particular, highlights the dilemma of employing a surrogate for race in the admission process. When students were separated by SES group, using self-reported measures of SES, the data showed that the lowest SES students within each ethnic group reported the lowest LSAT scores. One consequence of applying sufficient weight to SES to change the predicted admission decision for some students is that the students who would be admitted under an SES-weighted model would have LSAT scores and UGPAs that are statistically significantly lower than the scores and grades of other students in the same ethnic group who would not be admitted. This practice would have the effect both of admitting students of higher academic risk and of widening the gap in academic preparation between admitted white students and admitted students of color.").

<sup>185</sup> See Greenberg, *supra* note 153, at 552 (explaining that under UCLA's SES diversity program, "while high-SES blacks had been eligible for affirmative action consideration, they are not eligible under the new program because they do not receive credit for suffering from disadvantage").

[A] large majority of blacks from families with high SES (superior economic, educational, and other indicia of status) were deemed too well-off to be eligible for affirmative action and not admitted. At the same time, black students from disadvantaged families did not have scores high enough to be admitted and were too low in SES for the socio-economic supplement to put them over the top.<sup>186</sup>

If we adjust the definition of low SES status to capture more of the African American students with higher LSAT scores, then the pool of eligible Anglos will expand significantly.<sup>187</sup> Sander notes that: "[the] tradeoff between socioeconomic preference and academic ones is characterized by diminishing returns. As the size of the 'class' preference increases, the bonus in either economic or racial diversity declines as the academic cost grows."<sup>188</sup> He continues, "the reasons for this are logically self-evident: students who are relatively needy but have relatively high scores are the easiest to pick up in a system of preferences; as the preference intensifies, it expands to those who are less needy and to those with weaker credentials."<sup>189</sup> He concludes that "SES preferences are quite difficult to justify on a purely racial rationale."<sup>190</sup>

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<sup>186</sup> *Id.*

<sup>187</sup> See Sander, *supra* note 181, at 501–02 ("The subtle argument, which Malamud develops brilliantly, is this: the more broadly one defines a class of SES-disadvantaged people, the less inclusive of racial minorities (especially blacks) it becomes. Since there are only a handful of truly deprived people in the applicant pool of most law schools, the administrators of an SES system will be sorely tempted to create much broader criteria for preferences, which will dilute the presence not only of minorities, but of the most disadvantaged applicants.").

<sup>188</sup> *Id.* at 498.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 503. Greenburg further explains:

We have also demonstrated something that we intuitively knew from the start: a class-based system is not a fungible substitute for a race-based system. Each type of system produces diversity, but the diversities do not duplicate one another; they merely overlap. The extent of an existing racial preference, the size of the new SES preference and the relative socioeconomic levels of different races, determine the extent of the overlap. In the law school admissions context, blacks generally receive race-based preferences equal to a standard deviation on the LSAT. Since, in our admissions pool, the black SES divergence from whites is generally smaller than this, an SES preference cannot fully offset a racial one, regardless of the size of the SES preference. Latinos generally receive race-based preferences equal to one-half a standard deviation; since this is comparable to their SES divergence from whites, an SES preference can offset the racial one, though much less efficiently (e.g. with a lower academic threshold and the admission of many non-Latinos).

*Id.*

More Asian and Anglo students from that same low SES background have adequate scores to be considered.<sup>191</sup> Most of the African Americans with competitive scores for a school such as UCLA School of Law are from middle class families, and thus would not qualify for the low SES boost.<sup>192</sup> Of course, as one considers schools lower in the U.S. News rankings, these numbers change somewhat, but the vast majority of low SES students remain Anglo at any qualification level. And the vast majority of Anglos outscore the average African American or Latino on the LSAT.

As we have learned from previous diversity experiments at UCLA School of Law (socio-economic and diversity of public service vocations), we can expect that this diversity program would increase diversity in the ways that are considered by the selection committee. If race and ethnicity are not considered, then racial or ethnic diversity will not increase in any significant way through this type of diversity scholarship program. As the experiment with socio-economic diversity demonstrated after the end of affirmative action in California public law schools, racial and ethnic diversity cannot be maintained, let alone increased, when socio-economic status is the main consideration. UCLA was able to significantly increase the number of students who were poor or the first in their family to attend college or law school, which are both laudable achievements, but most of those students were Anglo.<sup>193</sup>

## 2. Other Race Neutral Factors to Consider

Are there other factors that should be considered in a race-neutral diversity scholarship program that would be effective in selecting students from a variety of racial and ethnic backgrounds? If fluency in any second language (as opposed to the more "cultured" or high status languages) was a factor, that would add points for many Asian Americans and Latinos. Anglos would be as likely, or more likely, to possess this skill than African Americans, and thus this factor would not increase African American diversity levels. Athletic abilities may be an effective factor for awarding

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<sup>191</sup> *Id.* at 498.

<sup>192</sup> See Kidder, *supra* note 115, at 183 (acknowledging Rick Sander's data on the SES admissions program and stating that Sander "reports that the median parental income of applicants was \$38,000 for Blacks, \$31,000 for Latinos, and \$64,000 for Whites. Among the top 1,000 applicants (based on LSAT/UGPA index scores) the racial income gaps increased: Blacks \$40,000, Latinos \$44,000 and Whites \$79,000. Thus, among top performers, Whites have almost double [sic] the parental income of Blacks."). This data suggests that the SES correlation with race contributes to the overprediction vis-a-vis minority applicants of lower SES status.

<sup>193</sup> Sander, *supra* note 181, at 488, 501.

points to African American students at levels higher than those of Asian Americans, Latinos and Anglos (depending on the sport, of course) at the undergraduate level but would be difficult to justify in law schools and other graduate program admissions. Overcoming obstacles may be a factor that weighs more heavily for applicants of color, though the obstacle of poverty is a substantial one and one that many Anglos also share. While all of these factors may provide some additional points to some diversity applicants, it is unlikely that any one will have a substantial impact on racial and ethnic diversity. As the University of Michigan argued in their *Grutter* briefs, other methods of maintaining academic excellence and a diverse student body were ineffective.<sup>194</sup>

*What about a reverse grandfather clause?* Perhaps the following standard should be used: if an applicant's grandparents would not have been eligible to enroll in the school due to their race or ethnicity, then that school could decide that the applicant is eligible for a scholarship if he or she is admitted and chooses to enroll. Schools would need to determine whether to require that all four grandparents have been ineligible, or a lesser number like two or three. Using this criterion would take into account a variety of factors, such as race and gender, as well as wealth and access to education issues. Then, schools truly would be helping those who started without the benefit of wealthy educated grandparents, which in turns leads to wealthy educated parents. If eligibility were based on parental ability to enroll, the effectiveness of the policy would be compromised, simply because more schools have changed their policies and become less overtly discriminatory towards underrepresented groups in the last generation.

The reverse grandfather clause also would have the effect of being neither over-inclusive nor under-inclusive by limiting its purview to those who lived in the United States before and during the civil rights era of the 1960s and excluding those who immigrated to the United States after that time. This clause would not be explicitly race-based, nor even race-conscious, and thus may be effective for African Americans and Latinos as well as for Asian ethnicities (though not, perhaps, the least disadvantaged, such as the Vietnamese and other South East Asians, who immigrated here in larger numbers at a later time). We would need to examine the effects of this policy on the Jewish population, depending upon whether the Jewish quotas were lifted in higher education before or after current grandparents would have sought enrollment.

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<sup>194</sup> University of Michigan Brief, *supra* note 82, at 68–76.

### 3. Incorporating International Students Into the Diversity Equation

Using international students to increase diversity would be another race-neutral route. However, there is an issue that some scholars have raised as to whether international students and recent immigrants should "count" for diversity purposes. Some of the diversity that we experience in elite educational institutions comes from students of color who were born or grew up in other nations around the globe. Are black immigrants and their children the new sort of "model minority" in the United States? Consider the warm welcome of now Senator Barack Obama at the Democratic National Convention.<sup>195</sup> These international students may be from diverse backgrounds and cultures, and therefore can contribute to the benefits that flow from a diverse student body, such as helping to eradicate stereotypes based on race. But are the costs of admitting these students over United States citizens worth the benefits? The stereotypes based on national origin (American Blacks versus African Blacks, for instance) would remain for American-born blacks and descendants of those enslaved in the United States. It is likely that the international blacks would begin to hear the refrain familiar to so many educated African Americans: "You are not like those *other* black people."

Moreover, the heavy use of international students may give us a false sense of accomplishment in reducing the racial performance gaps.<sup>196</sup> Forde-Mazrui explains that:

[D]iversity-based programs may create a false impression that past discrimination is being addressed by benefiting blacks who are not victims of past societal discrimination, such as recent black immigrants. Such programs may thus close the black-white gap with the wrong blacks, that is, with blacks who were not harmed by past societal discrimination. The apparent elimination of racial disparities could thus deceive us into believing we have repaired the past when we have only obscured it.<sup>197</sup>

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<sup>195</sup> See Dyson, *supra* note 89, at 253–54.

<sup>196</sup> Such admissions might also exacerbate the socio-economic gap that Professor Bell laments, because international students generally are not provided with financial aid and therefore must have sufficient economic means to pay for their own elite education.

<sup>197</sup> See Kim Forde-Mazrui, *Taking Conservatives, Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 CAL. L. REV. 683, 750–51 (2004).



The author recognizes, however, that remedying past discrimination is a different goal than providing diversity, but the concerns about the false sense of accomplishment still apply to the extent that one of the benefits of diversity is helping to legitimize our elite institutions.<sup>198</sup> In response to Justice Scalia's warning that minority groups will litigate each other over the allocation of critical mass spaces, Dyson explains that for West Indian and African immigrants, "their children, and the children of biracial couples [represent] the largest portion of blacks admitted to the most selective institutions of higher education."<sup>199</sup> Specifically Dyson notes: "Recent research confirms that on average, West Indians account for more than forty-one percent of all 'blacks' at twenty-eight selective institutions," including Harvard, Columbia, Duke, Penn and UC Berkeley.<sup>200</sup> Perhaps the reverse grandfather clause suggestion discussed above would provide a partial solution to this perceived dilemma.

#### 4. Race Neutral Means are Ineffective

Now so we come to the rationale for the *Grutter* decision: because race neutral means do not achieve the desired goal in the context of admissions, the university is left with no choice but to employ race conscious means of evaluating applicants.<sup>201</sup> This choice is a limited and limiting one because it can only endure for a short time and only so long as it is necessary to further the compelling interest (and perhaps according to some interpretations of *Grutter* for no more than twenty-two more years, regardless of its success or failure at that time). Spann explains that: "the [Supreme] Court is now able to use the concept of prospective race neutrality as a means of freezing existing racial inequalities in the distribution of resources. And it is able to do so while purporting to advance the abstract goal of racial equality."<sup>202</sup>

Prospective racial equality seems to be the end point for affirmative action (the time when it is no longer needed) but even if racial equality never is realized, the end will come nonetheless. Unfortunately, the persistence of subtle and obvious Anglo privilege prevents the attainment of racial equality,

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<sup>198</sup> *Id.*

<sup>199</sup> Dyson, *supra* note 89, at 253–54.

<sup>200</sup> *Id.*

<sup>201</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 328, 332 (2003) (noting that "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.").

<sup>202</sup> Spann, *supra* note 171, at 249–50.

at least under the current Supreme Court's interpretation of the matter. In the meantime, Spann cautions:

There is no such thing as race neutral allocation. There is only the pretense of race neutrality that occurs when we elect to use inertia as our preferred form of racial discrimination. Which, [sic] of course, is precisely what the Supreme Court has done by reading the Constitution to prohibit the race-conscious pursuit of racial balance.<sup>203</sup>

Because racial balance cannot be the goal, we must distinguish the critical mass goal from racial balancing.

*B. Turning to Race Consciousness: Avoiding the Quota Criticism and Racial Balancing Allegations*

If race neutrality is illusory, and racial balancing is impermissible, how can diversity lawfully be increased? It seems that a focus on critical mass and under-representation actually propagates an illegal quota, or impermissible "racial balancing" by evaluating when a group has reached its ceiling for representation, and thereafter cutting off any preferential treatment for that group. Individuals will be judged based on their membership in the group, and not based on their individual merits and value, and thus the equal protection clause will be violated.

However, convincing this argument may be, the *Grutter* majority opinion supports a contrary view. The *Grutter* Court reasoned that a concentration on critical mass is not the same as a quota, because it is a flexible number, not an absolute constant that must be achieved and maintained from year to year without regard to any annual variations in the quality of the applicant pool.<sup>204</sup> The *Grutter* Court relied heavily upon the historical fact that "the number of underrepresented minority students who ultimately enroll in the Law School differs substantially from their representation in the applicant pool and varies considerably for each group from year to year."<sup>205</sup> Thus, as long as the critical mass of students in each

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<sup>203</sup> *Id.* at 241.

<sup>204</sup> *See Grutter*, 539 U.S. at 335–36 (2003) ("The Law School's goal of attaining a critical mass of underrepresented minority students does not transform its program into a quota. As the Harvard plan described by Justice Powell recognized, there is of course 'some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted.' (citations omitted) 'Some attention to numbers' without more, does not transform a flexible admissions system into a rigid quota.").

<sup>205</sup> *Id.* at 336.

group is flexible and not an absolute number, the program would not constitute an impermissible use of quotas.

The *Grutter* Court also recognized the limitations of "racial balancing,"<sup>205</sup> determining that while outright racial balancing was impermissible, pursuing a flexible critical mass of diverse races and ethnicities would be acceptable.<sup>206</sup> The Supreme Court granted certiorari to review the issue of racial balancing in the *Seattle Schools* and *Jefferson County* cases,<sup>207</sup> addressing this question:

May a school district that is not racially segregated and that normally permits a student to attend any high school of her choosing deny a child admission to her chosen school solely because of her race in an effort to achieve a desired racial balance in particular schools, or does such racial balancing violate the Equal Protection Clause of the Fourteenth Amendment?<sup>208</sup>

As this article was in the final editing stages, the Court issued its opinion, reaffirming the view that racial balancing is not permissible, and striking down the programs as insufficiently narrowly tailored, specifically because race neutral alternatives were not adequately considered.<sup>209</sup>

One issue presented in this *Seattle Schools* litigation is that the multitude of races and ethnicities is grouped together rather cavalierly.<sup>210</sup> If each race were identified more specifically, then the opposition likely would label the program an impermissible quota. But the situation is not a binary one and should not be treated as such. Yet, the First Circuit case referenced

<sup>206</sup> *Id.* at 309.

<sup>207</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162 (Wash. 2005), *cert. granted*, 126 S. Ct. 2351 (2006), *rev'd*, 127 S. Ct. 2738 (2007) argued in tandem with *Meredith v. Jefferson County Bd. of Educ.*, *cert. granted*, 126 S. Ct. 2351 (2006), *rev'd*, 127 S. Ct. 2738 (2007).

<sup>208</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738 (2007). See Petition for Writ of Certiorari, *Parents*, 126 S. Ct. 2351 (No. 05-908) (explaining that there is a split of authority on the issue of racial balancing in the circuit courts, and that is likely one reason why the petition was granted); *but see* Brief in Opposition, *Parents*, WL 789611, 14 (2006) (arguing that there is "no circuit conflict or confusion," and cautions that "to the extent that the circuit courts continue to refine the application of the Michigan cases in the highly fact-specific context of K-12 school assignment plans, granting review without the benefit of a record that reflects current trends in this dynamic area of educational policy would not be helpful to the orderly development of the law"). The reply brief states that "[A]s this court said in *Grutter*, this is nothing more than 'racial balancing, which is patently unconstitutional.'" *Id.* (*citing Grutter v. Bollinger*, 539 U.S. 306, 330 (2003)). Upon checking that quote in the text of the *Grutter* case, however, the "this" actually refers to "some specified percentage of a particular group merely because of its race or ethnicity. That would amount to outright racial balancing, which is patently unconstitutional." *Grutter*, 539 U.S. at 330. The quote continues: "Rather, critical mass is defined by reference to the educational benefits that diversity is designed to produce" (not to be achieved for its own sake). *Id.*

<sup>209</sup> *Parents*, 127 S. Ct. 2738.

<sup>210</sup> *Parents*, 426 F.3d at 1170.

as part of the conflict in authority, suggests that the lumping together of the various minority races and ethnicities is appropriate because "narrow tailoring does not require that Lynn [the school district] ensure diversity among every racial and ethnic subgroup as well."<sup>211</sup> The First Circuit's interpretation is that the critical mass refers to the sum of all of the underrepresented racial and ethnic groups.<sup>212</sup>

The *Comfort* court explained that "[w]here a community does not seek racial diversity for its own sake, but rather to advance a compelling interest in the educational benefits that diversity provides, there is no absolute bar to pursuing racial diversity."<sup>213</sup> The court also found that the Lynn school plan "takes race into account to foster intergroup [sic] contact rather than to segregate."<sup>214</sup> In addition, the Circuit court reiterated the district court's determination that:

[T]he Lynn Plan validates this conclusion: by reducing racial isolation and increasing intergroup [sic] contact, it has ameliorated racial and ethnic tension and bred interracial tolerance . . . . We therefore see no reason to impose a blanket prohibition on the use of race as a decisive factor in a student transfer plan to further a compelling interest in obtaining the educational benefits of racial diversity. If a non-competitive, voluntary student transfer plan is otherwise narrowly tailored, individualized consideration of each student is unnecessary.<sup>215</sup>

It would appear that this First Circuit authority provides the most compelling argument that the narrowly tailoring factors are indeed that—factors, which are weighed and balanced against one another, and are not elements, each of which must be satisfied to satisfy strict scrutiny review. The *Comfort* court may have been somewhat bold in asserting that individualized review is not necessary, but such a departure is reasonable given the substantial differences between selection for admission to the highly competitive elite universities and the open choice system for non-competitive secondary and elementary schools. This different conception of what is sufficiently narrowly tailored at the lower educational levels provides

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<sup>211</sup> *Comfort v. Lynn Sch. Dist.*, 418 F.3d 1, 22 (1st Cir. 2005) (citations omitted) (noting that the law school sought to enroll a critical mass of 'minority' students, a category that included African-Americans, Hispanics, and Native Americans), *cert. denied*, 126 S. Ct. 798 (2005).

<sup>212</sup> *Comfort*, 418 F.3d at 22.

<sup>213</sup> *Id.* at 15 (1st Cir. 2005) (citing *Grutter*, 539 U.S. at 330).

<sup>214</sup> *Id.* at 19.

<sup>215</sup> *Id.* (internal citations omitted). In evaluating the narrowly tailoring aspect, the court also found that "the diminished nature of any harm here is significant." *Id.* at 20.

a useful analogy to the financial aid process. Students seeking financial assistance already have been through the highly competitive admissions process, and thus the rules can be more relaxed for the allocation of financial aid to those already admitted students, much as the rules can be more relaxed for the assigning of admissions slots in non-competitive elementary and secondary school districts where every student is assured a spot in the classroom.

If the only real option is a race-conscious allocation of financial aid, then we must consider Factor Two: whether a less extensive or intrusive use of race would be ineffective?

*C. Factor Two: Whether a Less Extensive or Intrusive Use of Race Would Be Ineffective*

To focus more specifically on achieving and maintaining racial and ethnic diversity, as a subset of the Diversity Scholarships, the universities also should offer "Critical Mass Scholarships." These scholarships would be a less intrusive and less extensive manner of taking race into account, because the majority of diversity scholarships would be based on race neutral factors, and therefore could fulfill Factor One, discussed above, by having some success in the other ways of diversifying the student body. Because the *Grutter* Court's discussion of the concept of critical mass referred to racial and ethnic diversity, those characteristics would be the primary focus of the Critical Mass Scholarships. This small subset of the Diversity Scholarships would involve race-conscious consideration, and thus must be a narrowly tailored means of achieving the compelling interest in student body diversity or the benefits that flow from student body diversity.<sup>216</sup> Our examination of the requirements for narrowly tailoring under *Grutter* would be applied to the scholarship program, and as long as the concept of *stare decisis* holds, the scholarship program also should pass the *Grutter* version of strict scrutiny analysis.<sup>217</sup>

The *Grutter* analysis requires individualized review, and the *Gratz* ruling demonstrates the illegitimacy of a mechanistic formula, which fit quite well under this second factor about the extensiveness and intrusiveness of the use of race.<sup>218</sup> The mechanistic formula is the epitome of an extensive use of race (as discussed in *Gratz* where an automatic twenty points was awarded

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<sup>216</sup> See generally, Chris Chambers Goodman, *A Modest Proposal in Deference to Diversity*, NAT'L BLACK L. J. (forthcoming Spring 2006).

<sup>217</sup> DOE Guidelines, *supra* note 121,

<sup>218</sup> See *Gratz v. Bollinger*, 539 U.S. 244, 246 (2003) (explaining the importance of considering each particular applicant as an individual).

for everyone who identified as a member of an underrepresented racial or ethnic minority group).<sup>219</sup> The individualized review, which awarded points based on a combination of diversity and other merit factors, was deemed to be less extensive and less intrusive, while still being effective.<sup>220</sup>

The U.S. Supreme Court roster has changed in the three years since *Grutter* and *Gratz*, and therefore if a race-conscious financial aid program was granted certiorari, the Court might follow reasoning other than that explained in the majority opinions, on the grounds that *stare decisis* is not implicated because of the differences between admissions and financial aid issues. If the Court notes this distinction, then the argument that the scholarship aid is sufficiently narrowly tailored to satisfy the strict scrutiny test is a stronger one than in the admissions context.

Financial aid decisions differ from admissions decisions in an important way, which renders the fit between the means used and the compelling goal as much closer with the Critical Mass Scholarships than it was with "race as a plus factor" admissions. Admitting a diverse group of students is only the first step towards achieving student body diversity in a given year. The other steps include: convincing a diverse group of students to accept the admission offer; encouraging that group of students to actually enroll and attend the school so that there is a critical mass; and ensuring that those students participate in the learning community and continue to participate through the years, so that the benefits that flow from diversity can be enjoyed by all. Other steps that may or may not be included in a particular university's diversity goal are: ensuring that those students succeed and graduate at rates similar to other students. Nevertheless, admitting diverse students does not guarantee a diverse class, though it is a necessary first step.

On the other hand, the financial aid awards are linked directly to the goal of obtaining a critical mass. Money is awarded to ensure that the students needed to satisfy that critical mass are able to afford to attend, as well as to entice them to attend. One commentator suggests a "diversity of perspective statement" for review by the financial aid committee that would award diversity scholarships.<sup>221</sup> "Seen this way," Dyson explains, "financial aid is only a conduit by which to reinforce admissions offers that in turn maybe designed to attract and recruit a critical mass of diversity."<sup>222</sup> Dyson

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<sup>219</sup> *Id.*

<sup>220</sup> *Grutter v. Bollinger*, 539 U.S. 306, 309 (2003).

<sup>221</sup> Dyson, *supra* note 89, at 252.

<sup>222</sup> *Id.*

summarizes the proper way to evaluate narrow tailoring as follows: "by taking account of all relevant diversifying factors, including ethnicity, national origin, and color in an individualized and competitive process in both the admissions and financial aid decisions."<sup>223</sup>

If the student accepts the Critical Mass Scholarship and enrolls in the university, then the school is one step closer to filling its critical mass goal for that group of students. If the student declines to enroll, then the Critical Mass Scholarship is not awarded to that student, and the money is saved for someone who has what the university values at that stage in the enrollment process—a characteristic which the university still lacks in its critical mass calculations.

*D. Factor Three: Whether the Use of Race or National Origin is of Limited Extent and Duration and is Applied in a Flexible Manner*

As discussed above, the Critical Mass Scholarships would use race and ethnicity only for a subset of the Diversity Scholarships and only to the extent necessary to obtain a diverse entering class. In each admissions cycle, the committee can monitor the levels of racial and ethnic diversity being obtained through the general diversity scholarships and can use that information to determine the extent to which Critical Mass Scholarships need to be offered, and to which groups. If one racial or ethnic group is adequately represented in the critical mass equation through the main diversity process, then there is no need to engage in the race conscious consideration of the critical mass program for members of that group given that the goal of the Critical Mass Scholarship component of the diversity program is to enroll a critical mass of students from otherwise underrepresented racial and ethnic groups and to avoid the problems of tokenism and racial isolation that come from too little diversity.

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<sup>223</sup> *Id.* at 256–57. Dyson then evaluates three proposals for race conscious aid: (1) "race plus considerations in a holistic race-conscious allocation determination of financial aid"; (2) "[a]llocating race-based financial aid directly from university funding while maintaining a race-conscious admission process under Grutter and Gratz"; and (3) "[a]dministering race-based financial aid by selecting recipients for private donor, race-restricted grants while maintaining a race-conscious admissions process under Grutter." *Id.* at 258–59. Ultimately, Dyson concludes that the first option is the "one most likely to be endorsed by the courts." *Id.* Nevertheless, Dyson finds that the third option can be analogized to establishment clause cases, which did not find sufficient administration by the public entity to violate the establishment clause, and she suggests that universities avoid "burdensome, pervasive monitoring," such as interviewing candidates, checking on recipients' grades and other administrative pursuits. *Id.* at 269. Bednark also provides an analysis of religion-conscious scholarships, and determines that they can survive strict scrutiny by passing the Establishment Clause analysis, when a race-conscious scholarship (as opposed to all forms of diversity scholarship, including race and ethnicity) would not satisfy the strict scrutiny test of the Equal Protection Clause. Bednark, *supra* note 163, at 1435–36.

The limited duration of the Critical Mass Scholarship awards also is narrowly tailored. The scholarships are given to particular students who fulfill critical mass needs, for the year, or for the length of time that those students continue to fulfill critical mass needs at that particular university. Thus, if the university surpasses its critical mass range for Japanese American students, for instance, then obtaining additional Japanese American students would be of less value in the diversity analysis in that particular year. Therefore, the university would cut back or curtail any critical mass scholarship awards to Japanese American students. If in subsequent years, the university finds Japanese American students numbering below their critical mass range, the scholarship offers can be resumed to encourage greater enrollment. When the university is able, on a continuing basis, to achieve its critical mass range of Japanese American students with decreasing Critical Mass Scholarships' dollars, then the awards can be suspended, until the need arises in the future. Those monies can then be allocated to other groups for which the university has yet to achieve a critical mass.

The flexibility of the Critical Mass Scholarships is another important feature that permits universities to narrowly tailor the program to satisfy their diversity goals. For instance, if several African American students are thinking of dropping out of the school because the demands of working part-time while studying is having an adverse affect on their grades (a common reason for student attrition), and losing those three or four students would leave only one or two African American students to endure the concomitant racial isolation, the school can choose to offer additional Critical Mass Scholarship aid to those several students, so they no longer need to work for a semester or year, and thus can stay in school. Having those students remain in school adds value to the educational experience in at least two ways: (1) the students themselves will be able to participate in keeping up the critical mass, so that the true benefits can flow from diversity in that regard; (2) the students who otherwise would be left almost alone, and might themselves have considered leaving so as not to be "tokens," will be able to benefit from continuing their education in a less isolated environment.

As the school is able to exceed its critical mass range for students of one particular race or ethnicity, it can curtail the Critical Mass Scholarships to members of that group and move the money into scholarships for groups that are now underrepresented in an effort to increase diversity to its optimal



levels. This adjustment is not impermissible racial balancing, based on *Grutter's* analysis; instead, it constitutes a proper focus on critical mass.<sup>224</sup>

The flexibility of this Critical Mass Scholarship program also avoids two other fatal flaws of many other diversity programs: under-inclusiveness and over-inclusiveness. The program struck down in *Podberesky* was over-inclusive because while its stated goal was to remedy past discrimination against high achieving African Americans by the university, there was no evidence that the school had discriminated against these particular high achieving African Americans in the past, nor that African Americans from outside the state of Maryland had been victims of past discrimination by this particular university. In addition, the Banekar scholarship program was under-inclusive for two reasons: First, it was not available to other groups who had been discriminated against by the university in the past.<sup>225</sup> Second, it did not necessarily result in an increase in the education of *Maryland* residents because *out of state* African Americans also were eligible for the scholarship.<sup>226</sup>

In contrast, the Critical Mass Scholarship program envisioned here would not suffer from under-inclusiveness. The money would be available to all those qualified and admitted students who provided value to the university by meeting a critical mass need of the university. While the financial resources may be limited, it is not likely that the court would find budget limitations to constitute under-inclusiveness, based on the guidance from admissions decisions, in which there are a limited number of admissions slots to award. The Critical Mass Scholarship also would not be over-inclusive because only qualified admitted students who added value by meeting a current critical mass need of the university would be offered the aid.<sup>227</sup> Any student who stopped fulfilling that need would stop receiving the aid.

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<sup>224</sup> See *supra* notes 167–74 and accompanying text on racial balancing (explaining that while racial balancing is impermissible, pursuing a flexible critical mass of diverse races and ethnicities would be acceptable).

<sup>225</sup> *Podberesky v. Kirwan*, 38 F.3d 147, 153 (4th Cir. 1994).

<sup>226</sup> *Id.* at 158 n.11.

<sup>227</sup> There is an argument that the benefit of the aid to the student continues for a lifetime, because that is some amount less money that must be repaid through loans for the benefit of that educational experience. In that sense, the award could be slightly over-inclusive, as continuing to benefit those who no longer add value to the critical mass, but I think such an argument is not likely to succeed in overturning the program.

*E. Factor Four: Whether the Institution Regularly Re-examines the Use of Race or National Origin in Awarding Financial Aid to Determine Whether It Is Still Necessary to Achieve Its Goal*

As students enroll, graduate or leave the university, the requirements for maintaining a critical mass of various groups will adjust with each admissions cycle. Universities will necessarily re-evaluate the Critical Mass Scholarship goals each year to determine what money should be directed at which groups. The efficacy of the program also is a factor in the narrowly tailored analysis, and it is easy to determine whether the Critical Mass Scholarships are working to obtain a critical mass of diverse students by noting the achievement of critical mass ranges when the scholarships are awarded. If the scholarship awards turn out to be insufficient to ensure or entice sufficient numbers of students of a particular race or ethnicity, then the dollar amounts can be adjusted. If that adjustment does not accomplish the goal, then the university can research other mechanisms for enrolling students from that particular group.

On the other hand, as the scholarships attract more students from the underrepresented group, and as the critical mass grows, the university may become more attractive to students from this group, such that less financial enticement will be needed in future years. Then, the university can lessen the amount of these race-conscious financial aid awards for members of that group and focus the money on groups for which a critical mass still is lacking.

*F. Factor Five: Whether the Effective Use of Race or National Origin on Students Who Are Not Beneficiaries Of That Use Is Sufficiently Small and Diffuse So As To Not Create An Undue Burden On Their Opportunity to Receive Financial Aid*

The explanations of the DOE Policy Guidance show that the burden on students who do not qualify for race-based financial aid must be minimized.<sup>228</sup> The commentary states:

Generally, the less severe and more diffuse the impact on non-minority students, the more likely a classification based on race or national

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<sup>228</sup> See DOE Guidelines, *supra* note 121, at 8762 (advising on the Civil Rights Act of 1964 and related regulations and their applicability to those financial aid awards at least partially based on race or national origin).

origin will address this factor satisfactorily. However, it is not necessary to show that no student's opportunity to receive financial aid has been in any way diminished by the use of the race-targeted aid. Rather the use of race-targeted financial aid must not place an undue burden on students who are not eligible for that aid.<sup>229</sup>

Financial aid decisions do not place an "undue burden" on the non-beneficiaries (here, the non-recipients of aid, or those who receive less aid than they would like) because the invitation to enroll already has been extended, and thus the applicant has the ability to attend the school, as long as he or she can work out the finances.

This is not to belittle the critical importance of financial aid in helping students from middle and lower SES backgrounds to attend expensive colleges and universities. If the student is from a lower SES background, the money can be obtained from the federal government through grants and loans. Dyson explains that the allocation of race-based scholarships may have a lesser burden on non-qualifying Anglos when federal financial aid funds are available to students who do not receive race-based funding.<sup>230</sup> Any federal funding would have been reduced by the amount of the race-based scholarship if they had been eligible. Thus, the students are as able to get their financial needs met, whether or not they qualify for race-based aid.

In addition, the critical mass fund does not take money away from students who do not satisfy a critical mass need. When an admitted applicant requires financial assistance to attend the university, the committee will determine whether that individual helps to fulfill a diversity need. If so, then that student will be considered for the diversity-based financial aid, which is available to students of all races and ethnicities. If the student fills a current critical mass need, that student can be offered funds from the race-conscious funds. If the student does not meet either of these needs, she will be offered funding from the need-based category.

This three-step decision process even more narrowly tailors the program to accomplish the goal of diversity and achieving critical masses where applicable. It does not section off special funds each year for "minorities only," and thus would not fall victim to the *Bakke*<sup>231</sup> dilemma of

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<sup>229</sup> *Id.*

<sup>230</sup> See Dyson, *supra* note 89, at 260–61 (finding that university financial aid offsets the difference between students receiving federal funds and those who are not).

<sup>231</sup> See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (finding that the school's system of reserving places for disadvantaged applicants in the entering class was unconstitutional; however, race can be taken into account as one factor in the admissions process).

segregated selection pools. Instead, those dollars that were donated for race-conscious aid will be available to a particular student who meets a need in a particular year. If no student meets the critical mass and diversity needs in a particular year, then no money would be awarded from that particular fund that year. The university will not need to allocate the funds to an unqualified applicant to maintain diversity, and the money will not be taken away from an admitted student who does not satisfy the critical mass needs that year.

In determining whether the student needs financial assistance to enroll, this article suggests a more flexible approach to financial aid decisions instead of applying a mechanistic need-based formula that so many schools currently rely upon. Differences in wealth and net worth between the families of students of color and Anglo-Saxon students can be substantial, but the current financial aid calculations seem to rely most upon current and immediately past family income. Two families with current income of \$200,000 may look the same in terms of current ability to contribute to a child's college education, but if one family owns three homes (and their mortgages are paid off), and another family rents its home and leases its vehicles, there is a substantial difference in these two families' current ability to pay a child's college tuition.<sup>232</sup> Thus, flexible diversity and Critical Mass Scholarship Programs could take factors like wealth and net worth into consideration more readily to determine whether a particular student actually needs additional financial assistance to be able to enroll and remain in school. The flexibility of this approach likely will result in more, or higher, financial aid awards to students who are otherwise considered middle or upper-middle class, yet are unable to attend the schools of their choice due to inadequate need-based awards under the current system most widely applied.

If the student is from a middle class or upper-middle class background, then some parental or student contribution may be required even under this new system, but the goal is to ensure that the amount is not daunting. If the student does not receive a diversity or critical mass financial aid award, still there are need-based funds, as well as private lending opportunities and student employment to help bridge the gap. The ultimate benefit of a college or graduate school education is not denied to the

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<sup>232</sup> See Kidder, *supra* note 115, at 184–85 (describing the differences between black families and white families in regard to wealth accumulation, being that white families have a far greater accumulation).

qualified student who is offered admission but not offered sufficient scholarship aid from the institution itself.<sup>233</sup>

This burden of receiving financial assistance from a different source is distinguishable from the burden in the admission context in which the student is precluded from attending an institution to which she was not admitted (at least for the time being, unless a subsequent application is successful in another enrollment cycle). While the *Grutter* Court did not consider that denial to be an undue burden in the admissions cycle,<sup>234</sup> the current Court may draw the line differently. Nonetheless, this financial aid burden is much lower, and farther from an "undue" burden in the financial context.

### *G. Will This Scholarship Program Provide Adequate Individualized Consideration?*

Individualized review was a cornerstone of the admissions process in the *Grutter* and *Gratz* cases,<sup>235</sup> and it is likely that the current United States Supreme Court would expect the same individualized review for race-conscious financial aid decisions. The perceived lack of individual consideration is a public relations issue as well when the Anglo-Saxons see themselves as "displaced" by less qualified applicants of color. Goodwin Liu explains that the public relations problem is based on a false premise because "the admission of minority applicants and the rejection of white applicants are largely independent events, improperly linked through the causation fallacy."<sup>236</sup>

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<sup>233</sup> When the financial aid award is small, the amount of loans necessary may appear overwhelming, and "some schools argue that admitting a student and then telling them the school doesn't have the money to fund them is no different than denying them. They argue that they don't want to put the family through the false hope of being able to attend. NAIS would argue that honesty is the best policy; if the student is qualified to be admitted, he/she should know that. If the school cannot give them the aid they need, the family should know that as well. Then the family can decide if they can or cannot gather the resources to pay tuition. Otherwise, if a child is denied admission because the school cannot (or chooses not to) fund them, he/she is not likely to know that this is the reason and may feel they just weren't 'good enough' to get in." Mark J. Mitchell, *Developing a Need-Blind Approach to Admission* (on file with author).

<sup>234</sup> See *Grutter*, 539 U.S. at 341 (finding that the university's admission process included acceptance of non-minority applicants over minority applicants when the non-minority applicants would better assist the university in its goal of a diverse environment).

<sup>235</sup> See generally, Section D. The Narrowly Tailoring Factors Post-*Grutter*.

<sup>236</sup> Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1049 (2002). Liu summarizes his argument as follows: "My argument proceeds from one simple statistical truth: In any admissions process where applicants greatly outnumber admittees, and where white applicants greatly outnumber minority applicants, substantial preferences for minority applicants will not significantly diminish the odds of admission facing white applicants." *Id.* at 1049. Liu also notes:

Lui suggests that shifting the focus of harm to whites away from "displacement" (because most whites would not have their admissions chances increased in any significant way if all affirmative action were halted) and toward avoiding stereotyping would be a more positive way to evaluate the efficacy of diversity programs that consider race as well as other factors.<sup>237</sup> Lui states that: "the key point is that the grievances of white applicants cannot be meaningfully evaluated through a generalized balancing of tangible costs and benefits. What is required is a nuanced examination of how a particular affirmative action policy operates and how its operation does or does not accord each applicant equal dignity."<sup>238</sup>

Under the Critical Mass Scholarship Program, financial aid will be awarded based on individual value—how an individual student is able to add value to the educational institution by helping to satisfy a critical mass goal. Applicants are not interchangeable in this equation. Anglo-Saxon applicants also have the ability to fulfill diversity goals, and therefore are not displaced as a group from the diversity financial aid program. The numerous components of diversity will ensure that each student has something to offer in terms of diversity, regardless of her race or ethnicity. This reality may in time help to lessen the stereotyping associated with diversity in general and critical mass allocations in particular.

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When the mechanics of selective admissions are analyzed at the level of individual applicants, it becomes clear that a substantial number of unsuccessful white applicants (somewhere close to half in Bowen and Bok's study) are too weak to be admitted even when placed on an equal footing with minority applicants. Because the failure of those [displaced white] applicants to gain admission has nothing to do with race, they lack standing to challenge affirmative action.

*Id.* at 1050. He further states:

Because strict scrutiny takes into account the nature and severity of the burden that affirmative action imposes on white applicants, it is essential to characterize that burden accurately, without the distorting influence of the causation fallacy. Moreover, exposing the causation fallacy has the salutary effect of centering the merits inquiry on whether white applicants are improperly stereotyped, not displaced, by affirmative action. Claims of displacement tend to inflate the degree of racial conflict inherent in race-conscious admissions, thereby heightening the pressure to be 'for' or 'against' affirmative action. In contrast, the stereotyping concern defuses the tendency toward polarization by relating the fairness of affirmative action to the concrete workings of particular policies.

*Id.*

<sup>237</sup> *Id.* at 1101–02.

<sup>238</sup> *Id.* at 1102.

### V. Conclusion

The traditional notion of merit as a requisite for financial assistance like scholarships diminishes diversity, particularly racial and ethnic diversity in higher education. Moreover, a traditional merit-based system is not supported by the principles of justice, because rational actors who do not know how meritorious they will be would be unlikely to choose merit as the criteria for financial aid from behind the veil of ignorance. For these reasons, our traditional merit system does not provide the fairest allocation of educational assistance and resources.

The two corollaries that this article draws from Rawls arise from Rawls' original position, beneath the veil of ignorance, and they are likely to satisfy rational actors in that position. Financial equality of opportunity would be more important to rational actors in the original position, and therefore a need-based rule, to provide financial assistance to those who need it, would be more likely to emerge. This first corollary is justified by Rawls' principles of justice and explains one way to apply Rawls' theory to financial aid. The Diversity Scholarship depends upon the first corollary by recognizing that needs vary with culture, class, race and other circumstances, and therefore provides a more relaxed mechanism for evaluating financial need, to capture a larger share of diversity students.

Increasing representation for the underrepresented, the second corollary, also emerges readily from the original position, as an *a priori* determination that resources be allocated in a manner that gives everyone a chance at obtaining some of those educational resources. The second corollary also provides a justification for the Diversity Scholarships on the grounds that increasing diversity helps to maximize the representation of underrepresented groups. The Critical Mass component of the Diversity Scholarship Program focuses on the second corollary, by providing an effective method of achieving and maintaining racial and ethnic diversity through lifting up the least among us, the least represented in a particular institution of higher education. The need-based component of the first corollary provides a crucial limitation on the Critical Mass Scholarship Program, to ensure that the program remains narrowly tailored, not only by providing assistance where it is needed to help increase representation of underrepresented groups, but also by ceasing such assistance when the group no longer is underrepresented in the diversity calculus.

This Article has demonstrated that the Diversity Scholarship Program would not be subject to strict scrutiny to the extent that the program is not race-based. The race-conscious portion of the program (the Critical

Mass Scholarships) would survive strict scrutiny as a narrowly tailored way to pursue the compelling interest in racial and ethnic diversity that *Grutter* permits in institutions of higher education. The Critical Mass Scholarship component satisfies existing federal law by meeting the narrow tailoring factors of *Grutter*, *Podberesky* and the DOE Guidelines on financial aid to pursue diversity. Furthermore, to the extent that some past or current discrimination can be established, in the areas of merit, faculty offspring, and alumnae scholarships, the Critical Mass Scholarships would provide a narrowly tailored race-conscious remedy to that past (and continuing) discrimination that would not violate Title VI funding limitations.

The two corollaries provide a mechanism for analyzing the fairness of this and other diversity and Critical Mass Scholarship Programs. It is this author's hope that while diversity remains a compelling interest, and the court permits narrowly tailored means to achieve the goal of diversity, institutions of higher education put forth their strongest efforts by providing targeted financial resources to achieve the critical mass diversity that *Grutter* lauds, while complying with the principles of justice and fundamental fairness that Rawls espouses.



