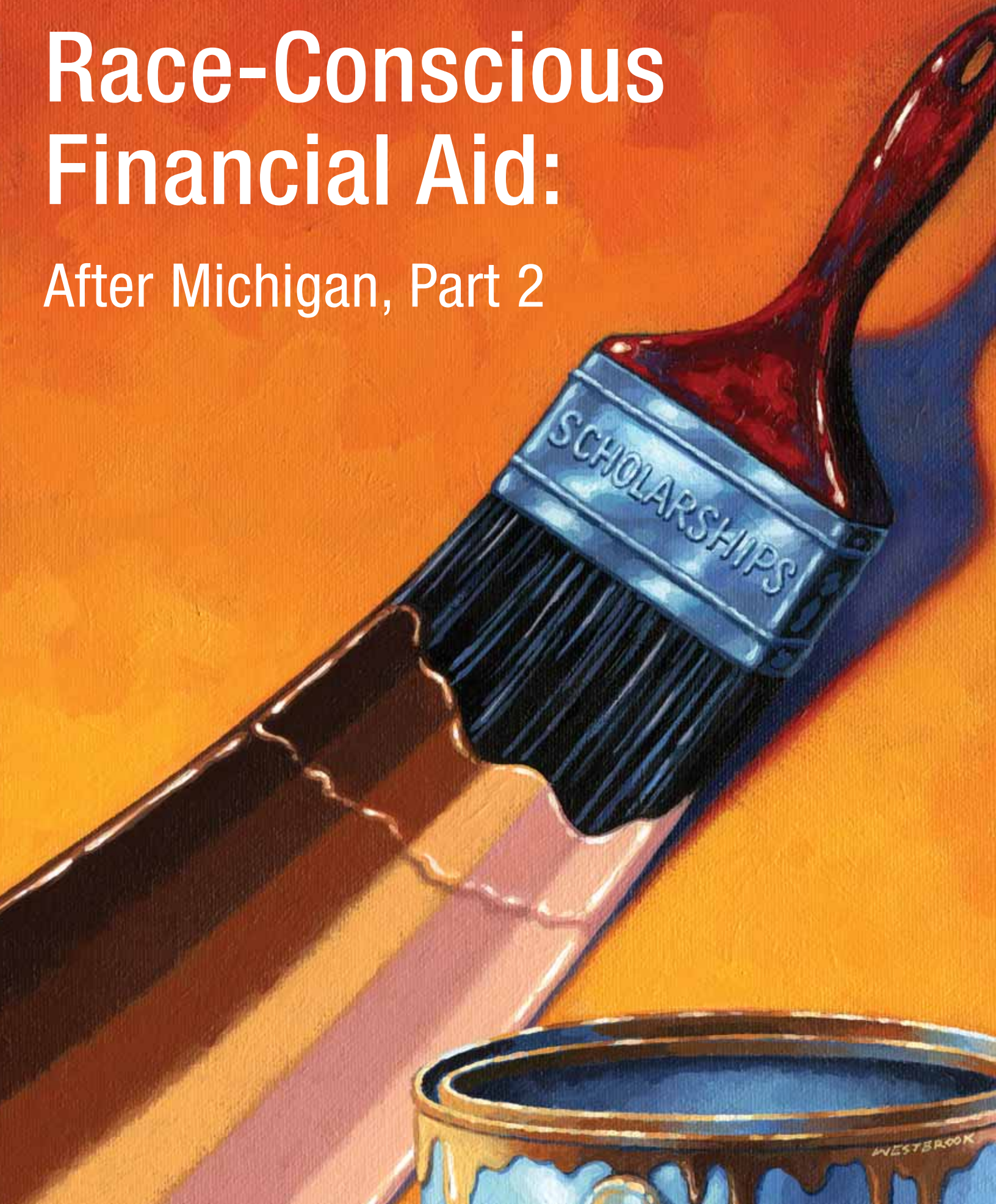


Race-Conscious Financial Aid:

After Michigan, Part 2



By Elizabeth B. Meers and William E. Thro

The following discussion is not legal advice. Pertinent legal standards are evolving and far from fully settled. Student financial aid administrators and other responsible college and university personnel should consult their institution's legal counsel concerning particular race-conscious financial aid programs.

This article is the second in a two-part series addressing some—but far from all—frequently asked questions about race-conscious financial aid after the U.S. Supreme Court's decisions in *Grutter v. Bollinger* and *Gratz v. Bollinger*. The discussion in these articles is based on current federal law under Title VI of the Civil Rights Act of 1964 (Title VI) and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution as applicable to higher education institutions, as well as policy guidance issued by the U.S. Department of Education (ED) in 1994 (hereafter “the 1994 Policy Guidance”). It does not address state or local law, which may be more restrictive than federal law, or legal aspects of race-conscious financial aid relevant to donors.

Part 1 of this article, published in *Student Aid Transcript*, Vol. 16, No. 1, addressed five frequently asked questions about race-conscious financial aid. This article therefore begins with question number six:

6. My institution has a number of scholarships for which membership in a particular minority group is not required as a condition of eligibility, but is considered in the award process. Can we continue to award these scholarships after the University of Michigan cases of Grutter v. Bollinger and Gratz v. Bollinger?

Many scholarships allow anyone to apply, but treat race as a “plus factor” in the award process. The 1994 Policy Guidance (discussed more fully in Part 1 of this article) stated that ED would “presume that a college’s use of race...as a plus factor, with other factors, is narrowly tailored to further the compelling governmental interest in diversity, as long as the college periodically reexamines whether its use of race...as a plus factor continues to be necessary to achieve a diverse student body.” *Grutter* and *Gratz* can be interpreted to support the lawfulness of such financial aid if it is narrowly tailored to achieve a compelling governmental interest, although the Supreme Court

did not directly address the question and legal observers have differing views on it.

It is uncertain whether or how courts will apply the principles of “narrow tailoring” expressed in *Grutter* and *Gratz* to the context of financial aid. As noted in Part 1 of this article, there may be significant legal differences between the two settings. If courts will apply the same type of analysis to financial aid as to admissions, scholarships that take race into account as a general consideration in making awards are likely to be more defensible than race-exclusive scholarships. If all students are eligible to apply for a scholarship and race is only one consideration in the award, the scholarship—like the race-conscious admissions policy upheld in *Grutter*—may provide for “individualized consideration” and not “unduly burden” members of disfavored groups.

However, the scholarship could be subject to legal challenge, if for example the institution uses a mechanical point system that gives decisive weight

to race, as in *Gratz*. The institution should consider whether, in its particular circumstances, race-neutral approaches to financial aid would be sufficient to achieve the type of student body diversity that the institution seeks. The institution may conclude that race-conscious methods are needed in both admissions and financial aid or in one context, but not the other. As with race-conscious admissions policies, institutions should periodically review race-conscious financial aid programs and offer such aid only as long as needed to achieve a compelling interest.

the Fifth Circuit, as a “proxy for other characteristics that institutions value but that do not raise similar constitutional concerns.” For example, if an institution wished to help students who live in poverty, the institution might have administered race-based scholarships as a means of helping those in poverty because a disproportionate number of racial minorities live in poverty. A more defensible approach to achieving that objective may be to create scholarships that help people, regardless of race or ethnicity, who live in poverty. In this way, the institution

which prohibits discrimination in employment on the basis of national origin and other traits, the Supreme Court has noted that “[t]he term ‘national origin’ on its face refers to the country where a person was born or, more broadly, the country from which his or her ancestors came.” According to regulations of the Equal Employment Opportunity Commission (C.F.R. § 1606.1), which enforces Title VII, the phrase “national origin discrimination” is broad enough to include discrimination on account of “an individual’s, or his or her ancestor’s, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group.” Courts are likely to look to these definitions of the term “national origin” in the context of Title VI.

Accordingly, an institution administering a scholarship limited to students of a particular national origin would need to justify the scholarship in the same manner as a scholarship restricted to students of a particular race, as discussed in Part 1 of this article and in response to Question 6. It may be possible to negotiate with the donor for a restriction that would carry out his or her intent, but possibly be more defensible in the event of a legal challenge. For example, the donor might be willing to make national origin a consideration in award, rather than a condition of eligibility. Alternatively, the donor might wish to orient the scholarship to students interested in, for example, Latin American studies, without regard to their national origin.

9. Can we accept a gift intended for students whose first language is Spanish?

Title VI prohibits discrimination based on race, color or national origin; it does not prohibit discrimination on account of language as such. The Supreme Court has not determined how language-based classifications should be treated under the Equal Protection Clause, but lower courts have generally declined to treat language by itself

Many scholarships allow anyone to apply, but treat race as a “plus factor” in the award process.

7. Can we create a scholarship for extremely low-income students when the majority of our non-minority students will not qualify?

Essentially, this question asks whether it is permissible to base eligibility on race-neutral criteria—such as coming from a low-income family, being the first person from a family to attend college, growing up in a single parent household, graduating from a high school that has a high dropout rate or does not offer certain college preparatory courses, or living in a particular geographic area—when it is apparent that the resulting applicant pool will be disproportionately minority.

In these circumstances, although certain racial and ethnic minorities may be represented disproportionately among those who meet the relevant criteria, individuals are not given a preference because of their race. For example, at least some nonminority applicants will likely meet the criteria, and conversely, some members of racial and ethnic minority groups likely will not.

Some institutions use race, in the words of the U.S. Court of Appeals for

could help those persons it desires to help and at least to some extent reduce the legal risk of race-based scholarships. On its face, such an approach arguably eliminates race as a relevant factor.

To date, courts have not ruled directly on scholarship programs based on race-neutral criteria that disproportionately benefit minority students. Because such scholarships involve no racial classification, courts are less likely to apply the particularly rigorous legal standards applicable to racial classifications under Title VI and the Constitution unless the institution adopted race-neutral criteria for a racially discriminatory purpose. Thus, even if they disproportionately benefit minority students, race-neutral scholarships may present less legal risk than race-conscious financial aid.

8. Can we accept a gift restricting awards by country of origin—Nicaragua, for example?

Title VI prohibits discrimination on the basis of race, color, and national origin. In the context of Title VII of the Civil Rights Act of 1964 (“Title VII”),

as equivalent to national origin.

The answer to this question therefore depends on whether a student's first language of Spanish constitutes a proxy for national origin under Title VI or the Equal Protection Clause—in other words, whether the institution intends to limit aid to recipients of certain national origin(s). Although courts have differed on the issue, they generally have resisted the argument that language equals national origin when they have considered policies that differentiate between individuals who speak English and those who do not. Some courts have suggested, in the context of employment discrimination suits, that it is inappropriate to treat an individual's native language as the equivalent of his or her national origin for purposes of discrimination claims if that person is bilingual or multilingual.

In contrast, if (in the words of the U.S. Court of Appeals for the Ninth Circuit) the "target groups" of a language classification are "distinct and easily identifiable," courts may be more likely to treat language-based discrimination as equivalent to national origin discrimination and require that the classification be justified by a compelling interest and implemented through narrowly tailored means.

Whether a scholarship for students whose first language is Spanish could be treated as discriminating on the basis of national origin thus may depend on the facts. If a language-based preference is not equivalent to national origin discrimination, the scholarship should be treated as "race-neutral," even if it disproportionately benefits individuals of certain national origin(s), as discussed in response to Question 7. If the language-based preference is equivalent to national origin discrimination, the college or university would be required to justify the scholarship restriction in the same manner as it would a race-conscious scholarship, as discussed in Part 1 and in response to Question 6.

10. To assist us in recruiting more foreign students, a donor would like to give us a scholarship for citizens of China. May we accept the gift?

The Supreme Court has held that under the Constitution classifications on the basis of citizenship are subject to legal standards similar to discrimination on the basis of race. Applying those standards, the Supreme Court has ruled that public universities may not limit financial aid to U.S. citizens, but must also include at least resident aliens. Although Title VI does not prohibit discrimination on the basis of citizenship, classifications based on citizenship often resemble classifications based on national origin. Accordingly, it is generally prudent for an institution to take the same steps to justify financial aid restricted to foreign citizens as it does for financial aid restricted on the basis of race or national origin.

11. If a scholarship endowment was given to the school by a will many years ago and the will specifically requests that needy minority students receive the funds, may I still administer the scholarship and follow the will's instructions? Or must I have to take the will to court to allow a change in the terms so I can give away the money to any needy student?

Many institutions over the years have accepted gifts from individuals, foundations, and other private sources restricted to race-conscious scholarships. Assuming that the institution holds the funds or is involved in admin-

istration of the scholarship, the institution should consider whether the scholarship is legally defensible in the same manner that it would consider other race-conscious scholarships administered by the institution, as discussed in Part 1 of this article and in response to Question 6.

If the institution concludes that the restriction does not conform to current legal requirements, the institution can take several steps. For example, if the donor is living or is an on-going organization, the institution may approach the donor for modification of the terms of the gift. If the donor is deceased, the institution may consider asking the relevant court to modify the terms of the will to carry out the testator's intention as closely as possible in the current legal environment. If the institution does not already do so, it may want to consider including in its standard gift agreement a provision that the institution may modify any restrictions on the gift in the event that they become unlawful or otherwise subject to modification under applicable law.

12. If the federal government offers my institution funding designated to individual students with need who are minorities underrepresented in a specific profession, such as in health professions, can my school administer those funds, or do we need to justify them separately?

Essentially, this question poses two inquiries. First, is the federal government subject to the same standards that

The institution should consider whether, in its particular circumstances, race-neutral approaches to financial aid would be sufficient to achieve the type of student body diversity that the institution seeks.



Because public colleges and universities are generally considered to be an “arm of the state,” the potential liability of a public institution for administering a race-conscious scholarship will likely be the same as the potential liability of the state.

apply to public institutions and private institutions that receive federal funds? Second, if an institution participates in a program that is funded and administered by the federal government, does the institution face potential liability?

With respect to the first inquiry, the Supreme Court has made clear that the federal government’s use of racial classifications is judged by the same standards applicable to the states, public institutions, and private institutions that receive federal funds. In other words, use of race by the federal government must be narrowly tailored to achieve a compelling governmental interest.

Courts have not directly addressed the question of whether a college or university can be held liable under federal civil rights laws for administering a

race-conscious scholarship program authorized by Congress. In the related context of race-conscious public contracting programs, courts have held that a state need not justify the program independently if it merely complies with federal program requirements that authorize consideration of race. Similarly, the 1994 Policy Guidance stated that “financial aid programs for minority students that are authorized by a specific federal law cannot be considered to violate another federal law, i.e., Title VI.”

13. After the University of Michigan cases, is a state government legally able to offer a race-targeted scholarship, such as funding designated to individual students with need who are minorities underrepresented in a spe-

cific profession?

Essentially, this question asks whether state governments are subject to the same restrictions as public institutions or private institutions that receive federal funds.

In broad terms, there is no difference between the standard that applies to state governments and the standard that applies to public institutions and private institutions that receive federal funds. If a state government enacts a program that utilizes racial preferences, it must be able to show that the use of race is narrowly tailored to the achievement of a compelling governmental interest.

Because public colleges and universities are generally considered to be an “arm of the state,” the potential liability of a public institution for administering a race-conscious scholarship will likely be the same as the potential liability of the state. If the state legislature authorized the scholarship, the public college or university probably need not justify the scholarship separately, but would be held to the same constitutional standard as the state legislature. A public or independent college or university participating in a state-sponsored race-conscious scholarship program could be found to have violated Title VI if the state program does not satisfy the applicable legal standards under Title VI.

14. My institution has scholarships that are restricted to men or to women. Are those scholarships affected by the University of Michigan cases?

Title IX of the Education Amendments of 1972 (“Title IX”) prohibits recipients of federal financial assistance from discriminating in educational programs on the basis of sex. ED’s Title IX regulations permit recipients to administer sex-restricted student financial aid established by will, trust, bequest, or similar legal instrument if “the overall effect” of such aid “does not discriminate on the basis of sex.” (20 USC § 1681). In other words, the regulations specify that an institution

must (1) select students for award based on nondiscriminatory criteria and not based on availability of sex-restricted funds, (2) allocate appropriate sex-restricted financial aid to each selected student, and (3) not deny any student the award for which he or she was selected because of the absence of financial aid designated for that student's sex (34 CFR 106.37(b)(1)&(2)). Thus, in some limited circumstances, institutions that receive federal financial assistance may award financial aid on the basis of sex without violating Title IX.

Grutter and *Gratz* did not address classifications based on sex, which are generally subject to somewhat less rigorous judicial scrutiny than race-based classifications. Since those decisions, ED has not announced that it intends to modify the Title IX regulations relating to sex-restricted financial aid.

In addition to Title IX, public institutions must comply with the Constitution. The permissibility of sex-restricted scholarships under the Title IX regulations does not necessarily mean that they are permissible under the Constitution. The Supreme Court has held that differing treatment on the basis of sex is constitutional only if such differing treatment (1) serves important governmental objectives and (2) is substantially related to the achievement of those objectives. While no court has ruled directly on whether the Title IX regulations regarding gender-conscious financial assistance meet the constitutional standard applicable to sex-based classifications, some courts have considered the constitutionality of sex-restricted scholarships offered pursuant to private charitable trusts. Courts have upheld such scholarships under federal law where the government's involvement was insufficient to warrant a finding of state action or where the classification was justified as a remedy for past discrimination.

Neither ED's Title VI regulations nor

the 1994 Policy Guidance contains a provision similar to the Title IX regulations with respect to race-conscious financial aid.

Elizabeth B. Meers is a partner at Hogan & Hartson L.L.P. in Washington, D.C., and director of the firm's education practice group. She may be reached at ebmeers@hhlaw.com.

William E. Thro is State Solicitor General of the Commonwealth of Virginia. He may be reached at WThro@cox.net.

The views expressed in this article are

entirely those of the authors and do not necessarily represent the views of the Attorney General of the Commonwealth of Virginia or any other organization. The authors acknowledge with gratitude the assistance of Hogan & Hartson associate Jennifer B. Stillerman in the preparation of this article.

Portions of this article were originally published in Elizabeth B. Meers and William E. Thro, "Race-Conscious Admissions and Financial Aid" (National Association of College and University Attorneys, 2004: www.nacua.org/publications/pubs/pamphlets/rca.html).

Further Reading

- Jonathan Alger, "Race-Conscious Financial Aid After the University of Michigan Decisions," 2 *NACUANotes* (June 9, 2004), available through members of the National Association of College and University Attorneys.
- Bingham McCutchen LLP, Morrison & Foerster LLP, Heller Ehrman White & McAuliffe LLP, "Preserving Diversity in Higher Education: A Manual on Admissions Policies and Procedures after the University of Michigan Decisions," available at <http://www.equaljusticesociety.org/compliancemanual/>.
- Roger Clegg, "Time Has Not Favored Racial Preferences," *Chronicle of Higher Education* (Jan. 14, 2005).
- Arthur Coleman and Scott Palmer, "Diversity in Higher Education: A Strategic Planning and Policy Manual Regarding Federal Law in Admissions, Financial Aid, and Outreach" (College Board 2d ed. 2004), available at http://www.collegeboard.com/prod_downloads/highered/ad/diversity_manual_2_ed.pdf.
- Curt A. Levey, "Colleges Should Take No Comfort in the Supreme Court's Reprieve," *Chronicle of Higher Education* (July 18, 2003).
- Elizabeth B. Meers and William E. Thro, "Race-Conscious Admissions and Financial Aid Programs" (National Association of College and University Attorneys 2004), available at <http://www.nacua.org?publications/pubs/pamphlets/rca.html>.
- Martin Michaelson, "Affirmative Action Has a Future," *Chronicle of Higher Education* (Feb. 11, 2005).
- Kenneth E. Redd, "Diversity on Dangerous Ground: Continuing Questions on Race-Based Scholarships since the Gratz and Grutter Decisions," *Student Aid Transcript*, Vol. 15, No. 2 (2004): NASFAA.
- U.S. Department of Education, Office for Civil Rights, "Achieving Diversity: Race-Neutral Alternatives in American Education" (2004), available at <http://www.ed.gov/about/offices/list/ocr/edlite-raceneutralreport2.html>.
- U.S. Department of Education, Office for Civil Rights, "Race-Neutral Approaches in Postsecondary Education: Innovative Approaches to Diversity" (2003), available at http://www.nacua.org/documents/Race_Neutral_Admissions.htm.
- U.S. Department of Education, Notice of Final Policy Guidance: Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964, 59 Fed. Reg. 8756 (1994), available at www.ed.gov/about/offices/list/ocr/docs/racefa.html.