

Race-Conscious Admissions and Financial Aid Programs

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The recent decisions of the U.S. Supreme Court in *Grutter v. Bollinger*¹ and *Gratz v. Bollinger*² were historic in their importance to the higher education community and potentially wide-ranging in their implications for colleges and universities.

These two landmark decisions, issued simultaneously on June 23, 2003, provide the legal standards that now generally must be utilized by counsel, college and university administrators, the federal government, and ultimately the courts in assessing the legality of the use of race in college and university admissions. The decisions may also affect the use of race in financial aid and other programs.

In light of *Grutter* and *Gratz* and other legal developments relating to race-conscious programs,³ this monograph is designed to assist colleges and universities in assessing the legal risks associated with the operation of such programs generally, and in recognizing those program design features that present a heightened or diminished risk in light of judicial precedent and federal agency guidelines. Institutions should consider the legal and practical implications of the University of Michigan cases for the current as well as future admissions cycles.

This monograph is intended to serve as a general resource for college and university attorneys and administrators, and for other interested members of the higher education community. It does not provide legal advice, however, and college and university administrators should consult legal counsel concerning particular race-conscious admissions or financial aid programs at their own institutions. Although the general legal principles discussed in this monograph may extend beyond race-conscious admissions and financial aid, the operation of those principles or other applicable law in the context of other student affairs programs, employment, contracting, or gender-based affirmative action programs is outside its scope. Finally, this monograph focuses on federal civil rights law; colleges and universities must also consider whether other rules, such as accrediting agency standards, state law (constitutional or statutory), or pending legislation, may similarly affect their programs.

This monograph is divided into five parts. Part I provides an overview of race-conscious admissions and financial assistance programs. The first section examines the

1. 123 S. Ct. 2325 (2003).

2. 123 S. Ct. 2411 (2003).

3. "Race-conscious" programs encompass a wide range of programs, both in terms of the nature of the programs and their use of race. In general, they encompass "governmental [and in some instances, private] decisions that 'touch upon an individual's race or ethnic background'," which set the "touchstone for constitutional [and in some instances, statutory] analysis of race-conscious admissions [and in some instances, other] policies." *Grutter*, 123 S. Ct. at 2336 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1974) (opinion of Powell, J.)).

role of these programs in eradicating past discrimination and in obtaining the educational benefits of a diverse student body. The second section describes the origins of these programs and traces their history from the early 1960's to the present.

Part II outlines the legal principles governing race-conscious programs. The first section presents an overview of the two compelling interests that the Supreme Court has recognized as justifying race-conscious programs – obtaining the educational benefits of a diverse student body and eradicating the present-day effects of past discrimination at the institution. The second section discusses the requirement that such programs be “narrowly tailored” to meet the identified compelling interest, with detailed consideration of the four factors utilized in the University of Michigan decisions – individualized consideration of each application, consideration of race-neutral alternatives, the burden on individuals who are not members of the favored group, and the duration of the race-conscious program.

Part III applies those principles in the context of admissions and financial assistance. The first section explores the context of admissions by providing an extensive recapitulation of both the University of Michigan Law School and the University of Michigan undergraduate cases. The second section applies those principles in the context of student financial assistance. This section describes various forms of race-related scholarships – “race-exclusive” scholarships limited to particular racial groups; scholarships using race as a “plus factor”; scholarships that are race-neutral by their terms, but disproportionately benefit particular racial groups; privately funded race-conscious scholarships; race-conscious scholarships authorized by federal law; and participation by historically black colleges and universities in scholarship programs targeted to black students – and discusses relevant legal principles as applied to each form.

Part IV details the enforcement procedures utilized by the federal government and private parties. With respect to the latter, the discussion focuses on the standing of private parties to challenge race-conscious programs, possible causes of action, available remedies, and potential immunities unique to state colleges and universities.

Part V offers a series of questions that colleges and universities may want to consider as they review their admissions and financial aid policies in light of the University of Michigan cases.