Perspectives on *Fisher v. University of Texas* and the Strict Scrutiny Standard in the University Admissions Context

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I. INTRODUCTION

This term, the United States Supreme Court will weigh in again on the constitutionality of race-conscious college admissions in a case called Fisher v. University of Texas at Austin. This issue was last addressed in 2003 in the twin cases of Grutter v. Bollinger and Gratz v. Bollinger. In Gratz v. Bollinger, the Court held 6-3 that it was unconstitutional for a university to assign a pre-determined point value to an applicant based on minority status alone. In the more critical case Grutter v. Bollinger, the Court held by a 5-4 majority that the holistic and individualized consideration of race during the admissions process is narrowly tailored to meet a university’s compelling interest in assembling a diverse student body.

The University of Texas, which the Fifth Circuit had previously banned from considering the race of its applicants in Hopwood v. Texas, implemented a new admission program following Grutter that took limited consideration of the race
of some of its applicants. Before Grutter overruled Hopwood, the University of Texas had preserved racial diversity on campus through its Top Ten Percent Plan, which admitted all Texas applicants ranked in the top ten percent of their high school classes. Although this plan reduced the university’s ability to be truly selective with its student body, the racial imbalance of Texas’s geographical regions assured the university that this plan would prevent a precipitous drop in the university’s population of black and Hispanic students in the wake of Hopwood. Since Grutter, the University of Texas has continued to use the Top Ten Percent Plan, under which 60 to 80 percent of undergraduates are admitted, but it also has included race as one of many relevant factors in its second-tier admissions process, which consists of a more traditional individualized assessment of an applicant’s academic and personal merits. In this second-tier process, the race of some applicants receives limited consideration.

Although Grutter held that race-conscious admissions were acceptable, it still encouraged experimentation with race-neutral alternatives like the Top Ten Percent Plan. Ironically, it is the University of Texas’ experimental hybridization of the race-neutral Top Ten Percent Plan and the race-conscious second-tier plan that became the fodder for the Fisher case. Petitioner Abigail Fisher, a white student who was not in the top ten percent of her high school class and was not admitted, claims that the University of Texas used “racial classifications” in a way that violated her right to equal protection under the laws.

By way of background, all government uses of “racial classifications” are subject to “strict scrutiny review” under the Equal Protection Clause. The strict scrutiny analysis that the Court applies to racial classifications requires the university to prove that any racial classification is “narrowly tailored” to

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6 Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 225 (5th Cir. 2011).
7 See Brief for Respondent at 8, Fisher v. Univ. of Tex. at Austin, 631 F.3d 213 (5th Cir. 2011) (No. 11-345).
8 Id.
9 Id. at 10–11. See Fisher, 631 F.3d at 227.
10 Fisher has since graduated from another college. See Brief for Respondent, supra note 7, at 17.
meet a compelling interest. The Court’s language describing strict scrutiny as a “most exacting” standard under which all ambiguities must be construed against the government suggests that few racial classifications could withstand it. Various decisions have fashioned tests aimed at “ferreting out” any loose threads in the racial classification’s “narrowly tailoring” to a “compelling state interest.” Notably, cases reviewed under strict scrutiny require the serious examination of race-neutral alternatives before concluding that a racial classification is narrowly tailored. Although race-conscious admissions have been justified by a compelling interest in campus diversity—though Grutter stated that race-conscious admissions must eventually come to an end—the petitioner in Fisher has attacked the university’s hybrid race-neutral/race-conscious scheme for achieving campus diversity on two grounds. First, she argues that the Top Ten Percent Plan was so successful at producing campus diversity that it eliminated the compelling interest warranting race-conscious admissions. Second, she argues that the use of race is not narrowly tailored for several reasons, including the fact that race only enters the admissions equation under very limited circumstances.

In spite of these arguments, it seems virtually certain that the University of Texas’s plan does comply with the mandates of Grutter. Even Judge Garza of the Fifth Circuit, whose concurring opinion harshly criticized Grutter and the very institution of race-conscious admissions itself, conceded that the University of Texas’s program was constitutional within the existing Grutter standard.

The university’s brief very deftly deflates each of the petitioner’s arguments and sub-arguments, except for the

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15 Grutter, 539 U.S. at 342.
16 Id. at 328–33.
17 Brief for Petitioner at 31–36, Fisher v. Univ. of Tex. at Austin, 631 F.3d 213 (5th Cir. 2011) (No.11-345).
18 Fisher, 631 F.3d at 247.
petitioner’s last argument, which may be the most important in asking the Court to reconsider its holding in *Grutter*. 19

The university’s counterargument was simply that stare decisis concerns should prevent an overturning of *Grutter*. 20 While stare decisis is a valid argument, it does not go to the core of the problem. The petitioner has challenged *Grutter* on a fundamental level. Specifically, the petitioner argues that *Grutter* erred by giving universities a level of good faith deference in their implementation of race-conscious admissions. 21 True strict scrutiny, the petitioner argues, tolerates no such deference. 22 What is more, it is somewhat difficult to believe that the Court would have granted certiorari in this case unless it considered overruling *Grutter* in some respects, although the use of race at the University of Texas is substantially more limited than it was in the University of Michigan Law School (“Michigan Law School”) process held constitutional in *Grutter*. Furthermore, the petitioner’s arguments about the application of *Grutter* are not terribly convincing, except for the one that attacks *Grutter’s* interpretation of strict scrutiny itself.

This Article explores ways that the University might have handled this most pressing question more fundamentally than appealing to an interest in stare decisis. Part II reviews the basic standard for the constitutional use of race-conscious admissions, as developed through the main race-conscious admissions cases, as well as other Equal Protection cases. The rest of the Article explores fundamental approaches to overcoming the plaintiff’s arguments about strict scrutiny. Part III addresses whether the University’s use of race in the admissions process is even a “racial classification” warranting Equal Protection review in the first place. Part IV explores the possibility that universities have a compelling interest in a transparent student selection process, which cannot possibly occur without the use of race. Part V argues that strict scrutiny itself is context-sensitive and flexible and that the Court should officially recognize that the rigidity of strict scrutiny

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19 Brief for Petitioner, supra note 17, at 53.
20 Brief for Respondent, supra note 7, at 50–54.
21 Brief for Petitioner, supra note 17, at 53–57.
22 Id. at 54 (citations omitted).
should be subject to slackening in certain contexts.

II. BASIC STANDARD: RACE-CONSCIOUS ADMISSIONS PROCESSES THAT DO NOT INSULATE MINORITIES FROM COMPETITION WITH ALL OTHER CANDIDATES ARE CONSTITUTIONAL

In a series of three cases, Regents of University of California v. Bakke, Gratz v. Bollinger, and Grutter v. Bollinger, the Supreme Court has specified what does and does not constitute an acceptable use of race in the university admissions process. In these cases, the Court forbade universities from conferring discrete benefits based solely on race but permitted universities to holistically consider the race of applicants, so long as race was not considered in a way that insulated minorities from competition with all other candidates.

In University of California v. Bakke, the Court held that setting aside a certain number of seats in a class for minority students violated the Equal Protection Clause. In Gratz v. Bollinger, the Court forbade the University of Michigan from giving undergraduate candidates twenty points—one-fifth of the points needed to earn admission—just for being minorities. This automatic award assured admission for virtually every minimally qualified minority applicant. While the holdings in Bakke and Gratz specified what a university could not do when considering an applicant’s race, these cases also made it clear that universities can constitutionally use race as a “plus factor” in the admissions process. Grutter v. Bollinger’s importance lay in its incorporation of the constitutionality of considering race as a “plus factor” into its holding.

Using the factor of race, among other factors, is critical to
a school’s right to assemble a heterogeneous student body.\textsuperscript{30} The key to the constitutional use of race is that it must not “insulate the individual from comparison with all other candidates for the available seats.”\textsuperscript{31} A program is constitutional where it “treats each applicant as an individual in the admissions process.”\textsuperscript{32} As the Court in \textit{Grutter} stated, “The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.”\textsuperscript{33}

In \textit{Bakke}, the plaintiff was a white applicant to the University of California—Davis medical school who was denied admission.\textsuperscript{34} He argued that the medical school had violated his rights to equal protection because it did not consider his application for the sixteen seats that were reserved for members of disadvantaged minority groups.\textsuperscript{35} The Court agreed that the medical school had a racial quota, which it held unconstitutional.\textsuperscript{36}

In the \textit{Bakke} opinion, Justice Powell used the example of Harvard College to illustrate a constitutional race-conscious admissions process—an example which would later influence \textit{Grutter} and \textit{Gratz}. At Harvard, the admissions officials were allowed to consider racial and ethnic background, among other factors that would help contribute to a diverse student body, the definition of “diversity” being necessarily fluid.\textsuperscript{37} Race could “tip” a decision just as “geographic origin” or a “life spent on a farm.”\textsuperscript{38} Being a member of a minority group does not necessarily become “decisive” to the decision.\textsuperscript{39} An Italian-American would still be chosen over an African-American if the Italian-American had overall qualities that would be more likely to promote “educational pluralism.”\textsuperscript{40} Ultimately, “[t]he applicant who loses out on the last available seat to another

\begin{itemize}
  \item \textit{Bakke}, 438 U.S. at 314.
  \item \textit{Id.} at 317.
  \item \textit{Id.} at 318.
  \item \textit{Grutter}, 539 U.S. at 337.
  \item \textit{Bakke}, 438 U.S. at 276.
  \item \textit{Id.} at 277–78.
  \item \textit{Id.} at 266.
  \item \textit{Id.} at 316.
  \item \textit{Id.} at 323.
  \item \textit{Id.} at 317.
  \item \textit{Bakke}, 438 U.S. at 318.
\end{itemize}
candidate receiving a ‘plus’ on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname.\textsuperscript{41} No goals or quotas existed for the number of racial minorities to be admitted, but Harvard did keep track of the numbers of admitted students in various categories.\textsuperscript{42}

In a similar vein, the Harvard program was constitutional because it did not make incorrect assumptions about a person based on race alone. Although the constitutionality of the Harvard program was not at stake in \textit{Bakke}, the Harvard program became the model of acceptable race-conscious admissions as the standard against which the University of Michigan’s undergraduate admissions program was ruled unconstitutional in \textit{Gratz}.\textsuperscript{43} The unconstitutionality of the undergraduate University of Michigan program was rooted not only in its failure to expose minority applicants to holistic review, but in its incorrect assumption that a minority student’s race alone brought some predetermined, quantifiable measure of diversity to the school.\textsuperscript{44} In her concurring opinion, Justice O’Connor emphasized that what made the University of Michigan’s process unconstitutional was its lack of “meaningful individualized review” and its automatic award of twenty points was given to every minority.\textsuperscript{45}

In contrast, the Michigan Law School admissions program held constitutional in \textit{Grutter} essentially adopted the Harvard model:

Here, the Law School engages in a highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. The Law School affords this individualized consideration to applicants of all races.

\textsuperscript{41} Id. at 318.
\textsuperscript{42} Id. at 316–17.
\textsuperscript{43} \textit{Gratz} v. \textit{Bollinger}, 539 U.S. 244, 270–76 (2003).
\textsuperscript{44} See \textit{id.} at 271 (stating that the Harvard plan was constitutional because it did not assume that a person’s race “automatically ensured a specific and identifiable contribution to a university’s diversity”); see also \textit{id.} at 273–74 (“[T]he result of the automatic distribution of 20 points is that the University would never consider [a minority student’s] individual background, experiences, and characteristics to assess his individual ‘potential contribution to diversity.’ Instead, every [minority applicant] would simply be admitted.”).
\textsuperscript{45} Id. at 276.
There is no policy, either *de jure* or *de facto*, of automatic acceptance or rejection based on any single “soft” variable. Unlike the program at issue in *Gratz v. Bollinger*, the Law School awards no mechanical, predetermined diversity “bonuses” based on race or ethnicity.46

The University of Texas at issue in *Fisher* affords all of its candidates the same type of individualized review as Harvard College or Michigan Law School. An applicant’s race is one of many factors considered in a broad assessment called a “personal achievement score,” which is used to assess candidates whose merit as applicants is not fully reflected by their academic achievement.47 The “personal achievement score” includes an “applicant’s demonstrated leadership qualities, awards and honors, work experience, and involvement in extracurricular activities and community service.”48 Additionally, it incorporates “a ‘special circumstances’ element that may reflect the socioeconomic status of the applicant and his or her high school, the applicant’s family status and family responsibilities, the applicant’s standardized test score compared to the average of her high school, and—beginning in 2004—the applicant’s race.”49 The use of race at the University of Texas therefore fits the basic parameter for a constitutional use of race because it requires individualized review and does not award candidates any discrete benefit based solely on race. In fact, the University of Texas’s program is even more restrained and prudent in its use of race than the constitutional programs in *Bakke* and *Grutter*, having been adjusted to address the concerns expressed in Justice Kennedy’s *Grutter* dissent by assuring that “individual assessment is safeguarded through the entire process.”50

47 *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 228 (5th Cir. 2011).
48 *Id.*
49 *Id.*
50 *Grutter*, 539 U.S. at 389 (Kennedy, J., dissenting). In his dissent, Justice Kennedy expressed concern that race was “likely outcome determinative” in the decisions about who would fill the seats in the bottom fifteen to twenty percent of the class. *Id.* This concern arose because admissions officials monitored the racial composition of the incoming class on a “day-to-day” basis and could “recalibrate the plus factor given to race depending on how close they were to achieving the Law’s School’s goal of critical mass.” *Id.* at 392. This system of monitoring racial composition,
Only a minority of applicants not admitted under the University of Texas’s Top Ten Percent Plan might have their race considered during the second-tier admissions process.\(^{51}\) In this second-tier process, applicants are assigned two numbers: an Academic Index (“AI”), and a Personal Achievement Index (“PAI”).\(^{52}\) Both scores are assigned long before officials make any decision about who to admit or deny.\(^{53}\) If the applicant’s AI score is high enough, the applicant is admitted based on that score alone.\(^{54}\) If the applicant’s scores are not high enough, the application is “presumptively denied.”\(^{55}\) On rare occasions, senior admissions staff may “designate [a presumptively denied] file for full review notwithstanding the AI score.”\(^{56}\)

The PAI, which has been in effect since 1997, was designed to “identify and reward students whose merit as applicants was not adequately reflected by their class rank and test scores.”\(^{57}\) The PAI is based on three scores: one score for each of two required essays and a third score—the personal achievement score discussed above—which represents an evaluation of the applicant’s entire file.\(^{58}\) The essays are each given a score between one and six through “a holistic evaluation of the essay as a piece of writing based on its complexity of thought, substantiality of development, and facility with language.”\(^{59}\) The personal achievement score is also based on a scale of one to six, although it is given slightly greater weight in the final PAI calculation than the mean of the two essay scores.\(^{60}\)

The Fifth Circuit\(^{61}\) explained the place of race in while not limiting the size of the plus factor, created a likelihood that “individual consideration” was not preserved at the end of the admission season. \(\text{Id.}\) at 389.


\(^{52}\) Id. at 222–23.

\(^{53}\) Brief for Respondent, supra note 7, at 13.

\(^{54}\) Fisher, 631 F.3d at 227.

\(^{55}\) Id.

\(^{56}\) Id.

\(^{57}\) Id. at 223 (citing Fisher v. Univ. of Tex. at Austin, 645 F. Supp. 2d. 587, 591 (W.D. Tex. 2009)).

\(^{58}\) Id. at 227.

\(^{59}\) Id. (citing Fisher, 645 F. Supp. 2d at 597).

\(^{60}\) Id. at 228.

\(^{61}\) In the Fifth Circuit Fisher appeal, 631 F.3d 213, 215 (5th Cir. 2011), the petitioners Abigail Fisher and Rachel Michalewicz claimed that the race-conscious second-tier process violated their rights to equal protection by discriminating against them on the basis of race.
calculating the personal achievement score in detail, demonstrating that minority applicants at the University of Texas are not given any discrete benefit just for being a member of a minority group:

None of the elements of the personal achievement score—including race—are considered individually or given separate numerical values to be added together. Rather, the file is evaluated as a whole in order to provide the fullest possible understanding of the student as a person and to place his or her achievements in context. As UT’s director of admissions explained, “race provides—like [the] language [spoken in the applicant’s home], whether or not someone is the first in their family to attend college, and family responsibilities—important context in which to evaluate applicants, and is only one aspect of the diversity that the University seeks to attain.” Race is considered as part of the applicant’s context whether or not the applicant belongs to a minority group, and so—at least in theory—it “can positively impact applicants of all races, including Caucasian[s], or [it] may have no impact whatsoever.” Moreover, given the mechanics of UT’s admissions process, race has the potential to influence only a small part of the applicant’s overall admissions score. The sole instance when race is considered is as one element of the personal achievement score, which itself is only a part of the total PAI. Without a sufficiently high AI and well-written essays, an applicant with even the highest personal achievement score will still be denied admission.62

Perhaps most importantly, the University of Texas does not keep a running tally of the racial composition of its incoming class.63 Thus, at the end of each admissions cycle, University of Texas officials will not inflate the size of the “plus” factor given to race in an effort to meet a particular racial goal. This eliminates the fear, expressed by Justice Kennedy in his dissent in Grutter, that candidates at the bottom of the admitted class will be selected solely, or almost solely, based on their race.64

62 Id. at 228–29 (citations omitted).
63 Id. at 236 (“Demographics are not consulted as part of any individual admissions decision, and UT’s admissions procedures do not treat certain racial groups or minorities differently than others when reviewing individual applications.”).
Accordingly, the University’s first argument in its brief is that its race-conscious admissions plan conforms closely to the dictates of the prior case law. But compliance with prior case law may not be what the Court is going to scrutinize in this case. The Supreme Court may well evaluate whether the underlying decision in *Grutter* was actually constitutional. If that is what the Supreme Court intends to do, then *Fisher* calls for more fundamental arguments about Equal Protection.

III. THE UNIVERSITY OF TEXAS DOES NOT EMPLOY “RACIAL CLASSIFICATIONS” SUBJECT TO STRICT SCRUTINY REVIEW

Throughout the course of the *Fisher* litigation, the parties and courts have taken for granted that the plaintiff stated an Equal Protection claim by virtue of the University’s use of “racial classifications.” All governmental uses of “racial classifications” are subject to “strict scrutiny review” under the Equal Protection Clause. There is an argument to be made, however, that the University of Texas did not use “racial classifications” warranting strict scrutiny review.

The Supreme Court has never defined what a “racial classification” is, and this case presents an opportunity for the pinning down of the contours of a definition. There are two possible definitions that could have been argued by the University of Texas. First, the University of Texas could have argued that a racial classification is a discrete, automatic action based solely on race that does not take consideration of any of the individual or attending circumstances. Virtually every previous case would tolerate such a definition, except possibly *Grutter* where it might contend with the Court’s assumption that racial classifications existed at Michigan Law School in *Grutter*. However, the University could have argued for a second, slightly wider definition of racial classifications, which would have accommodated *Grutter* but still result in a victory for the University of Texas: a government action that entails a risk that race could become the predominant factor in any admissions decision.

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65 Brief for Petitioner, *supra* note 17, at 23.
A. “Racial Classifications” as Racial Preferences or Discrete Actions Based Solely on Race

Although the Supreme Court has never explicitly defined “racial classification,” the First Circuit provides some guidance. In Raso v. Lago, the court held that an affirmative action clause attached to a company’s receipt of federal funds for the construction of a housing development was not a racial classification warranting review under the Equal Protection Clause. The affirmative action clause required the recipient of federal construction funds to actively encourage minorities to purchase homes in the development through “mailings to minority organizations, assurances of nondiscrimination, and like measures . . . but it did not require the developer to prefer members of minority races.” The court explained that the term “racial classification” normally “refers to a governmental standard, preferentially favorable to one race or another, for the distribution of benefits.”

That a racial classification is tantamount to a “racial preference” is implicit in the frequent use of the term “racial preference” in the language of the most notable and recent Equal Protection cases, where it is semantically interchangeable with the term “racial classification.” The semantic interchangeability of the terms “racial classification” and “racial preference” is apparent not only from a reading of those cases, but also in the high frequency with which the Court used the latter term in those cases. In Richmond v. J.A. Croson Co.—a case that involved the constitutionality of an affirmative action program requiring the government to prefer contracts with minority-owned businesses—the Court refers to “preferences” of a racial nature twenty-nine times. In Adarand Constructors, Inc. v. Peña, another government contracting case, the Court mentions racial “preferences” thirty-six times, followed by eighteen times in Grutter.

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67 Raso v. Lago, 135 F.3d 11 (1st Cir. 1998).
68 Id. at 16.
69 Id. at 13–14.
70 Id. at 16 (citing Adarand, 515 U.S. at 226–27; City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)).
71 Croson, 488 U.S. 469.
72 Adarand, 515 U.S. at 200.
Moreover, the Court often uses the term “racial preference” to define the trigger for strict scrutiny.74

Although a racial classification is identical to a racial preference in an affirmative action context, “racial classification” must have a more expansive definition, for in some cases, racial classifications exist even when there is no unequal distribution of benefits or burdens. In Johnson v. California, the Court held that strict scrutiny applied to a policy that automatically segregated prisoners by race in order to avoid racially-motivated gang violence.75 The Court has also held in Shaw v. Reno that blatant gerrymandering to create majority-minority voting districts warranted strict scrutiny review.76

Even though these cases did not involve “preferences,” they were still subject to strict scrutiny review because, like preferences, the government actions in these cases were based solely upon racial assumptions, stigma, and stereotypes; the government took these actions without consideration of the individuality of those affected. In Johnson, for example, the Court wrote that what made the racial separation of prisoners suspect for Equal Protection violation was the use of “race as a proxy for gang membership and violence” without any individualized assessment of the prisoner or the facility.77 Similarly, in Shaw, the Court wrote that racial classifications threaten “to stigmatize individuals by reason of their membership in a racial group,”78 noting that race-based gerrymandering perpetuated “stereotypical notions about members of the same racial group—that they think alike, share the same political interests, and prefer the same candidates.”79 That a racial classification amounts to some unwarranted assumption about a person based solely on race is eminently

74 See, e.g., Adarand, 515 U.S. at 223 (“[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination.” (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273 (1986) (emphasis added))).
78 Shaw, 509 U.S. at 643.
79 Id. at 643.
clear in college admissions cases, too, where the Court cites as its main constitutional concern applicants’ individualized review.80

In a similar vein, it is important to note that in order for a racial classification to exist, the government must take a discrete action based solely on race. This is evident in the very language of the cases. In Bakke, for example, the Court wrote, “Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.”81 The affirmative action and college admissions cases have made it clear that a racial classification exists where a government action occurs solely because of race but not when race is simply acknowledged in a more complex, openly competitive process.82

Given this body of case law, the University of Texas does not employ “racial classifications” subject to strict scrutiny review. As discussed at length in Part II, the University’s consideration of race is not a preference and is not tied to automatic assumptions about the applicant based solely on race. More fundamentally, the University takes no discrete action based solely upon race. Admissions officers give no award of admission or even an award of a particular number of points based on race alone. Any deference given to a student is not based solely on his race, but on race in the context of other relevant socio-economic indicators that demonstrate personal merits not reflected in a purely academic profile.83

81 Bakke, 438 U.S. at 290–91 (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943) (emphasis added)); see also id. at 305 (citing McLaurin v. Okla. State Regents, 339 U.S. 637, 641–42 (1950)) (“When a classification denies an individual opportunities or benefits enjoyed by others solely because of his race or ethnic background, it must be regarded as suspect.” (emphasis added)); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (“The Richmond Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race.” (emphasis added)); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 262 (1995) (“Such review prevents ineligible firms from taking part in the program solely because of their minority ownership.” (emphasis added)); Gratz v. Bollinger, 539 U.S. 244, 246 (2003) (finding it unconstitutional to award a minority applicant twenty points “solely because of race” (emphasis added))).
82 See Grutter, 539 U.S. at 334.
83 Fisher v. Univ. of Tex. at Austin, 631 F.3d 213 (5th Cir. 2011).
B. "Racial Classifications" Where There is a Risk of Race Becoming a Predominant Factor in a Decision

Defining "racial classifications" as racial preferences or discrete acts based solely on race would cause some tension with Grutter. Grutter unquestioningly assumed that racial classifications existed at Michigan Law School even though their admissions program did not employ preferences based solely on race. In fact, the Court upheld the admissions program because the decision to admit or deny was not based solely on race. A slightly wider definition of "racial classifications" could keep the assumption of racial preferences in Grutter consistent with a finding of no racial classifications in Fisher.

Principles espoused in the voting redistricting cases that followed the 1990 census strongly indicate that racial classifications do not exist unless race forms the predominant basis upon which the government takes a discrete action. Summarizing prior case holdings, Justice O'Connor wrote in Bush v. Vera,

Strict scrutiny applies where . . . "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines' and 'the legislature subordinated traditional race-neutral districting principles . . . to racial considerations." Strict scrutiny does not apply merely because redistricting is performed with consciousness of race.84

Essentially, this holding means that race-consciousness alone is not evidence of a racial classification. A racial classification cannot exist unless racial considerations dominate a decision-making process.

In order to accommodate the assumption of racial classifications in Grutter, however, the definition would have to be expanded further to include not just instances where race dominates a decision-making process, but where there is a risk that race could dominate. Justice Kennedy’s dissent in Grutter noted that there was a substantial risk that race would dominate the decisions about who would fill the last fifteen

to twenty percent of seats of the incoming class at Michigan Law School. Because admissions officials could inflate the size of the “plus” given to race in order to meet diversity goals, race could become the predominant factor in those late-season decisions.\footnote{Grutter, 539 U.S. at 389–92 (“Without a sufficiently high AI and well-written essays, an applicant with even the highest personal achievement score will still be denied admission.”).} The risk of some race-dominated decisions at Michigan Law School makes it potentially subject to Equal Protection violation, thus warranting a finding that the law school used racial classifications.

The University of Texas took Justice Kennedy’s dissent seriously and completely eliminated the risk of any single admissions decision being racially dominated by numerically confining the role that race can play in any one decision and by not keeping track of the racial composition of its incoming class during the admissions season.\footnote{Fisher, 631 F.3d at 236.}

A definition of “racial classification” that narrows it to discrete government actions based predominantly on race would be almost entirely consistent with previous case law and would give universities some repose with respect to their race-conscious admissions decisions. It is an argument that will not be considered in \textit{Fisher}, but which perhaps may be considered in a future battle over race-conscious admissions.

IV. THE UNIVERSITY HAS A COMPPELLING INTEREST IN A TRANSPARENT ADMISSIONS PROCESS

The University of Texas also did not argue that the Court should recognize that the University’s use of race is narrowly tailored to further a compelling interest in a transparent admission process. This interest is inherent in Court precedent on academic freedom.\footnote{See Robert J. Tepper & Craig G. White, \textit{Speak No Evil: Academic Freedom and the Application of Garcetti v. Ceballos to Public University Faculty}, 59 CATH. U. L. REV. 125, 126-146 (2009) and Amy H. Candido, Comment, \textit{A Right to Talk Dirty?: Academic Freedom Values and Sexual Harassment in the University Classroom}, 4 U. CHI. L. SCH. ROUNDTABLE 85, 86 (1997) for general discussions of the connection between academic freedom and the First Amendment. \textit{See also} Erica Goldberg & Kelly Sarabyn, \textit{Measuring A “Degree of Deference”: Institutional Academic Freedom in A Post-Grutter World}, 31 SANTA CLARA L. REV. 217, 239 (2011).}

The finding in \textit{Bakke} that a university has a compelling
interest in creating campus diversity is rooted in First Amendment rights to academic freedom. Universities have
the freedom to make their own “judgments as to education,” including “the selection of its student body.” This is one of
the “four essential freedoms” of a university—”to determine for itself on academic grounds who may teach, what may be
taught, how it shall be taught, and who may be admitted to study.” In Grutter, Justice O’Connor’s decision to hold
Michigan Law School’s use of race constitutional was rooted in this right. If universities have a compelling interest rooted
in the First Amendment to select their own student bodies, then it follows that the University of Texas has a compelling
interest in obtaining a complete and transparent picture of its applicants. This simply cannot happen unless the students can
report their race in their application.

Racial classifications are traditionally held suspect because race is so frequently irrelevant to achieving a legitimate
government interest. The Court has conceded, however, that race may be relevant in two instances. First, race may be
relevant where the government has an interest in “eliminating the pernicious vestiges of past discrimination.” Second, in
Grutter, the Court held that race was relevant to the compelling interest of creating campus diversity.

Race is also relevant to a transparent admission process. Universities seek more in their student bodies than the most
academically qualified students. They also seek personal

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88 Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978); Keyishian v. Bd. of
Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967).
89 Bakke, 438 U.S. at 312.
90 Id. (citing Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J.,
concurring in result)).
keeping with our tradition of giving a degree of deference to a university’s academic
decisions, within constitutionally prescribed limits.”).
92 See, e.g., Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 301 (1986); Hirabayashi
v. United States, 320 U.S. 81, 100 (1944); Frontiero v. Richardson, 411 U.S. 677, 686 (1973)
(stating that strict scrutiny has been rooted in the unfairness of considering an
“immutable characteristic unrelated to a person’s ability to perform or contribute to
society.”).
93 Wygant, 476 U.S. at 301.
94 Grutter, 539 U.S. at 328–33.
95 See Bakke, 438 U.S. at 312 (noting that a diverse student body is essential to
the exchange of ideas).
qualities that indicate a potential for contribution or success that cannot be reflected solely in academic terms. 96 While race alone does not bespeak any potential for contribution or success, it is a relevant factor because it can be an important part of the applicant’s identity and personal history. 97 A person’s racial identity can communicate important personal qualities to an admissions official, and the benefit is not limited to underprivileged minorities. 98 As the District Court and Fifth Circuit noted in Fisher, an applicant who takes an active leadership role in his community would not be evaluated in the same way as a white student who takes an active leadership role in a predominantly Hispanic community. 99 If a university cannot actively inquire into the racial identity of candidates, the social nuances of racial identity, which may indicate special qualities in certain candidates, will be lost. This loss constitutes a serious infringement of a university’s First Amendment right to make informed choices about who will study at its institution. This loss substantially outweighs the questionable harms that the petitioner alleges befall non-minority candidates under the University of Texas’ admissions process. 100

To the extent that the petitioner or her amici may argue that the consideration of race permits admission officials to perpetuate stereotypes about low minority ability, that argument is fundamentally flawed for three reasons. First, officially eliminating the consideration of race alone will not prevent admissions officials from making race-influenced judgments. Second, the undue level of opacity that comes with eliminating race from applications can result in mistaken judgments on the part of admissions officials. Third, making

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96 Id. at 317 (“Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important.”).
97 Stephanie M. Wildman & Adrienne D. Davis, Language and Silence Making Systems of Privilege Visible, 35 SANTA CLARA L. REV. 881, 900 (1995) (stating that race has the power to “shape our vision of the world and of ourselves.”).
98 Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 236 (5th Cir. 2011).
99 Id.
the admissions process entirely race-blind is itself a harm that is worse than a measured consideration of race.

Even if candidates do not report race, the race of candidates is often evident from names and addresses. An admission official is likely to assume that a candidate named Oscar Salazar from the Rio Grande Valley is Hispanic and probably Mexican, and that assumption may trigger an admissions official’s sympathies or prejudices towards Mexican-American applicants as he holistically evaluates the applicant’s merits. Even more importantly, racial assumptions based on last names and addresses could be entirely wrong. Oscar Salazar from the Rio Grande Valley who has taken an active role in the immigrants’ rights movement could be a fourth-generation Texan with one Hispanic great-great-grandparent. Schools should be allowed to inquire into a candidate’s race in order to eliminate the level of opaqueness that a completely race-blind process would create.

Lastly, even if there is a risk that consideration of race in the context of academic achievement has a potential to perpetuate an expectation of lower minority academic achievement, making the process race-blind plays into an equally, if not more shameful history of failing “to confront the complexity of the issue in a candid and critical manner.”

There is substantial evidence that key indicators of academic success, namely standardized tests, have built-in racial prejudices. Pretending that this pervasive, if unintentional, prejudice does not exist is more harmful than engaging in it. Even if the studies indicating that standardized tests prejudice minority students have been subject to doubt, the Court’s decision to take a side in that debate would require it to make “complex educational judgments in an area that lies primarily within the expertise of the university.”


102 See William C. Kidder & Jay Rosner, How the SAT Creates “Built-in Headwinds”: An Educational and Legal Analysis of Disparate Impact, 43 SANTA CLARA L. REV. 131, 139 (2002) (citing Grutter, 288 F.3d 712); see also Claude Steele & Joshua Aronson, Stereotype Threat and the Intellectual Test Performance of African Americans, 69 J. PERSONALITY & SOC. PSYCH. 797 (1995); Amicus Brief of The College Board and The National School Boards Ass’n at 22 (framing the issue as the SAT only being a single, imperfect predictor of academic success and criterion in who should be admitted to a university).

103 Grutter, 539 U.S. 306 at 328.
A compromise between the two concerns is the one that has been in play since Bakke was decided in 1978—to permit a holistic evaluation of a candidate’s race in the context of all other relevant factors.

Depriving universities of the right to consider the race of candidates creates an unnecessary and detrimental layer of opaqueness in the admissions process. If universities have a compelling interest in choosing who will attend, then they should be able to transparently learn the race of their candidates and how this racial identity has influenced their lives. There is no race-neutral way to accomplish this goal, and so the University of Texas’ race-conscious process is narrowly tailored to the compelling interest in a transparent admissions process.104

V. THE COURT SHOULD RECOGNIZE THAT STRICT SCRUTINY WITH DEFERENCE AS APPLIED IN GRUTTER IS APPROPRIATE BECAUSE EQUAL PROTECTION SCRUTINY IS FLEXIBLE AND CONTEXT-SENSITIVE

In his concurring Fifth Circuit opinion in Fisher, Judge Garza called into question whether any race-conscious admissions standard could ever withstand strict scrutiny.105 While Judge Garza conceded that the Fifth Circuit appropriately applied the standard from Grutter, he criticized Grutter for applying “a standard markedly less demanding” than strict scrutiny.106 This may be the issue that the Supreme Court granted certiorari in order to evaluate, and it calls for an argument about the meaning of strict scrutiny itself.

Judge Garza may be right that no race-conscious program could ever withstand “strict scrutiny” in its “most exacting” form, but he overlooks the fact that the three-tiered scrutiny system is flexible to context.107 During the 1970s, 1980s, and

104 See Richmond v. J.A. Croson Co., 488 U.S. 469, 509–10 (1989) (requiring consideration of race-neutral alternatives before finding that a racial classification is narrowly tailored); see also Grutter, 539 U.S. at 359 (“Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative.”).
105 See Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 247 (5th Cir. 2011) (Garza, J., concurring) (“To be specific, race now matters in university admissions, where, if strict scrutiny where properly applied, it should not.”).
106 Id.
107 See generally Suzanne B. Goldberg, Equality Without Tiers, 77 S. Cal. L.
1990s, for example, the Court developed what observers have called “rational basis with bite” for traditionally non-suspect classifications.\(^{108}\) In several notable cases, such as \textit{City of Cleburne, Texas v. Cleburne Living Center},\(^{109}\) \textit{U. S. Department of Agriculture v. Moreno},\(^{110}\) and \textit{Romer v. Evans},\(^{111}\) the Court subjected traditionally non-suspect classifications (disability, co-habitant status, and sexual orientation, respectively) to heightened scrutiny even though it never formally departed from “rational basis review.” In these cases, the Court functionally departed from the “usual deference associated with rational basis review” because the legislation at issue “was in fact intended to further an improper government objective.”\(^{112}\)

Likewise, \textit{Bakke} and \textit{Grutter} have clearly carved out a relaxed form of strict scrutiny that is appropriate to the particular context of college admissions. Both cases stated that some level of deference should be afforded to colleges given the tradition of academic freedom and the fact that college admissions involve “complex educational judgments in an area that lies primarily within the expertise of the university.”\(^{113}\) Even if this means that a university is able to escape the strictest application of judicial scrutiny, it is appropriate given this special context, especially where non-minority applicants suffer no substantial harm.\(^{114}\) Although this particular level of deference may depart from the strictest form of strict scrutiny, like “rational basis with bite,” the relaxed version of strict scrutiny sanctioned in \textit{Bakke} and applied in \textit{Grutter} is proper given that the use of race does not spring from an improper motive, as it furthers a compelling state interest, does not unduly harm non-minorities, and has been used to further appropriate ends for university admissions programs since the


\(^{112}\) \textit{Am. Express}, 641 F.3d at 692.


\(^{114}\) \textit{Id.} at 309.
1970s.

As Justice O'Connor wrote in *Grutter*, “context matters” in Equal Protection cases.\(^{115}\) In *Adarand*, the Court “made clear that strict scrutiny must take ‘relevant differences’ into account.”\(^{116}\) Taking a close look at context is the “fundamental purpose” of strict scrutiny itself.\(^{117}\) To subject racial awareness in the college admissions process to the same level of scrutiny as miscegenation laws is a patent absurdity.\(^{118}\) If the Court is to adhere to the label “strict scrutiny,” then there is very good reason to nevertheless permit the application of “good faith deference” granted by *Bakke* and *Grutter*. Otherwise, there would be no place for race in the college admissions process.\(^{119}\)

V. CONCLUSION

Given how tightly the University of Texas’ race-conscious admissions program adheres to the standard of *Grutter*, it is hard to believe that the Supreme Court would have granted certiorari unless it was considering a modification of the *Grutter* standard. The University of Texas has met the challenge with an appeal to stare decisis interests. It is a good argument, but perhaps not powerful enough to overcome what could be a very probing inquiry into the meaning of strict scrutiny of racial classifications. Should the Court’s decision fail to completely and permanently resolve all doubts about the constitutionality of race-conscious admissions, more fundamental arguments about the very meaning of strict scrutiny might be used to a university’s advantage in future litigation.

\(^{115}\) *Id.* at 308 (citing *Gomillion v. Lightfoot*, 364 U.S. 339, 343–344 (1960)).

\(^{116}\) *Id.* (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 228 (1995)).

\(^{117}\) *Id.*

\(^{118}\) *Compare Loving v. Virginia*, 388 U.S. 1, 11 (1967) (holding that a law against interracial marriage had “no legitimate overriding purpose independent of invidious racial discrimination”) with *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (finding a compelling state interest in the creation of a diverse campus that can be served through race-conscious admissions).

\(^{119}\) *Grutter*, 539 U.S. at 308 (citing *Bakke*, 438 U.S. at 318–319); see also *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 247 (5th Cir. 2011).