Grutter and *Fisher*: A Reassessment and a Preview

*James F. Blumstein**

In agreeing to hear *Fisher v. University of Texas at Austin* in its 2012–13 Term,[1] the Supreme Court has tentatively[2] agreed to revisit,

* University Professor of Constitutional Law and Health Law and Policy at Vanderbilt University Law School.

1. 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012).

2. There is a mootness issue in the case. Petitioner Fisher was denied admission to the University of Texas at Austin and enrolled elsewhere (at Louisiana State University). The challenge to the University of Texas's race-preferenced admissions policy was not brought as a class action, and Fisher has no intention of reapplying to the University of Texas, so claims for prospective declaratory and injunctive relief are moot. *Fisher*, 631 F.3d at 217. The Court of Appeals rested its jurisdiction on Petitioner's money damages claim. *Id.* In its brief opposing certiorari, the University asserted that Petitioner's complaint did not seek damages, but only a request for a refund of fees that are nonrefundable for either successful or unsuccessful applicants. Brief in Opposition at 2, 10–20, *Fisher*, 132 S. Ct. 1536 (No. 11-345), 2011 WL 6146835. In her Reply Brief, Petitioner asserts that she has preserved her potential claim for damages and that the issue of relief was pretermitted in the district court as the claims were bifurcated into liability claims and, subsequently, remedy claims. Reply Brief at 4, *Fisher*, 132 S. Ct. 1536 (No. 11-345), 2011 WL 6780150. Since the district court ruled against Petitioner on liability, it never dealt with remedies issues such as damages, which would be litigated on remand if Petitioner prevails on her liability claims. One might infer that the Supreme Court took these jurisdictional questions seriously before granting review; the Court scheduled consideration of the case at three conferences before agreeing to grant review. But, since jurisdictional questions can always be raised, one can reasonably foresee a preliminary skirmish at the merits stage on the jurisdictional question. The results of a finding of mootness at this stage might well be an order vacating the lower court decisions, depriving them of precedential

after a decade, the issue of racial preferences in the context of higher education student admissions.[3]

Fisher involves admission to the undergraduate program at the University of Texas at Austin. In response to *Hopwood v. Texas*,[4] which in 1996 invalidated the use of race-based criteria in admissions decisions at the University of Texas Law School,[5] the Texas legislature adopted the Top Ten Percent Law, which "mandated that Texas high school seniors in the top ten percent of their class be automatically admitted to any Texas state university."[6] The goal of the Top Ten Percent program was to increase the enrollment of "underrepresented minorities" at the University of Texas,[7] and it succeeded[8]: the percentage of enrolled black students increased from 2.7 percent to 4.5 percent from 1997–2004; the percentage of enrolled Hispanic students increased from 12.6 percent to 16.9 percent during the same period.[9] By 2008, the Top Ten Percent Plan accounted for 8,984 of the 10,200 students admitted to the University of Texas (eighty-eight percent) and yielded eighty-one percent of all freshman enrolled at the University.[10] Proponents of the Top Ten Percent Plan viewed it as a race-neutral, albeit race-motivated, attempt to increase minority enrollment at the University of Texas.[11]

In 2004, the University of Texas reintroduced consideration of race into the admissions process as a means of increasing student

---

status. *See* Arizonans for Official English v. Arizona, 520 U.S. 43, 71, 75 (1997) (recognizing that, when a case becomes moot upon appellate review, the normal practice is to vacate the judgments of the lower courts "down the line"); United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950) ("The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.").

3. Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

4. 78 F.3d 932 (5th Cir. 1996).

5. *Fisher*, 631 F.3d at 223 n.50.

6. *Id*. at 224.

7. *Id*. at 225.

8. The precise cause of the increase in minority enrollment is a subject of some dispute because of "changing demographics and other minority outreach programs." *Id*. at 239.

9. *Id*. at 242–43. Prior to *Hopwood*, the University of Texas had used race-conscious admissions, considering race "directly" and "often" as a "controlling factor." *Id*. at 223. The University of Texas Law School had reviewed minority and nonminority applicants "by separate committees," and they were "subject to different grade and test-score cutoffs." *Id*. at 219 n.16, 222–23. Before *Hopwood*, race-conscious admissions at the University of Texas resulted in a freshman class enrollment of 4.5 percent black students and 15.6 percent Hispanic students, *id*. at 222–23, a "fairly consistent" proportion over the years prior to *Hopwood*. *Id*. at 223 n.47.

10. *Id*. at 239–40.

11. Although some skepticism about the Top Ten Percent Plan was expressed by the Court of Appeals in *Fisher*, *id*. at 240 ("[T]he Top Ten Percent Law alone does not perform well in pursuit of . . . diversity."), its constitutionality is not challenged in *Fisher*. *Id*. at 242 n.156; *id*. at 247 (King, J., concurring); *id*. at 263 n.21 (Garza, J., concurring).

body diversity.[12] The University found that a diverse student enrollment breaks down stereotypes, promotes understanding among students of different races, and "prepares students for an increasingly diverse workplace and society."[13] The University focused on the lack of minority representation in small classes, sized from ten to twenty-four students, and noted that "a majority of all students felt there was 'insufficient minority representation' in classrooms for 'the full benefits of diversity to occur' " and that minority students reported "feeling isolated."[14] These findings suggested to the University that it "had not yet achieved the critical mass of underrepresented minority students needed to obtain the full educational benefits of diversity."[15]

The race-conscious admissions process seems to have increased minority enrollment. According to the Petition for a Writ of Certiorari, the incoming freshman class enrollment in 2007 at the University of Texas was 5.8 percent black (compared to 4.5 percent in 2004) and 19.7 percent Hispanic (compared to 16.9 percent in 2004).[16]

This Article will proceed as follows. Part I will provide some background on the use of race-conscious university admissions programs, noting the transition from remedial to non-remedial justifications for such programs and the important limitations that the

---

12. The University of Texas's reintroduction of the consideration of race occurred in the immediate aftermath of the Supreme Court's decision in *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003), which endorsed such conduct as a permissible means of achieving student body diversity and which held that student body diversity constituted a compelling interest in the context of public university admissions.

13. *Fisher*, 631 F.3d at 225 (citations omitted) (internal quotation marks omitted).

14. *Id.*

15. *Id.* at 225–26. The University's emphasis not on "aggregate minority enrollment" but on "adequate diversity in the classroom" was characterized by the Court of Appeals as an "appropriate consideration" because "the aggregate number overstates the University's true level of diverse interaction." *Id.* at 245; *see also id.* at 240–41 (noting that "percentage plans bear little promise of producing . . . meaningful diverse interactions . . . at least not in the classroom"). Some considerable ambiguity about the University's rationale was introduced by its statement that "the significant differences between the racial and ethnic makeup of the University's undergraduate population and the state's population prevent the University from fully achieving its mission." *Id.* at 226. Similarly, the Court of Appeals seemed to look at racial and ethnic proportionality in determining whether a "critical mass" of minority students was enrolled. This would seem to conflate critical mass to achieve an educational objective and critical mass to reflect "the social changes Texas has undergone," in which there have been "vast increases in the Hispanic population of Texas." *Id.* at 244. The latter set of considerations would seem more like the prohibited pursuit of racial proportionality, as "increasing racial representation is not a sufficiently compelling interest to justify the use of racial preferences," and "[a]ttempting to ensure that the student body contains some specified percentage of a particular racial group is 'patently unconstitutional.' " *Id.* at 234 (citation omitted).

16. Petition for a Writ of Certiorari at 9, Fisher v. Univ. of Tex. at Austin, 132 S. Ct. 1536 (2012) (No. 11-345), 2011 WL 4352286.

Court has placed on the non-remedial rationale for race-conscious measures.

Part II will turn its analysis to a partial reassessment of *Grutter v. Bollinger*,[17] which endorsed the use of racial preferences in the context of university student admissions, which held that such preferences could be justified under strict scrutiny in order to achieve student body diversity, and which described student body diversity in race-neutral terms.

Part II will consider the troubling implications of the student body diversity rationale embraced in *Grutter*, noting that that rationale treats the presence of black and minority students as a means of educating students otherwise matriculating to the university, an instrumental role that commodifies black and minority students whose presence is valued largely because it affords educational benefits to others. Part II will also examine the distinction between the race-neutral concept of "student body diversity" and the concept of "racial diversity." *Grutter* assumed that achieving racial diversity was an essential component of achieving student body diversity and that using race affirmatively was, in turn, a necessary and appropriate means of achieving racial diversity. Part II will call that assumption into question under traditional strict-scrutiny "narrow tailoring" analysis, which only allows the use of race as a last resort and imposes on the university the burden of demonstrating that the educational benefits that accrue from student body diversity cannot be attained without the explicit consideration of race or racial diversity. *Grutter*'s approach is in considerable tension with analogous cases involving jury selection (peremptory challenges) and racial gerrymandering—both of which reject the use of race as a proxy for juror or voter experiences or attitudes.

Part III will selectively consider application of *Grutter* to *Fisher*. It will conclude that the deference granted to the University of Michigan Law School in *Grutter* does not and should not apply in the *Fisher* context. Deference in *Grutter* was justified to allow the Law School to pursue student body diversity as essential to its mission and to avoid, under narrow tailoring, requiring the Law School to sacrifice its selectivity in student admissions. Neither concern is threatened in *Fisher*. There is already considerable diversity at the University of Texas, and *Grutter*-style deference is questionable on the issue of whether the University can superimpose a regime of racial preference to improve diversity in particularized ways such as in small-sized classes. To the extent that qualitative standards are at issue, the

17. 539 U.S. 306 (2003).

quality standards at the University of Texas derive from a plan adopted by the Texas legislature, not by judicial intervention—a very different scenario than that present in *Grutter*.

I. BACKGROUND AND INTRODUCTION

"It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny."[18] That is, "all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized."[19] This uniform or consistent standard of strict scrutiny for racial classifications adheres to the principle of racial reciprocity—that the "standard of review . . . is not dependent on the race of those burdened or benefited by a particular classification."[20] The Court's adoption of the racial-reciprocity principle reflects a rejection of the idea that strict scrutiny applies only when race is used hegemonically, by the white majority to subjugate or stigmatize blacks and other racial minorities.[21] The rationale for adopting the racial-reciprocity principle is that the use of race in a pluralistic, democratic society is poisonous (or like cancer).[22] As the Court has found, "racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification."[23]

Under strict scrutiny, a racial classification is presumptively invalid[24] and is only sustainable if the governmental entity seeking to justify the use of race can carry the burden of "demonstrat[ing]" that

---

18. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 711 (2007).

19. Gratz v. Bollinger, 539 U.S. 244, 270 (2003) (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 224 (1995)).

20. *Adarand*, 515 U.S. at 224 (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989) (plurality opinion)).

21. *Cf.* Loving v. Virginia, 388 U.S. 1, 11 n.11 (1967) (rejecting anti-miscegenation legislation even if the goal is not just to protect the white race but to protect the "integrity" of all races).

22. C*f. Parents Involved*, 551 U.S. at 795–97 (Kennedy, J., concurring in part and concurring in judgment) ("Reduction of an individual to an assigned racial identity for differential treatment is among the most pernicious actions our government can undertake. The allocation of governmental burdens and benefits, contentious under any circumstances, is even more divisive when allocations are made on the basis of individual racial classifications. . . . Governmental classifications that command people to march in different directions based on racial typologies can cause a new divisiveness. The practice can lead to corrosive discourse . . . .").

23. *Gratz*, 539 U.S. at 270 (internal cite omitted).

24. *Parents Involved*, 551 U.S. at 793 (Kennedy, J. concurring in part and concurring in judgment) (acknowledging "the presumptive invalidity of a State's use of racial classifications to differentiate its treatment of individuals"); Johnson v. California, 543 U.S. 499, 505 (2005) (government has the "burden of proving" that racial classifications are narrowly tailored to further compelling interests).

its "use of race" is "narrowly tailored" and "further[s] compelling governmental interests."[25] Before 2003, the Court had reserved the use of race to the remedial context. The only "compelling interest" recognized as justifying government's use of race in the school context was remedying the ongoing effects of identified intentional racial discrimination.[26] Remedying the more amorphous "societal discrimination" did not qualify as a "compelling interest" that justified the use of race.[27]

In 2003, for the first time, the Court upheld the non-remedial use of race as satisfying the compelling governmental interest standard. In *Grutter v. Bollinger*, the Court upheld under strict scrutiny the use of race to achieve the non-remedial or positive objective of "student body diversity" in the context of "university admissions"[28] despite "some language" in earlier opinions that "might be read to suggest that remedying past discrimination is the only permissible justification for race-based governmental action."[29] *Grutter* held that universities have a "compelling interest in attaining a diverse student body."[30]

In 2007, the Supreme Court in *Parents Involved* reaffirmed that the compelling interest recognized in *Grutter* was "diversity in higher education,"[31] accommodating "considerations unique to institutions of higher education"[32] and reflecting "the special niche in our constitutional tradition" that "universities occupy."[33] "Context matters,"[34] the Court in *Parents Involved* observed, and a "key limitation[]" on *Grutter*'s holding was its application to the "unique context of higher education,"[35] not elementary or secondary education.[36]

---

25. *Gratz*, 539 U.S. at 270 (citations omitted).

26. *Parents Involved*, 551 U.S. at 720 (recognizing the "compelling interest of remedying the effects of past intentional discrimination").

27. Shaw v. Hunt, 517 U.S. 899, 909–10 (1996) ("[A]n effort to alleviate the effects of societal discrimination is not a compelling interest.").

28. *Grutter*, 539 U.S. at 325. *Grutter* involved law school admissions, but the same compelling interest exists in the context of undergraduate admissions, the subject of the *Fisher* case. *Gratz*, 539 U.S. at 268.

29. *Grutter*, 539 U.S. at 328.

30. *Id.* at 329.

31. *Parents Involved*, 551 U.S. at 722.

32. *Id.* at 724.

33. *Id.* (quoting *Grutter*, 539 U.S. at 329).

34. *Id.* (quoting *Grutter*, 539 U.S. at 326–27).

35. *Id.* at 725.

36. *Id.* This component of *Parents Involved* (Section III.A) was joined by five justices and therefore was a holding of the Court.

A second "key limitation" of the compelling interest recognized in *Grutter* was its application to a "specific type of broad-based diversity,"[37] which included a "broader assessment of diversity, and not simply an effort to achieve racial balance, which . . . would be 'patently unconstitutional.' "[38] The compelling interest recognized in *Grutter* was race-neutral—"student body diversity"[39]—not racial diversity. Under *Grutter,* student body diversity can include racial diversity among its elements, but it also takes into account "all pertinent elements of diversity in light of the particular qualifications of each applicant,"[40] "ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions,"[41] and "does not . . . limit in any way the broad range of qualities and experiences that may be considered valuable contributions to student body diversity," including such non-racial factors as travel, language fluency, overcoming "personal adversity and family hardship," community service, and a track record of nonacademic performance.[42] The Court in *Grutter* accepted the University of Michigan Law School's assertion—deferring to its judgment on this matter—that student body diversity was "essential" to the Law School's "educational mission" and "yield[ed] educational benefits."[43]

II. SOME DOCTRINAL HICCUPS IN *GRUTTER*

Although the University of Texas has vigorously asserted that *Grutter* should not be reconsidered or overruled,[44] Petitioner claims that she "has preserved the argument that *Grutter* should be reconsidered," that "the question whether *Grutter* should be reconsidered was briefed below," and that "[t]he issue is 'fairly included' within the question presented . . . and preserved for" Supreme Court review.[45] Since it is possible that the Court will reconsider some aspects of *Grutter*, some concerns raised by the analysis in *Grutter* are worthy of discussion and reassessment.

---

37. *Id*. at 725.
38. *Id*. at 723 (internal citation omitted).
39. *Grutter*, 539 U.S. at 328.
40. *Id*. at 334 (internal citation omitted).
41. *Id*. at 337.
42. *Id*. at 338.
43. *Id*. at 328.
44. Brief in Opposition, *supra* note 2, at 35–39.
45. Reply Brief, *supra* note 2, at 11.

This Part will critically address two analytical components of *Grutter*. First, it will discuss the problems with and perverse implications of the student body diversity rationale *Grutter* adopts for justifying the use of racial preferences in the context of higher education student admissions. It will conclude that the student body diversity rationale views the presence of qualified but otherwise non-admissible black and minority students as a means of educating students otherwise matriculating to the university. This instrumental role for black and minority students commodifies them and, under *Grutter*, justifies the racial preferences accorded them not for the sake of the black and minority students' own education but largely for the sake of affording educational benefits to others.

Second, this Part will examine the distinction between the interest that *Grutter* recognized as "compelling"—namely the race-neutral concept of "student body diversity"—and the concept of "racial diversity." *Grutter* assumed that achieving racial diversity was an essential component of achieving student body diversity and that using race affirmatively was, in turn, a necessary and appropriate means of achieving racial diversity. This Part will call that assumption into question in two ways. It will show that under the traditional understanding of "narrow tailoring" under strict scrutiny, the university has the burden to demonstrate that the educational benefits that accrue from student body diversity cannot be attained without the explicit consideration of race or racial diversity. *Grutter* did not, as it should have under strict scrutiny, impose that burden on the University of Michigan Law School. This Part will then note that this truncation of narrow tailoring analysis in *Grutter* is in considerable tension with analogous cases involving jury selection (peremptory challenges) and racial gerrymandering—both of which reject the use of race as a proxy for juror or voter experiences or attitudes and neither of which were discussed or even considered or cited in *Grutter*.

A. The Nature and Implications of the Interest in Student Body Diversity

In recognizing a non-remedial basis under strict scrutiny for justifying classifications based on race, *Grutter* redirected attention from redressing grievances of the victims of past racial discrimination to promoting the educational mission of public institutions of higher education. As the *Grutter* Court observed, "only one justification for [the] use of race in the admissions process" was advanced: "obtaining

the educational benefits that flow from a diverse student body" in the context of higher education.[46]

In *Grutter*, certain minority-student applicants received preference in the admissions process, thereby disadvantaging some white applicants on account of their race. Justification for the preference did not focus on the students receiving the preference—redressing class-based harms to minorities disadvantaged by past racial injustices. That is, the justification for preferences in *Grutter* focused not on those victims but on the educational benefits to students who matriculated to the University of Michigan Law School. The students who secured the lion's share of the educational benefits from student body diversity were white students who matriculated to the Law School. What *Grutter* permits is the preferencing of some minority students at the expense of some white students in order to benefit predominantly higher-scoring white students whose educational opportunity and outcome are enhanced by the presence of a critical mass of minority students. The presence of the preferenced minority students enriches the educational process for all matriculants (white and minority, but numerically, predominantly white students).

The shift in the unit of analysis from the remedial to the non-remedial use of race results in a not-so-subtle transformation of the nature of the rationale for, and the identity of the beneficiaries of, the scheme of racial preferences. Preferential admission for minority students is justified not in itself, since "racial balancing . . . is patently unconstitutional,"[47] nor is it justified remedially for the benefit of the preferred black students seeking admission. Instead, race-based advantages for minorities are justified as instrumental—a means to achieve a broader objective. And that broader objective—"educational benefits that diversity is designed to produce"[48]—does not focus on minority students or their interests but on "attaining a diverse student body," which is "at the heart of the Law School's proper institutional mission."[49] In this scenario, minority students are valued because of their "potential 'to contribute to the learning of those around them' "[50] and receive preference not because of their own interests, but as instruments for improving educational opportunity and attainment for all matriculated students (most of whom are

46. 539 U.S. at 328, 343.

47. *Id*. at 330.

48. *Id*.

49. *Id*. at 329.

50. *Id*. at 315 (internal citation omitted).

white). The diversity policy "aspires 'to achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts.' "[51]

This rationale for providing preference to minority students commodifies them, turning them into instruments of education primarily for others—vehicles for the advancement of the educational mission of a public university. That is, from the perspective of a public university, a diverse student body promotes better understanding among students of different races, overcomes racial stereotyping,[52] and affords "livelier, more spirited, and simply more enlightening and interesting" classroom discussion,[53] exposing students to "widely diverse people, cultures, ideas, and viewpoints."[54]

And, from the perspective of the white student applicants disadvantaged on account of their race, their sacrifice is justified to achieve a marginally improved educational experience primarily for higher-scoring white students who are admitted to and matriculate to the public university. That is, a higher-scoring white student offered admission receives a better education because of the enhanced presence of underrepresented minority students (who otherwise would not attain admission), and the price for that improved educational benefit is paid by slightly lower-scoring white students who otherwise would have attained admission but are denied admission on account of their race.

Whatever one might think of group-based racial preferences—targeted remedially to assist minority students as a class even if they cannot identify racial discrimination aimed at them on an individual basis—one should take pause at the non-remedial commodification rationale underlying *Grutter*. The *Grutter* rationale for racial preferences for minority students relies on the educational benefits from greater minority-student presence for matriculated students overall, treating minority-student presence as instrumental—a means toward achieving the end of improved quality of education at a public

51. *Id*. (internal citation omitted).

52. "[W]hen a critical mass of underrepresented minority students is present, racial stereotypes lose their force, because nonminority students learn there is no 'minority viewpoint' but rather a variety of viewpoints among minority students." *Id*. at 319–20 (reporting testimony of Dean Kent Syverud).

53. When there is a critical mass of underrepresented minority students, they "do not feel isolated or like spokespersons for their race," *id*. at 319 (reporting testimony of Dean Jeffrey Lehman), thereby contributing to a more robust educational environment. The focus on lack of isolation in this regard is designed to assure a more meaningful contribution to the overall educational process by minority students, not to address in itself the educational attainment of minority students themselves.

54. *Id*. at 330 (internal citation omitted).

institution of higher education. This troubling rationale strongly suggests cabining *Grutter*, as the Court has begun to do in *Parents Involved*.

The *Grutter* Court acknowledged that race is a group-based classification that should be closely scrutinized "to ensure that the *personal* right to equal protection of the laws has not been infringed."[55] Where, as in *Fisher*, a race-neutral but racially motivated program—the Top Ten Percent Plan—enhances overall institutional diversity but does not fulfill some of the more particularized institutional objectives such as diversity in small classes, the justification for use of overt race-conscious measures becomes all the more questionable.

The Court seemed to recognize this in *Parents Involved*. It denigrated the magnitude of the governmental benefit being asserted because the challenged race-conscious measures had minimal impact: "the minimal impact of the districts' racial classifications on school enrollment casts doubt on the necessity of using racial classifications."[56]

The value of student body diversity may be compelling when, absent race-conscious admissions, an insubstantial minority student presence would result. In *Grutter*, minority students were unlikely to be admitted in "meaningful numbers" under the Law School's traditional criteria.[57] In *Fisher*, the increased minority presence from the Top Ten Percent Plan means that substantial student body diversity exists at the University of Texas. The marginal return on the use of race-conscious measures is far less substantial and therefore not "necessary" under narrow-tailoring analysis. And nonracial alternatives, such as imposing more foundational course requirements that can be fulfilled only in small-sized classes that would likely have more enrollment diversity, offer readily available options that do not rely on the use of overt racial classifications. The availability of such alternatives further undermines the University's claim of necessity for using racial classifications to achieve student body diversity.

B. Student Body Diversity vs. Racial Diversity

Grutter recognized "student body diversity," not racial diversity, as a compelling interest in higher education admissions. The Court emphasized this distinction in *Gratz v. Bollinger*, which

55. *Id*. at 326 (emphasis in original) (internal citation omitted).

56. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 734 (2007). This component of *Parents Involved* (Section III.C) was joined by five justices and therefore constituted a holding of the Court.

57. *Grutter*, 539 U.S. at 338.

invalidated the awarding of plus points to all black applicants to Michigan's undergraduate school.[58] The student body diversity concept embraced in *Grutter* "emphasized the importance of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and, in turn, evaluating that individual's ability to contribute to the unique setting of higher education."[59] No single characteristic, such as race, could "automatically ensure[] a specific and identifiable contribution to a university's diversity."[60] Instead, "each characteristic of a particular applicant" must be individually considered "in assessing the applicant's entire application."[61] Automatically awarding points to black applicants violated the diversity principle of individualized, totality-of-contribution evaluation.

The concept of student body diversity focuses on "all factors that may contribute to student body diversity,"[62] comprising 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."[63] Diversity is not seen as a code word for race, as nonracial factors can and do enter into the admissions process. But *Grutter* allows for express consideration of race as part of the diversity calculus, relying on the "experiences" that underrepresented minority students have had "[b]y virtue of our Nation's struggle with racial inequality."[64]

Narrow Tailoring. In its discussion of narrow tailoring, *Grutter* assumes that racial diversity is an essential component of student body diversity and holds that "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative"[65] to achieve racial diversity. In *Parents Involved*, the Court noted the "specific type of broad-based diversity"[66] upheld in *Grutter*, observing that student body diversity focuses "on each applicant as an individual, and not simply as a member of a particular racial group."[67] In light of the broad, all-encompassing, and race-neutral notion of student body diversity described in *Grutter* and *Parents Involved*, there is a fair

58. Gratz v. Bollinger, 539 U.S. 244, 251, 255, 256 (2003).
59. *Id.* at 271.
60. *Id.*
61. *Id.*
62. *Grutter*, 539 U.S. at 337.
63. *Id.*
64. *Id.* at 338.
65. *Id.* at 339.
66. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 725 (2007).
67. *Id.* at 722.

question why narrow tailoring—which permits the use of racial factors only as a last resort[68]—does not rule out explicit consideration of race when and if, overall, the educational benefits that derive from student body diversity have been or can be achieved in the absence of such explicit consideration of race or racial diversity.

As student body diversity and the educational benefits that flow from it are described in *Grutter* and *Gratz*, such diversity, and the attendant educational benefits, likely can be achieved without consideration of racial diversity. Each applicant must be viewed and evaluated as an individual "and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application."[69] The benefits of diversity that the Court describes in *Grutter* can often, if not always, be achieved without explicit consideration of race or racial diversity.

> To the degree that state universities genuinely desire students with diverse backgrounds and experiences, race-neutral factors like specific hardships overcome, extensive travel, leadership positions held, volunteer and work experience, dedication to particular causes, and extracurricular activities, among many other variables, can be articulated with specificity in the admissions essays. These markers for viewpoint diversity are far more likely to translate into enhanced classroom dialogue than a blanket presumption that race will do the same.[70]

These insights suggest that the narrow-tailoring inquiry should not assume that racial diversity is an essential element of the race-neutral concept of student body diversity and that use of race to achieve racial diversity should be reserved to situations where, under careful scrutiny, a state university can establish that the educational benefits of *student body diversity* cannot be satisfactorily achieved in the absence of explicit consideration of race or *racial diversity*. In this regard, noting that blacks face different experiences as a result of race discrimination is insufficient to satisfy that inquiry. The critical inquiry under strict scrutiny is whether, in the face of the existence of substantial student body diversity (broadly understood), it is necessary to use overt racial criteria to achieve *racial diversity* in order to achieve the educational benefits of *student body diversity*. And the burden under strict scrutiny is on the government to make out the case for this contention.

---

68. *See id*. at 790 (Kennedy, J., concurring in part and concurring in judgment) ("[I]ndividual racial classifications . . . may be considered legitimate only if they are a last resort to achieve a compelling interest."); Richmond v. J.A. Croson Co., 488 U.S. 469, 519 (1989) (Kennedy, J., concurring in part and concurring in judgment) (stating that racial classifications are permitted only "as a last resort").

69. *Grutter*, 539 U.S. at 337.

70. Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 253 (5th Cir. 2011) (Garza, J., concurring) (footnote omitted), *cert. granted*, 132 S. Ct. 1536 (2012).

The Tension With Analogous Cases. The foregoing narrow-tailoring analysis, which calls into question the assumption that the use of racial criteria or the achievement of racial diversity is necessarily required to achieve student body diversity, is buttressed by the jury-selection (peremptory-challenge) cases[71] and the racial gerrymander cases[72]—cases that *Grutter* does not consider or discuss and that are in tension with *Grutter*.

Grutter holds that the race-neutral principle of student body diversity (not racial diversity) constitutes a compelling governmental interest in the context of strict scrutiny. The rationale is that such diversity provides educational benefits at public universities, which must be permitted to achieve student body diversity and educational excellence through selective admissions practices.[73] From the general race-neutral principle of student body diversity, *Grutter* proceeds to equate nonracial characteristics such as "growing up in a particular region or having particular professional experiences" with the "unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters."[74] Accordingly, *Grutter* assumes that *racial diversity* is an essential ingredient of *student body diversity* because of the "unique experience of being a racial minority."

Grutter's linking of race to experience and attitude in promoting the value of student body diversity and the educational benefits that accrue from such diversity fails to take into account the insights of the jury-selection and racial-gerrymander cases. Those cases call into question *Grutter*'s conclusion that race is or properly can be correlated with, or used as a proxy for, such things as political viewpoint (voting cases)[75] or the effects of experiences in evaluating evidence (jury selection).[76]

Private parties that exercise peremptory jury challenges through the use of race make judgments about juror attitude, experience, competence, and bias. Race (or sex) may enter the peremptory-challenge decision based on probabilistic judgments related to a prospective juror's background and experience. A member

---

71. *E.g.*, Powers v. Ohio, 499 U.S. 400, 410 (1991) ("Race cannot be a proxy for determining juror bias or competence"); *cf.* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 137–38 (1994) (neither race nor gender may be used as a proxy or predictor of a juror's attitudes).

72. *E.g.*, Shaw v. Reno, 509 U.S. 630, 647 (1993) (noting that perceptions underlying racial gerrymanders that "members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls" constitute "impermissible racial stereotypes").

73. *Grutter*, 539 U.S. at 330–31.

74. *Id.* at 333.

75. *See supra* note 72.

76. *See supra* note 71.

of a racial minority may have a set of special or distinct experiences that would shape perceptions about behavior or evidence. The same is true regarding gender-based experiences. But notwithstanding that there may be a "shred of truth" in some such generalizations, such "gross generalizations" based on race or sex have been deemed impermissible in the jury-selection process—insufficient to satisfy strict (race) or intermediate (gender) scrutiny.[77]

Race and sex are not and cannot be accurate proxies for a juror's attitudes, "bias or competence,"[78] or "assumptions of partiality."[79] A "race stereotype" cannot serve as a proxy for juror fairness; modes of investigating impartiality other than race must be "explored in a rational way that consists with respect for the dignity of persons, without the use of classifications based on ancestry or skin color."[80]

The Court in *Grutter* did not explain why the same nonracial "rational way" should not apply, in the context of strict scrutiny, in determining whether the educational benefits of achieving student body diversity must include racial diversity and the use of racial preferences to achieve racial diversity.

An objective of jury selection is the achievement of an impartial jury that reflects a cross section of the community. Those objectives must be satisfied under the peremptory challenge cases without the overt use of racial criteria. That conclusion would seem relevant to the context of higher education and the achievement of the educational benefits that stem from the attainment of the racially neutral concept of student body diversity. Yet, *Grutter* did not address the insights of the peremptory-challenge cases in determining whether consideration of race was, or the circumstances in which it could be, a necessary component of achieving the educational benefits from student body diversity. In its narrow-tailoring analysis, *Grutter* only addressed whether race-neutral ways of pursuing *racial diversity* were considered and evaluated, but it never considered the question raised by the juror-selection (peremptory-challenge) cases—whether *racial diversity* was a permissible or essential element of the broader educational goals that stem from the race-neutral concept of *student body diversity*. *Fisher* provides a good vehicle for this analytical reassessment, since substantial student body diversity is already

77. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 139–40 & n.11 (1994).

78. Powers v. Ohio, 499 U.S. 400, 410 (1991).

79. Georgia v. McCollum, 505 U.S. 42, 59 (1992).

80. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 631 (1991).

present at the University of Texas as a result of the Top Ten Percent Plan.[81]

III. *GRUTTER* AND *FISHER*

A. The Deference Issue

The critical ingredient of strict scrutiny is the lack of deference given to governmental decisions that trigger strict scrutiny. Strict scrutiny requires "detailed examination, both as to ends and as to means."[82] The Court of Appeals in *Fisher* concluded that *Grutter* mandated deference to the University of Texas regarding its use of race-based criteria in student admissions.[83] The nature, scope, and degree of deference to the University's decisionmaking are fundamental elements of how the *Grutter* framework should apply in *Fisher*.

In *Grutter*, the Court deferred to the Law School despite the traditional understanding that deference is unwarranted under strict-scrutiny analysis. The deference occurred both in terms of determining what constituted a compelling interest (student body diversity) and in terms of analyzing how the narrow-tailoring component of means-ends scrutiny worked under strict scrutiny.[84]

The *Grutter* Court deferred to the Law School's educational judgment that student body diversity was "essential to its educational mission."[85]

When they select students who will contribute most to a "robust exchange of ideas," universities pursue a "goal that is of paramount importance in the fulfillment of [their] mission."[86] Judicial deference was "in keeping with [the Court's] tradition of giving a

---

81. The racial gerrymander cases raise the same set of questions about conflating racial diversity with the broader student body diversity. *Shaw v. Reno*, 509 U.S. 630 (1993), rejects the premise that racial characteristics justify lumping together members of a racial group based on purported commonality of interest. Such perceptions are "impermissible racial stereotypes" and do not warrant use of racial criteria in legislative district line drawing. *Id.* at 647. Race cannot be used as a proxy for commonality of interest in district line drawing. That insight is in considerable tension with the *Grutter* Court's use of race not only as a proxy for the race-neutral concept of student body diversity but as a necessary component of the student body diversity that provides compelling educational benefits to students in institutions of higher education.

82. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 236 (1995).

83. Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 232 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012).

84. *See supra* Section II.B.

85. Grutter v. Bollinger, 539 U.S. 306, 328 (2003).

86. *Id.* at 329 (internal citations omitted).

degree of deference to a university's academic decisions"[87] and recognizing that "universities occupy a special niche in our constitutional tradition."[88] Deferring to universities and presuming "good faith" on the part of universities in determining the educational benefits associated with admissions policies reflect the Court's view that "attaining a diverse student body is at the heart of [a university's] proper institutional mission."[89] At the same time, such deference must be constrained by "constitutionally prescribed limits."[90]

With respect to narrow tailoring regarding "race-conscious admissions programs," such programs must be "calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education."[91]

Grutter commanded deference to public universities by not "forcing" a public university "to abandon the academic selectivity that is the cornerstone of its educational mission."[92] Narrow tailoring does not require a university "to become a much different institution and sacrifice a vital component of its educational mission,"[93] a form of deference to the university's ability to set for itself its educational objectives.

How does the deference shown to university decisionmaking in *Grutter* apply to the *Fisher* context?

This question is complicated because of the presence of the Top Ten Percent Plan, which uses facially race-neutral means to achieve the race-motivated goal of increasing attendance at the University of Texas of historically underrepresented minority students—blacks and Hispanics. *Grutter* refused to mandate use of such a percentage plan in part because it was not clear "how such plans could work for graduate and professional schools."[94] The Court also declined to require such facially race-neutral schemes as a lottery because it would "effectively sacrifice all other educational values, not to mention every other kind of diversity."[95] In short, no race-neutral alternative that was "currently capable of producing a critical mass" of minority students without impairing fundamental elements of the Law School's

87. *Id*. at 328.
88. *Id*. at 329.
89. *Id*.
90. *Id*. at 328.
91. *Id*. at 333–34.
92. *Id*. at 340.
93. *Id*.
94. *Id*.
95. *Id*.

educational mission was presented in *Grutter*.[96] It was in that context that the Court concluded that the Law School had "adequately considered race-neutral alternatives."[97]

But this type of deference does not and cannot mean that a deferential process-based review is all that narrow tailoring requires in the context of *Fisher*. The University of Texas was faced with a very different diversity environment than the University of Michigan Law School confronted in *Grutter*. The Texas legislature had already implemented the Top Ten Percent Plan, and it had had a strong measure of success. The issue in *Fisher* is not whether a Court should command a percentage plan as an alternative to a race-based admissions process. The State has already done that. The question is whether the University can build on the existing level of diversity by superimposing on top of the legislatively driven Top Ten Percent Plan a race-based plan to improve student body diversity in areas arguably under-fulfilled by the percentage plan. And on that issue, deference under strict scrutiny seems unwarranted.

The validity of the Top Ten Percent Plan is not under challenge by Petitioner, but the Court of Appeals opinion expressed reservations about the plan because of a loss of student selectivity, an inability to screen for fine-tuned elements of diversity, and a lack of diversity in small classes.[98] But the Top Ten Percent Plan has been adopted by the Texas legislature and has brought about greater student body diversity at the University of Texas than would have been the case in *Grutter* in the absence of the race-conscious plan under review there. Under the circumstances, there is no comparable threat to the autonomy or academic integrity of the University of Texas as there was to the University of Michigan Law School.

Given the state-implemented percentage plan, a university under strict scrutiny should be required to shoulder the burden of justifying its use of racial criteria as the school districts in *Parents Involved* were required to do. Why have the educational benefits of student body diversity not been adequately attained through the Top Ten Percent Plan, and why is the pursuit of further *racial diversity* necessary to achieve the educational benefits of *student body diversity* under the circumstances? What, precisely, is the marginal increase in educational benefits from the use of race-based admissions criteria, and why is that level of increased benefits sufficiently substantial to

96. *Id.*

97. *Id.*

98. Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 239–41 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012).

warrant the use of race-based admissions criteria under narrow-tailoring analysis? When an overtly race-based plan such as that challenged in *Fisher* builds on the foundation of a percentage plan, the risk that impermissible racial factors are being used in a state's race-based admissions plan is just too great.[99] The burden of justification under strict scrutiny in such circumstances should apply to the university as a governmental entity. Imposing the burden of justification on the university is the customary requirement under strict scrutiny. *Grutter*, *Gratz*, and *Parents Involved* do not seem to the contrary.

The two areas of deference to the university in *Grutter* should not alter the entire tradition of strict-scrutiny analysis, which imposes on the government the burden of demonstrating the need for use of race-based decisionmaking. Lack of deference on the critical questions in *Fisher* does not undermine the ability of the University of Texas to map out its own educational objectives. Nor does lack of deference require the University to lower its educational standards. To the extent that Top Ten Percent Plan does reduce qualitative standards measured by objective indicators like the national aptitude tests, that result stems from a legislative choice of the state of Texas.

B. Classroom Diversity

The University of Texas in *Fisher* expresses a concern about the lack of diversity at the level of small-sized classes.[100] This seems like both a sensible concern and a dangerous one.

Educational interactions occur most poignantly in small-sized classes; so the composition of a small-sized class is an important part of the educational benefits that can stem from student body diversity. In the context of a law school, where it is typical for much or nearly all of the first-year curriculum to be required for all students, classroom-based student body diversity seems to be a realistic objective—at least for the foundational first-year courses and other required courses. In the context of a much more variegated undergraduate curriculum, where students pick from a broad curriculum menu based on individual interests and preferences, pursuit of such an objective as classroom-based student body diversity actually calls into question the very applicability of *Grutter* to the undergraduate setting.

---

99. This is especially the case given the history of the University of Texas prior to *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), when it was using overtly race-based admissions criteria.

100. 631 F.3d at 225–26.

The Court of Appeals in *Fisher* did not delineate how the race-based admissions program implemented by the University of Texas actually addressed, or was tailored to, improving diversity in small-sized classes. No record of the outcomes of race-based admissions was kept, so there was no way to track the correlation between the use of race and the effect of racial diversity in small-sized classes. The idea seemed to be that the presence of more minority students seemed to improve the odds that more diversity would accrue in small-sized classes. This is not narrow tailoring but a field of dreams.

Students select their courses based on their individual interests and talents. Hoping that the presence of more minority students will increase the level of diversity in small-sized classes is not the type of targeted approach that the narrow-tailoring requirement of strict scrutiny demands. Here again, the University should be required to satisfy a burden of justification to show that its race-based admissions program actually results, or is likely to result in, improving diversity in small-sized classes. Moreover, there are other effective ways of improving the likelihood of achieving student body diversity in small classes. For example, imposing more foundational course requirements that can be fulfilled only in small-sized classes would be one way of achieving the small-sized classroom diversity goal. In any event, the burden of explanation and demonstrating the lack of alternatives under strict scrutiny should fall on the University. The claims of deference from *Grutter* just do not seem applicable to this critical issue in *Fisher*.

IV. CONCLUSION

Fisher provides an opportunity for the Supreme Court to reassess and modify some of the troubling aspects of the rationale in *Grutter*. But even on its own terms, *Grutter* does not seem to warrant the broad degree of deference accorded to the University of Texas by the Court of Appeals—a deference that undermines the Court's articulated commitment to strict scrutiny for all racial classifications.