NON-STRICt STRICt SCRUTINy: THE FIFth CIRCUIt AND THE GRUTtER STANDARD IN FISHER v. UNIVERSITY OF TEXAS AT AUSTIN

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Abstract: On January 18, 2011, in Fisher v. University of Texas at Austin, the U.S. Court of Appeals for the Fifth Circuit held that a university’s admissions policy was constitutional because it had a compelling interest in achieving a critical mass of minority students and did not strive for outright racial balancing for its own sake. Although the Fifth Circuit’s holding aligns with the Supreme Court’s standard in Grutter v. Bollinger, it exemplifies how Grutter discourages universities from experimenting to create better race-conscious admissions policies.

Introduction

Abigail Fisher and Rachel Michalewicz were denied admission to the University of Texas at Austin (UT) and challenged its use of race in its undergraduate admissions.1 In Fisher v. University of Texas at Austin, Fisher and Michalewicz, both Caucasian, alleged that UT discriminated against them on the basis of race in violation of their right to equal protection under the Fourteenth Amendment.2 The United States District Court for the Western District of Texas granted summary judgment in favor of UT, and the United States Court of Appeals for the Fifth Circuit affirmed, holding that UT’s use of race mirrored that of the policy approved by the Supreme Court in Grutter v. Bollinger.3 The Fifth Circuit analyzed UT’s admissions policy using a strict scrutiny standard and held that the admissions policy was constitutional because UT had


1 Fisher v. Univ. of Tex. at Austin (Fisher II), 631 F.3d 213, 216–17 (5th Cir. 2011), reh’g denied, 644 F.3d 301 (5th Cir. 2011), cert. granted, 80 U.S.L.W. 3144 (U.S. Feb. 21, 2012) (No. 11-345).

2 Id. at 217; Fisher v. Univ. of Tex. at Austin (Fisher I), 645 F. Supp. 2d 587, 590 (W.D. Tex. 2009).

a compelling interest in achieving a “critical mass” of underrepresented minority students.  

Judge Garza concurred with the Fifth Circuit majority, but noted that the Grutter standard is “markedly less demanding” than strict scrutiny. According to Judge Garza, the Grutter standard is problematic because it does not provide courts with a clear approach to analyzing race-conscious admissions policies. Consequently, universities may simply follow the race-conscious admissions policy approved in and avoid experimentation with other racially inclusive policies.

I. UT’s Admissions Policy Under the Grutter Standard

When the appellants in Fisher applied for admission in 2008, UT’s admissions policy was largely shaped by the “Top Ten Percent Law,” a legislative initiative that guaranteed admission to Texas students in the top ten percent of their high school class. That year, UT filled 88% of the seats it allotted to Texas residents pursuant to the Top Ten Percent Law. Plaintiffs, both Texas residents, were denied admission to UT and challenged its admissions policy for those Texas applicants not admitted pursuant to the Top Ten Percent Law. 

Texas applicants not admitted pursuant to the Top Ten Percent Law were evaluated based on their Academic and Personal Achievement Indices. The Academic Index was a computation of an applicant’s standardized test scores and high school class rank. The applicant’s Personal Achievement Index was based on evaluation of two required essays and “the personal achievement score.” In calculating the per-

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5 Id. at 247 (Garza, J., concurring).
6 Id. at 258.
7 Id. at 258–59.
8 Tex. Educ. Code Ann. § 51.803 (Vernon 1997); see Fisher v. Univ. of Tex. at Austin (Fisher II), 631 F.3d 213, 216, 224, 227 (5th Cir. 2011), reh’g denied, 644 F.3d 301 (5th Cir. 2011), cert. granted, 80 U.S.L.W. 3144 (U.S. Feb. 21, 2012) (No. 11-345). The Texas legislature enacted the “Top Ten Percent Law” in response to the Fifth Circuit’s 1996 decision in Hopwood v. Texas, a case that struck down UT’s law school admissions policy because it considered race directly and often made race a “controlling factor.” Fisher II, 631 F.3d at 223–24. Because the “Top Ten Percent Law” is facially race-neutral, the plaintiffs did not challenge it in this case. See id. at 217, 239.
9 Fisher II, 631 F.3d at 227.
10 Id. at 217, 227. Texas applicants not admitted pursuant to the “Top Ten Percent Law” amounted to 1216 admission offers in 2008. Id. at 227.
11 Id. at 227.
12 Id.
13 Id. at 227–28.
sonal achievement score, admissions personnel took into consideration an applicant’s entire file.14 UT considered race as part of an applicant’s file, thereby factoring race into an applicant’s personal achievement score.15

UT’s use of race to classify people in its admissions policy automatically triggered a strict scrutiny analysis under the Equal Protection Clause of the Fourteenth Amendment because it was a race-based classification.16 Courts apply a strict scrutiny standard of review whenever race is used to classify people because a core purpose of the Fourteenth Amendment is to eliminate discriminatory racial classifications.17 To be constitutional under a strict scrutiny analysis, the racial classification must be narrowly tailored to further a compelling governmental interest.18

The Supreme Court’s decision in Grutter is the model for other courts in strictly scrutinizing admissions policies in the university context.19 In Grutter, the Court rejected a plaintiff’s constitutional challenge to the race-conscious admissions policy at the University of Michigan Law School (the “Law School”).20 The Court held that the Law School’s admissions policy did not violate the Equal Protection Clause because it was narrowly tailored to achieve a compelling interest.21

In finding a compelling interest, the Grutter Court expressly deferred to the Law School’s expertise in deciding that diversity was essential to its mission.22 As part of its mission, the Law School sought to admit a “critical mass” of minority students to ensure that underrepresented groups would be able to make a meaningful contribution to the school’s character.23 The Court reasoned that the Law School had a compelling interest in admitting a critical mass of minority students because diversity enriched the learning environment and prepared

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14 Fisher II, 631 F.3d at 228.
15 Id. at 228–29.
16 Id. at 231. Appellants, on the other hand, urged the court to apply the strong-basis-in-evidence standard when evaluating whether the remedial actions were necessary, which would have been more restrictive than a deferential form of strict scrutiny review. Id. at 232. Noting that the strong-basis-in-evidence standard has been applied in cases regarding discrimination in public employment, the court refused to apply it here. See id. at 232–33.
17 See id. at 247–48 (Garza, J., concurring); see also Shaw v. Reno, 509 U.S. 630, 650–51 (1993).
18 Fisher II, 631 F.3d at 231.
20 539 U.S. at 311, 343.
21 Id. at 343.
22 Id. at 327–28.
23 See id. at 316 (citing the Law School’s admissions policy).
students for an increasingly diverse work force.\textsuperscript{24} The Court recounted witness testimony which explained that a critical mass is not numerically defined, but more aptly described through abstract concepts such as “meaningful numbers,” “meaningful representation,” and “a number that encourages underrepresented minority students to participate in the classroom and not feel isolated.”\textsuperscript{25} The critical mass a school needs to achieve such abstract concepts may be defined in relation to the educational benefits the school seeks with its diversity policy.\textsuperscript{26} The Court found that the Law School’s policy was narrowly tailored because each applicant was evaluated in a highly individualized and holistic manner, and race was considered in conjunction with many other factors.\textsuperscript{27} Therefore, the Court held that the Law School’s policy was constitutional because it narrowly tailored its use of race to further its compelling interest in diversity.\textsuperscript{28}

In \textit{Fisher}, the Fifth Circuit followed the \textit{Grutter} analysis and held that UT had a compelling interest in enrolling a critical mass of underrepresented minority students.\textsuperscript{29} UT sought to obtain a critical mass of minority students by pursuing three distinct educational objectives articulated in \textit{Grutter}—enhancing classroom discussion, preparing students for the professional world, and promoting effective participation in civic life by people of all backgrounds.\textsuperscript{30} Like the \textit{Grutter} Court, the \textit{Fisher} court refused to define “critical mass” by numbers or benchmarks, and instead explained that it “is defined by reference to the educational benefits that diversity is designed to produce.”\textsuperscript{31} The Fifth Circuit also deferred to UT’s judgment that diversity would have educational benefits, noting that universities have the most experience in this area and are best equipped to make such determinations.\textsuperscript{32} The court further concluded

\textsuperscript{24} See id. at 330, 343.
\textsuperscript{25} See \textit{Grutter}, 539 U.S. at 318–19 (internal quotations omitted).
\textsuperscript{26} See id. at 330.
\textsuperscript{27} Id. at 334, 337–38 (including as bases for diversity factors such as travel abroad, language fluency, community service, career achievements, and the ability to overcome personal hardship).
\textsuperscript{28} Id. at 329–30, 343.
\textsuperscript{29} \textit{Fisher II}, 645 F.3d at 230–31.
\textsuperscript{30} See id. at 219–20, 230–31. Appellants argued that UT’s special concern for minority groups neglects “the diverse contributions of others,” so it amounts to racial balancing. \textit{Id.} at 235–36. The court conceded that UT gave attention to minority groups, but said that this was an educational benefit and therefore not unconstitutional. \textit{Id.} at 236.
\textsuperscript{31} Id. at 245 (quoting \textit{Grutter}, 539 U.S. at 330).
\textsuperscript{32} See id. at 231 (explaining that ‘the Supreme Court has held that [c]ontext matters’ when evaluating race-based governmental action, and a university’s educational judgment in developing diversity policies is due deference’); \textit{see also} Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (“The freedom of a university to make its own judgments
that UT’s admissions policy was narrowly tailored. Similar to the Law School in *Grutter*, UT used a “holistic, multi-factor approach” in evaluating applications, and recognized race as only one of a broad range of qualities and experiences that could contribute to diversity.

Appellants argued that UT’s minority enrollment had already met or exceeded a critical mass because UT’s total minority enrollment had increased over the years, rendering the reintroduction of race into its admissions policy unconstitutional. The Fifth Circuit reinforced the notion that a critical mass cannot have a “fixed upper bound that applies across different schools, different degrees, different states, different years, different class sizes, and different racial and ethnic subcomposition.” Moreover, given societal changes in Texas, such as “vast increases” in its Hispanic population, the Fifth Circuit accepted UT’s “good faith conclusion” that it had not achieved a critical mass.

Although the Fifth Circuit did not agree with the appellants that UT had already reached a critical mass, the court cautioned that, “[i]n this dynamic environment,” the court would not be able to “bless the university’s race-conscious admissions program in perpetuity.” As Justice O’Connor observed in *Grutter*, the use of racial preferences in admissions policies may no longer be necessary in the foreseeable future.

For now, UT may include race as a factor in its admissions to the extent that it helps the university achieve “the educational benefits that flow from diversity.”

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33 See *Fisher II*, 631 F.3d at 218, 228, 247.
34 See *id.*
35 See *Fisher II*, 631 F.3d at 242.
36 Id. at 243.
37 See *id.* at 244.
38 Id. at 246.
39 See 539 U.S. at 343. Justice O’Connor wrote that the Court expects the use of racial preferences to be unnecessary in twenty-five years. Id.
40 See *Fisher II*, 631 F.3d at 247.
II. Scrutinizing the Grutter Standard

UT’s admissions policy conformed to the Supreme Court’s standard in Grutter by including race as one of many considerations.41 The only way for the appellants to challenge such a policy is if the Supreme Court calls Grutter into doubt.42 While the Fifth Circuit majority did not inquire into the constitutionality of Grutter, Judge Garza took issue with the fact that the Grutter Court detoured from constitutional first principles.43 In his concurrence, Judge Garza argued that Grutter is wrong because its standard is “markedly less demanding” than the strict scrutiny analysis of the Fourteenth Amendment.44 According to Judge Garza, the Grutter Court applied a relaxed version of strict scrutiny, and therefore he called for the Supreme Court to overturn it.45

Judge Garza argued that if courts properly applied the strict scrutiny standard, then race should not matter in university admissions.46 Under the typically rigorous strict scrutiny standard, the government must show that its policy is sufficiently compelling to justify discrimination based on race, that the means chosen are the least harmful, and that it is narrowly tailored.47 To prove this, a party must show “serious, good faith consideration” of race-neutral alternatives.48 Thus, typical strict scrutiny is a high bar, as proven by the Court’s rejection of a number of “intuitively appealing” reasons for using racial discrimina-

41 See Fisher v. Univ. of Tex. at Austin (Fisher II), 631 F.3d 213, 218 (5th Cir. 2011) (noting that “the district court found that it would be difficult for UT to construct an admissions policy that more closely resembles the policy approved by the Supreme Court in Grutter . . . .”) (internal quotations omitted), reh’g denied, 644 F.3d 301 (5th Cir. 2011), cert. granted, 80 U.S.L.W. 3144 (U.S. Feb. 21, 2012) (No. 11-345).
42 See id. at 218 n.9 (“If the Plaintiffs are right, Grutter is wrong.”) (quoting Fisher v. Univ. of Tex. at Austin (Fisher I), 645 F. Supp. 2d. 587, 612 (W.D. Tex. 2009) (internal quotations omitted)).
43 See Fisher II, 631 F.3d at 247–49 (Garza, J., concurring).
44 See id. at 247.
45 See id. at 247, 266.
46 See id. at 247.
47 Id. at 248–49. Even if the Court finds a compelling state interest, the means chosen must still “work the least harm possible to other innocent persons competing for the benefit.” Univ. of Cal. Regents v. Bakke, 438 U.S. 265, 308 (1978). Moreover, the classification must “fit” the state interest “with greater precision than any alternative means.” Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 n.6 (1986) (internal quotations omitted).
48 Fisher II, 631 F.3d at 250 (Garza, J., concurring); see also Wygant, 476 U.S. at 280 n.6 (finding that programs must consider alternatives and less restrictive means to be narrowly tailored).
tion. According to Judge Garza, *Grutter* exemplifies a more relaxed version of strict scrutiny because universities no longer have to use the most effective race-neutral policy, and courts will defer to universities’ “serious, good faith consideration.” As Justice Kennedy pointed out in his dissent in *Grutter*, “[d]eference is antithetical to strict scrutiny, not consistent with it.” *Grutter* changed the way courts employ strict scrutiny in the university context and, according to Judge Garza, *Grutter* lowered the bar.

Judge Garza argued that *Grutter*’s version of strict scrutiny was not only relaxed, but ambiguous. For example, *Grutter* required individualized consideration of each applicant, but the Court never explained the meaning of “individualized consideration.” The Court allowed the use of race as a “plus” factor within the holistic review of admissions, but did not say how much of a plus could be given. The Justices on the *Grutter* Court also did not agree on whether the Law School’s purported pursuit of a “critical mass” was acceptable. Justice O’Connor accepted the Law School’s pursuit of a “critical mass” because, instead of outright racial balancing, the Law School defined critical mass in reference to the educational benefits of diversity. Chief Justice Rehnquist was more critical and opined that the Law School’s actual admissions practices were too inconsistent to be coherently defined as seeking a “critical mass.” Instead, Chief Justice Rehnquist argued that the Law School’s practices were more akin to racial balancing. According to Judge Garza, this ambiguity makes “meaningful judicial review all but impossible.”

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49 See Fisher II, 631 F.3d at 248 (Garza, J., concurring); see, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469, 496–98 (1989) (holding that remedying societal discrimination was an insufficient justification for using racial discrimination for affirmative action purposes); Wygant, 476 U.S. at 275–76 (holding that providing role models for minority students was an insufficient justification for protecting some employees based on race).

50 Fisher II, 631 F.3d at 250–51 (Garza, J., concurring).
51 539 U.S. at 394 (Kennedy, J., dissenting).
52 See Fisher II, 631 F.3d at 249–50 (Garza, J., concurring).
53 See id. at 258.
54 See id. at 220–21 (majority opinion); id. at 251 (Garza, J., concurring).
55 Grutter, 539 U.S. at 321 (internal quotations omitted); Fisher II, 631 F.3d at 251 (Garza, J., concurring).
56 See Fisher II, 631 F.3d at 219 (“That the concept of critical mass bears a simple but deceptive label is evidenced by the division of the Justices over its meaning.”).
57 See Grutter, 539 U.S. at 329–30 (majority opinion).
58 See id. at 380–81, 383, 386 (Rehnquist, C.J., dissenting).
59 See id. at 386.
60 Fisher II, 631 F.3d at 251 (Garza, J., concurring).
Grutter’s relaxed, ambiguous version of strict scrutiny “encourages opacity” in admissions policies because it does not rely on measurable, hard data but rather on “intuitive appeal.” 61 For example, a goal of viewpoint diversity is “theoretical and abstract,” cannot be proven, and rests on intuition rather than hard data. 62 Also, like the Grutter Court, the Fifth Circuit did not require UT to provide conclusive data about how much race factors into its admissions and enrollment. 63 The only judicial scrutiny courts can engage in under this relaxed, ambiguous standard is to analyze whether the admissions officials gave “serious, good faith consideration” to their policies. 64 Judge Garza argued that this standard encourages opacity in admissions policies because educational institutions know that only blunt racial preference policies, such as quotas or point-systems, will be struck down. 65

Judge Garza was further troubled by the ambiguous nature of Grutter because it could continue to govern race-conscious admissions programs for many years. 66 In Grutter, Justice O’Connor opined that the Court “expect[s] that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.” 67 Therefore, this problematic standard may be perpetuated because the Supreme Court has effectively suspended review of race-conscious admissions programs for twenty-five years. 68 The Fisher majority conceded that this twenty-five year benchmark is more aspirational than absolute, but Judge Garza was troubled that this ambiguous standard could be allowed to remain in place for such a great length of time. 69 Without sufficient guidance to experiment with race-based admissions policies, universities may not search for a more effective system of racial inclusion. 70 Rather, like UT, universities “will simply model their programs

61 See id. at 249, 255.
62 See id. at 255, 264 (noting that Grutter replaced the clear strict scrutiny standard with “an amorphous, untestable, and above all, hopelessly deferential standard”).
63 See id. at 250, 259.
64 Id. at 250.
66 See Fisher II, 631 F.3d at 251 (Garza, J., concurring).
67 539 U.S. at 343.
68 See id.; Fisher II, 631 F.3d at 251 (Garza, J., concurring).
69 See Fisher II, 631 F.3d at 222, 246 (majority opinion); id. at 251 (Garza, J., concurring).
70 See id. at 258–59 (Garza, J., concurring).
after the one approved in *Grutter* . . . .” The Supreme Court has since granted certiorari to *Fisher*, however, so whether the *Grutter* standard for race-conscious admissions will remain good law is uncertain.

### III. One Ambiguous Standard, One Choice

Without sufficient guidance to experiment with race-based admissions policies, universities may simply follow *Grutter* and not search for more effective systems of racial inclusion. Although *Grutter* provides one model of race-conscious admissions, the standard is ambiguous, using subjective terms such as “critical mass.” Therefore, universities may want to create better race-conscious admissions policies, but *Grutter* discourages experimentation beyond the one approved norm. Warning of this pitfall, Judge Garza cited Justice Kennedy’s concurrence in *United States v. Lopez* which encouraged States to serve as “laboratories for experimentation” to test various policies and find the best solution. In order for States and their universities to serve as laboratories, however, the Supreme Court must provide clearer guidance about what is constitutionally acceptable. While the *Grutter* Court purportedly defers to the expertise of educational institutions, not providing any measurable

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71 See id.
72 See id., cert. granted, 80 U.S.L.W. 3144.
73 See *Fisher* v. Univ. of Tex. at Austin (*Fisher II*), 631 F.3d 213, 258–59 (5th Cir. 2011) (Garza, J., concurring), reh’g denied, 644 F.3d 301 (5th Cir. 2011), cert. granted, 80 U.S.L.W. 3144 (U.S. Feb. 21, 2012) (No. 11-345). Judge Garza is against any use of race in admissions policies. See id. at 247 (explaining that “race now matters in university admissions, where, if strict judicial scrutiny were properly applied, it should not”).
74 Id. at 258.
75 See id. at 258–59; see also Brief of the Asian American Legal Foundation as Amicus Curiae in Support of Petitioner at 1, *Fisher* v. Univ. of Tex. at Austin (No. 11-345), 2011 WL 5040038, at *1 (“Asian American students suffer discrimination at the hands of the University of Texas at Austin . . . even though, at variance with UT Austin’s stated goal of providing a ‘critical mass,’ Asian American students, in fact, are present in UT Austin classrooms in fewer numbers than ‘Hispanics,’ one of the favored ethnicities.”); L. Darnell Weeden, *Back to the Future: Should Grutter’s Diversity Rationale Apply to Faculty Hiring? Is Title VII Implicated?*, 26 Berkeley J. Emp. & Lab. L. 511, 527–28 (2005) (“The *Grutter* opinion is a dangerous precedent because its rationale for admitting qualified students . . . based on their racial group status perpetuates a stereotypical group status view that those students received the racial preference, and are thus not qualified on their own merit . . . .”); Jessica Bulman-Pozen, Note, *Grutter* at Work: A Title VII Critique of Constitutional Affirmative Action, 115 Yale L.J. 1408, 1418 (2006) (“Ironically, it is the individualized consideration *Grutter’s* narrow-tailoring prong demands that threatens to facilitate a stereotype-laden search for connections between race and viewpoint.”).
77 See id. at 258–59.
outcomes or conceptual precision may handcuff universities to one ambiguous standard and prevent them from experimenting.\textsuperscript{78}

In his dissent in \textit{Grutter}, Justice Kennedy predicted what happened at UT: that universities would not experiment with other admissions policies and would simply mirror the one approved in \textit{Grutter}.\textsuperscript{79} Justice Kennedy warned that the Court’s refusal to apply meaningful strict scrutiny would stifle the creation of innovative admissions policies.\textsuperscript{80} He stated that “[b]y deferring to the law schools’ choice of minority admissions programs, the courts will lose the talents and resources of the faculties and administrators in devising new and fairer ways to ensure individual consideration.”\textsuperscript{81} Justice Kennedy believed that rigorous judicial review under a true strict scrutiny standard forces universities to create policies that are fair.\textsuperscript{82} Justice Kennedy’s emphasis on real judicial scrutiny to ensure universities create fair admissions policies is echoed in Judge Garza’s criticism that relaxed judicial review discourages universities from experimenting—both articulations value the search for better, fairer policies.\textsuperscript{83}

Judge Garza warned that the \textit{Grutter} standard “ensures that race-based preferences in university admissions will avoid meaningful judicial review for the next several decades.”\textsuperscript{84} If true, this is problematic because educational institutions are left without guidance on how to create admissions policies that meet constitutional standards.\textsuperscript{85} Universities may simply follow UT and implement the policy that mirrors the one approved in \textit{Grutter}, thereby stifling experimentation with other admissions policies in the search for better, fairer solutions.\textsuperscript{86}

\textbf{Conclusion}

The Fifth Circuit upheld UT’s race-conscious admissions policy because it mirrored the admissions policy approved by the Supreme Court in \textit{Grutter v. Bollinger}. Although the Fifth Circuit applied the strict scrutiny standard used in \textit{Grutter}, the \textit{Grutter} version of strict scrutiny is

\begin{itemize}
  \item \textsuperscript{78} See id.
  \item \textsuperscript{79} See \textit{Grutter v. Bollinger}, 539 U.S. 306, 393 (2003) (Kennedy, J., dissenting); see also \textit{Fisher II}, 631 F.3d at 217–18.
  \item \textsuperscript{80} See \textit{Grutter}, 539 U.S. at 393 (Kennedy, J., dissenting).
  \item \textsuperscript{81} Id.
  \item \textsuperscript{82} See id. at 393–94.
  \item \textsuperscript{83} See id.; \textit{Fisher II}, 631 F.3d at 258–59 (Garza, J., concurring).
  \item \textsuperscript{84} See \textit{Fisher II}, 631 F.3d at 264 (Garza, J., concurring).
  \item \textsuperscript{85} See id. at 258.
  \item \textsuperscript{86} See id. at 258–59.
\end{itemize}
arguably relaxed and ambiguous. In his concurrence, Judge Garza argued that this relaxed and ambiguous standard is not the correct application of strict scrutiny under the Fourteenth Amendment. The *Grutter* standard hinders experimentation with new admissions policies because it does not provide universities with sufficient guidance about what is constitutionally acceptable, and universities may simply mirror their admissions policies after the one approved in *Grutter*. Such rote compliance with *Grutter* is problematic because it discourages universities from experimenting in the search for better, fairer race-conscious admissions policies.