IN THE SUPREME COURT OF THE

UNITED STATES

ABIGAIL NOEL FISHER,

Petitioner,

vs.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.

Respondents.

**BRIEF OF RESPONDENTS**

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**Table of Cited Authorities**

*Adam Winkler, "Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts", Vanderbilt Law Review", Vol. 59, p. 793, 2006*

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

*Brown v. Board of Education of Topeka, 347 U.S. 483 (1954)*

*Fisher v. University of Texas,* [*570 U.S. \_\_\_*](https://en.wikipedia.org/wiki/United_States_Reports) *(2013)*

*Grutter v. Bollinger,* [*539 U.S. 306*](https://en.wikipedia.org/wiki/Case_citation) *(2003)*

*Korematsu v United States 323 U.S. 214 (1944)*

*Regents of the University of California v. Bakke, 438 U.S. 265 (1978)*

*United States v. Carolene Products Company, 304 U.S. 144 (1938)*

*National Conference of State Legislatures, Affirmative Action Overview*

**Statement of Argument**

 The University of Texas at Austin’s admission policy vis-a-vis race satisfies the criteria of compelling state interest and narrow tailoring established by Justice Black in Korematsu v. United States to guide legal considerations of suspected instance of race discrimination. The University of Texas adopted these affirmative action plans in defence of a long-recognized compelling state interest: that of diversity in the classroom, which is recognized as being of critical importance in the classroom generally and in undergraduate programs specifically. Furthermore, the University only adopted affirmative action after a long period of attempting to use other, non-racial methods of increasing minority representation, and crafted its affirmative action policy in strict accordance with jurisprudence, considering race not mechanistically, but holistically amongst a variety of other factors.

 Finally, we ask the court to keep in mind the historical importance of race in addressing fundamental and systemic race inequality, while also recognizing that too rigorous application of strict scrutiny threatens its power as a tool of equality.

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**Argument**

**I. Standards Established with Strict Scrutiny**Presuming that the University of Texas’s admissions process is placed under a standard of strict scrutiny, there are three stipulations that must be satisfied under the strict scrutiny ruling in *Korematsu v United States 323 U.S. 214 (1944).* Justice Black writes in the majority opinion that “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions.” This case sets the precedent for placing race under strict scrutiny and begins the process of creating the two tests that a policy must adhere to in order to stand up to strict scrutiny. Firstly, the government program must involve a compelling state interest, with the analysis made on a case by case basis given the lack of brightline in the jurisprudence (though one may get a general sense of what kind of interest is compelling from a history of judicial approbations that strongly the presence of a compelling state interest). Secondly, the means by which this compelling interest is achieved must be narrowly tailored, i.e. its effects should not excessively spill over to other areas, and the interest should be a direct and proximate consequence of the means, while also being minimally restrictive. Upon satisfying all stipulations, as explained in the following three sections, it may be said that affirmative action at the University of Texas has withstood strict scrutiny.

**II. Compelling State Interest of Affirmative Action**

**A. Diversity As a Compelling State Interest**

Diversity has been upheld numerous times as a compelling state interest, and affirmative action is a narrowly tailored manner in which to achieve diversity. Justice Sandra Day O’Connor writes in the majority opinion of *Grutter v. Bollinger, 539 U.S. 306 (2003)*:

Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School’s proper institutional mission...the Law School’s concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce. These benefits are substantial...the Law School’s admissions policy promotes “cross-racial understanding,” helps to break down racial stereotypes, and “enables [students] to better understand persons of different races.” App. to Pet. for Cert. 246a.

...numerous studies show that student body diversity promotes learning outcomes, and “better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.” Brief for American Education Research Association et al. as *Amici Curiae* 3

In an undergraduate program such as that in question at the University of Texas, a diverse student body hold a wide variety of benefits discussed by O’Connor in *Grutter v. Bollinger*. These benefits not only include a decrease in xenophobia across the nation but also the stimulation of the economy as students are better prepared to participate in an increasingly diverse workforce and society. Additionally, these benefits extend beyond simply the workforce and learning environment to a national security advantage, as Justice O’Connor continues:

What is more, high-ranking retired officers and civilian leaders of the United States military assert that, “[b]ased on [their] decades of experience,” a “highly qualified, racially diverse officer corps...is essential to the military’s ability to fulfill its principal mission to prove national security.” Brief for Julius W. Becton, Jr., et al. as *Amici Curiae* 5...At present, “the military cannot achieve an officer corps that is *both* highly qualified *and* racially diverse unless the service academies and the ROTC use limited race-conscious recruiting and admissions policies.” *Ibid.* (emphasis in original) We agree that “[i]t requires only a small step from this analysis to conclude that our country’s other most selective institutions must remain both diverse and selective.” *Ibid.*

Using the ROTC and the military as an example, Justice O’Connor logically concludes that affirmative action can be used effectively to pursue the compelling state interest of diversity. Given the benefits of diversity and the utility of affirmative action and other selective recruiting policies to encourage racial and ethnic diversity in educational institutions, affirmative action policies uphold the government’s compelling state interest to encourage diversity both inside and outside of educational facilities.

Without the explicit consideration of race in admissions, the University of Texas lacked adequate diversity and minority representation. Even after an attempt following *Hopwood v. Texas* to increase minority representation without considering race, a Proposal to Consider Race and Ethnicity in Admissions showed through statistical and anecdotal evidence that without explicitly considering race, few classes had a significant enrollment of racial minorities and the University lacked a critical mass of minority students overall. The consequently revised admissions process in 2004 resulted in a 4% increase in the percentage of Hispanic students entering the university (from 16.9% to the current 21%). The University of Texas’s admission process clearly works to increase diversity in the student body and therefore maintains a compelling government interest.

**B. Compelling Interest in Undergraduate Programs Specifically**

While diversity on its own is clearly a compelling government interest, previous decisions suggest that the court believes diversity in undergraduate programs is especially important. Justice Powell, in the ruling of *Regents of University of California v Bakke 438 U.S. 265 (1978)*, writes that while that decision in particular applied to medical school admissions, “[i]t may be argued that there is greater force to these views at the undergraduate level than in a medical school where the training is centered primarily on professional competency.” Powell comments that “As the Court noted in *Keyishian*, it is not too much to say that the “nation’s future depends on leaders trained through wide exposure” to the ideas and mores of students as diverse as this Nation of many peoples.” *Ibid*. Justice O’Connor’s opinion in *Grutter v. Bollinger, 539 U.S. 306 (2003)* supports this reasoning:

[U]niversities...represent the training ground for a large number of our Nation’s leaders...In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.

Given that a college degree is becoming a prerequisite for the majority of jobs in modern society, the ability to attend and benefit from higher education is an opportunity that must be offered to all members of society, regardless of race or ethnicity in order to achieve a diverse society. Affirmative action, especially at the undergraduate level of a selective institution such as the University of Texas, encourages this diversity and free exchange of ideas both at the educational level, within classrooms, and later in society, when the demographic of graduates from higher educational institutions is representative of the diversity of society as a whole.

**III. Narrow Tailoring of the Admissions Process**

**A. Good Faith Requirement Satisfied by the University of Texas**

Narrow tailoring does not require an institution of learning to exhaust all other conceivable options. Rather, it expressly states that the institution in question must have given a good faith effort to consider other, less restrictive means of increasing diversity, as O’Connor states in *Grutter v. Bollinger,* [*539 U.S. 306*](https://en.wikipedia.org/wiki/Case_citation) *(2003)*

Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups… Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.

The University of Texas, in accordance with *Hopwood v. Texas, 78 F. 3d 932, 955 (1996),* operated for a time without considering race as a criteria, attempting to use other factors such as socioeconomic state, English language proficiency, and family responsibility. Kennedy remarks in *Fisher v. University of Texas,* [*570 U.S. \_\_\_*](https://en.wikipedia.org/wiki/United_States_Reports) *(2013)* that the University “stopped considering race in admissions and substituted instead a new holistic metric of a candidate’s potential contribution to the University, to be used in conjunction with the Academic Index.” In attempt to represent a diverse set of students despite the apparent unconstitutionality of affirmative action, the University isolated a number of race-neutral factors to be numerically considered in applications, while also expanding its community outreach programs, including

leadership and work experience, awards, extra- curricular activities, community service, and other special circumstances… These included growing up in a single-parent home, speaking a language other than English at home, significant family responsibilities assumed by the applicant, and the general socioeconomic condition of the student’s family. Seeking to address the decline in minority enrollment after Hopwood, the University also expanded its outreach programs. (Ibid)

Together, these programs accounted for what may only be considered a minimal increase in the diversity of the incoming Freshman class

Before the admissions program at issue in this case, in the last year under the post-Hopwood AI/PAI system that did not consider race, the entering class was 4.5% African- American and 16.9% Hispanic. This is in contrast with the 1996 pre-Hopwood and Top Ten Percent regime, when race was explicitly considered, and the University’s entering freshman class was 4.1% African-American and 14.5% Hispanic. (Ibid)

In other words, an increase of thirty-four hundredths of a percent (0.34%) each year in the Hispanic population, and an increase of about fifty-seven thousands (.057%) in the Black population of the incoming freshman class following the striking down of affirmative action. This glacially slow growth in attendance by minority students was accompanied by a statistic concluding that diversity in the classroom was below the critical mass needed to engender the benefits of diversity in education:

The Proposal relied in substantial part on a study of a subset of undergraduate classes containing between 5 and 24 students. It showed that few of these classes had significant enrollment by members of racial minorities. In addition the Proposal relied on what it called “anecdotal” reports from students regarding their “interaction in the classroom.” The Proposal concluded that the University lacked a “critical mass” of minority students and that to remedy the deficiency it was necessary to give explicit consideration to race in the undergraduate admissions program. (Ibid)

In simple terms, the University had attempted to encourage racial diversity without actually considering race in the application process. This race-neutral system not only failed to improve diversity in any significant measure, but resulted in an environment in which the students themselves reported a lack of interaction with minority students and the diverse viewpoints they might have brought. The University of Texas maintained the race blind system for about seven years (Ibid), which constitutes considerably more than a simple good faith effort at a race-neutral policy. Seven years of trying to engender a critical mass of diversity students and systematically failing without the recourse of affirmative action indicates that a good faith effort was made on the part of the University, and that affirmative action was used only after the failure of race-neutral methods. Under these circumstances, adoption of an affirmative action policy, especially given the empirical effectiveness of such programs, is only logical, with affirmative action programs historically serving critical roles in diversity inclusion in other universities, such that, according to the National Conference on State Legislatures,

Statistics show that after California abolished its affirmative action programs in 1998, the minority student admissions at UC Berkeley fell 61 percent, and minority admissions at UCLA fell 36 percent. After Texas abolished its affirmative action program in 1996, Rice University's freshman class had 46 percent fewer African-Americans and 22 percent fewer Hispanic students.

The University attempted to recapture the percentages previously held under an affirmative action program while satisfying the constitutional requirements set out by the court, but only did so after trying other methods of increasing racial diversity for a total of seven years. Resorting to a “soft” (ie, not points-based or mechanistic) consideration of race following the protracted failure of other methods is not only logical, but constitutional.

**B. Inefficacy of Alternate Methods**

Furthermore, as stated in *Grutter v. Bollinger,* [*539 U.S. 306*](https://en.wikipedia.org/wiki/Case_citation) *(2003),* “Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative,” indicating that even though the University did not attempt every possible alternative to affirmative action, the act of investing significant time and resources to a race-neutral attempt at increasing minority diversity is enough to demonstrate that the policy is minimally restrictive within reason, an effort having been made to consider other methods. In the same opinion, O’Connor remarks that a University should not be expected to “choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups.” O’Connor names several alternate methods specifically that a University cannot be expected to adopt in *Grutter v. Bollinger*

The District Court took the Law School to task for failing to consider race-neutral alternatives such as “using a lottery system” or “decreasing the emphasis for all applicants on undergraduate GPA and LSAT scores…” But these alternatives would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both.

In short, that the University attempted only a “single” alternate method of raising minority representation (false, as the post-Hopwood initiative was comprised of several reforms, including community outreach programs as well as the inclusion of new traits and characteristics.) should not be construed as to indicate that the University did not make a good faith effort at establishing alternate methods, nor does identification of a method not employed by the University indicate an unconstitutional lapse.

Similarly, prominent alternate methods have been deemed patently unfeasible by the court, as stated by O’Connor in the prior quotation. The pressure to maintain the quality of the educational institution while also encouraging diversity means that only a narrow set of policies, such as University’s post-Hopwood program, are viable options, with more extreme yet racially neutral methods compromising the integrity of the educational mission; the court should view the the University’s attempts to increase racial diversity without actually considering race as framed against the constant imperative to maintain educational quality, and a good deal of leeway should be given to the University in that regards despite the application of strict scrutiny.

Furthermore, the court has held a degree of deference for the expertise of the University in forming its own policies, as suggested in *Grutter v. Bollinger,* [*539 U.S. 306*](https://en.wikipedia.org/wiki/Case_citation) *(2003)*,

Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.

While Kennedy rightly points out in *Fisher v. University of Texas,* [*570 U.S. \_\_\_*](https://en.wikipedia.org/wiki/United_States_Reports) *(2013*) that this does not immunize the University from judicial analysis of whether or not a University’s admissions policy is narrowly tailored, it still remains that there are certain factual considerations in which the University, being naturally more capable of evaluating academic impact than the Supreme Court, should be deferred to, including whether or not an alternative to affirmative action would be unreasonably harmful to academic excellence.

Such an analysis necessarily indicates that the University not only made a good faith effort to explore other means of achieving racial diversity, as required by jurisprudence, but also took all steps feasible to explore these methods. Upon concluding that not all alternatives need be investigated, that many of these alternatives have been considered unfeasible by the court, and that a certain level of deference should be maintained as to the academic workings of a policy, the constitutionality of the admissions criteria is sound as far as alternative means might be considered.

**C. Holistic Consideration of Applications**

The court has expressed its opinion that race, if considered amongst a variety of other factors, is a minimally invasive method to survive the burden of strict scrutiny. Furthermore, the court has concluded that evaluation of race amongst other factors is sufficient enough to satisfy the minimal restrictiveness burden of strict scrutiny. Justice O’Connor writes in *Grutter v. Bollinger,* [*539 U.S. 306*](https://en.wikipedia.org/wiki/Case_citation) *(2003)*:

The Law School’s goal of attaining a critical mass of underrepresented minority students does not transform its program into a quota...the Law School’s race-conscious admissions program adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions...[and] all underrepresented minority students admitted by the Law School have been deemed qualified.

The University of Texas employs a numerical Personality Achievement Index that ensures that “all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions.” *Ibid*. In *Fisher v. University of Texas,* [*570 U.S. \_\_\_*](https://en.wikipedia.org/wiki/United_States_Reports) *(2013),* Kennedy remarks:

This “Personal Achievement Index” (PAI) measures a student’s leadership and work experience, awards, extracurricular activities, community service, and other special circumstances that give insight into a student’s background. These included growing up in a single-parent home, speaking a language other than English at home, significant family responsibility assumed by the applicant, and the general socioeconomic condition of the student’s family. Seeking to address the decline in minority enrollment after Hopwood, the University has expanded its outreach programs.

Notably, race is merely factored into the PAI and is not considered separately. According to *Grutter*, while universities may not attempt to achieve racial balancing, thereby instituting a quota, they may strive to achieve a critical mass of minority students, as long as race continues to be considered as only one factor among many. When instituting the explicit consideration of race in admissions, the University first conducted a study that statistically and anecdotally showed that the university lacked significant enrollment of racial minorities and a critical mass of minority students overall. *Fisher v. University of Texas,* [*570 U.S. \_\_\_*](https://en.wikipedia.org/wiki/United_States_Reports) *(2013).* The University of Texas therefore fits within this standard to achieve critical mass, as Kennedy goes on to note:

The University of Texas at Austin considers race as one of various factors in its undergraduate admissions process. Race is not itself assigned a numerical value for each applicant, but the University has committed itself to increasing racial minority enrollment on campus. It refers to this goal as a “critical mass.”

However, the court continues to hold that that admissions processes that explicitly consider race are constitutionally sound only if race is not the only factor considered in admission. If race is so significant a factor that it is the primary reason for acceptance, the method of admissions is no longer constitutional, as Justice Rehnquist notes in *Gratz v. Bollinger 539 U.S. 244 (2003)*:

In *Bakke,* Justice Powell reiterated that “[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake.” 438 U.S, at 307. He then explained, however, that in his view it would be permissible for a university to employ an admissions program in which “race or ethnic background may be deemed a ‘plus’ in a particular applicant’s file.” *Id*., at 217...The [University of Michigan’s] automatic distribution of 20 points has the effect of making “the factor of race...decisive” for virtually every minimally qualified underrepresented minority applicant. *Id*., at 317.

The issue in *Gratz v. Bollinger* was that race carried so heavy a weight in admissions factors that “any...applicant who could “*contribut[e] to a diverse student body*” should “generally be admitted” even with substantially lower qualifications than those required of other transfer applicants. See, *e.g*., 2 App. in No. 01-1333 etc. (CA6) pp. 507-542. With both an explicit numerical value added to an applicant’s score for admission and such a significant weight put on race, the court held that the University’s admissions process was not narrowly tailored enough to achieve the compelling interest in diversity. Similarly, in *Parents Involved in Community Schools v. Seattle School District 551 U.S. 701 (2007)*, the court ruled that without individualized consideration of student and a limited notion of diversity, with race being the only tiebreaker for admission, race cannot be too heavily weighted in admissions decisions, even at the high school level. *Ricci v. DeStefano 557 U.S. \_\_\_ (2009)* also placed far too much weight on race when accepting firefighters, explicitly discriminating based on race and refusing to accept white candidates even if they performed better, a practice deemed forbidden by Title VII of the Civil Rights Act. At the University of Texas, on the other hand, race is not assigned an explicit value but is rather considered as one meaningful factor among many other factors, thereby upholding the requirements for an admissions process established by *Gratz*. Students with substantially lower qualifications are not admitted simply on the basis of race, allowing the University of Texas’s admissions policies to fall more in line with those accepted in *Grutter* than with those rejected in *Gratz.*

**IV. Strict Scrutiny Revisited**

Strict Scrutiny, and indeed the 14th amendment, finds its roots in equality as a statement not of personal right to strict protection, but as a social one; it should be considered, in the most proper application, as a means by which minorities, rendered insular, disenfranchised by social conditions, and historically discriminated against, may have access to a judicial shield against institutional racism. In recent decades, however, there’s been a general shift away from Justice Stone’s original interpretations of strict scrutiny as a social protection, to an individualistic one that’s threatened the efficacy of the standard as a tool for racial equality.

**A.Protection Specific to Insular Minorities**

Justice Stone established Strict Scrutiny as a corrective force in footnote four of *United States v. Carolene Products Company, 304 U.S. 144 (1938)*, stating that

prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Thus, the more “exacting scrutiny” that has been traditionally brought to bear against affirmative action should be avoided when the “discrimination” occurs not for the benefit of a politically dominant group, but rather to equalize a long-standing inequality--affirmative action is should be protected under a traditionalist view of strict scrutiny.

Furthermore, strict scrutiny should be reserved for cases in which sheer numerical representation or social conditions prevent remediation via political avenues, as a means of striking a balance between the power of the majority and the interests of the minority. Caucasians are predominant on both a numerical and political level--there is, in short, no need to afford additional protections, as there are alternate and pervasive means by which Caucasians may protect themselves.

Furthermore, *United States v. Carolene Products Company* establishes use of strict scrutiny in specific instances in which the rights of a historically-discriminated group are under questioned. O’Connor attacks this in *Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995)*, but fails to address the indicative properties of history--while a history of discrimination may not categorically prove present discrimination, it still strongly indicates the unfettered presence of discriminatory social forces--thus, one of the main determining factors of whether or not to apply a standard of strict scrutiny should be whether the minority in question has a history of discrimination in a given field; this is a consideration that, once more, precludes application of strict scrutiny to this case. Furthermore, O’Connor cites Stevens in *Adarand Constructors, Inc. v. Peña* stating that Strict Scrutiny must be universally applied because,

racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate.

However, the pernicious effect that disparate treatment may have on the body politic is a moot point when the differently treated race is that with the greatest representation in congress and the unquestionably highest voter turnout rate. In such a case, the sanctity of the body politic may be preserved just as well, if not more effectively, by narrowly applying strict scrutiny to policy impinging on races that have historically suffered discrimination or disenfranchisement. Furthermore, the argument that racial characteristics seldom provide a justifiable basis for disparate treatment is a generality, and doesn’t interact with the unique environment constituted by the institution of higher learning, where a body of diverse students is not only good, but necessary for the creation of an inclusive, creative, and worldly student body and education. Furthermore

**B. Strict Scrutiny as Fatal in Fact**

O’Connor’s closing defense of strict scrutiny as a universal protection in *Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995)* is to refute the conclusion that Strict Scrutiny is strict in theory but fatal in fact:

We make clear however that the strict scrutiny is not strict in theory, but fatal in fact.
We recognize the unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country, and nothing we say today disqualifies government from acting in response to it. The purpose of strict scrutiny is to afford all racial classifications, a careful and searching review, in order to distinguish legitimate from illegitimate use of race in governmental decision making. When that careful review shows that a racial classification serves a compelling state interest and is narrowly tailored to further that interest, the classification is constitutional.

Though more rhetorically powerful than substantively indicative, the phrase “Strict in theory, fatal in fact” nevertheless holds strong empirical support. Adam Winkler’s *"Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts,”* featured in the Vanderbilt law journal, establishes that suspect classification cases only have a 27% chance of survival. While suspect classification may not be fatal, it certainly is mortal, and increasingly so: Winkler establishes that “surprisingly... strict scrutiny has become more fatal in the years since Adarand declared the standard to be survivable (from 40% in the early 1990s to 20% in the early 2000s).” Instead of declining in frequency as discriminatory government policies are eliminated, strict scrutiny has instead become more and more sensitive, and generally in favor of the Caucasian political majority. Winkler goes on to say

“(For convenience, therefore, I will refer to the entire group of suspect class discrimination cases as “race” cases.) The overwhelming majority of applications (85%) addressed the constitutionality of affirmative action policies.”

Rather than apply equal scrutiny to all questions of race and act in defense of minorities, strict scrutiny has instead become a means by which legislative and local efforts to ameliorate longstanding divisions and inequalities may be struck down, almost universally for the benefit of the political majority.

**C. The Freedman’s Bureau**

Furthermore, the court should keep in mind the historical importance of education in efforts to establish race equality. The importance of education goes back to the Freedman’s Bureau, the organization established to remediate the profound and systemic inequality that characterized the south. In this endeavor, education was a such a central part that even after the dissolution of the bureau proper, the educational components remained in force.

And be it further enacted, That the commissioner of the bureau shall, on the first day of January next [1869], cause the said bureau to be withdrawn from the several States within which said bureau has acted and its operations shall be discontinued. But the educational department of the said bureau…shall be continued as now provided by law until otherwise ordered by act of Congress.

According to the Harlan Institute, “The [Bureau’s](http://eh.net/encyclopedia/article/troost.freedmens.bureau.) most successful efforts were those to educate newly freed slaves in schools and universities built especially for them,” and this speaks to the simple efficacy of extending education to minorities who would otherwise be systematically refused access to a high standard of education, largely due to structural inequality and the inherent disadvantage of being a race minority.

Despite the efficacy of the education program, it was overturned in congress as the agenda shifted to other issues and momentum was lost--the programme, effective though it may have been, was overturned on charges of inequality and unfairness towards whites. Education, along with other gains in social standing, immediately backslid, highlighting the importance of continued education--the fruits of education and equality are hard-won. This brings us to understand that this case is not a cut-and-dry application of strict scrutiny to a University’s admissions program, but rather a watershed moment for civil rights and the fight against structural inequality for years in the future. The dangers of abrogating racial access to universities is clear and historically apparent, and the court should keep this threat in mind while evaluating the University of Texas’s affirmative action policy.

Conclusion

Two primary arguments vindicate the University of Texas’s affirmative action program. The first is an indictment of the historical misrepresentation of strict scrutiny as a tool of broad and universal protection--historically and properly, strict scrutiny was a mechanism by which discrete and insular minorities could be given protection otherwise unattainable through political redress. Justice Stone clearly articulates that the majority needs not the protection of strict scrutiny, as other methods of remediation are readily available. Specifically, the environment of the University has proven a locus where strict scrutiny has worked counter to its intended purpose, striking down equalizing programs in favor of a Caucasian majority already favored in education and admissions. Furthermore, we articulate that to be a minority constitutes a disadvantage ipso facto, such that an affirmative action policy is not necessarily a *racial* policy, but one focused on addressing a categorically present disadvantage.

And in the final analysis, even if strict scrutiny were to be applied to the University of Texas, the structuring of the admissions policy resists criticism. Not only is diversity in the student body a widely-recognized and constitutionally sound reason for a minor impingement of majoritarian rights, but the specific method by which the University goes about analyzing race leaves the method narrowly tailored and minimally exclusive as a wide variety of other factors are considered alongside race in the affirmative action system.

In short, the University’s admissions processes are above reproof, regardless of the standard applied. The court is faced with a historic opportunity to affirm a minimally-restrictive and constitutionally sound means of carrying out affirmative action.