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# ON CHECKBOX DIVERSITY

PHILIP LEE\*

## INTRODUCTION

In this article, I contest a certain definition of diversity in higher education that was recently articulated by Chief Justice John Roberts and Justice Antonin Scalia at oral argument in *Fisher v. University of Texas*.<sup>1</sup> This definition assumes that diversity is simply reducible to the number of students in a college, university, graduate school, or professional program who choose to self-identify as racial or ethnic minorities on their applications. However, diversity based solely on checked boxes (i.e., “checkbox diversity”) is problematic for a number of reasons.

I offer a critique of checkbox diversity, and to the extent that any higher education admissions offices rely on checkbox diversity in making their decisions, I provide an alternative for creating a more meaningful type of diversity in their entering classes. Specifically, for an admissions process to be narrowly tailored under the educational benefits rationale set forth by the U.S. Supreme Court, the evaluation must consider how each individual applicant would add to the diversity of perspectives in the class. Checkbox diversity fails to meet this objective because it assumes that certain checked boxes are proxies for different perspectives—which also assumes an essentialist view of racial identity. It, therefore, does not go deep enough to determine how an applicant’s optional self-identification actually informs his or her perspective.

As an alternative to this superficial measure of diversity, I contend that admissions officers and faculty readers at institutions of higher education should view racial and other identities as contextual and look for markers within the application materials that demonstrate how these identities are

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<sup>1</sup> 570 U.S. \_\_\_ (2013).

important to an applicant who claims them.

### I. FISHER V. UNIVERSITY OF TEXAS

In *Fisher v. University of Texas*, a white applicant who was denied admission to University of Texas at Austin (UT) brought an equal protection challenge to the university's use of race in its holistic application review process.<sup>2</sup> The U.S. Supreme Court vacated the Fifth Circuit's decision upholding UT's race-conscious admissions policy and remanded the case for a determination whether the university offered sufficient evidence to prove that its policy was narrowly tailored to obtain the educational benefits of diversity. At oral argument, on October 10, 2012, some of the justices seemed skeptical about the prospects of UT demonstrating narrow tailoring. Counsel for UT, Gregory G. Garre, and Chief Justice Roberts and Justice Scalia engaged in the following exchange:

Chief Justice Roberts: Counsel, before – I need to figure out exactly what these numbers mean. Should someone who is one-quarter Hispanic check the Hispanic box or some different box?

Mr. Garre: Your Honor, there is a multiracial checkbox. Students check boxes based on their own determination.

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Chief Justice Roberts: Would it violate the honor code for someone who is one-eighth Hispanic and says, I identify as Hispanic, to check the Hispanic box?

Mr. Garre: I don't think – I don't think it would, Your Honor. . .

\*\*\*

Justice Scalia: Do they have to self-identify?

<sup>2</sup> UT admits its students through two policies: 1) The Top Ten Percent Law, in which Texas high school seniors in the top ten percent of their class be automatically admitted to any Texas state university. 56 TEX. EDUC. CODE ANN. §51.803 (West 2009); and 2) a holistic review for students not admitted by the Top Ten Percent Law including Texas applicants who graduated outside the top ten percent of their high schools, out-of-state residents, and international students. The holistic review evaluates individual applicants on the basis of both an Academic Index (AI) for hard factors (i.e., standardized test scores and high school class rank) as well as a Personal Achievement Index (PAI) for soft factors (i.e., content and quality of required essays, leadership, awards and honors, work experience, extracurricular activities, and "special circumstances" including socioeconomic, family, and racial backgrounds). Petitioner in *Fisher* only challenged the race-conscious evaluation of the holistic review.

Mr. Garre: They do not, Your Honor. Every year people do not, and many of those applicants are admitted.

Justice Scalia: And how do they decide? You know, it's – they want not just a critical mass in the school at large, but class by class? How do they figure out that particular classes don't have enough? What – are they – somebody walks in the room and looks them over to see who looks – who looks Asian, who looks black, who looks Hispanic? Is that – is that how it's done?

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Justice Scalia: On their way in – did they require everyone to check a box or [did] they have somebody figure out, oh, this person looks 1/32nd Hispanic, and that's enough?<sup>3</sup>

Chief Justice Roberts and Justice Scalia, in their questioning, evidenced a critical view of diversity in higher education which envisioned the concept as having people who appear racially different sitting in the same classroom—regardless of what perspectives they bring to the table. Hence, their hypothetical questions focused on determining the proper racial categories for multiracial people (i.e., how should someone who is one-quarter, one-eighth, or one-thirty-second Hispanic identify?) to see how they would fit into the mix. Roberts and Scalia critiqued this type of diversity as arbitrary and unworkable—especially in light of the narrow tailoring requirements of equal protection. This truncated conception of diversity, however, does not capture the educational benefits of diversity that prior cases have recognized. In particular, the most relevant inquiry in an application evaluation should not be the checkbox itself, but how the applicant describes the importance of the checkbox to his or her identity. An analysis of the educational benefits of diversity rationale will make this clear.

## II. STRICT SCRUTINY AND THE EDUCATIONAL BENEFITS RATIONALE

The educational benefits of diversity rationale was articulated by the U.S. Supreme Court in three cases that dealt with the constitutionality of voluntary race-conscious admissions policies in public higher education: *Grutter v. Bollinger*,<sup>4</sup> *Gratz v. Bollinger*,<sup>5</sup> and *Regents of the University of*

<sup>3</sup> Transcript of Oral Argument at 32-35, *Fisher v. University of Texas*, No. 11-345 (Oct. 10, 2012), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/11-345.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-345.pdf).

<sup>4</sup> 539 U.S. 306 (2003) (upholding University of Michigan Law School's race-conscious admissions policy as both a compelling state interest and narrowly tailored to achieve that interest).

*California v. Bakke*<sup>6</sup> (collectively “the Grutter cases”). *Grutter*, along with *Gratz*, upheld Justice Powell’s plurality opinion in *Bakke*.

In *Bakke*, UC-Davis Medical School’s race-conscious admissions policy was challenged as a violation of the Equal Protection Clause. The medical school had two separate evaluation processes—one for general admissions and one for special admissions targeting disadvantaged students.<sup>7</sup> Sixteen of one hundred seats in the class were reserved for applicants in the special admissions pool—and even though disadvantaged white applicants applied for special admissions status, this program only benefitted “Blacks, Chicanos, and Asians.”<sup>8</sup> The Court analyzed the race-conscious admissions program under the Equal Protection Clause using the highest level of scrutiny (i.e., strict scrutiny). It examined two separate, but related, questions under strict scrutiny: 1) Did the race-conscious admissions policy at UC-Davis Medical School serve a compelling state interest?; and 2) If the state interest was compelling, was the means chosen to further that interest narrowly tailored? As to the first question, the Court held that race-conscious admissions policies served a compelling state interest because of the educational benefits associated with a diverse class.<sup>9</sup> In the context of UC-Davis Medical School, the Court observed, “Physicians serve a heterogeneous population. An otherwise qualified medical student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.”<sup>10</sup> As to the second question, under strict scrutiny, the Court held that the dual admissions program was not narrowly tailored—specifically, the Court noted alternative policies that UC-Davis could have employed that were more narrowly framed to provide individualized, holistic review (e.g., the Harvard College admissions policy or “Harvard Plan”).<sup>11</sup> Therefore, the UC-Davis race-conscious admissions

<sup>5</sup> 539 U.S. 244 (2003) (striking down University of Michigan’s undergraduate race-conscious admissions policy as not narrowly tailored but affirming educational benefits of diversity as a compelling state interest).

<sup>6</sup> 438 U.S. 265 (1978) (striking down UC-Davis Medical School’s race-conscious admissions program as not narrowly tailored but affirming educational benefits of diversity as a compelling state interest).

<sup>7</sup> *Id.* at 272–76.

<sup>8</sup> *Id.* at 276.

<sup>9</sup> *Id.* at 314–15.

<sup>10</sup> *Id.* at 314.

<sup>11</sup> *Id.* at 316–18. The Harvard Plan stated:

In recent years Harvard College has expanded the concept of diversity to include students

policy was struck down as unconstitutional.

While *Bakke* upheld the educational benefits of diversity as compelling, the Court rejected a number of other state interests proposed as additional justifications for UC-Davis Medical School's affirmative action program including: "(i) reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession; (ii) countering the effects of societal discrimination; [and] (iii) increasing the number of physicians who will practice in communities currently underserved."<sup>12</sup> *Grutter* and *Gratz*, in upholding *Bakke*, also relied on the educational benefits of diversity as a compelling interest. The analysis contained in this article will, therefore, be framed solely by the educational benefits rationale.<sup>13</sup>

In *Grutter*, the University of Michigan Law School was faced with a similar constitutional challenge to its race-conscious admissions policy. The Court upheld the educational benefits rationale contained in *Bakke*. In one of the clearest expressions of this rationale, Justice Sandra Day O'Connor writing for the majority observed:

As part of its goal of "assembling a class that is both exceptionally academically qualified and broadly diverse," the Law School seeks to "enroll a 'critical mass' of minority students." The Law School's interest is not simply "to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin." That would amount to outright racial balancing, which is patently unconstitutional. Rather, the Law School's concept of critical mass is defined by reference to the educational

from disadvantaged economic, racial and ethnic groups. Harvard College now recruits not only Californians or Louisianans but also blacks and Chicanos and other minority students.

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In practice, this new definition of diversity has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are "admissible" and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer. The quality of the educational experience of all the students in Harvard College depends in part on these differences in the background and outlook that students bring with them.

*Id.* at 322-23.

<sup>12</sup> *Id.* at 306-11.

<sup>13</sup> The analysis under the three rationales rejected by *Bakke* would be different. For example, under both a reduction of the historic deficit rationale and a countering societal discrimination rationale, the issue would center on the inclusion of historically excluded groups—regardless of the educational benefits of such inclusion. Further, the analysis under an underserved community rationale would center on finding applicants who are committed to working in these communities—again, regardless of the educational benefits that diversity creates.

benefits that diversity is designed to produce.<sup>14</sup>

Justice O'Connor recognized that these benefits were substantial:

As the District Court emphasized, 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." These benefits are "important and laudable," because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when the students have "the greatest possible variety of backgrounds."<sup>15</sup>

Unlike the dual system struck down in *Bakke*, the law school evaluated racial background as one of many factors in its "highly individualized, holistic review of each applicant's file."<sup>16</sup> The race-conscious admissions policy in *Grutter* was, therefore, upheld under the Equal Protection Clause as being narrowly tailored to obtain the educational benefits of diversity.<sup>17</sup>

In *Gratz*, the University of Michigan undergraduate admissions policy was challenged under the Equal Protection Clause. Specifically, the University of Michigan practiced a form of race-conscious admissions in which it gave all applicants from certain minority backgrounds a predetermined number of points in the evaluation.<sup>18</sup> The Court affirmed the educational benefits rationale articulated in *Bakke* and maintained that diversity was a compelling government interest.<sup>19</sup> However, it struck down the rigid point system holding that "because the University's use of race in its current freshman admissions policy is not narrowly tailored to achieve respondents' asserted compelling interest in diversity, the admissions policy violates the Equal Protection Clause of the Fourteenth Amendment."<sup>20</sup> The race-conscious admissions policy in *Gratz* was,

<sup>14</sup> *Grutter*, *supra* note 5, at 330–31 (internal citations omitted).

<sup>15</sup> *Id.* at 330 (internal citations omitted). Justice O'Connor also recognized, "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." *Id.* at 333. To the extent that O'Connor expanded *Bakke* by creating a new public legitimacy rationale for race-conscious admissions, I do not take issue with it. My critique, instead, focuses on checkbox diversity as a proxy for diversity of perspective under the educational benefits rationale.

<sup>16</sup> *Id.* at 337.

<sup>17</sup> *Id.* at 343.

<sup>18</sup> *Gratz*, *supra* note 6, at 255 ("Of particular significance here, under a 'miscellaneous' category, an applicant was entitled to 20 points [out of 150] based upon his or her membership in an underrepresented racial or ethnic minority group.").

<sup>19</sup> *Id.* at 270–271.

<sup>20</sup> *Id.* at 276.

therefore, ruled unconstitutional. For an admissions process to be consistent with narrow tailoring in the context of the educational benefits rationale articulated in the *Grutter* cases, the evaluation must consider how the diversity of perspectives in an entering class will enhance the educational experience.<sup>21</sup> Checkbox diversity fails to meet this objective because it assumes that certain checked boxes are proxies for different perspectives. It does not go deep enough to determine how a person's optional self-identification informs his or her perspective.

### III. THE INADEQUACY OF CHECKBOX DIVERSITY

Checkbox diversity envisions identity in essentialist terms. In other words, it sees something essential about being a racial minority, a woman or a gay or lesbian person that necessarily creates a minority, female, or gay or lesbian worldview. It fails to explore the diversity of experiences and views within groups. Under checkbox diversity, a self-identified racial minority who has not indicated anywhere on the application why this identify is important to her or him would, nonetheless, receive a “plus” factor<sup>22</sup> in the evaluation—it assumes that a different perspective simply flows from the checkbox.

Further, checkbox diversity fails to appreciate the diversity of perspectives that can be created by the intersection of multiple identities (e.g., race, gender, sexual orientation). The primary concern under this checkbox paradigm would be aesthetic—the focus would be how many race and ethnicity checkboxes a university can publicly report at the end of the admissions cycle, instead of how applicants who claim multiple identities can enhance the educational experience of the class. As suggested by Chief Justice Roberts and Justice Scalia at oral argument, satisfying the narrow tailoring prong of equal protection would be exceedingly difficult under such a framework.

<sup>21</sup> Note that this analysis applies to both public universities and private universities that receive federal funding. See WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* 350 (4th ed. 2006) (“Because Title VI and the equal protection clause embody the same legal standards, the *Grutter* and *Gratz* [and *Bakke*] principles are applicable to both public institutions and private institutions that receive federal financial assistance.”).

<sup>22</sup> See *Bakke*, *supra* note 7, at 317–18 (holding that race could be used as a “plus” factor in an individualized, holistic admissions process); see also *Grutter*, *supra* note 5, at 334; *Gratz*, *supra* note 6, at 270–71.



### *A. Three Dimensions of Race*

Scott Page argues that there are three ways of defining race.<sup>23</sup> First, it can be defined externally or in how others see us.<sup>24</sup> This external definition can also be viewed as an ascriptive category that bears an involuntary marker of difference.<sup>25</sup> Justice Scalia's questioning during the oral argument in *Fisher* regarding racial categorization by who appears Asian, black, and Hispanic is a criticism of an external definition of race for admissions purposes. As counsel for UT Austin responded, since admissions offices should not be ascribing racial identities to applicants during the evaluation process based on the applicants' physical appearances—instead it should rely on the applicants' self-reporting—the other two definitions of race become most relevant for my analysis.

Second, race can be defined internally or in how we see ourselves.<sup>26</sup> The optional racial checkboxes on an application form are an attempt to capture this self-identification. An internal definition of race, while distinct from an external definition because it is not imposed by others, is nonetheless related to the external. How we see ourselves can certainly be informed by how others see us. However, the internal definition allows the individual to decide how she or he self-identifies.<sup>27</sup>

Third, race can be defined expressively or in how we present ourselves to others.<sup>28</sup> This expressive identity connects the importance of internal identity with the applicant's actual perspective. In other words, it captures the meaning of an applicant's internal identity, not by merely naming the category of difference, but by illustrating the importance of this concept to his or her life. The checkbox diversity view focuses on an applicant's internal definition of race, while downplaying the expressive dimension.

### *B. The Importance of Expressive Identity*

Without analyzing an applicant's expressive identity, the personal significance of the internal definition of race cannot be measured—it can

<sup>23</sup> See SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* 306 (2007).

<sup>24</sup> *Id.*

<sup>25</sup> See AMY GUTMANN, *IDENTITY IN DEMOCRACY* 24 (2003).

<sup>26</sup> PAGE, *supra* note 24, at 306.

<sup>27</sup> Note that if the internal and external definitions of race converge for an individual, then external identity would lose its involuntariness. On the other hand, if the internal and external definitions diverge, then the external definition would be involuntary because it would be imposed on people who self-identify in other ways.

<sup>28</sup> *Id.*

just be assumed. This is particularly the case where an applicant's identity is complex; in these situations, internal, external, and expressive identities can both conflict and overlap depending on the context. For example, a multiracial student who primarily self-identifies as one race, while others often see her as something different, may choose different expressive identities depending on who she is addressing at any given time.<sup>29</sup> The admissions reader will have no way of knowing this unless the applicant presents this information in the application materials. This student's articulation of her multi-layered expressive identity will be important for understanding the meaning that she gives to the checkbox(es) she selects (or the reason why she refuses to check any). The expressive aspect of racial identity, therefore, is the most relevant for reaping the educational benefits of a racially diverse classroom because it provides much needed context to why the checked box has any meaning to the applicant at all. In turn, the admissions officer can use this contextual information in crafting a class that will maximize the educational benefits of the racial diversity contained therein.

#### IV. CONTEXTUAL DIVERSITY AND NARROW TAILORING

Contextual diversity analysis moves away from essentialist conceptions of race by viewing racial identity in its various contexts, and not as an essentialist proxy for meaning. Justice Sandra Day O'Connor, who penned the *Grutter* majority's opinion and who was the first woman appointed to the U.S. Supreme Court, articulated a contextual view in a book that she wrote as an active member of the Court.<sup>30</sup> She reflected, "We all bring to the seats of power our individual experiences and values, and part of these depend on our gender."<sup>31</sup> Justice O'Connor then wrote about her struggle to find employment after law school:

I graduated near the top of my class from one of the better law schools in the country [i.e., Stanford]. My male classmates had no trouble finding jobs. I interviewed with several firms in

<sup>29</sup> See e.g., RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* (2003) (discussing "racial passing" as a type of expressive identity in various contexts); Nancy Leong, *Multiracial Identity and Affirmative Action*, 12 *ASIAN PAC. AM. L.J.* 1 (2007) (noting the unique issues that multiracial people have regarding their identities); Susan Saulny & Jacques Steinberg, *On College Forms, A Question of Race, or Races, Can Perplex*, N.Y. TIMES, June 13, 2011 (noting biracial students struggling to choose which identities to highlight and which to disregard for purposes of college admission).

<sup>30</sup> See generally SANDRA DAY O'CONNOR, *THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE* (Random House Trade Paperback ed. 2004).

<sup>31</sup> *Id.* at 195.

California but received no job offers—other than . . . as a legal secretary.<sup>32</sup>

Her outlook on the world was informed by her experiences as a white woman from a leading law school who could not find employment as a law firm associate in the early 1950s due solely to her gender. This contextual conception of identity is different than an essentialist view. Contextual diversity looks at the experiences of the individual to see how that person's perspective may be different than others instead of assuming a different perspective based on a cursory checking of a box. Justice O'Connor, indeed, rejected the essentialist view that there are essential ways of knowing and thinking as a woman because "it so nearly echoes the old Victorian myth of the 'true woman'—the myth that worked so well to keep women out of the professions for so long."<sup>33</sup> In its place, she argued, "This should be our aspiration: that whatever our gender or background, we all may become wise—wise through our different struggles and different victories, wise through work and play, wise through profession and family."<sup>34</sup> This aspiration leaves room for individual identities to inform the diversity of perspectives in any group; however, the measure for such diversity would be actual differences in struggles and experiences—not just checkboxes.

Justice O'Connor also mentioned the special perspective that her colleague on the Court for many years, Justice Thurgood Marshall, brought to discussions regarding pending cases. She recounts:

Although all of us come to the Court with our own personal histories and experiences, Justice Marshall brought a special perspective. . . . At oral arguments and conference meetings, in opinions and dissents, Justice Marshall imparted *not only his legal acumen but also his life experiences*, constantly pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth.<sup>35</sup>

O'Connor was, once again, illustrating how contextual identity can inform the diversity of perspectives in the room. She did not rely on essentialist identity and say that Justice Marshall, as an African American—and by that fact alone—brought a unique perspective.<sup>36</sup>

<sup>32</sup> *Id.* at 199.

<sup>33</sup> *Id.* at 192.

<sup>34</sup> *Id.* at 193.

<sup>35</sup> *Id.* at 133 (emphasis added).

<sup>36</sup> Under the simplistic essentialist view, one may have mistakenly assumed that Justice Clarence Thomas, Thurgood Marshall's successor on the Court, would have had a similar perspective to Justice

Instead, her statement implied that Marshall, as an African American with certain lived experiences, had “a special perspective” to present to his colleagues.<sup>37</sup> Justice O’Connor understood that not all African Americans have the same worldview, but there was something unique in Justice Marshall’s life experience that improved the quality of the discussion among the justices. The contextual identity articulated by O’Connor is consistent with the educational benefits rationale in *Grutter* in which classroom discussion is better because of the varied perspectives, and not just differences in physical appearance, of the students in the room.<sup>38</sup>

The perspective of Justice Ruth Bader Ginsburg, who joined with the majority in *Grutter*, is also informative in terms of contextual diversity. Shortly after graduating from Columbia Law School in 1959, Ginsburg was refused a clerkship with Supreme Court Justice Felix Frankfurter because Justice Frankfurter said that he was just not ready to hire a woman.<sup>39</sup> Although Justice Ginsburg was at the top of her class in law school, she was also unable to secure a law firm job immediately after graduation.<sup>40</sup> Informed by these early experiences, she went on to become a powerful advocate for gender equality at the American Civil Liberties Union.<sup>41</sup> Justice Ginsburg’s unique perspective has been illustrated by her opinions in gender rights cases, most notably the case that ended the exclusion of women at the Virginia Military Institute.<sup>42</sup> More recently, in *Safford Unified School District #1 v. Redding*,<sup>43</sup> Justice Ginsburg’s perspective, based on her past experiences, shaped her understanding of what constitutes a “reasonable search.” In that case, school officials strip-searched an eighth grader, Savana Redding, based on a tip by another

Marshall—because they both happen to be African American men.

<sup>37</sup> O’CONNOR, *supra* note 31, at 133.

<sup>38</sup> Justice O’Connor also wrote, “Just as growing up in a particular region or having particular professional experiences is likely to affect an individual’s views, so too is one’s own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.” *Grutter*, *supra* note 5, at 333. Consistent with a non-essentialist view of identity, O’Connor observed that being from a certain racial background is likely to affect someone’s worldview—but she did not say it inevitably will.

<sup>39</sup> See Neil A. Lewis, *Supreme Court: Woman in the News; Rejected as Clerk, Chosen as a Justice: Ruth Joan Bader Ginsburg*, N.Y. TIMES, June 15, 1993, available at <http://www.nytimes.com/1993/06/15/us/supreme-court-woman-rejected-clerk-chosen-justice-ruth-joan-bader-ginsburg.html>.

<sup>40</sup> See *Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff*, AMERICAN CIVIL LIBERTIES UNION (Mar. 7, 2006), <http://www.aclu.org/womens-rights/tribute-legacy-ruth-bader-ginsburg-and-wrp-staff>.

<sup>41</sup> See Lewis, *supra* note 40.

<sup>42</sup> See *U.S. v. Virginia*, 518 U.S. 515, 532–33 (1996) (recognizing a heightened level of scrutiny – i.e., “exceedingly persuasive” – for classifications based on gender).

<sup>43</sup> 557 U.S. 364 (2009).

student that Savana possessed ibuprofen in violation of a zero tolerance drug policy at her middle school. No drugs were found. The majority opinion in *Redding*, joined by Justice Ginsburg, held that Savana's Fourth Amendment right to be secure from "unreasonable searches and seizures" was violated when school officials searched the inside of her underwear for what were "common pain relievers equivalent to two Advil, or one Aleve."<sup>44</sup> In an interview about this case, Justice Ginsburg, stated that based on their comments at the oral argument, some of her colleagues, all men at the time, had failed to appreciate what Ms. Redding had been through.<sup>45</sup> "They have never been a 13-year-old girl," said the Justice, adding, "It's a very sensitive age for a girl. I don't think my colleagues, some of them, quite understood."<sup>46</sup> Justice Ginsberg's view on what constitutes "reasonable" for Fourth Amendment purposes was informed by her own experiences as a woman. She was not saying that all women should agree with her because her perspective is the one and only women's perspective. Instead, she was simply emphasizing that her views have been shaped in certain ways by her own gender-based experiences.

Applying this conception of contextual identity to the higher education application process, the admissions reader would ask how a particular applicant will add to the diversity of the class. *Bakke* highlighted this type of narrowly tailored contextual inquiry with an example:

The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. *Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important.*<sup>47</sup>

Under this contextual analysis, the personal qualities of the applicant should be what matters most—not a checkbox identity that may have no relation to the applicant's actual perspective. In terms of racial and ethnic diversity being a "plus" factor, the question becomes what specific

<sup>44</sup> *Id.* at 375–76.

<sup>45</sup> Adam Litpak, *Supreme Court Says Child's Rights Violated by Strip Search*, N.Y. TIMES, June 26, 2009, at A16, available at <http://www.nytimes.com/2009/06/26/us/politics/26scotus.html>.

<sup>46</sup> *Id.*

<sup>47</sup> *Bakke*, *supra* note 7, at 317 (emphasis added).

qualities, informed by race and ethnicity, does the individual possess that will give her or him a different perspective from others in the class? The applicant would address this question by providing information in the application—e.g., in a personal statement, diversity statement, resume, or addendum—that speaks to this contextual diversity concern. In other words, it would be the applicant's responsibility to provide the necessary context that would demonstrate why the self-identification is meaningful to her or him by connecting identity with perspective. In my former admissions role, I remember some applicants who did this quite well.<sup>48</sup> For example, a Native American student may focus on her connection to her tribal nation and how this motivates her to become an advocate for her community. Or a Vietnamese American student may highlight his experience as a refugee feeling marginalized in a predominantly white Southern community and how he learned to speak up for himself and the people he cares about in this environment. Or a multiracial student may discuss the complexity of her racial identity and how she often struggles with the tension between the socially constructed nature of race and the real life consequences of this construct. The examples can go on and on. With these markers of meaning, the admissions reader can make better decisions on how to craft a class that will maximize the educational benefits of diversity. This is what a narrowly tailored admissions practice should look like. Otherwise, without any evidence of the ways in which a particular applicant's worldview has been shaped by the selected checkboxes, the checkboxes themselves would not provide sufficient evidence of diversity of perspective. They would just provide checks in boxes that the applicant took a few seconds to fill in—limited information at best.

#### CONCLUSION

If an applicant fails to provide any contextual information regarding the meaning of their optional racial self-identification, then a diversity "plus" factor should not be given under the *Grutter* cases. The application should be analyzed relying primarily on other admissions criteria—e.g., hard factors such as standardized test scores, strength of prior curriculum, class ranks, grades; and indicators of soft factors contained in resumes, letters of recommendation, personal statements, and supplemental essays. However, if the context is provided, then the application reader could use it, in

<sup>48</sup> The following examples are by no means exhaustive, but merely illustrative of applicants who told their personal narratives in a way that highlighted why the checked boxes were meaningful for them.

conjunction with the other criteria (i.e., in a holistic way), in making an informed decision on how to craft an incoming class that includes different perspectives that will benefit the whole class. This is how the *Grutter* cases, and specifically the diversity “plus” factor, should apply to a narrowly tailored race-conscious admissions process operating under the educational benefits rationale. Mere checkbox diversity misses the point that these cases were making about the educational benefits of diversity.