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Finding Critical Mass: How *Fisher v. University at Austin* Could Undermine Diversity in Higher Education

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On November 18, 2013, the Young Conservatives of Texas (YCT) chapter of the University of Texas at Austin (UT- Austin) announced their plans to host an event called “Catch an Illegal Immigrant.” The chapter’s president, Lorenzo Garcia (a Latino), described the game as one where students go up to other students, present their student IDs, and tell the other students that they are there to take them to immigration services. Students who apprehended an “illegal immigrant” could win a twenty-five dollar gift card courtesy of the Young Conservatives of Texas, a right wing student group. Garcia stated that the idea for this event came to him after listening to President Barack Obama outline his agenda for the remainder of his second term. According to Garcia, President Obama’s comments made him think about illegal immigration and how much undocumented workers put into the system and how much they take from it. After a much-publicized and heated outcry from other UT-Austin students, local organizations, the UT-Austin president, and the Hispanic Communications Director of the Republican National Committee, Garcia cancelled the event.

Garcia and the YCT are no strangers to controversial stands, messages, or events at the UT-Austin campus. In September 2013, the YCT planned to host an “Affirmative Action Bake Sale” for students. The YCT had a sign selling baked goods at different prices depending on various immutable characteristics, such as Whites at two



dollars; Asians at one dollar and fifty cents; Latinos at one dollar; Blacks at seventy-five cents, and Native Americans at twenty-five cents. Women of any race received an additional twenty-five cent discount. Purportedly, YCT’s goal for the bake sale was to bring people’s attention to the use of race and gender as factors in admissions policies at universities.

While the lesson was probably lost on most observers, the pricing structure seems to reflect the racial and gender hierarchy in the minds of the

YCT's leadership.

Possibly unbeknownst to the YCT of UT-Austin, countless legal professionals, academics, and interested scholars have already been well aware of the constitutional issues and questions surrounding the use of affirmative action policies in post-secondary education since the 1970s. Affirmative action has been a constant source of criticism, praise, and debate. But despite the different approaches and positions on the use of affirmative action in higher education advanced by competing schools of thought and interest groups, the ultimate say in the matter lies within the discretion of the United States Supreme Court (the Court). The Court's jurisprudence on the issue of affirmative action is a question of constitutional law. Ever since the Court's ruling in *Grutter v. Bollinger* in 2003, it seemed as if affirmative action policies in undergraduate admissions were constitutionally permissible so long as its use by universities and colleges across the nation adhered by strict constitutional guidelines outlined by the Court. However, during the summer of 2013, the Court heard a more recent case, that of *Fisher v. University of Texas at Austin*, challenging the use of affirmative action in undergraduate admissions policies. Though the challenge is specific to UT-Austin, the outcome of this case could control the admissions policies of other universities and colleges. *Fisher v. University of Texas at Austin* may present the next opportunity for the Court to either uphold its precedent approving of the use of affirmative action in accordance with principles of precedence or prohibit its use outright.

This article reviews the issues raised by *Fisher* and considers the future of affirmative action in higher education. It contends that the use of affirmative action in higher education serves an important and compelling governmental and societal interest that should not be abandoned prematurely. It does this in four parts. First, it explores the constitutional background of affirmative action in post-secondary admissions and provides the necessary constitutional framework for analyzing its use. It then discusses the facts of *Fisher* and its potential impact on the use of affirmative action. It also addresses the arguments that the parties of *Fisher* are advancing. Following that, it focuses on the need for diversity in higher education and outlines

the Hispanic and Latino communities' role in colleges and universities. Finally, it sets forth the arguments in favor of affirmative action while addressing concerns of its opponents. Because *Fisher* could spell the end of affirmative action in higher education in the near future it is important that courts, legislators, and academics not let the need to promote diversity in higher education end along with it.

CONSTITUTIONAL FRAME WORK

Before discussing the relevant Supreme Court precedent on the issue of affirmative action in higher education, it is important to understand the framework of constitutional analysis that governs the issues of *Fisher*. The Fourteenth Amendment of U.S. Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This constitutional language is the subject of constitutional law courses in universities across the nation. Though the language above only references the "state," (meaning the individual states of the U.S.) it is a well-established rule of constitutional law that this Amendment also applies to the Federal Government through the Fifth Amendment of the Constitution. For purposes of affirmative action cases, the relevant language of the Amendment is "nor deny to any person within its jurisdiction *equal protection of the laws.*"



Equal Protection Clause issues arise when individuals (including corporate entities) are separated by some government actor into two or more different classes and those classes are somehow treated differently. The teeth behind the Equal Protection Clause form by way of judicial review of government actions that treat classes of people differently. In order for the Equal Protection Clause to apply to a government action, the distinction must have more than a mere disparate or uneven impact on the classes. There must be intent to discriminate on behalf of the government actor.

There are varying degrees with respect to how courts scrutinize different types of unequal treatment by the government under the Equal Protection Clause. The types are considered in terms of the suspect class prong of the Equal Protection Clause. If the distinction between classes is made against a “non-suspect” group, the government actor need only satisfy the “rational basis” test. This test is seen as the easiest level of constitutional scrutiny to meet. It only requires that the party challenging the government action show that there is no permissible government purpose to which the statute or policy is rationally related. If the distinction relates to groups that are “quasi-suspect,” then the government must demonstrate before the reviewing court that it made the distinction in order to advance an important governmental interest to which the classification is “substantially related.” Finally, if the distinction affects a “suspect class,” then the government is required to satisfy the “strict scrutiny” test. This level of scrutiny requires that the government show that it has a “compelling governmental interest” that is only advanced by a plan “narrowly tailored” (or necessary) to advance that interest. Distinctions based on race receive the strict level of scrutiny.

Over time, the Court has discussed why strict scrutiny applies to government distinctions made on the basis of race. Generally, the Court has discussed how the purpose and legislative history behind the 14th Amendment reflect the need at the time to protect African Americans in the post-Civil War period. The Court has also discussed the nation’s history of discrimination and what effect it has had on racial minorities. The Court has also expressed concern regarding the lack of political power that characterizes

minority groups. Accordingly, any governmental action that treats individuals on the basis of their race must satisfy the Court’s strict scrutiny review by showing that the treatment is narrowly tailored to advance an important and compelling governmental interest in order for the action to be constitutional. Affirmative action plans must satisfy this test.

Affirmative Action Precedents

Grutter and Gratz

Grutter v. Bollinger is a 2003 Supreme Court case that decided whether the use of race as a factor in the admissions process at the University of Michigan Law School was constitutional under the Equal Protection Clause. The Law School used race as a factor in order to have an incoming class comprised of a mix of students from varying backgrounds and experiences who would respect and learn from each other. The Law School also hoped to attain a level of diversity in its classrooms that improved the quality and nature of every student’s education. Race was just one of many factors considered in the law school’s admission process. The Law School crafted its admission policy to also achieve inclusion of students from groups which have been historically discriminated against, including African Americans, Hispanics and Native Americans, that without this commitment from the University might not be represented in its student body in meaningful numbers. Through its policies and practices the Law School hoped to achieve a “critical mass” of minority students.

The admissions policy of the Law School was challenged by an applicant who was denied admission. Barbara Grutter, a White Michigan resident, applied with a 3.8 GPA and an LSAT score of 161. She argued that the Law School discriminated against her on the basis of race in violation of the Equal Protection Clause of the 14th Amendment. Before analyzing the claim advanced by Grutter, the Court recognized its position taken in *Bakke* in 1978, where it held that governments do indeed have a substantial interest in promoting diversity but it must be served by an adequately devised admissions program that takes into consideration such factors as race and ethnic origin.

The Court agreed that the policy advanced a compelling government interest. It noted that diversity enlivens classroom discussions and makes them more spirited and more enlightening and interesting. It also discussed the point that student body diversity contributes to learning outcomes, helps prepare students for an increasingly diverse workforce and society, and better prepares them as professionals. The Court also stated that diminishing the force of negative stereotypes is both a crucial part of the Law School's mission and one that cannot be accomplished with only token numbers of minority students (Grutter, 2003).

However, as with strict scrutiny analysis, the inquiry does not end with a finding that the interest is compelling. The plan must also be narrowly tailored to serve that interest. Commenting on the use of race as a factor, the court stated that "a race-conscious admissions program cannot use a quota system . . . a university may consider race or ethnicity only as a 'plus'" (Grutter, 2003). Finally, the Court stated that when using race as a 'plus' factor in university admissions, a university's admissions program must use race in a way that does not make the applicant's race or ethnicity the defining feature of their application.

Thus, following *Grutter*, universities and colleges had a clear and comprehensible bright-line rule for establishing their own affirmative action programs. The Court's decision in *Grutter* found an appropriate balance between the need for diversity in higher education without running the risk of reverse discrimination. However, The Court heard another case on affirmative action the same year in *Gratz v. Bollinger* that ran afoul of that balance. In *Gratz* the University of Michigan's undergraduate admissions program was held unconstitutional because it automatically gave every minority applicant a twenty-point boost on their admissions spectrum. This model reflected exactly the type of quota system or defining factor warning that the Court stated in *Grutter*.

Since 2003, the use of affirmative action programs in higher education remained relatively stable. However, legal scholars and commentators wondered what the future of affirmative action would be in light of the Court's comments in *Grutter* that it expected that 25 years hence the use of racial preferences would no longer be necessary

to further the interest of diversity in society. Questions arose as to whether that language gave a strict deadline or if it was just a normative expression of where the Court hoped society would be in twenty-five years with regard to racial discrimination. *Fisher* may provide the answer to those questions fourteen years too soon.

Fisher

In 2008, Abigail Fisher applied to UT-Austin in hopes of joining the upcoming freshman class. During that admissions cycle, there were 29,500 other applications for admission. Out of these applications, 12,483 were offered admission and 6,715 accepted and enrolled. Fisher's application profile was not competitive. On a 1600 SAT scale, Fisher scored 1180. Her GPA was a 3.59. Having been denied admission, Fisher brought suit against UT-Austin claiming that the university's use of race as a factor in its admission policy violated the Equal Protection Clause of the Fourteenth Amendment.

UT-Austin's current admission program utilizes race as a "plus-factor" when considering the applicant's overall profile much like the University of Michigan's Law School did in *Grutter*. This program works in conjunction with the "Top Ten Percent Law" passed by the Texas Legislature, which grants automatic admission to any high school students graduating in the top ten percent of their graduating class to any public Texas college. The Court acknowledged the role that UT- Austin's plan had in increasing diversity on campus:

The University's revised admissions process, coupled with the operation of the Top Ten Percent Law, resulted in a more racially diverse environment at the University. 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 (Fisher, 2013).

Though the Supreme Court heard the case, it was not the landmark or watershed decision on affirmative action that legal academics thought it would be. While the Court discussed the appropriate facts, precedents, and its views on diversity in higher education, it did not analyze whether the admissions program at UT-Austin

survived the strict scrutiny test required by the Equal Protection Clause. Instead, the Court remanded the case back to the Fifth Circuit Court of Appeals for further review in accordance with the Court's opinion because *Grutter* "did not hold that good faith would forgive an impermissible consideration of race" as the Fifth Circuit believed it to do (Fisher, 2013).

On November 13, 2013 the Fifth Circuit heard oral arguments in the case. Lawyers for Fisher argued that the "critical mass" standard discussed by the Court throughout the course of its affirmative action in higher education jurisprudence was met and that UT-Austin's plan was no longer necessary (and thus, failed to satisfy the constitutional strict scrutiny test). Counsel for UT-Austin argued that the "critical mass" standard had not yet been reached. The Fifth Circuit Court has yet to issue a decision. Even after it does, the losing party is likely to appeal to the Supreme Court, which will most likely decide to hear the case (again). While *Fisher* makes its way through the courts, universities, students, and analysts are left to wonder what will become of affirmative action in higher education in the future.

In the meantime, several questions raised by *Fisher* must be addressed: (1) What is the defining point of "critical mass"?; (2) Are there other, race-neutral means that universities could adopt to increase diversity on campuses?; and (3) What is the public opinion of affirmative action in higher education and how have state and local governments responded? The rest of this article addresses these questions in an attempt to support the narrowly tailored use of affirmative action as a compelling government interest.

THE FUTURE OF AFFIRMATIVE ACTION

None of the opinions on affirmative action in higher education provide a definition for the meaning of "critical mass" within the context of university plans to increase diversity on campus. Indeed, during oral arguments in the Court and the most recent oral arguments before the Fifth Circuit, a common inquiry of presiding judges has been something to the effect of: What is the number that it would take to achieve the "critical mass" affirmative action programs are designed to achieve on American campuses?

Historically, the term "critical mass" originated in the field of physics. The term usually refers to the amount of fissile material required to start and maintain a nuclear fission reaction. In the scientific context, "critical mass" may refer to a specific set of numbers or formulas to achieve an identified reaction. However, the term has been used in many different contexts from politics, law, sociology, to business. In these contexts, it can certainly be said that there is no set number or reactions referenced. In these contexts, the term is much more amorphous and vague. Addis (2007) has thoroughly examined "critical mass" discourse in the legal field. He generally concluded that:

[I]n whatever field of social endeavor the notion of critical mass is invoked, there are certain common elements that define it. First, critical mass is used to understand the processes of relatively sudden social changes and the point of criticality that will bring about those changes. Second, the notion of criticality or threshold is based on the assumption that decisions of individuals or other entities are influenced by the choices that others make or are expected to make. So, critical mass is both about the threshold that triggers a transformation as well as about the nature of collective action or the production of a public good.

Nonetheless, the scientific equation for achieving the critical mass needed to cause a reaction is quite analogous to the use of the term in higher education affirmative action cases. The goal of achieving critical mass in higher education is clear: to achieve a sufficient level of diversity in higher education that substantially contributes to and advances classroom discourse (much like the reactions sought by nuclear scientists are identified) and learning experiences on campus. The only difference is that the elements of the formula are unclear. However, Addis' two-point elements of critical mass represent a good starting point for identifying that formula.

A Legal Critical Mass Formula

Addis' first element of critical mass states that "critical mass is used to understand the processes of relatively sudden social changes and the point of criticality that will bring about those changes" (2007:106). For purposes of analysis, this element can be analyzed in two component parts: (1) the social change desired, and (2) the point of

criticality that will start that change. Though it may seem ambitious, the view held here is that while achieving diversity in higher education is the constitutionally permissible goal of affirmative action plans, the larger goal and “social change desired” is an end to all forms of institutional racial discrimination in society.

Accordingly, when courts today and in the future ask whether or not a “critical mass” has been attained, the answer is a resounding “No!”. One need only conduct a brief examination of current news headlines to find that the “social change desired” through affirmative action in higher education still requires a lot of work. For example, a group of high school students in Kansas painted a mural on the wall of a school building that contained images of the Statute of Liberty, the U.S., and two people cloaked in a Mexican and American flag with the caption “Immigration is Beautiful.” It only took a few days for local onlookers to spray the words “wetback,” “welfare,” and “KKK” onto the mural. While we may never be able to eliminate racial discrimination at the individual level, it is possible to do so at the institutional level.

For example, the New York Police Department (NYPD) is notorious for its unfair and demeaning use of racial profiling of Latino and African American men. The NYPD (and other police departments) have the constitutional ability to perform what are called “stop and frisks.” Though there are many Fourth Amendment constitutional issues that govern the use of a stop and frisk, a police officer must still have “reasonable suspicion” that illegal activity is afoot in order to conduct a stop and frisk. The NYPD was recently sued for unfair and discriminatory practices in enforcing stop and frisks.

Without having to read the arguments of attorneys in the case, one fact paints an appropriate description of NYPD’s discriminatory practices: in the first quarter of 2012 alone, police stopped mostly African American and Latino men on approximately 200,000 occasions. On most of these stop and frisks, there was nothing done wrong by those suspected of wrongdoing. Recently, the Honorable Judge Shira A. Scheindlin of Federal District Court in Manhattan held that the practices adopted by the NYPD are unconstitutional. The suit and settlement talks are

ongoing.

Finally, consider the reaction to undocumented workers. On February 12, 2014, Nebraskans in the City of Fremont voted to pass a city ordinance that would require anyone renting within city limits to swear that they have “legal permission” to live in the U.S. Since 1990 the number of Hispanics living in Fremont has increased from 165 to 3,149 in 2010. Local citizens of Fremont believe that the ordinance was necessary because they believe that the country should take harsh stands against people living in this country illegally.

Each of the issues raised above deserve their own law review or other academic journal note. Each example is illustrative of why “critical mass” has yet to be achieved. Diversity in higher education can help prevent these problems from occurring. Each year approximately four million students enter freshman classes at colleges and universities throughout the country. Having a diverse population in this freshman class helps peers learn to see each other and their respective cultures as equal and important. Upon graduation these students, having been exposed to diversity in higher education, should be less likely to hold racial biases toward those different from them in the workplace, community and other societal arenas. The social change desired is not yet fully in effect, and diversity in higher education classrooms is an important, but only one, step in effecting that change. The second part of the Addis argument calls for the “point of criticality” that would help achieve the social change desired.

Admittedly, this is a much more difficult standard to identify. It depends upon a significant number of factors. However, at least two clear guidelines for defining this standard have emerged. First, the Court made it clear in *Grutter* that a quota system is inherently unconstitutional and thus cannot be part of a “critical mass” definition. This rule, also expressed in the Court’s recent *Fisher* opinion, seems to conflict with the Justices’ need to have an answer to the question of “how many students will it take to attain critical mass?”

It would be a clear contradiction for the Court to strike down affirmative action in higher education because it believes that the *number* of minority students enrolled at universities and colleges is sufficient to achieve the interest of

diversity—especially when it has already ruled that quotas are unconstitutional. In other words, if a majority of the Court wants to do away with affirmative action in higher education, it will have to also overturn its prior precedent holding that a numerical analysis of minority students in higher education is constitutionally impermissible.

Second, a simple comparison of the student-body makeup of UT-Austin shows that diversity is increasing, but it is occurring slowly. For example, the Court in *Fisher* cited statistics that in that period before *Grutter* (2006), UT-Austin had a makeup of 4.1% African American and 14.5% Hispanic students. As of 2013, UT-Austin reports it has a makeup of 4.3% African American students and 21.7% of Hispanic students. Though this seems like a successful increase on its face, the growth in the number of Hispanic students at UT- Austin has not been enough to overcome the still increasing lack of diversity in the university's classrooms. This has been the case despite the growing Hispanic population in the State of Texas and nationwide. If anything, the amount of diversity, proportionally, has remained the same since UT-Austin put into effect its current admissions policy. Thus, it can hardly be said that critical mass has not been attained today.

External Benefits of Affirmative Action Plans

Lee C. Bollinger, former president of the University of Michigan and current president of Columbia University, spoke about his experience with affirmative action at the University of Michigan and the Supreme Court's rulings in *Grutter* and *Gratz* during a symposium held at Willamette University in 2002 (Bollinger, 2002). Bollinger discussed several myths and sentiments surrounding race issues and the use of affirmative action on campus. These myths—even to this day—best summarize and illustrate the value of affirmative action in higher education.

The first issue discussed by Bollinger is the notion that discussions or considerations of race no longer have a place in American society. Arguably, since 2002, there have been several important advancements and achievements for minority communities in this country. In 2005 Condoleezza Rice became the first African

American woman to serve as the Secretary of State. President Barack Obama was elected President in 2008, becoming the first African American to be President, and Sonia Sotomayor was appointed by him to the U.S. Supreme Court in 2009, making her the Court's first Hispanic (and third woman) Justice in its entire history. These milestones in racial equality undoubtedly represent shifting attitudes toward race in America. Still, these achievements do not mean we live in a post-racial society.

The shift is neither as grand nor swift as it could be. Aside from more recent events that shed light on racial inequality discussed above, the country still faces immigration issues, constant state level voter ID attempts at "reform," and an ever-increasing income gap between White, Black and Hispanic households. Opponents of affirmative action claim that race is no longer an issue, but one need not look far to find overwhelming evidence indicating otherwise.

Another issue discussed by Bollinger is that critics of affirmative action often claim that race gives minorities an unfair advantage in the admissions process while qualified White students are left out. Ironically, it is institutional racism that gives and has historically given Whites an unfair advantage across all societal institutions. Affirmative action is a policy in which race is only one part of a much larger means of evaluating student applications for admission. Generally, universities consider the quality and difficulty of classes that a student took in high school, the quality of essays submitted with an application, a student's demonstrated leadership in the community, athletic ability, and other relevant personal achievements along with membership in an underrepresented racial or ethnic minority group.

As previously discussed, the Court's mandates for the use of race as a factor in college admissions requires that race only be one factor among many in the application review process. Race cannot be the sole outcome determinative factor for one's application, nor can it be the defining characteristic. It is only one part of a holistic admissions process.

Most importantly, and most relevant to the decision that the Court must address in *Fisher* is whether universities and colleges have a race-

neutral or colorblind way to increase diversity on its campuses instead of using affirmative action policies. On its face, this idea seems like a fair one. If society is to become colorblind in the future why not find the way that best promotes diversity without having to actually consider the race of applicants? However, there are several reasons—as discussed by Bollinger—why the answer is no.

In 1996, the State of California passed proposition 209. It was a ballot proposition that amended the state constitution to prevent state colleges and universities from allowing the consideration of race in their admissions procedures. At the University of California, Berkeley and Los Angeles Hispanic enrollment fell by 44 and 36 percent, respectively. At Berkeley, African American enrollment dropped by nearly 60 percent when the admissions office implemented a colorblind admissions program. It is clear that race must be part of the admissions process for the compelling interest of promoting diversity on campus to have any import in today's collegiate life.

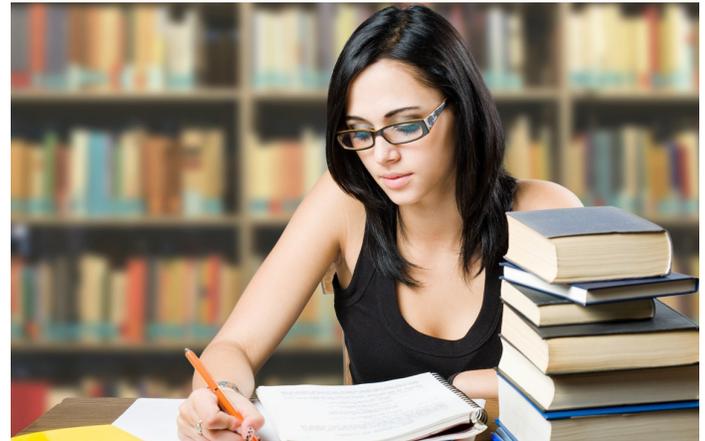
Currently, some universities and colleges have adopted “top percent” plans as a way of promoting diversity on their campuses. If a student graduates in a certain top percentile of their class, they can gain automatic admission to certain colleges and universities in their respective states. The majority of UT-Austin's freshman class is filled through this model (the top ten percent). Though it may seem to be an effective means of promoting diversity on college campuses, this approach leaves several systematic problems in secondary education unaddressed. For example, in California, African American high school students have a dropout rate of 30 percent and Hispanic students have one of 23 percent. While the different causes and potential solutions to the inequality of high school education across the country could serve as the focus of its own paper, contending that a top percent plan from these schools solves diversity issues at the post-secondary level is shortsighted.

Public Opinion and Reaction to the Use of Affirmative Action

In spite of the current constitutionality of the

consideration of race in higher education admissions, several states have limited or attempted to limit the use of race in admissions including passing laws that ban its use outright. Because of this it is important that the Court not overturn its precedent on the issue so that states and universities attempting to promote diversity on their campuses are able to do so without interference.

For example, in 1996 California voters passed Proposition 209, which prohibits the state from granting preferential treatment on the basis of race in many different contexts, including education. Similar measures have since been passed in other states either by voters or legislators; in Florida (1999) by executive order by Jeb Bush. These include Washington (1996), Michigan (2006), Nebraska (2008), Arizona (2010), New Hampshire (2011), and Oklahoma (2012).



Proposal 2 in Michigan was modeled after Proposition 209 in California. Among other things, it prohibits consideration of race at all of its public, state-operated universities. Since then, however, enforcement of the law has been challenged in the courts, and it is currently at the U.S. Supreme Court, where a decision is pending. It is expected that the decision will be released alongside the *Fisher* decision. Though the arguments in support and in opposition of affirmative action in higher education are applicable to the Proposal 2 case *Schuetz v. Coalition to Defend Affirmative Action*, the case raises different constitutional issues in that the 6th Circuit Court of Appeals held that the ban “unconstitutionally alters Michigan's political structure by impermissibly burdening racial minorities” (Schuetz, 2013).

The question in this case is not whether the

state has a compelling interest in promoting diversity that is achieved through a narrowly tailored plan like that in *Fisher*, but is instead whether Proposal 2 itself violates the Equal Protection Clause of the 14th Amendment. In the alternative, the Court must also decide whether Proposal 2 violates what is known as the political-restructuring doctrine. That is, if Proposal 2 denies opportunities to minority students, then Proposal 2 will be held unconstitutional, as it was by the 6th Circuit Court. In other words, if Proposal 2 includes a racial classification intended to treat a group of people different than another then it is unconstitutional. The Court has the opportunity to quell plans, reforms, or referenda that would have a negative impact on efforts using affirmative action to promote diversity at colleges and universities.

CONCLUSION

Fisher represents either the constitutional approval or death knell for affirmative action in higher education in the United States. Many of the arguments discussed above are arguments that the Court entertained during oral arguments in the case. Indeed, they are very similar arguments advanced before the Court's decisions in *Bakke*, *Grutter*, and *Gratz*.

The support and contentions in favor of affirmative action have remained constant because the goal has remained compelling: promoting diversity in higher education as a compelling state interest.

They have also remained constant because the need for the promotion of diversity at colleges and universities across the nation has become increasingly apparent and necessary over time. While opposition to affirmative action policies has grown along with the support, the differences boil down to perspective and ideology. Our society has made some advances toward racial inequality over time, but the country is not at a point where it can give up on the cause. The Court should recognize this reality and take the opportunity presented to it in *Fisher* and *Schuetz* to allow colleges and universities the ability to promote diversity in higher education. 

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