Integration vs. Segregation. Non-minorities vs. Minorities; and Diversity vs. Race; all of these are powerful concepts that represent the battle that American Public Higher Education Institutions are facing with respect to how best to implement admissions processes and provide equal educational experiences without infringing on the U.S. Constitution. When it comes to higher education, some scholars argue that affirmative action is necessary because of past invidious discrimination and systems of power, privilege, and oppression. Others argue that affirmative action, while trying to help perceived victims of societal discrimination, is actually perpetuating the cycle and creating other enclaves of oppression; thus rarely constitutional.

Either way, both groups of scholars know that a diverse student population is a main component of what makes a good school.¹ For higher education, the U.S. Supreme Court has put forth a test in order to decide whether the manner in which diversity is achieved is narrowly tailored to a compelling interest. Most scholars and the Supreme Court agree that racial diversity is important and serves a compelling interest but the means of achieving this goal are at issue. Now the question remains: how can one discern how best to implement an affirmative action admissions program that is narrowly tailored to a compelling interest so as to survive rigid scrutiny and create a sustainable and diverse student population? First, I will analyze the state of Michigan’s segregated educational past and speak to why diversity is a compelling interest in higher education. Then I will look to three key affirmative action cases, and lastly argue how I

¹ Dean Michael Kaufman Lecture, Education Law & Policy, Jan. 18, 2012.
believe Justice Kennedy—the key player—might vote in resolving this pending case in the U.S. Supreme Court.

**Taking Affirmative Steps: Michigan’s Compelling Interest**

The state of Michigan has always been in the limelight when discussing issues of segregation, integration, and affirmative action. While it is one of the most segregated states in the union, with five out of our nation’s twenty-five most racially segregated metropolitan regions, this state is similar to the racial patterns prevalent across our country, and problems ingrained in our primary education systems.\(^2\) In Michigan public schools, 73% of students are White, 19.98% Black, 3.73% Hispanic, 2.14% Asian/Pacific Islander, and 1.15% American Indian/Alaska Native.\(^3\) Out of these racial groups—Blacks, Hispanics, and American Indians—have a graduation rate of approximately 45.43%, while Asian and Whites have an average graduation rate of approximately 76.10%.\(^4\)

We look to Michigan, as this state often serves as a pictorial basis of segregation, yet as a state dedicated to remedying the discrimination, more specifically through higher education programs. This typical racial break down seen throughout our country is crucial in understanding the cycle of socialization a person undergoes in their lifetime and why diversity is a necessary and compelling interest in higher education. While the landmark affirmative action cases show why diversity is a compelling interest in higher education, below, I am purporting to show the foundation of this interest.

According to Bobbie Harro’s Cycle of Socialization, a person gets their first introduction to social identities and racial identities, based on the family they were born into and the biases and stereotypes introduced at birth. These messages are reinforced during the second stage in the

---


\(^3\) Realize the Dream, *Quality Education is a Civil Right* (2012), http://www.realizethedream.org/reports/states/michigan.html

\(^4\) Id.
areas of our educational systems, legal system, television, culture, and religion.\textsuperscript{5} These thought patterns, beliefs, and educational experiences are stigmatized and perpetuated thus resulting in dissonance, silence, and conformity when youth internalize these patterns of oppression and power as the norm: that is, the status quo stemming from segregated viewpoints, segregated housing, and segregated schools. Today, while this segregation is not explicitly government mandated, this cycle continues when youth become adults and decide to do nothing because they are disempowered and do not have the ability to dialogue across diverse perspectives in order to seek change.\textsuperscript{6} However, higher education is the cornerstone to empowering youth to challenge institutions and liberating themselves.

This sociological perspective is crucial to our understanding of the role higher education plays in our pluralistic and democratic society and in understanding why diversity is paramount to a college education. When a student enters into a university, they are at the defining moment between continuing under the cycle of socialization or pursuing liberation to challenge institutional structures. At the University of Michigan, most students are from segregated backgrounds and thus are forced to engage in conscious modes of thought that require students to push past their comfort zones and challenge their inner self.\textsuperscript{7} While the state of Michigan is highly segregated, it is a realistic portrayal of the discrimination engrained throughout our country, perpetuated in our school districts, and has become the centerpiece of race conscious affirmative action admission policies challenged in our courts.

\textsuperscript{5} Bobbie Harro, The Cycle of Socialization, 41 (2000).
\textsuperscript{6} Id.
The Big Three

Regents of the Univ. of California v. Bakke, 98 S.Ct. 2733 (1978) is one of the first landmark cases to discuss affirmative action in higher education. This case addressed University of California at Davis’ medical admissions process that specified a number of students from certain minority groups that were allowed admissions to the school.\(^8\) Under the regular admissions process a candidate was rejected if they had less than a 2.5 G.P.A. and if above, then their science G.P.A., MCAT score, letters of recommendation, extra curricular activities, and other biographical data were taken into consideration.\(^9\) The ratings of these categories gave the candidate a benchmark score to determine admissions.\(^10\) The special admissions process operated with a separate committee composed of predominantly minority members.\(^11\) However, its process did not have a minimum G.P.A. requirement and applicants checked boxes stating they wanted to be considered a racial minority which the school viewed as Blacks, “Chicanos,” Asians, and American Indians.\(^12\)

The Supreme Court gave no single majority opinion but four of the justices contended that racial quota systems were unconstitutional and that University of California at Davis’ special program amounted to such a system.\(^13\) The other four justices held that the use of race as a factor in admissions processes for higher education was constitutionally permissible.\(^14\) Justice Powell joined the latter opinion, but further contended that while race may be used as one of a number of factors in the process, the current process was not narrowly tailored.\(^15\) Nevertheless, Justice

---

\(^8\) Regents of the Univ. of California v. Bakke, 98 S.Ct. 2733, 2738 (1978).
\(^9\) Id. at 2739.
\(^10\) Id.
\(^11\) Id.
\(^12\) Id. at 2740.
\(^13\) Dean Michael Kaufman Lecture, Affirmative Action Student Group, Education Law & Policy, Mar. 27, 2012.
\(^15\) Regents of the Univ. of California, 98 S.Ct. at 2764.
Powell’s view is endorsed by the Supreme Court today, finding that student body diversity is a compelling interest in the context of higher education and serves as a substantial interest.\textsuperscript{16} However, in the context of what is considered narrowly tailored, this case set forth a hard-nosed discussion of what would ultimately become precedent in future cases. Justice Powell discussed that a school trying to help perceived victims of societal discrimination is not a compelling interest as that in and of itself created discrimination.\textsuperscript{17} The court further stated that providing health care services to underserved communities was a sufficiently compelling interest to support the use of suspect classifications, but there was no evidence indicating that the special program was tailored to support this goal.\textsuperscript{18} Further, while remedying past discrimination was a compelling interest, the University of California’s at Davis’ remedy was too broad because the program burdened third parties who had no responsibility for the harm the special admissions program candidates were thought to have suffered.\textsuperscript{19} Finally, despite ruling against the University of California at Davis, the court found that a diverse student population was a constitutionally permissible goal and a compelling interest in higher education that afforded a university to choose their student body.\textsuperscript{20}

In \textit{Gratz v. Bollinger}, 123 S.Ct. 2411 (2003), the Supreme Court looked to the University of Michigan’s undergraduate admissions policy that considered a number of factors in the admissions process including: school grades, standardized test scores, high school quality, curriculum strength, geography, alumni relationship, leadership, and race.\textsuperscript{21} The University of Michigan considered African Americans, Hispanics, and Native Americans as underrepresented

\textsuperscript{16} Dean Michael Kaufman Lecture, \textit{Affirmative Action Student Group}, Education Law & Policy, Mar. 27, 2012.
\textsuperscript{17} Regents of the Univ. of California, 98 S.Ct. at 2757.
\textsuperscript{18} Id. at 2759.
\textsuperscript{19} Id. at 2757; \textit{Grutter v. Bollinger}, 123 S.Ct. 2325, 2336 (2003).
\textsuperscript{20} Regents of the Univ. of California, 98 S.Ct. at 2761.
minorities. However, these groups of candidates were then given more points for their underrepresented minority status, socioeconomic disadvantage, attendance at a high school with a predominantly underrepresented minority population, or if they sought to apply to a unit in which the student was an underrepresented minority (such as men pursuing a degree in nursing). Subsequently, when the points were allocated to determine admissions, a candidate was entitled 20 points based upon his or her membership to the underrepresented racial or ethnic minority group.

The Supreme Court held that this admissions process violated the Equal Protection Clause of the 14th amendment, operated like a quota system, and ran counter to the opinion laid out in Regents of the Univ. of California. The court reasoned that 1/5 of the points needed to gain admissions were guaranteed to underrepresented minorities and thus the policy was not narrowly tailored to assert a compelling interest. The court reasoned a race conscious admissions policy might be narrowly tailored if it provides for individualized assessment of the applicants, but race as a decisive factor cannot survive strict scrutiny.

In Grutter v. Bollinger, 123 S.Ct. 2325 (2003), the Supreme Court looked to the University of Michigan’s Law School admissions process and policy that the faculty and staff unanimously adopted based on the prior Supreme Court ruling under Regents of the Univ. of California. The University of Michigan Law School process took into consideration hard factors such as personal statement, letters of recommendation, admission essay, GPA, LSAT score, and stated that while these are considered hard factors they are not determinative of

---

22 Id. at 2419.
23 Id.
24 Id.
25 Id. at 2421.
26 Id. at 2427.
admissions.\textsuperscript{29} Similarly, the admission policy took into consideration soft factors including the enthusiasm of the recommenders, quality of undergraduate institution, essay quality, difficulty of course work, and applicants likely contributions to the intellectual and social life of the school.\textsuperscript{30} This policy stated explicitly that it aspired to “achieve diversity…that will make the law school stronger than the sum of its parts” but doesn’t restrict the type of diversity allocating substantial weight to certain factors; however, the policy reaffirmed their commitment to racial and ethnic diversity and wanted to enroll a critical mass of underrepresented minorities to the school.\textsuperscript{31}

The Supreme Court held that the Law School’s admissions process was narrowly tailored using race in admissions to further a compelling interest and obtaining educational benefits that stemmed from a diverse student population.\textsuperscript{32} The court reasoned that the Law School sought, defined, and strived to enroll a critical mass not defined as a quota but rather a meaningful representation that encouraged underrepresented minority students to participate in the classroom and not feel isolated or tokenized.\textsuperscript{33} Further, the court reasoned that the law school merely used race as a potential plus factor thus constituting a narrowly tailored policy while additionally the University properly invoked their first amendment right of educational autonomy in selecting their own student body.\textsuperscript{34} Subsequently, the Supreme Court weighted heavily the amount of expert testimony put forth showing how a diverse student body promotes learning outcomes and best prepares students to work in a diverse society, workforce, and be competitive in a global economy.\textsuperscript{35}

\textsuperscript{29} Id. at 2331-2332.
\textsuperscript{30} Id.
\textsuperscript{31} Id.
\textsuperscript{32} Id. at 2339.
\textsuperscript{33} Id. at 2333.
\textsuperscript{34} Id. at 2333.
\textsuperscript{35} Id. at 2339.
Thus, *Grutter* solidifies *Regents of the Univ. of California* in showing that there are ways to achieve a narrowly tailored, race conscious admissions program that considers race as a plus factor without “insulating the individual from comparison with all other candidates for the available seat.” 36 The University of Michigan Law school case shows that admissions programs can be flexible in considering all aspects of diversity in comparison to other applicants and place them all on the same level of consideration while not necessarily giving them all the same weight. 37

The Supreme Court further made an effort to summarize explicitly what the difference was between *Regents of the Univ. of California* and *Gratz* in comparison to *Grutter*. The Supreme Court stated that they made the distinction that a quota amounted to fixed numbers or proportion of opportunities reserved for select groups and the number must be attained but not exceeded. 38 This was unconstitutional. In contrast, a permissible and narrowly tailored race conscious plan allows one to come within a demarcated goal that allows race to be a plus while still allowing other candidates to compete with all other qualified candidates. 39 The Supreme Court stated that in *Grutter*, the plan does not automatically accept or reject a candidate based on any factor and makes it clear that diversity does not exclusively mean race and ethnicity. 40

**The (Possible) End of Affirmative Action: Fisher v. University of Texas at Austin**

*Fisher v. Univ. of Texas*, 631 F.3d 213 (5th Cir. 2011) case was granted certiorari so that the Supreme Court could determine whether the use of race in the undergraduate admissions process at the University of Texas violates the Equal Protection Clause of the 14th amendment.

---

36 Id. at 2342.
37 Id.
38 Id.
39 Id.
The University of Texas program follows a two-prong approach in promoting diversity by first legislatively mandating the Top Ten Percent Law which requires that all seniors in the top ten percent of their class be automatically admitted to any Texas state university.\footnote{Fisher v. Univ. of Texas, 631 F.3d 213, 215 (5th Cir. 2011).} The second prong relates to those students not admitted under the Top Ten Percent Rule. Here, the University of Texas allows race, among many other factors, to calculate a personal achievement score (PAS) but no points are awarded and no quotas are used. The PAS was meant to reward students whose merit was not adequately shown through their class rank and test scores and designed to increase minority enrollment.\footnote{Id. at 223.}

Under the first prong, a majority of first year students are selected without any consideration to race: approximately 81\% of the entering class was admitted under this rule.\footnote{Id. at 227.} The remaining candidates are then competing for admissions based on the index that includes race as a factor.\footnote{Id.} However, the index first predicts a candidate’s potential first year G.P.A. using standardized test scores and class rank. If this score is high enough, the student may gain admissions.\footnote{Id. at 228.} If not, a student’s holistic score is taken in tandem with the PAS. The PAS looked to a candidates leadership qualities, awards/honors, work experience, extracurricular activities, community service, and special circumstances, which included socioeconomic status, family status, standardized test scores in comparison to their high school average, and race.\footnote{Id. at 215.}

The 5th Circuit affirmed the constitutionality of the University’s program.\footnote{Id. at 215.} The court found that the admissions policy was supported by a compelling interest to achieve a critical
mass of diversity similar to Grutter, and did not amount to racial balancing.\textsuperscript{48} Further, the Supreme Court reasoned that while narrowly tailored means specifically framed to accomplish the goal, that a minimal effect is still sufficient.\textsuperscript{49}

\textbf{The NINE (Eight) Take Action: A Constitutional Guess on Affirmative Action}

The Supreme Court has two main options. First, the court could hold that the Texas program does not comply with Grutter, and is not narrowly tailored to a compelling interest to survive rigid scrutiny. Next, the Supreme Court could argue that the Texas program follows Grutter and is thus narrowly tailored to a compelling interest. Or, the Supreme Court could hold that the Texas program follows Grutter but that Grutter is unconstitutional and thus these types of programs fail the strict level of scrutiny for race based admissions procedures. If the Supreme Court holds under the first option, they would be stating that if the Top Ten Percent Law were to serve the interests of the University just as well as the race conscious admissions policy that does differentiate on the basis of race, then the policy is unconstitutional.

I argue that the Supreme Court is able to uphold Grutter and find Fisher constitutional. First, I look to the composition of the court as it may help us reach a decision on how they may rule. Justices Alito, Roberts, Scalia, and Thomas have shown no signs towards any sort of racial preferences for minorities. Justice Kagan has recused herself and Justices Ginsburg, Breyer, and Sotomayor will likely vote in favor of this policy by following the 5\textsuperscript{th} Circuit’s decision and analysis. Therefore, it is up to Justice Kennedy to supply the fourth vote for the policy as this would affirm the 5\textsuperscript{th} circuit’s decision in an equally divided court. Therefore, understanding Kennedy’s viewpoint as to how race may play into admissions policies and what Kennedy is trying to convey as narrowly tailored will be key to the future of Grutter.

\textsuperscript{48} Id. at 245.  
\textsuperscript{49} Id.
While one of the main points of contention here involves the minimum effect the Texas plan has by using race, the Texas’ applicants call forth the Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No 1, 127 S.Ct. 2738 (2007) reasoning, to parallel the argument and state that since there was such a minimum effect in the increase of minority students, the Texas plan is not narrowly tailored and thus unnecessary. Kennedy, who casted the fifth vote in Parents Involved in Cmty. Sch. case, wrote separately to clarify his opinion in Grutter. He stated that Grutter allows small gains sought by schools with regard to individual evaluations of the schools needs and students characteristics that might include race as an element.\(^50\)

However, Justice Kennedy dissented in Grutter stating that racial preferences “can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality.”\(^51\) Nevertheless, Justice Kennedy stated at the same time, “there is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity, but an educational institution must ensure, through sufficient procedures, that each applicant receives individual consideration and that race does not become a predominant factor in the admissions decision-making.”\(^52\) While this statement leaves open the possibility that there are race conscious policy plans available, here, Kennedy qualified his assertion in that the University of Michigan’s Law School has failed to comply with this.

**Conclusion**

Justice Kennedy could join the conservative justices thus finding the University of Texas’ program unconstitutional for failing to be narrowly tailored. Or, Justice Kennedy could join the liberal justices and equally divide the court, thus affirming the Texas admissions policy.

Regardless, while the petitioner in this case is arguing that no consideration should be allowed

\(^{50}\) Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No 1, 127 S.Ct. 2738, 2793 (2007).

\(^{51}\) Grutter v. Bollinger, 123 S.Ct. at 2370.

\(^{52}\) Id. at 2373.
for race, I argue that Justice Kennedy would never fully reject or prohibit affirmative action but will finally clarify what kind of narrowly tailored to a compelling interest requirement is necessary so as to uphold the constitution and the rights of all individuals under the equal protection clause. While I support affirmative action for the reasons mentioned above and supported by the University of Michigan and Grutter, statistics and case studies are never determinative.

Nevertheless, I hope the Supreme Court upholds the 5th Circuit ruling. If Justice Kennedy thinks that Fisher is not narrowly tailored to a compelling interest, then achieving diversity in higher education in our future will be highly difficult, if not impossible. Regardless of what the Supreme Court will do, institutions will start to turn towards examining other race proxies—looking to socioeconomic status, neighborhood composites, and other home life factors—to promote diversity in higher education and withstand Kennedy’s view of narrowly tailored to a compelling interest. Notwithstanding Kennedy’s opinion in Grutter, I like to think that Kennedy will be persuaded by the numerous case studies purported in Grutter and Fisher showing the benefits stemming from diversity in higher education, and that in reality, the Constitution supports Fisher’s race conscious policy. While past court case verdicts delineate a need for a narrowly tailored program, we must not forget the difference between narrow and nothing, as drawing this line could nevertheless be suspect.