Affirmative Action, Reaction, and Inaction: A Positive Political Theory Analysis of Affirmative Action in Higher Education

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I. INTRODUCTION

Traditional analyses of the Supreme Court's decisions on affirmative action focus on how the political ideologies of individual Justices shape the Court's rulings. This is an important part of the story, but it is not all of it; it omits a critical factor influencing the Court's decisions – the Court's conscious strategic consideration of political forces that affect the Court's legitimacy and its long-term policy goals.

Positive Political Theory (PPT) – the idea that political bodies (including the Court) are actually strategic actors, acting rationally and with political awareness to maximize certain ends – provides a useful lens through which to view the Court's decisions. Through that lens, this article analyzes the major Supreme Court cases regarding affirmative action in higher education, from *Defunis v. Odegaard* in 1974 to the ongoing *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* case which may reach the Supreme Court in the next few years. This article demonstrates that the Court is a strategic entity making deliberate and politically expedient decisions which reflect the Court's (and its constituent members') desire to preserve institutional legitimacy and maximize the longevity of Justices' ideological preferences as reflected through policy and law.

II. *DEFUNIS V. ODEGAARD*

The first Supreme Court case to examine affirmative action practices in higher education was *DeFunis v. Odegaard* (1974).[1] This case concerned Marco DeFunis, a white applicant to University of Washington Law School.[2] Mr. DeFunis had initially been rejected from the school, despite documented evidence that minority applicants with lower GPAs and Law School Admission Test (LSAT) scores than those of Mr. DeFunis had been accepted under a special admissions procedure.[3] The school reviewed two

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[1] Carol M. Swain, *Affirmative Action: Legislative History, Judicial Interpretation, Public Consensus*, *in* AMERICA BECOMING: RACIAL TRENDS AND THEIR CONSEQUENCES 318, 327 (Neil J. Smelser et al., eds., 2001) (noting that *DeFunis* was the first of a long line of cases with white male plaintiffs).

[2] DeFunis v. Odegaard, 416 U.S. 312, 314 (1974).

[3] *Id.*

groups separately: a minority group and a non-minority group.[4] The minority students were reviewed under a far less exacting standard than were the other students.[5] The conservative Warren Burger Supreme Court initially granted certiorari to hear the case and heard oral arguments, but then declared the case moot shortly after because a lower court ordered DeFunis' admission to the school and, at that point, he was nearly finished with his studies.[6]

Still, *DeFunis* was an important case in affirmative action jurisprudence. First, there was the dissenting opinion in which Justice Douglass, one of the more liberal Justices at the time, denounced race-based admission policies. He argued that the policy branded minority students as unable to "make it on their individual merit." That, he said, "is a stamp of inferiority that a state is not permitted to place on any lawyers."[7] But *DeFunis* was equally important for what the Court did not do. By declaring the controversy moot, the Court avoided adjudicating a politically divisive issue. In fact, *DeFunis* marked the beginning of a pattern in which the Court avoided making decisions on contentious political issues because of a presumed threat to its institutional authority.[8]

DeFunis is emblematic of that particular strategy which the Court adopted toward deciding issues of affirmative action in higher education. Generally, when faced with a constitutional attack on a law, a court has three options: it can uphold the law, invalidate the law, or refuse to address the issue by denying certiorari or using avoidant strategies including issuing a minimalist or intensely case-specific decision.[9] In this case, the Court employed an avoidant strategy.

Professor Alexander Bickel has argued that judicial avoidance is advantageous for the Court, allowing it to avoid deciding particularly thorny issues as a means to protect its institutional legitimacy from potential backlash or even override.[10] By postponing or avoiding issues, the Court

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[4] *Id.* at 320.

[5] *Id.* at 324.

[6] Swain, *supra* note 1, at 327. This seems like a fragile mootness theory since the case was capable of repetition.

[7] DeFunis, 416 U.S. at 343 (Because Justice Douglas was generally considered the Court's leading liberal theorist, his dissent was initially surprising to some).

[8] Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1, 21 n. 94 (2016) (noting that "the majority opinion dismissed a contentious question of affirmative action on mootness grounds in a short per curium decision, with blistering dissents from Justice Douglas and Brennan accusing the court of seeking to 'avoid' constitutional issues"); *see also* DeFunis, 416 U.S. at 350 (Justice Brennan expressed his frustration at his fellow Justices' avoidance: "[W]e should not transform principles of avoidance of constitutional decisions into devices for sidestepping resolution of difficult cases").

[9] CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 135 (1999) (noting all three methods),

[10] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16–17 (1962).

avoids being thwarted by the legislature and/or president.[11] This is important because "being overturned by Congress is institutionally costly to the courts, as overrides make the courts appear weak, lower their legitimacy, and waste judicial resources."[12] Justices' ability to achieve their policy goals hinges on the Court's legitimacy (as it lacks enforcement power) so its erosion is a serious concern.

At the time of *DeFunis*, public opinion on affirmative action was largely unknown.[13] By avoiding a ruling on affirmative action, the Court allowed for or even spurred public debate that could help to form a consensus on the issue, which would have relieved the Court of serving as a vanguard.[14] As Professor Cass Sunstein writes: "the Supreme Court's apparently odd behavior in the affirmative action context – its meandering course, its refusal to issue rules, its minimalism – might be defended as performing a valuable *catalytic* function . . . [and its] willingness to hear a number of affirmative action cases and its complex, rule-free, highly particularistic opinions have had the salutary consequence of helping to stimulate . . . open discussion."[15]

The benefit of such a strategy is partially in its dilatory effect. By postponing a difficult decision with players who might threaten a Court's legitimacy, the Court allowed for popular opinion to form, be revealed, and be refined in the political arena and expressed through the other two branches of government. In the process, the Court avoided responsibility for imposing an unpopular rule, a strategic "response to the counter-majoritarian difficulty."[16]

Although it has been suggested that considering institutional capacity, political pressure, and social change is outside the scope of a court's proper duty,[17] there is little doubt that high courts are strategic entities that take "expediency into account . . . not in spite of its impact on legitimacy, but precisely because strategic considerations can promote legitimacy."[18]

DeFunis was an exercise in *ex ante* judicial avoidance motivated by

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[11] *See* Kevin T, McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preference*, 66 THE J. OF POL. 1018, 1019 (2004) (stating that because the Court has to rely on the other two branches of government to give judicial rulings full effect, justices must consider the extent to which policymakers will support their decisions).

[12] BARRY WEINGAST & DONALD WITTMAN, THE OXFORD HANDBOOK OF POLITICAL ECONOMY 208 (2006).

[13] SUNSTEIN, *supra* note 9, at 117, 120 (noting that "the citizenry's ambivalence about–or hostility toward affirmative action ha[d] been expressed mostly in private and not in public . . . [so,] [p]erhaps a firm judicial resolution would [have been] poorly received").

[14] *Id.* at 118, 122, 135.

[15] SUNSTEIN, *supra* note 9, at 117–18.

[16] *See* Delaney, *supra* note 8, at 10 (noting also that this has led to a "robust literature and recommendations for dialogic practices in courts around the world").

[17] *Id.* at 8.

[18] *Id. See also* Vincent Blasi, *The Rule of Strategic Reasoning in Constitutional Interpretation: In Defense of the Pathological Perspective*, 1986 DUKE L.J. 696, 697 (1986) (asserting that functional effectiveness is based on a series of strategic calculations).

strategic, even game-theory thinking.[19] By declaring the controversy moot, the Court avoided adjudication of a recent and politically controversial issue – one that had not yet had the chance to undergo deliberation. Had the Court tried to rein in affirmative action in the face of a Democratic House and Senate, its decision could have been overturned by legislative action, and the Court's legitimacy thereby damaged. The circumstances surrounding the case: the issue's recency and its concomitant lack of political deliberation presented a strong argument for avoiding adjudication. On the one hand, upholding affirmative action would legitimate a very new law, with the possibility of stymying political deliberation. But, on the other, declaring affirmative action unconstitutional could also have thrust the Court into a polarized debate, prompting legislative backlash and weakening the Court. Thus, avoiding making a decision altogether is in the Court's interest.

III. *REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE*

Two years later, the Court decided *Regents of the University of California v. Bakke*. Again, the conservative Burger Court was faced with a plaintiff challenging an affirmative action policy in a graduate school.[20] Allan Bakke, a white male, had applied twice to the University of California Medical School at Davis and was rejected both times, despite the fact that his GPA and Medical College Admission Test (MCAT) scores were substantially higher than those of most of the minority students who were accepted.[21] UC Davis admitted 100 students every year to the medical school and reserved 16 of those 100 spots exclusively for minority students.[22] As in *DeFunis*, there were essentially two application processes – one for minority students and one for white students. One committee evaluated white applicants with a minimum 2.5 undergraduate GPA, and another committee considered all minority candidates, regardless of their GPA.[23] Bakke argued that the policy worked effectively as a de facto quota system that discriminated against white applicants.[24] He further argued that the discrimination was especially insidious because while minority applicants were permitted to apply for all 100 seats in the entering class, white prospective students were actually only applying for 84 seats, and thus there was a clear way to quantitively model the influence of race on admissions and the penalty white students incurred because of their race.[25]

The Court found Bakke's arguments persuasive. It decided that UC

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[19] While the Court did initially grant certiorari, the Court was quick to take advantage of a lower court decision to justify calling it moot.

[20] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 269 (1978).

[21] *Id.* at 276–77.

[22] *Id.* at 278–79.

[23] *Id.* at 272–75.

[24] *Id.* at 288.

[25] *Id.* at 289.

Davis had to admit Bakke because the use of racial quotas violated the Equal Protection Clause of the 14th Amendment.[26] The decision, authored by Justice Powell, was narrow and uninstructive. While the Court did order to school to admit Bakke, it did not invalidate affirmative action in higher education more generally. Instead, it ruled that the State could still have a compelling interest to use race in admissions, but with no majority opinion, it was remarkably unclear in other areas.[27] For instance, *Bakke* left unsettled the significance of using a "numerical set-aside", and the relevance of the fact that the program was installed by the University rather than the legislature.[28] The Court issued six separate opinions with two different blocs of four justices joining different parts of Powell's opinion. The "unusual configuration of judicial opinions" in *Bakke* made the Court's holding recondite and for years after courts struggled to interpret the decision.[29] Yet in doing so, the Court appeased groups who supported Bakke as well as groups who opposed him by leaving affirmative action in place more generally.[30] Many saw *Bakke* as "mark[ing] out a position that served to heal wounds and defuse emotion,"[31] in essence a "Solomonic compromise."[32]

The *Bakke* decision was also an intensely strategic one. It closely mirrored public opinion towards affirmative action at the time: "Like much of the citizenry itself, Powell rejects overt racial quotas, accepts a policy specifically designed to assist racial minorities, and has difficulty explaining his position completely."[33] While perhaps unsatisfying, a narrow judicial ruling like *Bakke* allowed for the citizenry to pursue an issue effectively through political channels and reconfigure it if necessary.[34] Furthermore, as some have argued, the Court in *Bakke* likely adjusted its decision to match public opinion so that it could "assert control over the policy process . . . in order to ensure that judicially preferred positions are not overturned."[35]

Professor Paul Mishkin, who served as special counsel to the school in *Bakke*, argues that had the Court ruled too decisively by either rejecting the

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[26] Bakke, 438 U.S. at 230.

[27] Paul J. Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907, 913 (1983).

[28] *Id.*

[29] Keith J. Bybee, *The Political Significance of Legal Ambiguity: The Case of Affirmative Action*, 34 LAW & SOC'Y REV. 263, 266 (2000). This configuration remains controversial.

[30] Mishkin, *supra* note 27, at 918.

[31] *Id.*

[32] Law professors who were quoted in the press as praising the Court's result include Alan Dershowitz ("an act of judicial statesmanship, a brilliant compromise"), Paul Freund ("a good thing"), A.E. Dick Howard ("a Solomonic compromise"), Benno Schmidt ("just about right"), and Charles Alan Wright ("a very civilized ruling"). *See* Jarrold K. Footlick, et al., *The Landmark Bakke Ruling*, NEWSWEEK (Jul. 10, 1978) at 19, 30; *see also Bakke Wins, Quotas Lose: But the Divided Supreme Court Endorses Affirmative Action Based on Race*, TIME (Jul. 10, 1978) at 8.

[33] Bybee, *supra* note 29, at 272.

[34] Sunstein, *supra* note 9, at 124.

[35] Bybee, *supra* note 29, at 274.

claims advanced by Bakke or vice-versa, it could have caused significant resentment towards the judiciary or even worse, "a sense of betrayal" which, in turn, could well have "begotten a legislative backlash."[36] The backlash concern recognizes the Court's awareness that "there is legislative power to undo affirmative action programs, even after the Court has upheld such programs as valid."[37]

The same fear of legislative override of the Court's decision animated another affirmative action decision of the time.[38] In *United Steelworkers v. Weber* (decided the year after *Bakke*), the Court upheld an affirmative action-based training program to increase the number of a company's black craft workers.[39] Professor William Eskridge explains that the Court wanted to strike down affirmative action plans but was deterred by a Congress that would have overridden such action.[40] As Eskridge argues, "a number of other Burger Court decisions in the late 1970s relied on the Court's perception of legislative preferences to reach results that appeared more liberal than the Court's own preferences."[41] As in *Bakke*, the Court engaged in strategic analysis, anticipating the responses of Congress and the President. This suggests a "broader observation": the Burger Court generally produced results in cases that could be overridden that were more liberal than the results it reached in cases that could not be overridden.[42] And, as McNollGast explains, the conservative Court might have expanded civil rights because "by taking modest steps to expand rights, the Court forestalled an even larger change in the scope of the law by Congress."[43]

A decision-making model illustrates the transformation of civil rights by the Court in the 1970s. Policy setting at the time resembled Figure 1, where "the set of policy alternatives represents the degree of federal support for civil rights, J represents the ideal policy of the conservative Supreme Court majority, A represents the policy enacted by the 1964 [Civil Rights] Act, f is the ideal policy of the filibuster pivot (a conservative Republican and [the last Senator who must be brought on board to end debate]), and M is the median Senator's ideal policy . . . f prefers all policies between A and

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[36] *Id.*; *see also* Kenneth L. Karst & Harold W. Horowitz, *The Bakke Opinion and Equal Protection Doctrine*, 14 HARV. C.R.-C.L. L. REV. 7, 27–29 (1979) (noting that it is also true that, even if such a backlash ultimately failed, the pitched battle precipitated thereby could have had disastrous effects); Mishkin, *supra* note 27, at 929.

[37] Mishkin, *supra* note 27, at 929–30.

[38] William N. Eskridge, Jr., *Reneging on History–Playing the Court/Congress/President Civil Rights Game*, 79 CALIF. L. REV. 613, 651 (1991).

[39] United Steelworkers v. Weber, 443 U.S. 193, 194 (1979).

[40] *See* Eskridge, *supra* note 38, at 652.

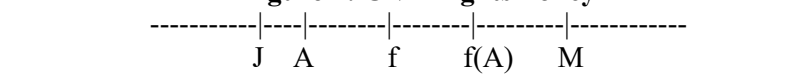
[41] *Id.* at 651.

[42] *Id.*

[43] Mat McCubbins, et al., *The Political Economy of Law: Decision-Making by Judicial, Legislative, Executive and Administrative Agencies*, STAN. INST. FOR ECON. POL. RES. (Discussion Paper) 113.

f(A)."[44] It is important to note that the filibuster pivot is the critical member of the Senate without whose support legislation will not pass, and is equally situated between A and f(A).

Figure 1: Civil Rights Policy



The reason the liberal Congress would pass new legislation, moving policy to the maximum point in the Senate (from A to f(A)) is because that is the point closest to M before f would filibuster and defeat the policy – still considerably more liberal than the 1964 Act, the ideal policy of the filibuster pivot, and the ideal policy of the Court.[45] This is what the Congress would have done without preemption by the judiciary.

In that setting, the Court knows several things: (1) it can be overruled by a more liberal legislature if it rules at its ideal point because it is more conservative than the status quo and thus further from the legislature's filibuster pivot point; (2) if left up to the legislature, the status quo would become more liberal because there are many more liberal positions the pivot point prefers to the status quo; (3) the Court should act strategically and try to preserve as much of the status quo as possible; and (4) by acting first and moving policy from A to the filibuster pivot (f), it can prevent further movement by Congress toward M because such a move would make the filibuster pivot worse off, who would then block the movement.

The model shows why a conservative Court might rule in a more liberal fashion in order to prevent a response by the legislature overruling the Court, damaging its legitimacy, and driving policy further from the Court's ideal point.[46]

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[44] *Id.* at 113, 114–15. ("Senate rules allow a minority of senators to defeat a bill by 'filibustering,' continuing the debate to prevent a measure from coming up for a vote. The Senate can end a filibuster only by a successful motion to end debate (cloture), which requires a super-majority of 60 positive votes.").

[45] *Id.* at 114–15. (The model also "shows the strategic role of the courts in the United States policymaking process. Courts are not the end of the process of policymaking and implementation; they interact with Congress and the president. This forces them to be strategic; failing to do so implies less influence and hence less force of their decisions."). McNollGast, *The Political Economy of Law*, *in* 2 THE POLITICAL ECONOMY OF LAW: DECISION MAKING BY JUDICIAL, LEGISLATIVE, EXECUTIVE AND ADMINISTRATIVE AGENCIES 1651, 1720 (2007) ("The political logic of PPT models implies that judicial decisions cannot solely be based on normative principles. Following normative principles alone requires that the courts ignore the political situation, implying that political officials will sometimes overturn their decisions. This political reality forces the courts to face a choice: either act strategically, and hence compromise their normative principles, or act according to principle but then have Congress overturn both the court's decision and the normative logic underlying it."). *Id.*

[46] Of course, this model is somewhat contingent on the Court correctly diagnosing each of these points, which is often not the case. *See, e.g.*, Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and its Interpretation*, 151 U. PA. L. REV. 1417, 1520–25 (2003) (arguing that *Weber* was incorrectly decided

In *Bakke*, the Court issued a relatively minimalist ruling, ordering Bakke's acceptance but leaving intact affirmative action more generally. This might have been a more liberal position than was the conservative Court's ideal policy point. But given the extent of political disagreement over the issue and the more liberal legislature, the Court's strategic restraint makes sense. A sweeping decision invalidating affirmative action would be vulnerable to legislative override, and one in favor of the UC Davis' system would contravene the Court's ideal policy position. Either one might invite reproach by the public and a concomitant erosion of the Court's institutional legitimacy. In fact, Justice Powell himself noted that a sweeping decision would have been politically disastrous, though he couched the reasons in other terms.[47]

IV. POST-*BAKKE* / PRE-*FISHER*

A series of Supreme Court decisions during the 1980s did little to change the standards of affirmative action until *Wards Cove Packing Co. v. Atonio* (1989), in which the Court required minority workers who claimed disparate-impact hiring violations to prove that a particular employment practice created the impact.[48] The 1989 Congress (controlled by Democrats) reacted swiftly to this decision, passing a civil rights bill in 1990 that overturned *Wards Cove*.[49] President George H.W. Bush, who opposed affirmative action, vetoed the legislation. Congress ultimately sustained the veto but passed a slightly different version of the Act in 1991 that was not vetoed and still overturned *Wards Cove*.[50] This case exemplifies what the *Bakke* Court was worried about – a Congress with the power and ideological makeup to overturn the Court's decision will do so, making the Court look weak in the process. Moreover, the ultimate policy passed was further from the conservative 1991 Court's ideal point than was the previous status quo.[51] Had the Court ruled less stridently, it likely could have lost less ground.

Following *Wards Cove*, the war over affirmative action was waged on two fronts: the courts and state ballot referendums.[52] In 1996, the Center for

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by the Court, which made a tactical error. The Court seemed to believe that Hubert Humphrey was the pivotal legislator, when actually Everett Dirksen (who had a different ideal policy point) was).

[47] Bakke, 438 U.S. at 299 (as Powell puts it, discussing "the mutability of a constitutional principles, based upon shifting political and social judgments, undermines the chances for consistent application of the Constitution from one generation to the next, a critical feature of its coherent interpretation.").

[48] Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (Up to that point, courts were still bound by the ambiguous *Bakke* standard).

[49] *See* Swain, *supra* note 1, at 324 (noting that the legislature also overruled the Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), where the Court had invalidated a black woman's attempt to seek relief from racial harassment under the 1866 Civil Rights Act).

[50] *Id.*

[51] *Id.* at 324.

[52] State ballot referendums were passed in eight states and challenged in the courts, but the courts overwhelmingly permitted the referendums.

Individual Rights (CIR), a public policy law firm that has led many of the affirmative action fights, and the Institute of Justice recruited white students to file reverse discrimination suits against schools.[53] The Court of Appeals for the Fifth Circuit ruled in one of these cases, *Hopwood v. Texas*, that, despite *Bakke*, race could not be used even as a "plus" factor in university admissions.[54] The Court of Appeals also concluded that part of Justice Powell's majority opinion – that striving for a diverse class of students was a compelling government interest – was not binding on lower courts.[55]

The Court of Appeals' effective rejection of Justice Powell's decision led some to speculate that the Supreme Court would agree to hear the University of Texas' appeal.[56] Yet, though declining to endorse *Hopwood*'s rationale, the Court denied the certiorari petition, and *Hopwood* remained binding in the Fifth Circuit.[57] The Court declined because, as Justice Ginsberg wrote, "we must await a final judgment on a program genuinely in controversy before addressing the important question raised in this petition."[58] In other words, the Court, perhaps wary of its decision being overturned, wanted the political process to play out more before it ruled again on affirmative action.[59] Interestingly, the Court was more tolerant of a temporary subverting of its legitimacy by an inferior court – perhaps because it knew it could fix that of its own power – than a subversion from another branch that had the inherent power to do so.

V. *GRUTTER/GRATZ V. BOLLINGER*

Although not ruled on by the Supreme Court until the early 2000s,[60] in 1995 and 1996, two lawsuits surfaced challenging the constitutionality of affirmative action programs at the University of Michigan and the University of Michigan Law School. Jennifer Gratz, who, in 1995 was denied admission to the University of Michigan's undergraduate program, and Barbara Grutter who, a year later, was rejected from the Law School, were the named plaintiffs.[61] Both plaintiffs were white and argued that they had the academic credentials to be admitted to the schools, but that they had

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[53] Swain, *supra* note 1, at 328.

[54] Hopwood v. Texas, 78 F.3d 943 (5th Cir. 1996).

[55] *Id.* at 944.

[56] Leslie Garfield, *Back to* Bakke*: Defining the Strict Scrutiny Test for Affirmative Action Policies Aimed at Achieving Diversity in the Classroom*, 83 NEB. L. REV. 631, 648 (2005).

[57] *Id.*

[58] Linda Greenhouse, *Justices Decline Affirmative-Action Case*, N.Y. TIMES (Jul. 2, 1996), https://www.nytimes.com/1996/07/02/us/Justices-decline-affirmative-action-case.html.

[59] Here it is a liberal justice who would presumably want to bury *Hopwood*, which might show how the overriding concern over the Court's power and legitimacy crosses ideological lines.

[60] There, however, were many decisions in the interim regarding affirmative action in other contexts.

[61] Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003) (Both were sponsored by CIR).

been discriminated against because of their race. The University argued that its admission criteria were constitutional, and that its policies fostered a racially and ethnically diverse student body.[62]

A. Grutter

Barbara Grutter filed a suit alleging that respondent, the University of Michigan Law School, had discriminated against her on the basis of race in violation of the Fourteenth Amendment.[63] She argued that she was improperly denied admission because the school used race as a "predominant" factor which advantaged minority applicants in getting accepted to the school, and that respondent had no compelling interest to justify that use of race.[64]

Grutter made its way up the courts. The United States District Court for the Eastern District of Michigan ruled that the law school's use of race as a factor in its admission practice was unlawful.[65] The Sixth Circuit Court, sitting en banc, then reversed the District Court's ruling.[66] It held that Justice Powell's opinion in *Bakke* was binding (contrary to *Hopwood*) and that diversity constituted a compelling governmental interest.[67] Moreover, the law school's use of race was narrowly tailored enough to justify its use of race in admissions.[68]

The Supreme Court affirmed the ruling issued by the Court of Appeals.[69] Justice O'Connor authored the judgment of the Court and addressed the two questions presented before the Court: whether racial diversity in a school's student body was a compelling state interest and whether the use of race by the school was narrowly tailored.[70] The Court held that the law school's interest in obtaining a "critical mass" of minority students constituted a compelling interest and a "tailored use", but that there needed to be an expiration date on the use of affirmative action.[71] In sum, the opinion largely upheld Justice Powell's decision in *Bakke*.

B. Gratz

Like *Grutter*, *Gratz* was first heard in District Court and then appealed to the Sixth Circuit Court of Appeals before it was granted certiorari by the

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[62] Grutter, 539 U.S. at 306; Gratz, 539 U.S. at 244.
[63] Grutter, 539 U.S. at 317.
[64] *Id.* at 306.
[65] *Id.*
[66] Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002).
[67] *Id.* at 738.
[68] *Id.* at 735.
[69] Grutter, 539 U.S. at 306.
[70] *Id.*
[71] *Id.* at 322, 335 (Justice O'Connor wrote: "we expect that 25 years from now, the use of racial preferences will no longer be necessary").

Supreme Court.[72] The Supreme Court, in a decision authored by Chief Justice Rehnquist, ruled that the University of Michigan undergraduate affirmative action program was unlawful.[73] The undergraduate school (unlike the law school) used a point system with "predetermined point allocations" that awarded 20 points towards admission to underrepresented minorities (a perfect SAT score was only worth 12 points).[74] It was ruled unlawful because the program became a de facto quota system that "ensure[d] that the diversity contributions of applicants [could not] be individually assessed."[75] Because the policy's lack of individual consideration resulted in the admission of nearly every applicant of "underrepresented minority" status, the Court held that it was not sufficiently narrowly tailored.[76]

Even though the controversies were similar, the specific affirmative action policies in question were different. The Court's ruling, echoing the opinions of Congress, the states, big business, academics, newspapers, and even the Bush administration, reflected this difference.[77] In *Grutter*, affirmative action was a narrowly tailored "plus factor" that did not involve quotas, and was constitutionally permitted by *Bakke* and well-received by elites.[78] The policy in *Gratz*, on the other hand, involved de facto quotas, and was neither narrowly tailored nor well-received.[79]

By the time of *Grutter* and *Gratz*, support for affirmative action was "stronger than ever."[80] Thus, the Court had little ability to embrace the same anti-affirmative action arguments that it had previously rejected in *Bakke*. As Professor Neal Devins argues, "rather than join forces with the politically isolated opponents of affirmative action, the Court issued a ruling that conformed to social and political forces."[81] *Grutter* was unsurprising because it reflected a Court cognizant of outside forces (particularly a legislature apt to overturn a decision from the Court with which it did not agree) and self-conscious about its institutional legitimacy.[82]

In fact, Congress had very recently and publicly backed affirmative

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[72] Gratz, 539 U.S. at 244.

[73] *Id.*

[74] *Id.* at 279.

[75] *Id.*

[76] *Id.* at 270; *see also id.* at 296 (Although the Court was provided minimal information detailing the functions of the Admissions Review Committee, it nonetheless deemed it to be the only source of individualized consideration).

[77] Neal Devins, *Explaining* Grutter v. Bollinger, 152 U. PA. L. REV. 347, 347 n.2 (2003) ("While the Bush Justice Department argued that both University of Michigan plans were unconstitutional, the President signaled to the Court that the White House would support a decision approving some form of race-conscious university admissions.").

[78] *Id.* at 348.

[79] *Id.*

[80] *Id.* at 365.

[81] *Id.* at 347.

[82] *Id.* at 355.

action.[83] For example, shortly after the 1994 Republican takeover of Congress, Republican leaders attempted to move affirmative action off the legislative schedule.[84] Then, motivated both by a desire "to craft a positive message for minorities" and a corresponding fear that a fight over affirmative action would delay their pursuit of the "Contract with America" reforms, Republicans in the House and Senate "voted down proposals to roll back federal affirmative action."[85]

Moreover, there were a number of other related social/political forces that fed directly into the Court. Many interest groups and lawmakers filed amicus briefs supporting affirmative action in higher education.[86] Additional factors included: "the ouster of Senate majority leader Trent Lott for making racially insensitive comments, and the difficulties of implementing a Court ruling barring or severely limiting race-conscious admission."[87] Corporate leaders, labor leaders, and educational institutions also spoke publicly in favor of the University of Michigan.[88] Perhaps even more influential was President George W. Bush.[89] The Bush Justice Department submitted a brief that "did not even ask the Justices to overturn the *Bakke* decision, . . . [instead] allowing race to be used as a plus factor."[90]

Also in the mind of the Court may well have been that a decision denouncing affirmative action would have fueled Senate Democrat efforts to block President Bush's judicial nominees.[91] There was widespread support for affirmative action, so a decision that repudiated such programs might have caused Senate Democrats to override the Court and block confirmations.[92] In sum, it was strategic to avoid ruling too decisively in order to avoid backlash.[93]

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[83] Devins, *supra* note 77, at 364.

[84] *Id.*

[85] *Id.* (The "Contract with America" is a document that was released by the United States Republican Party detailing actions the Republicans would take if they became the majority party in the United States House of Representatives for the first time in 40 years).

[86] *Id.* at 367 (noting that upwards of 100 lawmakers individually expressed support for the university's race-conscious admissions process as detailed in *Grutter*).

[87] *Id.* at 366.

[88] *Id.* at 368.

[89] *Id.* at 370.

[90] Linda Greenhouse, *BUSH AND AFFIRMATIVE ACTION: NEWS ANALYSIS, Muted Call in Race Case*, N.Y. TIMES (Jan. 17, 2003) at A20 (quoting an amicus curiae brief submitted to the Supreme Court of the United States, by the university administration, for the case of *Gratz v. Bollinger*).

[91] Devins, *supra* note 77, at 374–75. ("When Democrats controlled the Senate Judiciary Committee in 2001 and 2002, a handful of Bush nominees were either rejected or put on hold because of their views on civil and abortion rights. Following the 2002 midterm elections (when Republicans regained control of the committee), Senate Democrats . . . filibustered a number of Bush federal court of appeals nominees.").

[92] *Id.* at 375.

[93] Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 637 (2003) (describing O'Connor's and Kennedy's reluctance to hear cases

This is especially true because there was evidence that colleges might not have even conformed to the Court's decision if it outlawed affirmative action programs. The Court was likely aware of a brief filed by the University of Texas Law School in a 1996 preferential admissions case that warned: "If affirmative action is ended, inevitable political, economic and legal forces will pressure the great public universities to find ways to maintain minority enrollments."[94]

Grutter and *Gratz*, it has been argued, are "the work of a Court that maximizes its power by paying attention to the social and political forces that surround it."[95] The Rehnquist Court's seemingly unlikely support of civil rights – including racial diversity – appears to have been driven by conscious judicial strategy.[96] The majority opinion in *Grutter* cities a number of amicus filings from various political actors and briefs by the Bush administration, educational associations, colleges and law schools, and big business.[97] The Court understood the institutional cost it might have incurred in opposing affirmative action.[98] Thus, to some degree, the Court had to act in ways that would garner public acceptance, otherwise it would have invited political backlash. A court that is ignored, immediately overturned, or actively repudiated loses institutional legitimacy and risks a motivated legislature moving the policy even further away from the Court's ideal point.

The same forces that applied to *Grutter* applied to *Gratz:*

> By placing limits on how universities take race into account while improving the Law School's plan to treat race as a plus factor in "individualized" admissions decisions, the Court recognized that support for affirmative action is qualified . . . the Court's mixed decision allowed both the Bush administration and civil rights interests to rally around it. Finally, by disallowing one of the plans, the Court was able to portray itself as an independent check on government without

concerning social issues, and noting that O'Connor and Kennedy often vote to deny certiorari in cases raising divisive social issues, due to the expected "reputational costs" for themselves and the Court).

[94] Jeffrey Rosen, *How I Learned to Love Quotas*, N.Y. TIMES MAG. (June 1, 2003), https://www.nytimes.com/2003/06/22/magazine/l-how-i-learned-to-love-quotas-138657.html (quoting an amicus curiae brief, by three University of Texas professors, submitted to the Supreme Court of the United States).

[95] Devins, *supra* note 77, at 348.

[96] *Id.* at 348–49 ("This deception is directly at odds with recent depictions of the Rehnquist Court. By settling the 2000 presidential election and invalidating thirty-one federal laws between 1995 and 2002, the Court has been characterized as 'right-wing', 'conservative', 'arrogant, self-aggrandizing, and unduly activist.' *Grutter* and other progressive 2002 term decisions, such as *Lawrence v. Texas*, were therefore dubbed as 'surprising' and 'counterintuitive.'

[97] Devins, *supra* note 77, at 376.

[98] *Id.* at 373.

the fear of a majoritarian blacklash.[99]

Tracing public opinion, the Court rejected "nonindividualized [and] mechanical" policies.**[100]** While approving of general measures to increase diversity in higher education, majoritarian forces disapproved of quota-like systems and supported placing limits on affirmative action.**[101]** The Court therefore had reason not to give universities free rein to institute if, how, and when race could be taken into account in the admission process. "By upholding the law school's 'individualized' consideration of race while rejecting the college's across-the-board plan, 'the court comes across as temperate, reflecting the complexity of opinion in the public.'"[102]

Grutter and *Gratz* also reinforce the notion that the identity of the Court is often in the hands of the pivot Justices, the so-called swing Justices.[103] While the Rehnquist Court was notable for its uncharacteristically liberal rulings on civil rights issues (as was the Burger Court), the Court's decisions were actually shaped mostly by Sandra Day O'Connor and Anthony Kennedy.[104] Professor Devins writes that "some Justices care passionately about an issue and, thus, are unlikely to be swayed by majoritarian forces. But other Justices (often the swing Justices who cast the decisive votes) have relatively weak preferences."[105] These Justices, sensitive to social and political forces, are apt to consider the potential fallout of a decision.**[106]** For example, Justice O'Connor, according to her brother, "doesn't like to be part of polarizing decision . . . she takes it hard and feels it hard."**[107]** Justice Kennedy is known to be very cognizant of how any decision will impact the Court's reputation.**[108]** In other words, far from being unconstrained, the

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[99] *Id.* at 348.

[100] Gratz, 539 U.S. at 280 (O'Connor, J., concurring).

[101] Charles Lane, Polls: *Americans Say Court is 'About Right'*, WASH. POST, July 7, 2003, at A15; *see also* Gary Langer, *Assistance, But Not Preference Poll: Most Share Bush's View on Affirmative Action Analysis* ("likewise, most Americans oppose preferences while supporting 'affirmative action.'").

[102] Devins, *supra* note 77, at 381; David Von Drehle, *Court Mirrors Public Opinion*, WASH. POST, (Jun. 24. 2003), https://www.washingtonpost.com/archive/politics/2003/06/24/court-mirrors-public-opinion/3994c2f3-5d31-4a67-b804-421c628e1595/.

[103] Devins, *supra* note 77, at 349.

[104] William Mishler & Reginald Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective*, 58 J. POL. SCI. 169, 197 (1996) (finding that moderate Supreme Court Justices, who tend to be swing votes, respond most sensitively to changing public opinion.)

[105] Devins, *supra* note 77, at 351 n.18.

[106] Mishler & Sheehan, *supra* note 104, at 179.

[107] Evan Thomas & Stuart Taylor, Jr., *She Helped America Seek a Middle Ground on the Thorny Subject of Race*, at A48, NEWSWEEK (Jul. 7, 2003) (quoting Alan Day).

[108] Comments made by Justice Kennedy in a 1992 interview support this claim. Explaining why it is "'dangerous"' for a Supreme Court Justice to think "'himself a philosopher,"' Kennedy noted: "'History has its own way of unfolding, tripping you up or vindicating you. You're required to look into a crystal ball, but you don't see much there.'" Jerry Carter, *Crossing the Rubicon*, CAL. L. REV., Oct. 1992, at 39, 104.

Court was responding to social and political forces in making its decisions.

Ultimately, the Rehnquist Court appears to have made two strategic decisions. In *Grutter*, the Court upheld affirmative action, a policy that was supported by powerful political actors and by majoritarian forces more generally. In *Gratz*, the Court rejected a much less popular aspect of that same policy (i.e., the quota-like system existent at the University of Michigan). In this way, the Court avoided its legitimacy being degraded if the pro-affirmative action legislature were to overturn the Court's decision or if other universities were to disobey the Court's rulings. Additionally, it avoided political consequences that would come with such a ruling, such as judicial nominations being blocked. Finally, it preserved the status quo (or even moved the policy toward the Court's ideal point) without risking the legislature passing a new policy that would be further from the Court's ideal point than was the status quo.

V. *FISHER V. UNIVERSITY OF TEXAS*

The next critical affirmative action case to be decided by the Court was *Fisher v. University of Texas*. In 2008, petitioner Abigail Fisher was rejected from the University of Texas at Austin.[109] The University of Texas uses a "two-pronged" admissions system.[110] The majority of undergraduates are admitted via a race-neutral practice in which the top 10% of graduating Texas high school students are accepted into the University.[111] Fisher was just outside the top 10%.[112] Thus, she applied with the regular pool of students.[113] With respect to this pool (the students outside the top 10% of their class) the University openly employed race-conscious admissions.[114] Fisher sued the University, alleging an Equal Protection Clause violation.[115]

The case made its way up to the Supreme Court in 2012 from the Court of Appeals for the Fifth Circuit.[116] The Supreme Court decided 7-1 to vacate and remand the Court of Appeals' ruling because it failed to apply strict scrutiny in its decision affirming the admission policy.[117] On remand, the Court of Appeals ruled in favor of the University.[118] The Supreme Court again agreed to hear the case in 2015 (*Fisher II*) to decide whether the Court

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[109] Fisher v. Univ. of Tex., 570 U.S. 297, 305 (2013).

[110] *Id.* at 304.

[111] *Id.* (explaining that, in the year Fisher applied to the University of Texas, 81% of the available seats for the entering class were filled by students that graduated at the top ten percent of their high school classes).

[112] JOINT APPENDIX at 65a–66a, Fisher v. Univ. of Tex., 570 U.S. 297 (2013) (No. 11-345) (stating that Abigail Fisher graduated high school in the top 12% of her class with a 3.59 grade point average).

[113] *Id.*

[114] *Fisher*, 570 U.S. at 304.

[115] *Id.* at 297.

[116] *Id.*

[117] *Id.* at 314.

[118] Fisher v. Univ. of Tex., 771 F.3d 274 (5th Cir. 2014) (en banc).

of Appeals ruling that the University's use of racial preferences passed strict scrutiny could be sustained.[119]

The Court affirmed the Court of Appeals' decision.[120] First, it held that the University's rationale for employing race-based affirmative action was "sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them."[121] Second, the Court ruled that since *Hopwood*, race-neutral policies were *insufficient* to achieve the kind of holistic diversity that the University wanted to procure.[122] Third, it found that "consideration of race has had a meaningful, if still limited, effect on the diversity of the University's freshman class," and that such a limited effect "should be a hallmark of narrow tailoring, not evidence of unconstitutionality."[123] Finally, as Justice Anthony Kennedy explained in the majority opinion, race generally can be considered as long as it is a "factor of a factor of a factor."[124]

Applying a positive political theory analysis to *Fisher II* is challenging because of the decision's recency and its dearth of subsequent analysis. Still, there are some critical strategic considerations that were clearly in play for the Court. First, President Obama's expressed relatively unequivocal support for affirmative action in higher education.[125] Although Congress was Republican-controlled, with President Obama at the helm and the risk of non-compliance by colleges that had already surfaced in *Grutter*, the Court's safest position was to uphold the University's policy. Second, the Court was adding legitimacy to its prior decisions. The Court's decision in *Bakke* had been ignored in *Hopwood*, then the Court overruled *Hopwood* in *Grutter*. *Fisher II* presented another challenge from the same circuit that had issued *Hopwood*. The Court likely did not want to appear deferential to the prior judgment of a disobedient lower court.

VI. *STUDENTS FOR FAIR ADMISSIONS, INC. V. PRESIDENT & FELLOWS OF HARVARD COLLEGE*

Students for Fair Admissions, Inc. v. President & Fellows of Harvard

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[119] Fisher v. Univ. of Tex., No. 14-981, (U.S. June 23, 2016).

[120] *Id.* at 2215 (noting that the Court was comprised of seven Justices in *Fisher II* after Scalia's passing and Kagan's recusal).

[121] *Id.* at 2203.

[122] *Id.* at 2213.

[123] *Id.* at 2204.

[124] *Id.* at 2207 (the Court also ruled that Fisher failed "to offer any meaningful way in which the University could have improved upon . . ." the previously instituted race-neutral system utilized to achieve its diversity goals. The majority warned that the University has an ongoing obligation to use all available data "to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects . . . of the affirmative-action measures it deems necessary.").

[125] Nick Anderson & Moriah Balingit, *Trump Administration Moves to Rescind Obama-Era Guidance on Race in Admissions*, WASH. POST. (Jul. 3, 2018) at A1 (explaining that between 2011 and 2016, the Obama Department of Education issued seven notices advising colleges on how they may promote racial diversity on college campuses).

College (*SFFA v. Harvard*), recently decided in the United States District Court for the District of Massachusetts and now pending appeal to the United States Court of Appeal for the First Circuit, flips the strategy used in past challenges to race-conscious admissions.[126] Instead of arguing that Harvard University disadvantages white students, the plaintiffs claim that the school is admitting minority groups *and* white students over another minority group – Asian Americans.[127] Also unlike previous cases, there are thousands of plaintiffs who have outstanding academic credentials.[128] The lawsuit was orchestrated by Edward Blum, a self-described "legal entrepreneur" and former stockbroker who was also behind *Fisher* and *Hopwood*, on behalf of Students for Fair Admissions (SFFA).[129] SFFA sued Harvard for discriminating against Asian Americans and favoring other applicants, arguing that "because Harvard is an institution that accepts federal funds," it "violates Title VI when it engages in racial or ethnic discrimination [prohibited by] the Equal Protection Clause."[130]

The plaintiff group's legal filings show that Harvard uses a "holistic" admissions process in which applicants are rated on a scale of one to six on: their academic record, their extracurricular activities, their athletic ability and certain "personal" criteria (a subjective factor that admissions officers receive no guidance about, and has been argued is a possible pretext for anti-Asian discrimination.)[131] According to SFFA, Asian Americans consistently had higher scores for extracurriculars and academics than did other racial and ethnic groups, as well as higher "personal" scores (traits such as "'positive personality,' likability, courage, kindness, and 'being widely respected'") from alumni interviewers.[132] However, Asian students received significantly lower ratings on those same "personal" criteria by the admissions officers.[133] Specifically, while approximately one in five Asian

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[126] Camille G. Caldera, *Students for Fair Admissions Files Notice of Appeal in Harvard Admissions* Case, THE HARVARD CRIMSON (Oct. 5, 2019), https://www.thecrimson.com/article/2019/10/5/sffa-appeals-admissions-decision/.

[127] Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 308 F.R.D. 39, 43 (D. Mass. 2015) (No. 14-cv-14176).

[128] Anemona Hartocollis and Stephanie Saul, *Affirmative Action Battle Has a New Focus: Asian-Americans*, N.Y. TIMES (Aug. 2, 2018) https://www.nytimes.com/2017/08/02/us/affirmative-action-battle-has-a-new-focus-asian-americans.html?smprod=nytcore-ipad&smid=nytcore-ipad-share.

[129] *Id.*; *see also* Students for Fair Admissions, Inc. v. Univ. of N.C., 319 F.R.D. 490 (M.D.N.C. 2017).

[130] *See* Complaint at 94, *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 308 F.R.D. 39 (D. Mass. 2015) (No. 14-cv-14176) [hereinafter SFFA Complaint].

[131] David Lat, *Asian Americans v. Harvard: A Closer Look*, ABOVE THE LAW (Nov. 21, 2018), https://abovethelaw.com/2018/11/asian-americans-v-harvard-a-closer-look/.

[132] Anemona Hartocollis, *Harvard Rated Asian-American Applicants Lower on Personality Traits, Suit Says,* N.Y. TIMES (June 15, 2018), https://www.nytimes.com/2018/06/15/us/harvard-asian-enrollment-applicants.html.

[133] *Id.* ("[A]lumni interviewers give Asian-Americans personal ratings comparable to those of whites, but the admissions office gives them the worst scores of any racial group, often without even meeting them.").

Americans in the top 10% of academic performers received a personal rating of 2, white, black, and Hispanic applicants with significantly lower grades and SAT scores received much higher personal ratings.[134]

The effect of the personal criteria disparity is that Asian applicants would need to perform much better in the other categories than would all other groups in order to compensate for their lower personal ratings. The lawsuit says that Harvard contrives to hold the proportions of each race in its classes roughly constant and manipulates the vague personal admissions rating to "downgrade" applications from Asian Americans.[135] One study cited by the plaintiffs showed that "Asian applicants needed to score–on the 1600 point scale of the 'old SAT'–40 points higher than whites, 270 points higher than Hispanics, and 450 points higher than African Americans if other factors are held equal," in order to have the same chance of admission.[136] Additionally, lead counsel to the plaintiffs argued that there is evidence that Harvard has discriminated against Asian Americans by trying to achieve illegal "racial balancing" in their school.[137] SFFA notes that the percentage of Asian American students at Harvard has remained stable over the years, even as the total Asian American population in the United States has risen significantly (up 72% since 2000 as of 2017) – a rise which is reflected in Harvard's applicant pool.[138]

SFFA thus made four arguments: Harvard intentionally discriminates against Asian students; Harvard attempts to racially balance each incoming class; Harvard's use of race is not permitted under Supreme Court precedent; and Harvard does not need to consider race to create a diverse class.[139]

At the district court level, while "conclud[ing] that the data demonstrates a statistically significant and negative relationship between Asian American identity and the personal rating assigned by Harvard admissions officers," Judge Allison D. Burroughs rejected each one of the plaintiffs' claims.[140] Judge Burroughs ruled that Harvard's admissions practices meet

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[134] *Id.*

[135] *Id.* If Harvard considered only academic achievement, "[T]he Asian-American share of the class would rise to 43 percent from the actual 19 percent". *Id.*

[136] Thomas J. Espenshade & Alexandria Walton Radford, *No Longer Separate, Not Yet Equal*, 80 tbl. 3.3 (2009) (The study controlled for: social class; athletic recruitment; legacy status; and more).

[137] Lat, *supra* note 131.

[138] Gustavo López, Neil G. Ruiz & Eileen Patten, *Key facts about Asian Americans, a diverse and growing population*, PEW RES. CTR. (Sept. 8, 2017), http://www.pewresearch.org/facttank/2017/09/08/key-facts-about-asian-americans/.

[139] Benjamin Wermund, *GOP courts Asian-Americans with drive to end affirmative action*, POLITICO (Oct. 14, 2018), https://www.politico.com/story/2018/10/14/asian-americans-affirmative-action-898521 (noting also, "Harvard has said SFFA's lawsuit is based on a "deeply flawed statistical analysis" and presents a 'misleading narrative.' It has called the Justice Department's brief supporting SFFA 'a thinly veiled attack' on Supreme Court precedent that 'uncritically adopts SFFA's flawed narrative'").

[140] Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., (D. Mass. 2019) (No. 14-cv-14176) at *69, *127–30.

constitutional requirements such that the school does not illegally discriminate against Asian Americans.[141] She ruled first that Harvard does not engage in racial balancing: "Harvard does not employ a race-based quota, set aside seats for minority students, or otherwise define diversity as some specified percentage of a particular group merely because of its race or ethnic origin."[142] Second, she ruled that Harvard uses race as a non-mechanical plus factor: "[c]onsistent with what is required by Supreme Court precedent, Harvard has demonstrated that it uses race as a factor that can act as a 'plus' or a 'tip' in making admissions decisions, and that its admissions program is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight."[143] Third, she ruled that there exists "no adequate workable, and sufficient fully race-neutral alternative" to effectively supplant Harvard's affirmative action program and achieve the same racial diversity results that Harvard needs to create a diverse class.[144] Ultimately, she concluded that Harvard does not intentionally discriminate so as to violate Title VI of the Civil Rights Act.[145] Throughout the 127-page-long decision, Judge Burroughs extolled the inherent virtues of diversity,

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[141] *Id.* at *122.

[142] *Id.* at *113 (citations omitted).

[143] *Id.* at *116-17 (citations and internal quotation marks omitted).

[144] *Id.* at *119.

[145] *Id.* at *122-25: "1. Throughout this trial and after a careful review of all exhibits and written submissions, there is no evidence of any racial animus whatsoever or intentional discrimination on the part of Harvard beyond its use of a race conscious admissions policy, nor is there evidence that any particular admissions decision was negatively affected by Asian American identity; 2. A race-conscious admissions program allows Harvard to achieve a level of robust diversity that would not otherwise be possible, at least at this time; 3. The Court firmly believes that Asian Americans are not inherently less personable than any other demographic group, just as it believes that Asian Americans are not more intelligent or more gifted in extracurricular pursuits than any other group; 4. There is a statistical difference in the personal ratings with white applicants faring better that Asian American applicants. Asian American applicants, however, do better on the extracurricular and academic ratings than their white counterparts. All three ratings incorporate subjective and objective elements, and while implicit biases may be affecting Harvard's ratings at the margins, to the extent that the disparities are the result of race, they are unintentional and would not be cured by a judicial dictate that Harvard abandon considerations of race in its admission process; 5. Harvard's admissions program is conceptually narrowly tailored to meet its interest in diversity. In practice, as more fully discussed above, it does not seem to unduly burden Asian Americans despite the fact that some percentage of Asian American applicants have received lower personal ratings than white applicants who seem similarly situated. The reason for these lower scores is unclear, but they are not the result of intentional discrimination. They might be the result of qualitative factors that are harder to quantify, such as teacher and guidance counselor recommendations, or they may reflect some implicit biases. Race conscious admissions will always penalize to some extent the groups that are not being advantaged by the process, but this is justified by the compelling interest in diversity and all the benefits that flow from a diverse college population. Here, any relative burden on Asian Americans (and it is not clear that there is a disproportionate burden) is not enough to warrant a finding that Harvard s admissions process fails to survive strict scrutiny or to require it to move to an admissions model that foregoes diversity in favor of parity based solely on quantifiable metrics."

arguing that it was not yet time to abandon such efforts to increase racial diversity on college campuses.[146] Still, despite her praise for the aim of Harvard's program, she acknowledged that it was "not perfect" and suggested that Harvard could expend more effort guarding against any implicit bias in the system.[147] Even though imperfect, Judge Burroughs regarded Harvard's program to be "a very fine admissions program that passes constitutional muster" one that will not be "dismantle[d] . . . solely because it could do better."[148]

Having already appealed the decision, the plaintiffs contend that this case is far from over. Notwithstanding the persistence of the plaintiffs, ultimately, the lawsuit is not necessarily a referendum on affirmative action in higher education. But it is likely to reach the Supreme Court and "the question that it deals with could ultimately affect how and whether schools use processes like affirmative action."[149] The case is especially resonant because it questions the legitimacy of the "Harvard plan" which reflects the model upheld by Justice Powell in *Bakke*.[150]

Despite the fact that this suit challenges the constitutionality of a program that once was heralded as a "model" college admissions plan,[151] there is reason to think plaintiffs will succeed for the following reasons. First, with the confirmation of Brett Kavanaugh[152] and the retirement of Justice Kennedy (a swing vote who has often voted to uphold affirmative action programs), there is a conservative majority on the Supreme Court. Moreover, Justices Roberts, Alito, and Thomas dissented in *Fisher II*.[153] *Fisher II* was, by most accounts, a weaker case for the plaintiffs than is the Harvard case.[154] There is little reason to believe that those Justices will have a change of heart, nor as the following analysis shows would it be strategic for them to do so.

As is evident in Figure 2,[155] Justice Roberts (who dissented in *Fisher II*)

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[146] *See, e.g.*, *id.* at *129 ("the rich diversity at Harvard and other colleges and universities and the benefits that flow from that diversity will foster the tolerance, acceptance and understanding that will ultimately make race conscious admissions obsolete.").

[147] *Id.* at *127.

[148] *Id.*

[149] P.R. Lockhart, *The lawsuit against Harvard that could change affirmative action in college admissions, explained*, VOX (Oct 18, 2018), https://www.vox.com/2018/10/18/17984108/harvard-asian-americans-affirmative-action-racial-discrimination.

[150] Hartocollis, *supra* note 132.

[151] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 269 (1978).

[152] Lorenzo Arvanitis & Serena Cho, *Kavanaugh poses a potential threat for affirmative action, experts say*, YALE DAILY NEWS (Oct. 15, 2018, 1:57 AM), https://yaledailynews.com/blog /2018/10 /15/kavanaugh-poses-a-potential-threat-for-affirmative-action-experts-say/ ("According to four legal experts interviewed by the News, Kavanaugh is likely to rule against race-conscious efforts to increase diversity on university campuses.").

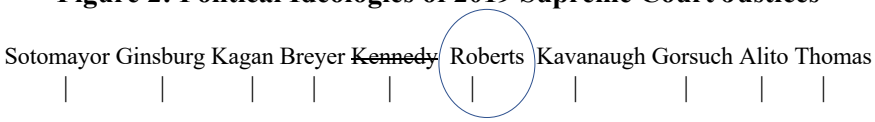
[153] Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198, 2201 (2016).

[154] *E.g.,* UT Austin's affirmative action program showed no evidence of deflating scores based on "personal" characteristics.

[155] Figure is adapted from Daniel Rodriguez and Barry Weingast's PowerPoint Presentation,

is the new pivot point, significantly further right than was Justice Kennedy.

Figure 2: Political Ideologies of 2019 Supreme Court Justices



Also notable is the current Administration's staunch anti-affirmative action position. In 2017, the Trump administration announced that it was investigating Harvard for discrimination against Asian Americans.[156] Following that, in what has been called an "an unprecedented aggressive posture", the Administration explicitly announced its support for the plaintiffs in the Harvard case.[157] The DOJ asserted that "Harvard's race-based admissions process significantly disadvantages Asian-American applicants compared to applicants of other racial groups—including both white applicants and applicants from other racial minority groups."[158] The Trump Administration in July also withdrew Obama-era guidance that counseled schools and colleges to consider race in their admissions processes.[159] Trump officials said that the Obama administration went beyond what the Supreme Court has allowed in affirmative action cases.[160] Much of this position was being staked out while conservative Republican control was firmly rooted in the White House, Senate and House.

The situation has now changed in the legislature. While the Senate remains controlled by Republicans, the House is now controlled by Democrats. A split and polarized Congress makes the Court's decision more secure because a split Congress is unlikely to reach agreement on an issue as politically divisive as affirmative action.[161] The current spectrum of affirmative action viewpoints is reflected in Figure 3 below, where P is the Trump Administration (anti-affirmative action), S represents the Senate which, comprised mostly of Republican legislators largely loyal to President Trump, is also fairly anti-affirmative action, J represents the ideal policy of the conservative Supreme Court majority, H is the House which is majority Democratic and likely mostly in favor of affirmative action, and SQ

Stanford Law (2018). Other versions of this spectrum exist with slight variations: *See, e.g.*, Amelia Thomson-DeVeaux, *The Supreme Court Might Have Three Swing Justices Now*, FIVETHIRTYEIGHT (July 2, 2019, 6:00 AM), https://fivethirtyeight.com/features/the-supreme-court-might-have-three-swing-justices-now/.

[156] Lockhart, *supra* note 149 (as well as Yale and a few other schools).

[157] Wermund, *supra* note 139.

[158] *Id.*

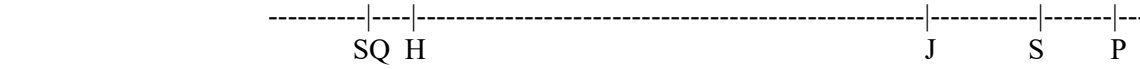
[159] Katie Benner, *Justice Dept. Backs Suit Accusing Harvard of Discriminating Against Asian-American Applicants*, N.Y. TIMES (Aug. 30, 2018), https://www.nytimes.com/2018/08/30/us/politics/asian-students-affirmative-action-harvard.html.

[160] *Id.*

[161] Brian A. Marks, *A Model of Judicial Influence on Congressional Policy Making:* Grove City College v. Bell, 31 THE J. OF L., ECON., AND ORG. 843, 843 (2012).

represents the status quo post-*Fisher II*. The figure shows that if the Court rules at its ideal point, which is closer to the Senate and President's position than that of the House or the status quo, it is unlikely to be overruled because a bill that passed the House would not pass the Senate and/or would be vetoed by President Trump.

Figure 3: 2019 PPT on Affirmative Action



In addition, Harvard's policy is unlikely to be supported by the public given some of the facts that have come to light.

That Harvard may have a system that artificially limits the number of Asian students at the college is reminiscent of some of the early quota systems that were intensely unpopular.[162] Still, it appears Asian Americans are somewhat divided on the case, with "some saying they are being unfairly used as a wedge in a brazen attempt to abolish affirmative action."[163] Public opinion on affirmative action more generally in the last few years has been mixed. While "Gallup polls have shown that a majority—although not a super majority—of Americans favor the broad, conceptual idea of affirmative action for racial minorities, responses to this question are to some degree affected by the context in which it is asked."[164] For instance, when asked about whether they would support "affirmative action programs designed to increase the number of black and minority students on college campuses,"[165] Pew found 71% of Americans agreed.[166] Notably, this question does not explain any specific action taken to achieve that goal. When specifics are provided, support drops.[167] In 2016, Gallup asked a question about *Fisher II*: "The Supreme Court recently ruled on a case that confirms that colleges can consider the race or ethnicity of students when making decisions on who to admit to the college. Overall, do you approve or disapprove of the Supreme Court's decision?" The results: 31% approved and 65% disapproved.[168]

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[162] *See e.g.,* Gratz v. Bollinger, 539 U.S. 244 (2003). *See also* Stephen Steinberg, *How Jewish Quotas Began,* COMMENT. MAG., https://www.commentarymagazine.com/articles/how-jewish-quotas-began/ (discussing the de facto quotas imposed on Jewish students in the early twentieth century).

[163] Anemona Hartocollis*, What's at Stake in the Harvard Lawsuit? Decades of Debate Over Race in Admissions*, N.Y. TIMES (Oct. 13, 2018), https://www.nytimes.com/2018/10/13/us/harvard-affirmative-action-asian-students.html.

[164] Frank Newport, *The Harvard Affirmative Action Case and Public Opinion*, GALLUP (Oct. 22, 2018), https://news.gallup.com/opinion/polling-matters/243965/harvard-affirmative-action-case-public-opinion.aspx.

[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] Frank Newport, *Most in U.S. Oppose Colleges Considering Race in Admissions*, GALLUP (July 8, 2016), https://news.gallup.com/poll/193508/oppose-colleges-considering-race-admissions.aspx?g_s

Thus, while the public does want to help increase the number of underrepresented minority students on campuses, it does not support programs that treat racial or ethnic groups preferentially. If what is alleged in the Harvard case is true, as it appears to be given the District Court's findings of fact, and not only are unrepresented minority students given a boost, but Asian students are penalized in the "personal" section, it is very unlikely that the public broadly will support Harvard in the case.[169]

The confluence of an anti-affirmative action Court, an anti-affirmative action Administration, a split Congress, and a public unlikely to support the Harvard Plan suggests that, should the Court grant certiorari, it will likely rule that the Harvard Plan is unconstitutional.[170] While certain colleges have expressed their support for Harvard by filing a joint amicus brief,[171] and more may follow suit in the appeal, the fact of this institutional support is unlikely to sway the Court. Further, the concern that certain colleges might disobey the Court's order is mostly dispelled by Trump's repeated threats to revoke federal funding should a college disobey. The Court is a strategic actor, but it also has ideological preferences. When its preferences harmonize with what is strategic (as is the case in *SFFA v. Harvard*), it will likely decide based on its preferences.[172]

VII. CONCLUSION

Ultimately, positive political theory contributes a lot to analysis of the Court's decisions on affirmative action in higher education over the last half century. It provides a diagnostic tool that helps to explain counterintuitive decisions made by the Court – liberal decisions issued by a conservative Court and avoidant decisions issued by an activist Court – and an analytical tool to predict the precarious future of affirmative action in higher education more generally.

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ource=link_newsv9&g_campaign=item_243965&g_medium=copy. More recently, polls have shown increased disapproval of affirmative action programs in higher education. A new Pew Research Center survey found that 73% of Americans believe colleges and universities should not consider race or ethnicity at all when making decisions about student admissions. *See* Nikki Graf, *Most Americans say colleges should not consider race or ethnicity in admissions,* FACT TANK (Feb. 25, 2019), https://www.pewresearch.org/fact-tank/2019/02/25/most-americans-say-colleges-should-not-consider-race-or-ethnicity-in-admissions/.

[169] Judge Burroughs did not conclude one way or another what the source of the penalty towards Asian students was but did not acknowledge its existences. *See SFFA*, 1:14-cv-14176-ADB at *69-73.

[170] The partial overturning of the Voting Rights Act in *Shelby County v. Holder* in addition to Justice O'Connor's admonition in *Grutter* indicates that the Court is time-sensitive to how long it will tolerate remedial practices designed around race (*see Shelby Cty.. v. Holder,* 570 U.S. 529 (2013); *Grutter*, 539 U.S. 306, 335).

[171] Brief for Brown University, et al. as Amici Curiae Supporting Respondents, *Students for Fair Admissions v. President & Fellows of Harvard Coll. Harvard Corp.*, Civil Action No. 14-cv-14176-ADB, 2018 U.S. Dist. LEXIS 167901 (D. Mass. Sep. 28, 2018) (16 universities have publicly expressed their support for Harvard).

[172] This could change depending on the results of the 2020 election and the external pressures on the Court the results of the election may inflict.