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The Importance of Being Political: How to Understand the U.S. Supreme Court's Approach to Affirmative Action in Education

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INTRODUCTION

In this article, I examine the evolving jurisprudence of the U.S. Supreme Court's decisions on the constitutionality of affirmative action with specific focus on education. Starting with the *Bakke* decision in 1978[1] and continuing through the University of Michigan cases in 2003,[2] *Parents Involved* in 2007[3] and *Fisher* in 2013,[4] the Supreme Court has applied different constitutional standards with different results. I will argue that the best, if not the only, way to understand this evolving doctrine is to focus on the political commitments of the justices, the role of interest groups, the voter alignments of the Democratic and Republican parties and white elite and public opinion, more generally. I will argue that the text of the Constitution itself is of little use in understanding how it will be interpreted and how that interpretation will change.

The contribution of the paper is manifold. First, by way of background, it presents and discusses many of the leading cases interpreting the Equal Protection Clause of the 14th Amendment of the U.S. Constitution. It then turns, secondly, to the affirmative action decisions of the U.S. Supreme Court, starting in the 1970s and continuing through 2013. Third, it summarizes and applies the

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

2 Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003).

3 Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007).

4 Fisher v. University of Texas, 570 U.S. (2013).

leading social science approaches to understanding judicial decision-making, including the attitudinal model, the strategic actor model, and the institutional/public opinion model. Finally, it makes what, I believe, is a powerful case that, in order to understand the jurisprudence of the U.S. Supreme Court in politically contentious issues, scholars must take politics into account.

CONSTITUTIONAL BACKGROUND AND 19TH CENTURY CASES

The starting point for any discussion of affirmative action is the 14th Amendment to the U.S. Constitution. The so-called Equal Protection Clause of Section 1 states, "no state shall... deny to any person within its jurisdiction the equal protection of the laws." Enacted in 1868 as part of the post-Civil War attempt to protect the newly freed slaves, these sixteen words have been the focus of intense scrutiny. What does it mean to deny a person the "equal protection of the laws"? Surely, it doesn't mean that all people need to be treated identically. Laws make distinctions between people all the time. Children are treated differently than adults, wealthy people pay taxes at higher rates than the poor, and some businesses are regulated in ways that others are not. The Equal Protection Clause was not intended to make such distinctions unconstitutional.

In order to understand how the Supreme Court has approached the question of the constitutionality of affirmative action, it is necessary to understand its basic approach to race-based discrimination and the Equal Protection Clause. In 1873, in the *Slaughterhouse Cases*,[5] the U.S. Supreme Court first turned its attention to the meaning of the Equal Protection Clause. Discussing the adoption of the 13th Amendment which prohibited slavery, the 14th Amendment, and the 15th Amendment which guaranteed newly free (male) slaves the right to vote, the Court noted that they were "events almost too recent to be called history"[6] which were "fresh within the memory of us all."[7] The Amendments had a "unity of purpose"[8] to protect the newly freed slaves: "the one pervading

5 83 U.S. 36 (1872).

6 *Id.* at 71.

7 *Id.* at 68.

8 *Id.* at 67.

purpose found in them all...[is] the freedom of the slave race."[9] The "obvious purpose" of the 13th Amendment, the Court wrote, was to "forbid all shades and conditions of African slavery."[10] But, on its own, it wasn't enough to protect their rights: "the condition of the slave race would, without further protection of the Federal government, be almost as bad as it was before."[11] The Court continued, "...something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much."[12] Thus, the 14th Amendment was ratified. But, it, too, was "inadequate for the protection of life, liberty, and property, without which freedom to the slave was no boon."[13] So, the 15th Amendment was added to the U.S. Constitution. Thus, the clear understanding of these Civil War Amendments, including the 14th Amendment, was that they were intended to help and protect African-Americans.

Constitutional provisions, even majestic ones, don't exist in a vacuum. They are interpreted, and can only be interpreted by people living in a particular place and time. Although the Civil War Amendments were ratified by 2/3rds majorities in each House of Congress and by 3/4s of the State legislatures, as required by Article V of the U.S. Constitution,[14] white Americans were at best ambivalent about and, at worst, hostile to guaranteeing equal rights to African-Americans. For example, when the U.S. Congress was debating what became the Civil Rights Act of 1875 guaranteeing equal treatment in public places, the *Chicago Trib*une wrote, "[i]s it not time for the colored race to stop playing baby?"[15] Overcoming opposition, Congress passed the Act. Section 1 held that:

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9 *Id.* at 71.

10 *Id.* at 69.

11 *Id.* at 70.

12 *Id.*

13 *Id.*at 71.

14 For an argument that the congressional vote was illegitimate because senators from southern states were excluded, and the votes of state legislatures were coerced, see Bruce Ackerman, *We the People: Transformations* (1998).

15 *As quoted in* Barry Friedman, The Will of the People: How Public Opinion has Influenced the Supreme Court and Shaped the Meaning of the Constitution 147 (2009).

> *"all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude."*[16]

In the *Civil Rights Cases* of 1883,[17] the Court heard a challenge to the constitutionality of the Act. The case brought together challenges to the law from the five states of California, Kansas, Missouri, New York, and Tennessee. In each of these states, African-Americans had been denied entrance to places covered under the Act, and they sued to have the Act enforced. The geographic range of the states, including the stalwart Union States of New York and California, is revealing of widespread white antipathy to guaranteeing African-Americans equal rights. For many white Americans, reintegrating white southerners back into the United States was the paramount goal. Former U.S. President Rutherford Hayes wrote to U.S. Supreme Court Chief Justice Waite in July 1882, stressing the importance of maintaining the friendship of white Southerners: "*With that sentiment right, our cause will advance, with that sentiment wrong, all our efforts will fail.*" The Chief Justice responded two days later: "I agree with you entirely as to the necessity of keeping public sentiment at the South in our favor."[18] Thus, it should be no surprise that in its decision the Supreme Court, by a vote of 8-1, interpreted the Act narrowly so as not to apply to privately owned establishments. Since virtually all "inns, public conveyances ... theaters, and other places of public amusement" were privately owned, this decision rendered the Act insignificant. Justice Bradley, writing for the 8-Justice majority, reflected the lack of support among white Americans for protecting the rights of African-Americans:

> *"When a man has emerged from slavery, and, by the aid of beneficent legislation, has shaken off the inseparable concomitants of that state, there*

16 18 Stat. 335 (1875).

17 109 U.S. 3 (1883).

18 *As quoted in* FRIEDMAN, *Supra* note 15 at 149.

> *must be some stage in the progress of his elevation when he takes the rank of a mere citizen and ceases to be the special favorite of the laws..."*[19]

The decision in the *Civil Rights Cases* reflected the lack of support of the federal government, and white America, for protecting the rights of African-Americans. With white majorities uninterested in protecting their rights, and the U.S. federal government unwilling to act, states were in effect free to discriminate on the basis of race. While racial discrimination existed everywhere in the U.S., it was particularly enforced in the South. In the southern states of the Civil War Confederacy, racial apartheid systems were created, backed by the authority of the state and the force of white vigilante violence. The distinguished U.S. historian, C. Vann Woodward, describes the situation facing African-Americans in the late 19th century in poignant language:

> *"Blacks watched with despair while the foundations for the Jim Crow [apartheid] system were laid and the walls of segregation mounted around them. Their disenchantment with the hopes based on the Civil War amendments and the Reconstruction laws was nearly complete by 1890. The American commitment to equality, solemnly attested by three amendments to the Constitution and elaborate civil rights acts, was virtually repudiated. What had started as a retreat in 1877, when the last Federal troops were pulled out of the South, had turned into a rout. Northern radicals and liberals had abandoned the cause; the courts had rendered the Constitution helpless; the Republican Party had forsaken the cause it had sponsored. A tide of racism was mounting in the country unopposed. Blacks held no less than five national conventions in 1890 to consider their plight, but all they could do was to pass resolutions of protest and confess their helplessness."*[20]

There is no better judicial example of this abandonment of protecting the rights of African-Americans than the U.S. Supreme Court decision in *Plessy* v. *Ferguson* in1896.[21] In the years 1887-1891, eight southern states passed laws requiring

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19 *Supra* note 17 at 25.

20 C. Vann Woodward, *The Case of the Louisiana Traveler* in QUARRELS THAT HAVE SHAPED THE CONSTITUTION 157-74, 159 (John A. Garraty (ed.),1962).

21 163 U.S. 537 (1896).

railroads to segregate passengers on account of race. The Louisiana statute of 1890 required railroads to provide "equal, but separate" accommodation for blacks and whites.[22] For the most part, the railroads complied with the separate requirement of the law but not the equal one. Homer Plessy, an African-American, was arrested for violating the Act. He challenged the constitutionality of the law under both the 13th and 14th Amendments to the U.S. Constitution. In contrast to the holding of the *Civil Rights Cases*, the denial of equal treatment by the railroads was pursuant to state law. Their actions were not those of private individuals who the Court had held were beyond the reach of the federal government. Rather, they were actions required by state law. This should have made it easy for the U.S. Supreme Court to follow the precedent it set in the *Civil Rights Cases* and invalidate this and other "separate, but equal" laws.

Constitution of 1896 was not the Constitution of 1868 when the 14th Amendment was adopted. The words hadn't changed, but both white public and elite opinion had changed. Thus, the Court found the case easy. With only one dissenting Justice, the Court held the Louisiana statute constitutional. Writing for the Court, Justice Brown drew a new distinction, not between private and state action as in the *Civil Rights Cases*, but between social and political equality. Although the "object of the [14th] Amendment was undoubtedly to enforce the absolute equality of the two races before the law," Justice Brown wrote, "*in the nature of things*, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality..."[23] In deciding whether legislation violates the requirements of the 14th Amendment, the Court held that "there must necessarily be a large discretion on the part of the legislature." The state, the Court held, "is at liberty to act with reference to the established usages, customs, and traditions of the people..."[24] In response to Plessy's argument that, as the Court put it, "the enforced separation of the two races stamps the colored race with a badge of inferiority," the Court disingenuously responded, "[i]f this be so, it is not by reason of anything found

22 *Id.*

23 *Id.* at 544.

24 *Id.* at 550.

in the act, but solely because the colored race chooses to put that construction upon it."[25]

In the discussion above, I suggested that the Court was following white elite and public opinion. How often does the Court decide cases, more or less, in keeping with public opinion? In his classic historical study of the behavior of the U.S. Supreme Court, Robert G. McCloskey argued that the U.S. Supreme Court "learned to be a political institution and to behave accordingly."[26] What he meant by this was that lacking enforcement powers, the Court learned that to be effective it pretty much had to keep its decisions in line with public opinion. At bottom, the Court realized the truth of what Alexander Hamilton wrote in *Federalist #78* long ago: that it lacks power. The Court, Hamilton wrote, has "no influence over either the sword or the purse...and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."[27] Thus, McCloskey wrote, "[J]udicial ideas of the good society can never be too far removed from the popular ideas."[28] Throughout its history, he found that the "Court has seldom lagged far behind or forged far ahead of America,"[29] and "seldom strayed very far from the mainstreams of American life."[30] So, as the views of the American public shifted, so did the opinions of the Court. For McCloskey, "the Court's whole history can be viewed as a constant or, at least, repeated readjustment of role to suit the circumstances of each succeeding judicial era."[31]

A few years earlier, Robert Dahl published his famous article, "Decision-Making in a Democracy: The Supreme Court as a National Policy Maker."[32] Examining

25 *Id.*at 552. In his justifiably famous solo dissent, the former slave owner Justice Harlan wrote, the "thin disguise of 'equal' accommodations [will] not mislead anyone, nor atone for the wrong this day done." 163 U.S. 537, 562 (1896).

26 Robert G. McCloskey, The American Supreme Court 261 (5th Ed. 2010).

27 Hamilton, *The Federalist No. 78*, (ClintonRossiter ed. 1961). *Available at* the Avalon Project, avalon.law.yale.edu/18th_century/fed78.asp.

28 *Id.* at 13.

29 *Id.* at 260-61.

30 *Id.* at 261.

31 *Id.* at 70.

32 Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy Maker* 6 J. Pub. L. 279 (1957).

the history of the Supreme Court, Dahl concluded that "[b]y itself the Court is almost powerless to affect the course of national policy."[33] This was largely because of the appointment process. Dahl calculated the average number of months between appointments, finding it to be 22 months.[34] Thus, historically, on average, a one-term President would likely have two appointments, and a two-term President would likely have four. Unless presidents choose poorly, the new Justices would likely reflect the policy views of the President and the political coalition that elected him. This meant, Dahl concluded, that "the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the U.S."[35]

In 2009, law professors Lucas A. Powe, Jr., and Barry Friedman published books that amplified and enlarged these arguments. Powe investigated the interests and demands of political elites and how the Court works with them to further their interests. His "dominant theme" was that the "Court is a majoritarian institution."[36] As Powe understands the role of the Court, it is to "harmonize the Constitution with the demands of majoritarian politics."[37] Friedman focused not on elites but on public opinion. His aim was to provide a "chronicle of the relationship between the popular will and the Supreme Court as it unfolded over two-hundred-plus years of American history."[38] In doing so, he concludes that what "history shows is assuredly not that Supreme Court decisions always are in line with popular opinion, but rather that they come into line with one another *over time*."[39]

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33 *Id.* at 294.

34 By 2013 the number of months between appointments has increased to 30.5 months for the 22 Justices appointed since 1957. This means that a one-term president is likely to have at least one appointment and a two-term president is likely to have two or three appointments, typically enough to sway the ideological direction of the Court.

35 *Supra* note 32 at 285.

36 Lucas A. Powe, Jr., The Supreme Court and the American Elite 1789-2008 ix (2009).

37 *Id.* at 350.

38 Barry Friedman, The Will of the People: How Public Opinion has Influenced the Supreme Court and Shaped the Meaning of the Constitution 4 (2009).

39 *Id.* at 382.

McCloskey, Dahl, Powe and Friedman understand the Court as a political *institution* constrained by forces and actors in addition to the law. Their overall explanation for the Court's opinions seems to describe well the decisions I have discussed so far. When elite or white public opinion supported protecting the rights of African-Americans, the Court upheld laws that did that and struck down laws that didn't. Cases like the *Slaughterhouse Cases* illustrate this claim. However, when elite or white opinion was hostile to African-Americans, so was the Court. This is seen in the *Civil Rights Cases* and *Plessy*. And, as shall be explained, when the white public and elites were torn, so was the Court (*Bakke*). This institutional/public opinion model appears to have explanatory power.

20TH CENTURY CASES

Brown v. Board of Education of Topeka, Kansas

In 1954, the U.S. Supreme Court issued a landmark decision that fundamentally changed constitutional interpretation. At issue was whether state laws that required racial segregation in public schools denied African-American children the equal protection of the laws as guaranteed by the 14th Amendment. At the time of the decision, the eleven states of the Civil War Confederacy enforced such laws, as did the six states that bordered the region and Washington, D.C., the nation's capital. In addition, four other states allowed local racial segregation. All of these jurisdictions operated racially segregated schools under the "Separate-but-Equal" doctrine upheld in *Plessy*. The African-American plaintiffs argued that while the schools were racially segregated, they were hardly equal. More importantly, they argued that separating African-Americans from whites, regardless of whether the school facilities were equal, denied African-Americans the equal protection of the laws.

A unanimous Supreme Court agreed. Writing for the Court, Chief Justice Earl Warren wrote, "to separate them [African-American school children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their

hearts and minds in a way unlikely ever to be undone."[40] Thus, the Court concluded, "...in the field of public education, the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[41] In effectively reversing the holding of *Plessy* v. *Ferguson*, the Court overturned more than half a century of constitutional interpretation.

What led the Supreme Court to change its interpretation of the Equal Protection Clause? Its words had not changed, nor had other relevant provisions of the Constitution. What had changed was elite white opinion and, to some extent, white public opinion.[42] The U.S. government urged the Court to find racial segregation in schools unconstitutional. In particular, the U.S. Department of State, seeing the world through a Cold War lense, argued that racial segregation made the U.S. look bad in its ideological battle with the Soviet Union.[43] While the justices struggled with how to decide the case,[44] in the end their decision was unanimous. And, in recent decades, *Brown* was been praised across the political spectrum. No serious politician, judge, or lawyer can reject *Brown* and expect to

40 347 U.S. 483, 494. Although this language repudiated Justice Brown's statement in *Plessy* that racial segregation was not intended to instill a sense of inferiority in African-Americans, the Court was careful not to overturn that decision. Noting that *Plessy* dealt with transportation, not education (347 U.S. 483, 491), Chief Justice Warren wrote only that "[a]ny language in Plessy v. Ferguson contrary to this finding is rejected" (347 U.S. 483, 494-95).

41 *Id.*at 495. The language of the 14th Amendment is a limitation on state action. Thus, the holding did not apply to Washington, D.C., which is governed by federal as opposed to state law. In the companion case of Bolling v. Sharpe 347 U.S. 497 (1954), the Court invalidated segregation in Washington, D.C., as well. In a very short opinion, a unanimous Court held that "racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution" (347 U.S. 497, 500 (1954)). Pointing to the just delivered *Brown* opinion, Chief justice Warren wrote that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government [than on the states]." (347 U.S. 497, 500 (1954)).

42 For a discussion of changes in race relations in the U.S. preceding *Brown*, *see* Chapter 5, *The Current of History* 157-169 in GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2nd ed.) (2008).

43 For in-depth discussion of the influence of the Cold War on racial segregation and *Brown* in particular, *see* Mary L. Dudziak, *Desegregation as a Cold War Imperative* 41 STANFORD LAW REVIEW 61 (1988). *See also*, MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY(2000).

44 MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 292-312 (2004).

be taken seriously. Former law professor and later Reagan-appointed federal court of appeals Judge J. Harvie Wilkinson put it this way in 1979: "*Brown* may be the most important political, social, and legal event in America's twentieth-century history."[45] Fifteen years later, law professor Michael Klarman went even further, writing that "constitutional lawyers and historians generally deem *Brown* v. *Board of Education* to be the most important United States Supreme Court decision of the Twentieth Century and, possibly, of all time."[46] With this background, I turn now to consideration of the Court's affirmative action jurisprudence.

AFFIRMATIVE ACTION: THE EARLY YEARS

Affirmative action in education in the United States involves the question of whether background attributes such as race, gender, and ethnic origin can be taken into account along with academic credentials in admissions decisions. Among qualified applicants, is it an unconstitutional denial of equal protection for a university to give preference to applicants from minority groups who have suffered, and may continue to suffer, from discrimination? U.S. society and the Supreme Court have been struggling with this question since the 1970s.

In the period 1941-1963, U.S. presidents issued twelve Executive Orders dealing with nondiscrimination and/or equal opportunity within the federal government. For example, in June 1941, President Roosevelt issued Executive Order 8802, requiring that "there shall be no discrimination in the employment of workers in defense industries or government because of race, creed, color, or national origin..."[47] Then, in 1964, the U.S. Congress passed, and President Johnson signed into law, the 1964 Civil Rights Act. Title VII of the Act made it unlawful for any employer to discriminate against "any individual because of his race, color, religion, sex, or national origin..."[48] The clear aim of Title VII was to stop discrimination against people of color.

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45 J. Harvie Wilkinson, III, From Brown to Alexander: The Supreme Court and School Integration 1954-19786 (1979).

46 Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 Journal of American History (1994).

47 Executive Order 8802, 6 Fed. Reg. 3109 (June 27, 1941). *Available at* http://www.eeoc.gov/eeoc/history/35th/thelaw/eo-8802.html).

48 Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e etseq (1964).

For many proponents of equality, Title VII, although important, was not enough to counter the negative effects of past discrimination and the ongoing effects of current discrimination. In June 1965, President Johnson gave the commencement address at Howard University, the historically black university in Washington, D.C., chartered by the U.S. Congress in 1867. In his speech, he stressed the need to do more than guarantee freedom from discrimination:

> *"But freedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please.... You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "you are free to compete with all the others," and still justly believe that you have been completely fair... This is the next and the more profound stage of the battle for civil rights. We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory, but equality as a fact and equality as a result."*[49]

As head of the Executive Branch, President Johnson used his position to implement his vision of nondiscrimination. In September 1965, he issued Executive Order 11246[50] requiring companies receiving contracts from the federal government to take affirmative action to assure non-discrimination. And, in 1969, the Department of Labor enforced, in effect, a hiring quota under EO 11246. This so-called "Philadelphia Plan" was upheld by the U.S. Court of Appeals for the 3rd Circuit in 1971.[51]

President Johnson's image of racial minorities, particularly African-Americans, as hobbled by centuries of discrimination was powerful. Universities in the U.S., especially the most prestigious ones, historically have been virtually all white with only a handful of minority students. In terms of elementary and secondary education, African-Americans lagged behind white Americans in

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49 Public Papers of the Presidents of the United States: Lyndon B. Johnson, 1965. Vol.II, Entry 301, 635-640 (. Government Printing Office, Washington, D. C ,1966). *Available at* http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650604.asp.

50 30 Fed. Reg. 12319 (Sept. 24, 1965).

51 Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (3rd cir. 1971).

school completion rates, academic records and test scores. When President Johnson delivered his Howard University speech, many African-Americans still attended schools that were 100% African-American, were under-funded, lacked adequate facilities and resources, and often had poorly trained teachers. In response to the passage of Title VII as well as the Civil Rights Movement of the 1960s, many universities began to make efforts to diversify their student bodies. One such was the medical school of the University of California at Davis.

The medical school at the University of California at Davis was founded in 1968. Its first class of fifty students had neither African-Americans, nor Mexican-American members.[52] Starting in the early 1970s, the faculty adopted a "special admissions program to increase the representation of "disadvantaged" students in each Medical School class."[53] In essence, 16 of the now 100 places in the entering class were reserved for racial and ethnic minorities. From 1971-1974, the special admission program resulted in the admission of 21 black students and 30 Mexican-American students, while over the same period, only 1 African-American and 6 Mexican-Americans were admitted under the regular admissions program.[54]

Allan Bakke was a white male who applied to, and was rejected by, the Davis Medical School in both 1973 and 1974. "In both years, applicants were admitted under the special program with grade point averages, MCAT scores and benchmark scores significantly lower than Bakke's."[55] After his second rejection, Bakke brought suit in California courts, arguing that he was denied admission on the basis of race in violation of the Equal Protection Clause of the 14th Amendment.[56] The trial court agreed, finding that the special admission

52 *Supra* note1 at 272.

53 *Id.*

54 *Id.* at 275.

55 *Id.* at 277. The "MCAT" (Medical College Admissions Test) was a test required of all medical school applicants. The "benchmark" score was a compilation of ratings given to each applicant by the admissions committee. Applicants with benchmark scores above a designated level were offered admission.

56 Bakke also claimed that his rejection violated Title VI of the 1964 Civil Rights Act and Section 1 of the California Constitution.

program was a racial quota that violated the California and U.S. Constitutions and federal law. The court held that the University could not take race into account in making admissions decisions.[57] On appeal, the California Supreme Court held that the Davis program denied Allan Bakke the equal protection of the laws because it was not the least intrusive means of achieving the admittedly compelling state interest of having more doctors from minority groups. The decision was appealed to the U.S. Supreme Court.

In deciding whether a plaintiff has been denied equal protection, the U.S. Supreme Court has developed three standards. The first, and most common, is the rational relations test. This test holds that there is no denial of equal protection if government action is *reasonably related* to a *legitimate governmental purpose.* Application of the rational relations test inevitably results in government action being upheld.

As early as 1938, the Court worried that rational relation was too lax a standard for evaluating governmental action alleged to deny minorities the equal protection of the law. In the most famous footnote in Supreme Court history, footnote four of *U.S.* v.*Carolene Products Co.*,[58] Justice Stone wondered:

> *"whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."*[59]

Six years later, Justice Black answered Justice Stone's query in the affirmative, writing for the Court that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect....[and] courts must subject them to the most rigid scrutiny."[60] As this strict scrutiny standard developed, when government action is challenged as denying a racial minority the equal protection of the laws, a court asks whether the legislation is *necessary* to further

57 *Supra* note 1 at 279.

58 304 U. S. 144 (1938).

59 *Id.* a 152.

60 Korematsu v. United States, 323 U.S. 214, 216 (1944).

a *compelling governmental purpose* or, sometimes, whether it is the *least intrusive means possible* for achieving that purpose or is *narrowly tailored.* Traditionally, with the exception of the *Korematsu* opinion which announced the strict scrutiny test, no legislation to which the standard was applied was upheld. It used to be said that the standard was strict in theory but fatal in fact. As we shall see, this has changed.

Finally, as the women's movement challenged gender discrimination in the United States, the Court was faced with the question of which standard to apply to gender discrimination claims. After struggling with the issue for several years, the Court adopted a third standard, the so-called intermediate standard of review.[61] When a law classifying people on the basis of gender is challenged as denying equal protection, the Court asks whether the law is *substantially related* to the achievement of *important governmental objectives.*

The *Bakke* case presented the question of which standard the Court should apply to evaluate the constitutionality of affirmative action. If it were to apply rational relation, the Davis program would be upheld. On the other hand, if it decided the applicable standard was strict scrutiny, as the California Supreme Court thought it was, the affirmative action program would be struck down. And, there was the possibility of applying the intermediate level scrutiny test developed in gender discrimination cases.

The fact that made the choice of standard particularly challenging was that the person alleging a denial of equal protection, Allan Bakke, was a white man, not a racial minority! In formulating and applying the strict scrutiny standard, the Court had focused on assessing claims that the challenged laws denied racial minorities the equal protection of the laws. In developing the intermediate scrutiny standard, the Court was focused on discrimination against women.[62] But, in this case, as in all affirmative action cases, race or gender is taken into account to help, not burden, racial minorities and women. Should that matter?

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61 Craig v. Boren, 429 U.S. 190 (1976).

62 Discrimination against women was the Court's focus, even though cases like Craig v. Boren were brought by a man.

Should whites alleging a denial of equal protection on the basis of race be treated the same as, or differently than, racial minorities alleging racial discrimination? Was the 14th Amendment adopted to protect the rights of African-Americans and other racial minorities or was its broad language applicable to all people regardless of race? These were difficult issues and the *Bakke* Court struggled with them.

A few years before *Bakke*, in 1974, the Court had heard another affirmative action case, *DeFunis* v. *Odegaard*.[63] The facts of this case were somewhat similar to those of *Bakke*. At issue was a preferential admission plan at the law school of the University of Washington. In 1971, a white male applicant, Marco DeFunis, Jr., applied for admission and was subsequently rejected. He alleged that under the preferential admission plan, the law school had admitted racial minorities with lower LSAT scores[64] and grades. He filed suit, arguing that the preferential admission plan discriminated against him on account of race in violation of the Equal Protection Clause of the 14th Amendment.

The trial court agreed with DeFunis and ordered him admitted to the law school. The University of Washington complied with the order but appealed the case. On appeal, the Supreme Court of Washington State held the preferential admissions plan constitutional and reversed the trial court's decision. DeFunis, by this point in his second year of law school, appealed to the U.S. Supreme Court.

By the time the case reached the U.S. Supreme Court, it was seen as having national importance. More than two dozen *amicus* briefs were filed, representing dozens of organizations.[65] The political breakdown of the *amicus* briefs was revealing of the difficulty of the issue. It revealed the fraying of the progressive New Deal political coalition comprised of unions, civil rights groups and Jewish groups. This coalition had provided the political support for laws such as Social Security, the 1964 Civil Rights Act, Food Stamps, Medicare and Medicaid.

63 416 U.S. 312 (1974).

64 The Law School Aptitude Test (LSAT) is a national test required of all applicants to law school.

65 *Supra* note 63 313.

While the overwhelming majority of *amici* argued for the constitutionality of the affirmative action plan, the largest union in the country, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), as well as several Jewish groups, joined with the conservative business group, the Chamber of Commerce of the United States, to argue in support of DeFunis.

The U.S. Supreme Court heard oral argument in the case in February, 1974. Two months later, on April 23, 1974, the Court announced its decision. The Court held:

> *"Because the petitioner will complete his law school studies at the end of the term for which he has now registered regardless of any decision this Court might reach on the merits of this litigation, we conclude that the Court cannot, consistently with the limitations of Art. III of the Constitution, consider the substantive constitutional issues tendered by the parties."*[66]

The Court punted! It held the case moot. Why, after accepting the case, hearing oral argument, receiving dozens of *amicus* briefs, did the Court make the embarrassing decision to decline to decide the substantive issue? Making matters worse, when the case was filed, it was no secret that DeFunis was a student at the University of Washington law school and was on track to graduate in the spring of 1974. Yet, that didn't prevent the Court from agreeing to hear the case-even though the Court has control over virtually all of its docket. The answer is likely that the justices were so splintered in their views that they preferred to avoid deciding the case.

But, the Court couldn't avoid the issue for long, nor the intense interest it engendered. In the *Bakke* case, nearly sixty *amici* briefs were filed representing approximately one hundred organizations and individuals, the largest number of such briefs ever filed in a Supreme Court case to this point.[67] And this time the Court produced an opinion, albeit a deeply fractured one. In an opinion by Justice Brennan, four justices held that the correct constitutional standard to

66 *Id.* at 319-20.

67 Interestingly, the AFL-CIO did not file an *amicus* brief this time, reflecting the splits within the union movement over affirmative action.

apply to affirmative action plans "designed to further remedial purposes" was the intermediate level scrutiny standard.[68] Applying this standard, the four justices upheld the Davis plan. Four other justices, in an opinion by Justice Stevens, didn't reach the constitutional issue. They held that the special admissions program violated Title VI of the Civil Rights Act of 1964[69] by "excluding Bakke from the Medical School because of his race."[70] Thus, there were four votes holding that neither the Constitution, nor legislation, prohibited a university from taking race into account in its admission decisions, and that under Title VI of the 1964 Civil Rights Act, a university could never take race into account in admissions.

This tie was broken by Justice Powell who agreed, in part, with each of the two groups. Applying the strict scrutiny standard, Justice Powell rejected the Davis plan. Its "fatal flaw," he wrote, was its racial quota, its "disregard of individual rights as guaranteed by the Fourteenth Amendment."[71] This meant there were five justices who held the Davis program unconstitutional, albeit for different reasons. However, he did find that the attainment of "a diverse student body"[72] was constitutionally "compelling in the context of a university's admissions program."[73] In order to achieve it, Justice Powell held that, while a university couldn't set aside a specific number of spots for racial minorities, it could take race into account in its admission decisions. In choosing among qualified candidates, Justice Powell held that "race or ethnic background may be deemed a 'plus' in a particular applicant's file."[74] This part of his opinion was joined by the other four justices, meaning five justices held that universities could take race into account in their admissions decisions.

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68 *Supra* note1 at 359.

69 Title VI states: "No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. §2000d.

70 *Supra* note 1 at 421.

71 *Id.* at 320.

72 *Id.* at 311.

73 *Id.* at 314.

74 *Id.* at 317.

The result of the *Bakke* decision was that, while universities could take race into account as one factor in admissions, they could not impose racial quotas. In essence, this allowed universities to continue their affirmative action programs. While some critics thought there was no essential difference between a racial quota and treating race as one factor among many,[75] the decision gave a little something to each side. Opponents of affirmative action could point to the holding that racial quotas denied applicants the equal protection of the laws, while supporters could reply that it was constitutional for a university to take race into account.

Why did the justices adopt this position? Certainly the language of the Constitution did not compel the result. The best answer, I think, is that the decision reflected a political compromise between contending forces. The New Deal coalition was split. There was little public opinion polling on the issue, but from the scant evidence that was available, the public seemed both unsure and divided in its views.[76] The brief filed by the U.S. government argued for the constitutionality of taking race into account but pretty much avoided the issue of racial quotas, mentioning opposition to it only in passing.[77] A split and unsure society produced a split opinion.

AFFIRMATIVE ACTION AFTER *BAKKE*

The *Bakke* decision, as might be expected, did not end the controversy over affirmative action. Affirmative action programs had also been adopted by governments at different levels to increase the number of minorities receiving government contracts. The city of Richmond, Virginia, adopted such a plan, giving preference to minority-owned businesses in the awarding of city

75 Justice Blackmun, for example, in his *Bakke* opinion, wrote that he didn't find the difference "very profound or constitutionally significant." *Id.* at 406.

76 Charlotte Steeh and Maria Krysan, *The Polls – Trends Affirmative Action and the Public1970-1995* 60 Public Opinion Quarterly 128-158 (1996).

77 The "Constitution permits a professional school to seek to achieve reasonable goals or targets (in contrast to rigid exclusionary quotas) for minority admissions..." Brief for the United States as *Amicus Curiae*, Regents of the University of California v. Bakke, 1977 U.S. S. Ct. Briefs LEXIS 143 at 94.

contracts. In *City of Richmond* v. *J.A. Croson Co.*,[78] the Court held that this program violated the Equal Protection Clause. In writing for the Court, Justice O'Connor applied the strict scrutiny standard. However, there were several concurring opinions, making it somewhat unclear whether the majority of justices would apply strict scrutiny to affirmative action plans.

The question was settled in *Adarand* v. *Pena* (1995),[79] another case about preferences for minority-owned businesses, this time by the federal government. Writing for herself and four other justices, Justice O'Connor stated:

> *"we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."*[80]

However, Justice O'Connor made the explicit point that adopting strict scrutiny didn't automatically mean that all affirmative action plans would be found unconstitutional. Towards the end of her opinion, she wrote, "we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'"[81]

The *Adarand* case was also notable for the concurring opinion of Justice Thomas, the only African-American member of the Court. One of the Court's most conservative members, Justice Thomas equated affirmative action with segregation and apartheid. He wrote, "I believe that there is a 'moral [and] constitutional equivalence'...between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality."[82] For Justice Thomas, "government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple."[83] In response, Justice Stevens rejected:

78 488 U.S. 469 (1989).

79 515 U.S. 200 (1995).

80 *Id.* at 227.

81 *Id.* at 237.

82 *Id.* at 240.

83 *Id.* at 241.

"Justice Thomas' extreme proposition – that there is a moral and constitutional equivalence between an attempt to subjugate and an attempt to redress the effects of a caste system..."[84] Acknowledging that there are "many responsible arguments" against affirmative action programs, Justice Stevens rejected the argument that "equate[d] the many well-meaning and intelligent lawmakers and their constituents...who have supported affirmative action over the years, to segregationists and bigots."[85]

What led the Supreme Court to adopt the strict scrutiny standard for evaluating the constitutionality of affirmative action under the Equal Protection Clause of the Fourteenth Amendment? One powerful answer comes from the attitudinal model of judicial decision making.

The attitudinal model of judicial decision-making was created by Political Scientists Jeffrey Segal and Harold Spaeth in the 1980s. It posits that when justices are faced with a legal issue, the most important factor leading to their decision is neither the Constitution, nor the law, nor precedent, nor legal argument. In fact, it isn't legal at all! The factor is their policy preferences. According to the attitudinal model, justices chose the outcome they prefer and then find the appropriate legal arguments to support it. In two books,[86] they make the case that the attitudinal model better explains the outcomes of Supreme Court cases than does any appeal to the law.

One of the challenges in applying the attitudinal model is to find a measure of each justice's policy preferences. The measure must be independent of their votes in cases; otherwise, the logic is circular. A judge might vote in a consistently liberal or conservative direction across a number of related cases, not because she is liberal or conservative, but rather because she is applying a principled jurisprudential approach.

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84 *Id.* at 248.

85 *Id.*

86 JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODELREVISITED (2002). *See also*, Jeffrey A. Segal & Harold J. Spaeth, *The Influence of Stare Decisis on the Votes of U.S. Supreme Court Justices* 40 AM. J. POL. SCI. 971 (1996).

There are two main approaches to discerning a justice's policy preferences. The first is based on coding newspaper editorials in two generally liberal and two generally conservative newspapers from a time a justice is nominated by the President, to the time the Senate votes to confirm the nominee. A score is then created for each justice, from 0 to 1, with 0 being a perfect conservative and 1 being a perfect liberal. In a 1989 journal article, Political Scientists Jeffrey Segal and Albert Cover employed this methodology to study the voting records of the seventeen justices nominated between 1954 and 1988, that is, from the nomination of Early Warren in 1954 through the nomination of Anthony Kennedy in 1988.[87] They then explored how each justice voted in cases involving civil liberties, civil rights, criminal procedure, freedom of speech, due process and privacy. Based on just the scores they developed from the newspaper editorials, they correctly predicted 80% of the votes! Excluding Justice Harlan, they correctly predicted 86% of the votes. In other words, without knowing the facts of a case, the relevant constitutional or statutory provisions, the related precedents, the briefs or oral arguments – in fact, without knowing anything about a case other than what area of law it involved – the attitudinal model correctly predicted close to 90% of the justices' votes.

As impressive as the results of the Segal-Cover scores are, the methodology is cumbersome. A second, albeit crude, measure of a justice's policy preferences is to use the political party of the President who appoints a justice as a proxy. The idea here is that presidents almost always appoint members of their own party to the Supreme Court. Further, the intuition is that Democrats and Republicans have different policy preferences, particularly on issues such as of civil rights and civil liberties, women's rights, privacy, the rights of workers, the rights of criminal defendants, environmental protection and government regulation more generally. At first glance, this measure seems too crude. Political parties in the U.S. are traditionally seen as being big tents, covering a wide variety of viewpoints. However true this may be, using the political party of the President as a proxy for a justice's policy preferences is a surprisingly

87 Jeffrey A. Segal and Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices* 83 Am. Pol. Sci. Rev. 557 (1989).

powerful predictor of how they vote. This holds true even at the appellate level where judges are constrained by Supreme Court precedent. Cass Sunstein and colleagues undertook a major study of nearly 15,000 votes of judges of the U.S. Courts of Appeals across thirteen areas of law, from 1995 to the early part of the twenty-first century.[88] They found statistically significant differences in the votes of these judges in almost all the areas they examined, based solely on the political party of the President who appointed them.

How does the attitudinal model help us to understand the *Adarand* decision? Using the party of the appointing President as a proxy for the justices' policy preferences, overall Republicans, including Republican Presidents, generally oppose affirmative action, while Democrats, including Democratic Presidents, generally support it. The five justices in the *Adarand* majority who adopted the strict scrutiny standard were appointed by Republican Presidents Reagan and George H. W. Bush. In contrast, the two Justices appointed by a Democratic President, Justices Ginsburg and Breyer, dissented. So, only knowing the political party of the appointing President correctly predicts seven of the nine votes. It does not, however, correctly predict the dissenting votes of Justices Stevens and Souter, appointed by Republican Presidents Ford and George H. W. Bush, respectively. This is largely because both justices were more moderate than typical Republican nominees. President Ford, in the wake of the Watergate scandal, lacking electoral legitimacy[89] and facing a Democrat-controlled Senate, was in a weak political position. It is no surprise, then, that he nominated a more moderate person. President Bush was influenced by his White House Chief of Staff, John Sununu of New Hampshire, who supported David Souter, also from New Hampshire. President Bush was also hoping to avoid a political battle with the Democratic-controlled Senate. Again, the fact that Justice Souter was more moderate than the typical Republican appointee is no surprise.

88 Cass R. Sunstein, Schkade David & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation* 90 VA. L. REV. 301 (2004).

89 Gerald Ford, the Republican leader in the U.S. House of Representatives, was selected by President Nixon to serve as Vice President after the resignation of the elected Vice President Spiro Agnew. When President Nixon resigned in 1974, Vice-President Ford became President.

Returning to affirmative action in education, while most colleges and universities adopted affirmative action plans, they remained controversial for some people. For example, the Law School at the University of Texas took race into account in its admission procedures. This practice was challenged by a white woman, Cheryl Hopwood, and three white men who were denied admission to the law school. They alleged that the law school's use of race as one factor in admissions violated the Equal Protection Clause. In 1996, the U.S. Court of Appeals for the 5th Circuit agreed.[90] Addressing the *Bakke* decision and the issue of diversity, the court held that "Justice Powell's view in *Bakke* is not binding precedent on this issue" in part because "no other Justice joined in that part of the opinion discussing the diversity rationale."[91] The court then held that the correct standard to apply to evaluating the constitutionality of affirmative action was strict scrutiny. Applying that standard, the court held that "any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment."[92] In a sweeping conclusion, the court wrote:

> *"In summary, we hold that the University of Texas School of Law may not use race as a factor in decidi ng which applicants to admit in order to achieve a diverse student body, to combat the perceived effects of a hostile environment at the law school, to alleviate the law school's poor reputation in the minority community, or to eliminate any present effects of past discrimination by actors other than the law school."*[93]

On appeal, the U.S. Supreme Court declined to hear the case. The result was that in the three states over which the U.S. Court of Appeals for the 5th Circuit exercises jurisdiction, Louisiana, Mississippi and Texas, affirmative action was unconstitutional.

Although Texas is a politically conservative state, many people were troubled by the drop in the enrollment of black and Hispanic students at the state's flagship campuses, the University of Texas at Austin and Texas A & M University, in the

90 Hopwood v. Texas, 78 F. 3d 932 (5th Cir. 1996).

91 *Id.* at 944.

92 *Id.*

93 *Id.* at 962.

wake of the *Hopwood* decision. In response, in 1997, the Texas legislature passed, and Governor George W. Bush signed, a bill that guaranteed admission to any public university in Texas to any student who graduated in the top 10 percent of his or her high school class. Given the racially segregated nature of many high schools in Texas, it was widely believed that this "Top Ten Percent Plan" would increase enrollment of Hispanic and African-American students in Texas universities.[94]

THE UNIVERSITY OF MICHIGAN CASES

The Supreme Court returned to the issue of affirmative action in university admissions in 2003 when it heard two cases challenging affirmative actions programs at the University of Michigan.[95] In *Gratz* v. *Bollinger*,[96] the Court examined the constitutionality of the affirmative action program for admission to the undergraduate program. In *Grutter* v. *Bollinger*,[97] the focus was on the affirmative action plan for admission to the Law School. The *Grutter* opinion discussed the issues in more depth.

The facts of *Grutter* were similar to the facts of other affirmative action cases. Barbara Grutter, a white applicant from Michigan, was denied admission to the University of Michigan Law School, one of the highest ranking law schools in the country. Because the Law School seeks "a mix of students with varying backgrounds and experiences who will respect and learn from each other,"[98] it adopted an affirmative action program. Under that program, the law school takes account of "racial and ethnic diversity [in the admission process] with

94 For a helpful review of the Top Ten Percent Plan, see Nicholas Webster, *Analysis of the Texas Ten Percent Plan*, Kirwan Institute for the Study of Race and Ethnicity, DEMOCRATIC MERIT PROJECT, (The Ohio State University, Columbus,2007).

95 Interestingly, these cases were part of a well-financed litigation strategy to end affirmative action led by the Center for Individual Rights, a conservative public-interest law firm based in Washington, D.C. In addition to orchestrating these two cases, it also was the organization behind Cheryl Hopwood's successful suit against the University of Texas. See Wendy Parker, *The Story of Grutter v. Bollinger: Affirmative Action Wins* in MICHAEL A. OLIVAS AND RONNAGREFFSCHNEIDEREDS, EDUCATION LAW STORIES Ch. 4 (2007)

96 539 U.S. 244 (2003).

97 539 U.S. 306 (2003).

98 *Id.* at 314.

special reference to the inclusion of students from groups which have been historically discriminated... against." The law school aims to enroll a "'critical mass' of [under-represented] minority students" to "ensur[e] their ability to make unique contributions to the character of the Law School."[99]Grutter challenged this program as denying her the equal protection of the laws in violation of the 14th Amendment.

Justice O'Connor, writing for a five-vote majority, held that the appropriate standard to evaluate the constitutionality of the program was strict scrutiny. Rejecting the notion that the strict scrutiny standard was "strict in theory, but fatal in fact,"[100] Justice O'Connor asked whether the law school had a compelling interest in adopting its affirmative action plan. She found that it did. That compelling interest was diversity: "we endorse Justice Powell's view [in *Bakke*] that student body diversity is a compelling state interest that can justify the use of race in university admissions."[101] This led to the next question under the strict scrutiny standard: was the law school's affirmative action program narrowly tailored to achieve its goal? Again, the majority held that it was. "To be narrowly tailored, a race-conscious admissions program cannot use a quota system." Instead, a university may consider race or ethnicity only as a "'plus' in a particular applicant's file," without "insulat[ing] the individual from comparison" with all other candidates for the available seats.[102] In other words, universities can "consider race or ethnicity more flexibly as a 'plus' factor in the context of individualized consideration of each and every applicant." Justice O'Connor concluded that this was how the Michigan Law School's affirmative action program worked: "the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body."[103]

99 *Id.* at 316.

100 *Id.* at 326.

101 *Id.* at 325.

102 *Id.* at 334.

103 *Id.* at 343.

The result in *Gratz* was different, as was the University of Michigan's affirmative action plan for undergraduate admissions. Under that plan, applicants were scored on a point scale in which an applicant could score a maximum of 150 points.[104] Applicants from an "under-represented racial or ethnic minority group" were automatically given 20 points.[105] Applicants who scored 100 points or higher were admitted.[106] Jennifer Gratz, a white woman from Michigan who was denied admission, challenged this affirmative action program as violating the Constitution by denying her the equal protection of the laws. The Court agreed. Applying the strict scrutiny standard, Chief Justice Rehnquist held that the automatic distribution of 20 points, one-fifth of the points needed for admission, did not provide the individualized treatment that the Equal Protection Clause demanded. Thus, the Court concluded, the affirmative action plan was "not narrowly tailored to achieve the interest in educational diversity that respondents' claim justifies their program."[107] Justice Breyer concurred in the judgment but didn't join the Chief Justice's opinion.[108]

How can the opinions in these cases be explained? Looked at from the vantage point of the institutional model, they reflect the split nature of public opinion on the issue. According to the Gallup Poll in 2001, 47% of Americans favored affirmative action programs for minorities while 44% opposed them.[109] In 2003, the year of these decisions, 49% of respondents supported such programs with 43% opposed.[110] By splitting the difference, upholding the law school's affirmative action plan and striking down the undergraduate plan, the Court can be seen as giving each side a victory, in effect offering a political compromise.

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104 *Supra* note 96 at 255.

105 *Id.*

106 *Id.*

107 *Supra* note 96 at 255.

108 *Id.* at 281.

109 Jeffrey M. Jones, *Race, Ideology, and Support for Affirmative Action Personal Politics has Little to do with Blacks' Support,* GALLUP POLL (Aug. 232005) *available at* http://www.gallup.com/poll/18091/Race-Ideology-Support-Affirmative-Action.aspx.

110 *Id.* Support for affirmative action does vary by race, with African-Americans overwhelmingly supportive and whites fairly evenly split. In 2005 for example, 72% of African-Americans favored affirmative action programs, while, among whites, 49% opposed such programs compared to 44% who supported them.

The attitudinal model does less well in explaining the results. In *Grutter,* it successfully predicts the votes of the four Republican-appointed justices who dissented, as well as the two Democrat-appointed justices who voted to uphold the program. However, they were joined by three-Republican appointees, Justices O'Connor, Stevens and Souter. Earlier in the article, I discussed why Justices Stevens and Souter might be expected to be more moderate on affirmative action than other Republican appointees. The same is true of Justice O'Connor. When he ran for President, Ronald Reagan pledged to appoint the first woman to the Supreme Court. When the opportunity arose, he discovered that, as a result of pervasive sex discrimination in legal education and the legal profession, there were not many qualified woman from which to choose. This was particularly true on the Republican side. So, as the first woman appointed to the Supreme Court, Justice O'Connor was more moderate than the typical Republican appointee. Indeed, her Segal-Cover score made her the most moderate Republican appointee on the Court, almost as close to democrat-appointee Stephen Breyer as to her closest Republican-appointed fellow justice, Anthony Kennedy.

There is a third model of judicial decision-making that Political Scientists have developed - the Strategic Actor Model. It is most closely associated with the work of Lee Epstein and Jack Knight. In The Choices Justices Make, Epstein & Knight write that the "strategic account of judicial decision making comprises three main ideas: [1] justices' actions are directed toward the attainment of goals, [2] justices are strategic and, [3] institutions structure justices' interactions."[111] In keeping with the attitudinal mode, Epstein & Knight accept the premise that "justices, first and foremost, wish to see their policy preferences etched into law."[112] In keeping with the public opinion/institutional model, Epstein & Knight also accept the premise that courts lack the power to implement their decisions and are heavily dependent on the support of others. Where the Strategic Actor Model differs from the Attitudinal Model is in its second premise, that judges are constrained in their ability to enact their policy preferences by their colleagues, the rules of the court in which they serve and the lack of power of judicial institutions.

111 Lee Epstein and Jack Knight, The Choices Justices Make 10-11 (1998).
112 *Id.* at 9-10.

As they write, "justices are strategic actors, who realize that their ability to achieve their goals depends on a consideration of the preferences of others, of the choices they expect others to make, and of the institutional context in which they act."[113] If a justice simply voted her sincere preferences, as the Attitudinal Model predicts, she might be the sole dissenter in a case. It takes a majority of judges on a court to set precedent. Thus, a strategic judge will compromise, selecting the outcome closest to her preferred policy position for which she can win a majority of her colleagues' votes. Similarly, a judge may realize that her preferred policy position lacks support among those political actors, interest groups, administrators, and the public whose support is essential for the decision to be implemented. Once again, the Strategic Actor Model predicts that a judge will compromise her position to select the outcome closest to her preferred policy position that is most likely to be implemented.

In practice, there is a good deal of evidence supporting the Strategic Actor Model. To explore the plausibility of the Model, the authors focused on the 157 cases that were orally argued in the U.S. Supreme Court's 1983 term and that were listed in Justice Brennan's register.[114] They also examined the private papers of Justices Brennan, Douglas, Marshall and Powell. In addition, they undertook similar investigation of 125 landmark opinions issued by the Supreme Court over the Court's 1969-1985 terms. Much of what they found supported the premise that justices acted strategically so as to build majorities for their preferred policy positions.

Among the findings was evidence that the justices were aware of the views of political elites, interest groups and public. For example, in the justices' files, they found newspaper editorials and stories about current and past cases.[115] They found that in most cases, at least one brief provided this information.[116] Further, more than three-fourths of briefs indicated the views of the other branches of

113 *Id.* at 10.

114 *Id.* at xiv.

115 *Id.* at 145.

116 *Id.* at 145-47.

government.[117] And, in more than half the cases at the justices' conference, at least one Justice mentioned the position of other branches of government.[118]

The Strategic Actor Model finds support in the *Grutter* decision. While the attitudinal model might have predicted that the University of Michigan's plan would be invalidated, the Strategic Actor Model looks to factors other than the justices' policy preferences. Eighty-four *amicus* briefs were filed in the case. Sixty-nine of them supported the University and its affirmative action plan, eleven supported Grutter and four supported neither party.[119] Among the briefs supporting affirmative action were ones from 13,922 current law students, twenty-eight of the leading liberal arts colleges in the country, most of the Ivy League colleges and universities and several other leading universities, such as the University of Chicago, Stanford, and MIT. Importantly, there was a brief filed by sixty-five *Fortune 500* companies in support of affirmative action. The General Motors Corporation filed a brief in support of affirmative action, as did DuPont and IBM. Also importantly, twenty-nine retired military leaders, including former high-ranking officers and civilian leaders of all branches of the U.S. military, Secretaries of Defense, and present and former members of the U.S. Senate who had military careers filed a brief in support of affirmative action.

These briefs, representing leaders in higher education, business, and the military could have sent a powerful signal to the Court about their support for affirmative action. The justices might have concluded that a decision invalidating all affirmative action would fly in the face of the practices of leading U.S. universities, corporations, and military leaders, practices said to be vital to their mission and effectiveness. This is more than conjecture. Writing for the Court in the *Grutter* decision, Justice O'Connor took note of these briefs:

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117 *Id.* at 147, Table 5-1.

118 *Id.* at 149.

119 List of the briefs and a summary of each of them, *available at* http://www.vpcomm.umich.edu/admissions/legal/gru_amicus-ussc/summary.html.Link to each of the briefs supporting the University, *available at* http://www.vpcomm.umich.edu/admissions/legal/gru_amicus-ussc/um.html.

> *"major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. Brief for 3M, et al. as Amici Curiae 5; Brief for General Motors Corp. as Amicus Curiae 3–4. What is more, high-ranking retired officers and civilian leaders of the United States military assert that, "[b]ased on [their] decades of experience," a "highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security." Brief for Julius W. Becton, Jr., et al. as Amici Curiae 5."*[120]

While supporters of the attitudinal model would likely suggest that Justice O'Connor used these briefs to support and further her policy preferences, her citations of them are at the very least compatible with the Strategic Actor Model of judicial decision-making.

THE POST-UNIVERSITY OF MICHIGAN CASES

In 2007 the Supreme Court heard yet another affirmative action case dealing with education, this time for elementary and high school students. In *Parents Involved in Community Schools* v. *Seattle School District No. 1*,[121] the Court heard constitutional challenges to "voluntarily adopted student assignment plans that rely upon race to determine which public schools certain children may attend"[122] in Seattle, Washington and Jefferson County (Louisville), Kentucky. The idea behind the plans was to maintain racial integration in the public schools and to prevent some of them from becoming all white or all minority. In particular, Seattle was concerned that without such a plan, minority students concentrated in low-income, minority neighborhoods would lack access to the best schools.[123] These plans were challenged by Parents Involved in Community Schools, a non-profit group that supported neighborhood schools. As Chief Justice Roberts explained, the suits were brought by "[p]arents

120 *Supra* note 97 at 330-31.

121 *Supra* note 79.

122 *Id.* at 709-10.

123 *Id.* at 712.

of students denied assignment to particular schools under these plans solely because of their race...contending that allocating children to different public schools on the basis of race violated the Fourteenth Amendment guarantee of equal protection."[124] In operation, both plans had minimal effects, involving 307 students in Seattle[125] and approximately three percent of school children in Jefferson County.[126]

The Supreme Court invalidated both plans. Writing for only a plurality of the Court, Chief Justice John Roberts rejected the diversity rationale of *Grutter*, holding that it was "unique to institutions of higher education."[127] He found that the governmental interest in both cases was "racial balance" which was not compelling under the strict scrutiny standard of the 14th Amendment. "In design and operation," Roberts wrote, "the plans are directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate."[128] Further in his opinion, he noted that at the "heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not simply as components of a racial, religious, sexual or national class."[129] To support this position, the Chief Justice looked back to the *Brown* decision, arguing it stood for the proposition that school children could not, constitutionally, be treated differently on the basis of race. Chief Justice Roberts wrote, "the position of the plaintiffs in *Brown* was spelled out in their brief and could not have been clearer: [T]he Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race."[130] He then quoted Robert Carter, one of the plaintiff's lawyers in *Brown,* who, in oral argument, had told the Court that his "one fundamental contention [was] that no State has any

124 *Id.* at 710-11.
125 *Id.* at 733.
126 *Id.* at 734.
127 *Id.* at 724.
128 *Id.* at 726.
129 *Id.* at 730.
130 *Id.* at 747.

authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens."[131]

The fifth vote for invalidating both affirmative action plans came from Justice Kennedy. Unlike the plurality opinion, Justice Kennedy stressed the reality of racial discrimination and unequal opportunities. "The enduring hope is that race should not matter; the reality is that too often it does" he wrote.[132] In his view, the plurality opinion was "too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race."[133] This meant for Justice Kennedy that a color-blind Constitution in "the real world...cannot be a universal constitutional principle."[134] "Diversity," Justice Kennedy wrote, can be "a compelling educational goal a school district may pursue."[135]

Justice Kennedy concurred in the result, however, because he thought that neither Seattle, nor Jefferson County had met its heavy burden under the strict scrutiny standard of "justifying its use of individual racial classifications."[136] But, this did not mean that race could never be used by school officials. "In the administration of public schools by the state and local authorities," wrote the Justice, "it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition."[137] The problem in these cases was the way in which it was done. A "more nuanced, individual evaluation of school needs and student characteristics that might include race as a component,"[138] Justice Kennedy wrote, "could be constitutional."

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131 *Id.*

132 *Id.* at 787.

133 *Id.* at 787-88.

134 *Id.* at 788.

135 *Id.* at 783.

136 *Id.* at 784.

137 *Id.* at 788.

138 *Id.* at 790.

The four dissenting justices were incensed at the way in which the Chief Justice used the *Brown* decision to argue against affirmative action. The context of *Brown* was that state and local officials used race to demean and stigmatize African-American school children, separating them from white children. The aim of the *Brown* decision was to help African-Americans to end their demeaning treatment. Justice Stevens called it a "cruel irony"[139] to turn *Brown* on its head and use its argument to stop voluntary efforts to provide equal opportunity to all students. As Justice Stevens pointed out, Chief Justice Roberts "fail[ed] to note that it was only black schoolchildren" who were unable to attend local schools. "[I]ndeed," Justice Stevens wrote, "The history books do not tell stories of white children struggling to attend black schools."[140] For Justice Stevens, the Chief Justice's opinion "rewrites the history of one of this Court's most important decisions."[141] Justice Breyer agreed, calling it a "cruel distortion of history to compare Topeka, Kansas, in the 1950's to Louisville and Seattle in the modern day—to equate the plight of Linda Brown (who was ordered to attend a Jim Crow school) to the circumstances of Joshua McDonald (whose request to transfer to a school closer to home was initially declined)."[142]

To explain the decision in *Parents Involved,* one need not look much further than the attitudinal model. The five justices who voted to invalidate the affirmative actions plans were all appointed by Republican Presidents. Both Democrat appointees, Justices Ginsburg and Breyer, dissented with the support of the two moderate Republican appointees, Justices Stevens and Souter. Since the Michigan decisions in 2003, two new Justices had joined the Court. Chief Justice Roberts replaced Chief Justice Rehnquist who died, and Justice Alito replaced Justice O'Connor who retired. Ideologically, the Roberts for Rehnquist replacement was a wash; the Alito for O'Connor was a conservative move. The Court that heard *Parents Involved* was a more conservative body than the Court that heard the Michigan affirmative action cases.

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139 *Id.* at 799.

140 *Id.*

141 *Id.*

142 *Id.* at 867.

In the wake of *Parents Involved,* it appeared that the constitutionality of affirmative action programs hung by a thread. Now, at least four justices even believed that *Brown* v. *Board of Education* should be read to outlaw affirmative action. Many people thought its future depended on the identity of the next President and of the next justice to leave the Court, either through retirement or death. If a Democrat President was elected in 2008 and one of the five most conservative justices left the Court, the President would almost certainly appoint a Justice who would uphold the constitutionality of affirmative action. On the other hand, if a Republican was elected, and one of the four more liberal justices left the Court, it was thought that all affirmative action plans would be invalidated. In the 2008 Presidential election, the Democrats' candidate, Senator Barack Obama was elected President. However, the two justices who retired, Justices Souter and Stevens, came from the liberal wing of the Court. Their replacements, Justices Sotomayor and Kagan, would presumably vote the same way, leaving the Court's views of affirmative action unchanged.

On June 24, 2013, the U.S. Supreme Court announced its decision in yet another affirmative action case involving the University of Texas. *Fisher* v. *The University of Texas*[143] was a case brought by a white woman, Abigail Fisher, who had been denied admission to the University of Texas. The University, in order to produce a "critical mass" of minority students over and above the numbers produced by the Top Ten Percent Plan, took race into account in its admission factors. Following the Supreme Court's holding in *Grutter*, the University treated race as one factor among many in its admission decisions. As Justice Kennedy wrote, the University used race as a "meaningful factor"[144] in its admission decisions. Fisher challenged this use of race as denying her the equal protection of the laws. The University's affirmative action plan was upheld in the lower courts. Fisher appealed to the U.S. Supreme Court.

In predicting how the Court would decide the issue, all eyes were on Justice Kennedy. If he were to vote with his four other Republican-appointed colleagues – Chief Justice Roberts and Justices Scalia, Thomas and Alito – then it was

143 Supra 4.

144 *Id.*

widely believed affirmative action in universities would be ended. If he were to vote with his Democrat-appointed colleagues who heard the case[145] – Justices Ginsburg, Breyer and Sotomayor – then it was widely believed affirmative action would survive, at least for the time being. And, it was hard to know what Justice Kennedy would do. On the one hand, he had dissented in the *Grutter* case which upheld the use of race as one factor in admission decisions. On the other hand, his concurrence in the more recent *Parents Involved* case suggested he might be open to a narrowly tailored and carefully structured affirmative action program.

Justice Kennedy wrote the Court's opinion. His opinion was joined by all of his colleagues except for Justice Ginsburg. The Court found that the lower courts had not correctly applied the strict scrutiny standard. Under the Constitution and the Court's precedents, Justice Kennedy wrote, "strict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available workable race-neutral alternatives do not suffice."[146] In considering the constitutionality of the affirmative action plan, the Court held that the lower courts had not subjected the University's plan to this searching inquiry. "The District Court and Court of Appeals confined the strict scrutiny inquiry in too narrow a way," Justice Kennedy wrote, "by deferring to the University's good faith in its use of racial classifications..."[147] Thus, the case was vacated and remanded to the Court of Appeals to apply the correct constitutional standard.[148]

The *Fisher* decision left the constitutionality of affirmative action unsettled. Why did the Court do this? One plausible explanation, of course, is that it was the correct legal decision. If a lower court misapplies current doctrine,

145 The ninth Justice on the Supreme Court, Justice Kagan, appointed by Democratic President Barack Obama, recused herself.

146 Supra 4.

147 *Id.*

148 The U.S. Court of Appeals for the 5th Circuit held oral argument in *Fisher* on November 13th, 2013. As of the date of this publication, it had not delivered its opinion. For coverage of the oral argument, see, Manny Fernandez, *Texas University's Race Admissions Policy Is Debated Before a Federal Court*New York Times, November 14, 2013. Available at http://www.nytimes.com/2013/11/14/us/texas-universitys-race-admissions-policy-is-debated-before-a-federal-court.html?emc=edit_tnt_20131114&tntemail0=y.

it is procedurally defensible to remand the case and order the lower court to re-examine the issue. But, this seems too easy. The Court wasn't required to hear the case. Typically, the Court accepts a case for review if there is a conflict among U.S. Courts of Appeals. That was not the case here. Another ground for the Court to take a case is if the lower courts reject Court precedent or make a major departure from current practice. Again, that was not the case here. Under Court rules, it takes the votes of four justices for the Court to accept a case. This suggests that the four conservative justices voted to hear the case thinking they could win the vote of Justice Kennedy and produce a Court opinion invalidating affirmative action once and for all. If so, it appears they miscalculated. It may be the case that Justice Kennedy isn't yet prepared to invalidate all use of race in university admissions. If he had been willing, it seems virtually certain he would have been joined by his other Republican-appointed colleagues.

Another interesting question raised by the decision is why Justices Breyer and Sotomayor, two Democrat-appointed justices who had voted to uphold affirmative action plans in the past,[149] joined the Court's opinion and not Justice Ginsburg's dissent? One possible answer comes from the Strategic Actor Model. If, as suggested above, they believed that the future of affirmative action depended on Justice Kennedy's vote, then perhaps they were willing to support him doing anything short of striking it down. They may have believed that a remand was the best outcome they could hope for. Further, the remand buys time. Perhaps one of the Republican-appointed justices will leave the Court before the next affirmative action case reaches it?[150] If that were to happen, and a Democrat was President, then there would very likely be five votes to uphold affirmative action.

149 Justice Breyer concurred in the *Gratz* decision which invalidated the automatic point system used in undergraduate admissions at the University of Michigan. The facts of the Fisher cases, however, were much more similar to the use of race in *Grutter*, which Justice Breyer supported.

150 Justices Scalia and Kennedy will both turn 78 in 2014.

CONCLUSION

The U.S. Supreme Court is a political institution. Its members are selected and appointed through a partisan political process. In contentious political issues, it is presented with the ambiguous words of the U.S. Constitution. Through *amicus* briefs, it learns the policy preferences of those individuals, institutions, and organizations whose support is crucial if the Court's decisions are to be given more than lip service. Given this reality, it is naive to expect the justices to be entirely removed from the society in which they live and the political system of which they are members. Perhaps, in no substantive area is this truer than in issues of discrimination, including affirmative action.

In examining how the Supreme Court reaches its decisions in affirmative action cases, I have argued that three leading models of judicial decision-making, the attitudinal model, the strategic actor model and the institutional/public opinion model shed a great deal of light. They highlight how the policy preferences of the justices, the constraints under which they operate, and the beliefs of white elites and the white public more generally are powerful predictors of how cases will be decided. If this is right, then the future of affirmative action depends much more on politics and elections than it does on constitutional provisions, precedents and legal interpretation. The future of affirmative action, then, largely depends on which party wins the 2016 U.S. Presidential election. That outcome, and not any legal argument, must be the focus of anyone who wishes to understand the development of the U.S. Supreme Court's jurisprudence in affirmative action and, perhaps, in other contentious areas.