An Analysis of the Factors Affecting US Supreme Court Decisions in Higher Education Affirmative Action Cases

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Abstract

In the study of judicial behavior, there has been an ongoing controversy about whether justices behave sincerely or strategically when making decisions. I contend that there are a variety of factors that influence a justice’s decision especially in cases of great public and governmental salience. In order to demonstrate this judicial responsiveness, I will conduct a qualitative analysis of the factors affecting US Supreme Court justices in higher education affirmative action cases.

A case study of the four major higher education cases will be provided in order to indepthly look at the facts of the cases and the justices’ decisions. Through the application of the legal model, the attitudinal model, and the neo-institutional model, I illustrate that key influences, such as mass and elite opinion, may affect judgments in higher education affirmative action cases. The neo-institutional model’s importance for further study is also noted because it incorporates the many diverse factors that affect US Supreme Court decisions. A framework for future quantitative research into this field is also provided.
There is an ongoing controversy in the analysis of judicial behavior that continues to rage on to this day. It is steeped in debate about whether or not justices are political or objective actors. This clash of ideologies has boiled down to a question: “When making decisions do United States Supreme Court Justices vote sincerely or strategically?”

Clayton and Gillman (1999) contend that although justices do take their own policy preferences into account, there is still no reason not to argue that other factors along with policy preferences may influence the decision of the Court. An evaluation of all the factors that may affect judicial decisions will allow more understanding of how the justices operate (Baum 2000). To further this understanding, I will analyze the institutional influences that justices may encounter and the role of policy preferences in Supreme Court judgments in higher education affirmative action judgments.

Some have argued that only policy preferences, and not external factors such as Congress and public opinion, have influence on Supreme Court judgments (Segal 1997). Segal (1997) found that justices, given the institutional barriers protecting them, regularly have little or no regard to the preferences of the other branches of the government. He argues that US Supreme Court justices act sincerely and don’t seem to adjust to governmental change. Segal and Spaeth (2002) also contend that those who believe that the Court rules simply on the merits of the case are only trying to “cloak the reality of the Court’s decision making process” (Segal and Spaeth 2002:53). I contend that the Supreme Court is responsive to a variety of factors, specifically when the case subject is of great contemporary importance, such as higher education affirmative action issues. Baum (2000) found that “Supreme Court justices care about their standing with audiences outside of the court.” Epstein and Knight (1998) also note that there is a necessity for justices to look at the public sentiment towards a specific issue if they seek to establish a standard for a law or policy. Justices often consider the other branches when making decisions because they do not want to face the prospect of a judgment being overturned. If the Court feels as though there is large opposition to what may be their majority preference, the Court will often compromise their opinion in order to achieve a most preferred over a least preferred outcome (Baum 2000). If Supreme Court justices do alter their opinions and preferences according to what an outside force like Congress may do in response, it is extremely important to take this into account when analyzing cases of such great political magnitude, such as affirmative action cases.

Affirmative action has been one of the most debated topics in American culture since the Bakke decision of 1978 (Spann 2000; Feinberg 1998). It is feasible to argue that the lack of a concrete decision on affirmative action has to do with many factors affecting the US Supreme Court justices and not their policy preferences alone. Not only are there varying beliefs about affirmative action amongst the members of the Court, but there is also a rather focused public and elite eye on the legality, issues, and judgments surrounding the policy of affirmative action.

It is necessary to point out that it is inherently difficult to discover exactly which factors affect different parts of a Supreme Court judgment (Segal and Spaeth 2002; Baum 2000). When analyzing exactly what factors affect a decision making body such as the Supreme Court, there is difficulty in finding if justices are actually responding to outside influences or if outside influences happen to coincide with justice preferences (Baum 2000). Baum (2000) contends that influence cannot be pinpointed to one specific thing; rather, it is a combination of various factors.
An in-depth look into affirmative action judgments has not been examined until now and more research is still needed. Although other topics of great contemporary interest, such as search and seizure laws and death penalty cases, have been examined by scholars in the field (see Baldus, Woodworth, and Pulaski Jr. 1990; Segal 1986; Wolpert 1991), researchers have yet to focus their attention on the factors influencing Supreme Court judgments in affirmative action higher education cases. This paper will be a preliminary analysis to highlight what factors are important, which factors are influencing justices’ decisions on this issue, and what direction should be taken in the analysis of future affirmative action court decisions.

My secondary goal is to begin and possibly draw attention to the importance of examination of decisions involving higher education affirmative action cases. The judgments that the Supreme Court will make in the future, both near and distant, have many implications for American society as a whole. There are few cases that address a sensitive topic like race and draw so much attention to the judgment of the Court. When cases of great public salience arrive, it is an ample opportunity to analyze the many factors that go into the decision of a US Supreme Court judgment.

In order to fully explore the factors that may affect the judgment of the Court, I utilize a combination of qualitative and quantitative methods that will assist in understanding judicial behavior. I also draw upon the research of the expert scholars in the field of judicial research and affirmative action policy. Theoretically, the utility of the attitudinal model, the legal model, and the neo-institutional model will be explored to discover the most adequate way to analyze US Supreme Court higher education affirmative action judgments. I will also allude to the importance of the neo-institutional model\(^1\) for future research. My preliminary study will analyze the question of whether justices behave strategically or sincerely in making judgments. I will also provide case studies of four significant higher education affirmative action cases (*Bakke v. University of California Board of Regents*, *Grutter v. Bollinger*, *Hopwood v. University of Texas*, and *Gratz v. Bollinger*) and analyze the similarities, differences, and implications of the cases. I will conclude my paper with a final analysis incorporating the aforementioned models and an opinion on the factors that affect US Supreme Court judgments in higher education affirmative action cases.

**Judicial Responsiveness**

Is the US Supreme Court an objective and mechanical instrument of the law? Much research has contested this notion and argued that justices are a functioning part of the political system (Segal and Spaeth 1993; Epstein and Knight 1998; Yates and Whitford 1998; Spiller and Gely 1992; Flemming and Wood 1997). In his groundbreaking work, *The Elements of Judicial Strategy*, Walter Murphy contended that due to the inherent vagueness in some of the terms used in the Constitution (“due process” and “equal protection”) it is rational to argue that justices may be following policy preferences in making their decisions (Murphy 1964). Although much controversy and debate over this issue has arisen, the question still remains: Do US Supreme Court justices behave sincerely or strategically in voting scenarios? Epstein and

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\(^1\)Neo-institutionalism embraces rational choice assumptions about human behavior, such as maximization of policy preference, with particular attention to how institutional arrangements shape purposive behavior (Brace and Hall 1990: 54; Clayton and Gillman 1999).
Knight (1998) support the notion that justices are policy seeking individuals who seek to move the law as close to their own beliefs as possible. One former Chief Justice is quoted as stating, “We are under a Constitution, but the Constitution is what the judges say it is” (Segal and Spaeth 2002: 2). Segal and Spaeth (2002) contend that although there may have been a time when people believed that justices were “tools of the law,” an analysis of the stark contrasts between the recent Burger court and the present Rehnquist court leaves little strength to this out dated and long held argument. However, there are those who argue against the notion of the policy minded judge and believe that good legal interpretation is the goal of the Supreme Court justice (Dworkin 1988).

The contention of the legal theorist is illustrated by D.C. Court of Appeals Judge Harry Edwards, “It is law- and not the personal politics of individual judges- that controls the judicial decision making in most cases…..” Legal theorists do not support the widespread notion that justices are free to pursue their interests and act freely and, for the most part, to their discretion (Dworkin 1988). Legal scholars place importance on precedence, particularly in regard to cases that have great significance or have no historical ruling or law. Legal scholar Herman Pritchett, although he acknowledges that judges do not act solely on precedent, contends that the idea that justices act solely on policy is a faulty assumption that does not lead to a more accurate analysis of judicial behavior (Pritchett 1969).

The neo-institutional scholars contend that there are a variety of factors that influences what courses and actions the Court chooses to take (Brace and Hall 1990). Looking into the other political factors that may affect the judges’ decisions, such as public and Congressional opinion, allows for a better understanding of how the Courts operate (Clayton and Gillman 1990). Epstein and Knight (1998) found that in deciding to grant certiorari to cases, justices consider not only the actions of their colleagues, but also that of other branches, especially Congress. Studies analyzing the importance of public opinion have increased in frequency (see Flemming and Wood 1997; Mishler and Sheehan 1993; Link 1995) and overall show a more positive relationship between the Court and the public’s opinion. Scholars have recently begun to analyze the effects of outside forces on US Supreme Court decision making (see Spiller and Gely 1992; Mishler and Sheehan 1993; Flemming and Wood 1997) but more work is still needed. I contend that what will lead to a more accurate analysis of judicial behavior is an analysis of a court issue with great public and governmental importance (see Baldus, Woodworth, and Pulaski Jr. 1990; Segal 1986; Wolpert 1991).

Affirmative action has been one of the most debated and controversial topics in America to date (Spann 2000). Due to its legal and societal implications, as well as its inherent reference to the preferences of the justices, an in depth analysis of affirmative action cases is both necessary and proper. Due to the limits of this research endeavor, the scope of my research will focus only on those cases that involve higher education and affirmative action. I will conduct a case study analysis in the effort to determine what model may be more apt to explain judicial behavior in higher education affirmative action cases. The contending models are: the legal (jurisprudence) model and the political model (e.g., attitudinal model and neo-institutional model).

The legal model has many variants amongst its supporters; however, the underlying belief in all cases is that the decisions in the Court are substantially influenced by case merits and to a lesser degree, the statutes, precedent, Constitution, and the intent of the framers (Segal and Spaeth 2002). Scholars contend that precedent has the power
lean a judge in a specific direction (Dworkin 1988). Proponents of this model argue that if a new case falls within the scope of a previous decision, the precedent established previously has the power to bind the justice in what he can do (Segal and Spaeth 2002). There has also been a school of thought asserting that justices pursue legal questions as a goal in and of itself (Segal and Spaeth 2002).

The attitudinal model asserts the idea that if policy preferences are vis-à-vis the facts of the case, the policy preferences of the justice will supercede the merits of a case (Segal and Spaeth 2002)—change wording. Proponents of the attitudinal model argue that because a justice is a known liberal that he will vote liberally in his cases and if a Chief Justice is known to be a stark conservative, he will tend to be in line with conservative judgments (Segal and Spaeth 2002). The supporters of this school of thought affirm the belief that judge preferences predict judicial behavior (Segal 1997; Segal and Spaeth 2002). Attitudinal advocates believe that institutional factors that are involved in the judicial process (Congress, public opinion, the Presidency) have little bearing on the Court and this allows the justices to act in a manner of their discretion in making judgments (Segal 1997).

The neo-institutional model views judgments as not only the result of policy preferences, but also, a collective expression of the diverse interaction of many values and structures of the government (Brace and Hall 1990). Smith (1988) contended that political scientists should begin to recognize the importance of legal and political factors and institutions as independent forces in a justice’s decision-making procedure. This model contends that decisional rules and institutional arrangements influence justice’s behavior (Brace and Hall 1990). Proponents of the neo-institutional model also argue that judicial norms and legal traditions take a role in court judgments (Clayton and Gillman 1999).

Before the case studies and analysis of the usefulness of these models, it is necessary to include a brief history of affirmative action in order to properly demonstrate the salience of this issue to the American public and the elites.

**Affirmative Action**

“The term ‘affirmative action’ was originally coined in the era following *Brown v. Board of Education* as a response to subtle forms of societal discrimination that continued to operate against racial minorities” (Spann 2000: 4). Initially, affirmative action was started when the government realized that the *Brown v. Board of Education* judgment was not sufficient to end segregation. At the urging of civil rights groups, due to the lack of enforcement for the *Brown* decision, the government initiated a course of action intended to redress this failing. The affirmative action program identifies the efforts of the government, through laws, policies, guidelines, and administrative practices, to protect minorities from discrimination in employment, housing, and education (Simmons 1982; Feinberg 1998). Although affirmative action officially began in 1964 with Title VII of the Civil Rights Act, the idea of taking “affirmative action” to increase minority representation in the work field was an idea that commenced before this act was passed (Feinberg 1998). Vice president Richard Nixon chaired the President’s Committee on Government Contracts in 1959 and made it an initiative to pursue steps to increase the number of black contractors receiving government contracts.
President Kennedy and President Johnson created executive orders\(^2\) in order to implement more equitable practices by government contractors (Feinberg 1998). In 1969, President Nixon and then labor secretary George Shultz issued an order to increase equal practices in the Philadelphia construction trades due to the 1.6% minority representation in the field. In 1973, the Nixon administration also found it appropriate to issue specific hiring goals and timetables to advance equal opportunity legislation in America. With these government initiatives came challenges to the idea of affirmative action and with these challenges came confusion and tentativeness by the Court to address this issue (Spann 2000). The difficulty that the Court has encountered in making judgments are quite visible in the notable affirmative action cases involving the three major sectors of racial affirmative action: redistricting\(^3\), education, and employment (Spann 2000).

In 1971, the Court found that the use of race-based pupil assignment was a permissible remedy for prior Constitutional violations in the *Swann v. Charlotte-Mecklenburg Board of Education*. However, in 1973 in *Keys v. School District No.1, Denver, CO*, the Court limited the court-ordered desegregation to de jure rather than de facto segregated school districts. The Supreme Court found that a congressional set-aside program for minority contractors was constitutional in *Fullilove v. Klutznick*\(^4\). However think of another word), just nine years later in 1989, the Supreme Court invalidated a minority set-aside program for contractors in *City of Richmond v. J.A. Croson*. The Court ruled that the system did not follow the precedent set by the *Fullilove* case because the city did not prove its past historical discrimination and the thirty percent quota was not justified if the city could not prove its historical discrimination.

The usefulness of the Voting Rights Act has been challenged recently due to the large amount of judgments that the Court has made limiting the scope of the act. In *Voinovich v. Quilter* the Court rejected a claim that minority voting strength would be diluted by “packing” minority voters into a few smaller districts. The Court rejected another claim, in *Johnson v. De Grandy*, that it was sufficient to establish minority-voting districts that were proportional to minority representation in the population.

In the 1960’s, at the onset of affirmative action, universities began to pursue measures to increase minority enrollment (this is understandable, considering that universities trained the workforce that affirmative action was intended to affect (Feinberg 1998)). However, since the 1970’s, many of the more progressive affirmative action programs have seen great public and governmental scrutiny (Feinberg 1998). In 1974 the Supreme Court saw its first challenge to higher education affirmative action. *Defunis v. Odegaard* was argued over a University of Washington School of Law program that gave minority students preferential treatment in the admissions process. A white student

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\(^2\) Executive Order 10,925 stated in part that “contractor[s] will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants will be employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.

\(^3\) The Voting Rights Act of 1965 was designed to prevent and remedy racial discrimination in voting. The act prohibits voting practices, including the adoption of voter reapportionment or districting plans that have the effect of diluting the voting strength of covered racial minorities.

\(^4\) *Fullilove v. Klutznick* the Court ruled that under the Public Works Act of 1977, recipient of federal funds were required to use 10 percent of those funds to procure goods or services from minority contractors. The agency in charge of the act had to ensure that minority firms that received the funds had been discriminated against historically.
challenged the program and the State Court of Washington found the program legal, however the Court avoided the case by issuing the case as moot because the white student was about to graduate from law school. Because the Court refused to address racial affirmative action in higher education the subject re-emerged in the Bakke case of 1978 (Spann 2000).

What follows are case studies of the four arguably major US Supreme Court cases that have been involved in the debate around affirmative action. Bakke v. University of California Board of Regents asked the Court to address the legality of quotas in affirmative action. Hopwood v. University of Texas, though it was not a Supreme Court case, is deserving of analysis because the Court did not see the case in which the Fifth circuit outlawed the use of race in public universities admissions processes. In Grutter v. Bollinger, a white applicant challenged the University of Michigan’s law school program; the question of diversity as a contemporary compelling interest was answered in this case. Gratz v. Bollinger outlawed a University of Michigan admissions program that awarded underrepresented minorities preference in admissions decisions.

This case study analysis is conducted in an effort to delineate which previously discussed model is appropriate for determining if justices act strategically or sincerely in voting for higher education affirmative action cases. I will provide an in-depth analysis of the facts of the case, as well as a report of how the justices voted. Along with this information, I will provide an analysis of the similarities, differences, and implications of the cases. The applicability of the models that were mentioned beforehand will be seen in my concluding analysis. I will culminate my paper with a final examination and a conclusion on the factors that may affect US Supreme Court judgments in higher education affirmative action cases.

**Case Studies**

The US Supreme Court’s first high profile case involving higher education affirmative action policy was Bakke v. University of California Board of Regents. This case involved the admission policies of the University of California Medical School’s admissions committee and a rejected applicant named Allan Bakke. Bakke claimed that the quota system that the school practiced was illegal because it set aside 16 of the 100 open slots for minorities. Bakke contended that he was more qualified than the minority applicants who had been accepted to the school over him. More specifically, his counsel contended that his 14th amendment rights had been violated and that the admission policy at the university was in violation of Title VI of the Civil Rights Act of 1964. The medical school contended that their program was in place to redress societal discrimination amongst minorities and to encourage minority doctors to serve underprivileged communities.

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5 The Fourteenth Amendment was originally intended to accord citizenship to African-Americans. The Equal Protection Clause of the 14th amendment states, “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

6 Title VI of the Civil Rights Act of 1964 states that 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.
After two lower courts found the system illegal, the medical school appealed for a writ of certiorari to the US Supreme Court. The trial bought much attention to the Court because the issue of affirmative action was one that had caused much conflict and turmoil amongst the justices, the government, and the public as well (Caplan 1997). Justice Powell wrote the opinion of the Court that applied the strict scrutiny standard\(^7\) and found the special admissions program illegal. Chief Justice Burger and Justices Stevens, Stewart, Powell, and Rehnquist provided the concurrence necessary to dispel the program. While a different five person concurrence composed of Justice Brennan, Justice White, Justice Powell, Justice Marshall, and Justice Blackmun found that it was appropriate to maintain racial classifications in affirmative action programs. Although the Court found the program illegal, they concluded that race may be considered as a “plus” factor in a multi-dimensional admissions policy. The Court also found that there was only one true justification for the consideration of race in college admissions—diverse student populations facilitated education and more stimulating campus communities. Because the medical school could not prove that the white applicant would not have been admitted even if the program was not in place, the Court ordered that the medical school offer admittance to Bakke.

Subsequent to the judgment in Bakke, the Court encountered a writ of certiorari for a major higher education case that never made it to the steps of the Supreme Court: *Cheryl Hopwood v. University of Texas Law School.*

Cheryl Hopwood applied to the University of Texas Law School and was denied admission. She and several other plaintiffs argue that they were discriminated against due to the unfair admission policy at the University of Texas Law School. Just as in the *Bakke* case, the plaintiffs believed that their Fourteenth amendment rights had been violated and that the admissions policy at the school was in violation of Title VI of the Civil Rights Act. The plaintiffs claimed that they would have been admitted were it not for the “unjust preference” that is granted to minority applicants in the review process. The University of Texas’ “illegal” admissions procedures were started in the 1970’s after no black students were being admitted to the law school. After the *Bakke* decision and much trial and error, the university came to develop the process that was being tried in the court. The law school created a system that deferred minority admissions to a committee composed of two deans and two minority student that were to choose applicants to achieve a class that was 5% Black and 10% Mexican-American. At this point, the full admissions committee no longer selected individual applicants for admission; the full committee only approved a list provided to them by the subcommittee. The District Court found that although diversity was a compelling interest, the system utilized by the law school was not legal. Judgment was made for the plaintiffs, but admission was not granted because the law school had proven that the applicants would have been denied even if the program was not in place. The University appealed to the Fifth Circuit of the United States who reversed the decision and found that diversity was no longer a compelling interest in the admissions process. How did this relate to the *Bakke* decision? The law school applied for a writ of certiorari to the Supreme Court that was denied. The Supreme Court issued a memorandum opinion denying cert. Nonetheless, both Justice Ginsburg and Justice Souter released a statement with the

\(^7\) All racial classifications imposed by government must be analyzed by a reviewing court under “strict scrutiny”; this means that such classifications are constitutional under the Equal Protection Clause only if they are narrowly tailored to further compelling government interests.
denial stating that although the issue of race in college admissions was important, the policy at the school had already been changed; therefore, the issue was moot. If the policy had not been changed the Court would have had grounds to hear the case, but they left the issue unanswered until 2003.

In 2003, the issue of affirmative action in higher education reappeared in the Supreme Court. These cases involved the University of Michigan’s undergraduate and law school admission policies.

Petitioners Jennifer Gratz and Patrick Hamacher both applied for admission to the University of Michigan’s College of Literature, Arts, and Sciences. Gratz applied for admission in fall 1995 and was denied, at which point she chose to attend the University of Michigan at Dearborn from which she graduated in 1999. Patrick Hamacher had applied to the university in the fall of 1997 and was also rejected, at which point he decided to attend Michigan State University. Hamacher and Gratz filed a class action lawsuit in October of 1997 in the US District Court of Eastern Michigan against the University of Michigan for racial discrimination in violation of their rights under the Fourteenth amendment. The class action suit involved all students who were denied admission from 1995 and onward who were in the less favored racial groups, i.e. Caucasian or Asian. The petitioners also sought punitive damages, an end to the university’s “discriminatory” admission policies, and Patrick Hamacher’s admittance as a transfer student. The District Court found that the policy of the school from 1995-1998 was in fact illegal because it was a functional equivalent of a quota. However, because Michigan had changed its policy by the year 1999, the District Court did not grant the injunction that the petitioners had wanted. Both parties appealed the decision and the case was granted a writ of certiorari before an appeals court decision could be made.

The petitioners argued that the system in place was unjust because it “unfairly” granted 20 points, or one-fifth of those needed in the admissions process, to underrepresented minorities simply because of their race. Petitioners also contended that the program violated their Fourteenth amendment rights and Title VI of the Civil Rights Act of 1964. The university contended that the admissions policy was narrowly tailored to serve the interest of achieving a racially and ethnically diverse student body and that the policy was also in effect to redress the university’s past and current discrimination against minorities. The majority opinion of the court, delivered by Chief Justice Rehnquist, found that the program was not narrowly tailored to meet the needs of a diverse class and did violate the Fourteenth amendment and Title VI of the Civil Rights Act. Justice O’Connor filed a concurring opinion in which Justice Breyer joined in part. The justices’ decisions were as follows: Both Justice Breyer and Justice Thomas filed separate concurring opinions. Justice Stevens filed a dissenting opinion in which Justice Souter joined. Justice Souter filed a dissenting opinion in which Justice Ginsburg joined in part and Justice Ginsburg filed an opinion in which Justice Souter and Justice Breyer joined in part. The Court found that the twenty points granted to minorities just because they are minorities went beyond the precedent set by Bakke: race must be a plus factor.

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8 From 1995 to 1998, the University of Michigan had utilized a system that managed its rolling admissions to permit consideration of certain applications submitted later in the academic years through the use of “protected seats.” Specific groups, including athletes, ROTC candidates, and underrepresented minorities were protected categories eligible for these seats. A committee referred to as the Enrollment Working Group projected how many applicants the university was likely to receive from these categories and paced admissions decision to permit full consideration of expected applicants from these groups.
not a predominant one. At the same time that the undergraduate admission policies of the University of Michigan were being decided, its law school was also undergoing the test of strict scrutiny.

Barbara Grutter applied to the University of Michigan Law School in 1996. She had a high GPA and LSAT score (3.81 and 161 respectively) and was placed on the waiting list. However, Grutter was eventually rejected from the law school. Upon receiving notification of this denial she filed a class action lawsuit against the University of Michigan Law School. She claimed that she had been discriminated against because the University of Michigan used race as a predominant factor and that minorities with similar grades and LSAT scores would have been admitted. The law school contended that their admissions policy had a compelling interest to achieve a diverse student body that helped break down racial stereotypes, improve cross-cultural understanding, better prepare students for a diverse workforce, and adequately prepare students for professional life. The law school also hoped to attract a “critical mass” of students who are underrepresented in the law school, such as African-Americans, Hispanic Americans, and Native Americans.

Barbara Grutter filed her case with the Eastern Michigan District Court and they found that she had been discriminated against and that the admission policy was not narrowly tailored. They also found that the law school could not use race in its admission policy. The law school filed with The Court of Appeals and the decision of the lower court was reversed holding that the Bakke decisions defined diversity as a compelling interest and the program was narrowly tailored because race was only a plus factor. Several judges on the Court of Appeals filed dissents stating that the system was in fact unconstitutional and the US Supreme Court granted a writ of certiorari in order to answer the question of whether or not diversity was a compelling state interest.

Although the petitioner argued that the system at the law school was unfair, the Court found that the system used race only as a “plus” factor amongst many that are considered in the admissions process. Justice O’Connor delivered the opinion of the Court, which found that the law school’s admission policy aspires “to achieve that diversity which has the potential to enrich everyone’s education and thus make a law school class stronger than the sum of its parts.” The mixture of opinions and decision by the justices is even more diverse than the University of Michigan undergraduate case. Justices Stevens, Souter, Ginsburg, and Breyer joined the opinion of the Court and Justices Thomas and Scalia joined in part. Justice Ginsburg filed a concurring opinion in which Justice Breyer joined. Justice Scalia filed an opinion concurring in part and dissenting in part, to which Justice Thomas joined. Justice Thomas’ opinion, which was concurring in part and dissenting in part, was joined in part by Justice Scalia. Chief Justice Rehnquist filed a dissenting opinion to which Justices Scalia, Kennedy, and Thomas joined. Justice Kennedy filed a dissenting opinion separately. The Court found that the policy did not discriminate against other students that were nonminority because nonminority students that had lower scores than minority students were regularly admitted. However, Justice O’Connor suggested that within 25 years, due to the progress made thus far in the admission of minorities, the governmental interest of having a diverse student population will no longer be compelling.
Information Analysis

The decisions reached in all of these cases have far reaching and significant consequences. The major issue in all of the cases is the idea of how affirmative action should be interpreted. Are judges using precedent, as the legal model would argue, policy preferences, as the attitudinal model would contend, or are there multiple factors at work as suggested by the neo-institutional model? It was not until the Bakke decision that institutes of higher education obtained an idea on how to pursue the action that the United States government, under the Civil Rights Act, wanted to pursue. Justice Powell changed affirmative action policy when he declared that seeking a diverse class was a compelling government interest and that race may be considered as a factor amongst many in admissions policies\(^9\). All cases that engaged the concept of affirmative action after Bakke made reference to the precedent set by this landmark case and Justice Powell's ruling.

Many of the students that objected to the school’s admission policies had also used the Fourteenth amendment and Title VI of the Civil Rights Act as basis for the unconstitutionality of each program. All cases involved the interpretation of how to pursue an interest such as diversity and whether or not the methods used to fulfill that interest were narrowly tailored. With the exception of the Hopwood case, all of the cases that were seen before the Supreme Court failed to have a concrete judgment handed down about affirmative action policy. Perhaps it is the tenuous Supreme Court judgments that lead to an ongoing controversy about the logistics of affirmative action policies. The differences in the policies of higher education institutions are a reflection of the lack of a tangible decision in a higher education affirmative action case.

The difference of greatest importance in the cases from 1978 until 2003 is found in the questioned affirmative action policies. In the Bakke case, for example, the question brought to the Court was whether or not “quotas” were illegal and, as in all the following cases, did the system infringe upon constitutional rights? In the Hopwood case, the judgment was based on both the legality of having two separate admission committees and the compelling interest of diversity. The University of Michigan undergraduate case contended the question of whether students were unfairly discriminated against because minority students received an automatic twenty points in the admissions process. The University of Michigan law school case argued it was reasonable to take race into account if race is a consideration amongst many factors in the admissions process. Also, it raised the question of whether or not such a program can be narrowly tailored to not infringe upon the Fourteenth amendment rights of nonminorities. These notable differences lead to the implications of the judgments on affirmative action in higher education.

There is a trend that is becoming more and more apparent in the study of Supreme Court affirmative action judgments. In its brief history, affirmative action’s policy initiatives have managed to differ and progress towards a more conservative stance. This is an important observation because the law is not becoming more conservative,

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\(^9\) Justice Powell’s assertion that seeking a diverse class was a compelling government interest and that race may be considered as a factor amongst many in admissions policies is an illustration of judicial activism. Judicial activism can be defined as a philosophy wherein justices do not decide cases merely based on the literal meaning of the Constitution but often make decision reflecting their personal preference also taking into consideration current values of the American people (Neubauer and Meinhold 2004).
because the law and the precedent is the same, but it is the interpretation that has an ideological bias that is changing the face of affirmative action in the courts.

In the *Bakke* case, the Supreme Court ruled that considering race to achieve a diverse student body was a compelling government interest but quotas were deemed an illegal means to achieve this action. However, in the *Hopwood* case, the District Court of Texas found that diversity was a compelling interest but the Fifth Circuit of the US Court of Appeals reversed this decision and declared the consideration of race in public universities illegal. The judges’ decision was directly opposed to the clear precedent already established in the *Bakke* case. The states of Texas, Louisiana, and Mississippi must follow the Hopwood ruling because they fall under the ruling of the Fifth Circuit (Caplan 1997). In the University of Michigan’s undergraduate case, the Supreme Court found that granting twenty points to minority students was in violation of the Fourteenth amendment and struck down the policy of the school. Finally, in the University of Michigan’s law school case, the Court found that the program for seeking diversity at the school was in fact narrowly tailored, however a proposed time frame of 25 years was given until diversity will no longer be a compelling state interest.

Were the justices influenced by their own policy preferences, or were the merits of the case ruling the Court? Perhaps it was a combination of many factors. To further analyze this question, an application of the legal and political models is obligatory. Upon examining the case studies and looking at the circumstances surrounding each case, an application of the most appropriate model to describe the judicial action in each case has been determined. Although the legal model fairs well in explaining the University of Michigan undergraduate case, and the attitudinal model fairs well in the *Hopwood* case, the neo-institutional model proves to be the most appropriate model for analyzing US Supreme Court higher education affirmative action cases. Chart 1 demonstrates a simplistic depiction of how I decided upon each model’s applicability to each case.

**Application of Models**

The legal model argues that the merits of the case, in accordance with precedent and the Constitution, are the major factors involved in the US Supreme Court decision (Segal and Spaeth 2000). Only law and precedent would explain judicial behavior; however this may not be true, as will be shown in my analysis. The attitudinal model would say that judicial preference in interpreting law could explain decisions; however, my analysis demonstrates that there could be other factors that affect their decision which should not be prematurely excluded from analysis. What becomes clear is that the legal and attitudinal models alone are not enough and provide an insufficient explanation of judicial behavior. Although it is apparent that judicial preferences and precedent do impact judgments, other factors may play a role as well, as my future research will attempt to show.

In the *Bakke* case, the question brought before the Court was one that involved violation of the 14th amendment rights and Title VI of the Civil Rights Act. This case presented an issue before the Court that had no precedent; nonetheless, as alluded to earlier, the justices chose to partake judicial activism in an expansive interpretation beyond the literal meaning of the law. Allan Bakke claimed that his right to equal protection under the law was violated when he was not eligible for consideration for all
seats in the medical class. The strict scrutiny standard was enforced because to the Court racial classifications must pass the most exhausting legal test to be considered necessary. The Court ruled that the language of the Fourteenth Amendment extended to all citizens and it cannot be applied to one race and not the other. Because the special admissions program excluded Bakke only on the basis of race, the program violated the 14th amendment and consequently, Title VI of the Civil Rights Act. However, Justice Powell’s ruling on the benefits of diversity as a compelling state interest has no precedent or legal rights involved. The same applies to his ruling that race may be considered a “plus factor” amongst many. In this case there is a mention of legal factors, violation of the fourteenth amendment and illegal quotas, as well as factors created by political preference, i.e. the “diversity” rationale and the “race as a plus” argument. Justices Powell, Brennan, White, Marshall, and Blackmun agreed that race should be a factor in admissions while Chief Justice Burger and Justices Stevens, Rehnquist, and Stewart argued that the race issue was not relevant to the case. It seems feasible to argue that “race as a plus factor” was the meeting ground between the two thoughts. Justice Powell supported the notion that race should be use in admissions to achieve a diverse student body, however, Justices Brennan, White, Marshall, and Blackmun had agreed that race could be used to correct past discrimination. It could also be argued that because Burger, Stevens, Rehnquist, and Stewart believed that race in admissions was not an issue, the middle ground was the diversity rationale. The neo-institutional model would argue that the interaction between the justices can also be analyzed for its influence on the decision. Along with this, an analysis on the influence of other external factors, such as Congressional and public opinion, may explain more of the justices actions. These other sectors of the political arena may have been focused on this case due to its precedential and historical salience.

In the Hopwood case, student Cheryl Hopwood argued that her fourteenth amendment rights had been violated by the admissions program at the University of Texas Law School. She argued that they had a program where minority applicants were considered for admission in a separate admissions process in which white students were not considered. The District Court ruled that, as stated in the Bakke case, race may be a “plus” factor; however, the policy of using separate admissions committees violated the 14th amendment rights of the students. However, when the case went before the Fifth Circuit of Appeals, a majority opinion stated that both the policy of the school and the idea that diversity was a compelling interest were invalid and unconstitutional. The court refuted that the goal of the equal protection clause was to eliminate race. The court did acknowledge Justice Powell’s opinion of the interest of diversity; however, it considered it only his opinion and still found that any consideration of race by the law school, for diversity or to correct past historical discrimination, violated the fourteenth amendment. The court contended that recent cases10 involving affirmative action had stated that past discrimination was the only compelling interest for equal protection purposes. The court

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10 Adarand v. Pena was a 1995 case involving government contracts for minorities. The Court invalidated a federal affirmative action program through the application of the strict scrutiny standard and found that it was not just to have preference for minority contractors because they were believed to be socially and economically disadvantaged. City of Richmond v. J.A. Croson Co. was a case in 1989 that found a minority set-aside program for contractors was illegal because it provided 30% set-aside instead of the 10% established by the Fullilove case. The Court found the program unconstitutional because the city could not prove its past discrimination in the construction trade, so the program was unjustified.
used the strict scrutiny standard applied to all racial classifications and, citing *Wygant* and *Croson*\(^\text{11}\), found that the past discrimination of the school was more societal and not necessarily that of the law school itself, therefore the law school could not use that discrimination in its defense. Precedent had previously stated that racial diversity was a compelling interest and here the court chose to ignore the influence of societal racial discrimination on restricting the law schools effort towards diverse classes. In this case much precedent is cited for justification. For most of its ruling, the Court backed up its opinion with an opinion that was found in the Supreme Court. However, the Court disregards the *Bakke* opinion stated by Justice Powell on the basis that it was only Justice Powell’s opinion and they also interpret the fourteenth amendment’s equal protection clause as one which seeks to remove race from all government decisions. An interpretation not used in any case opinion before this. The conservative policies of the justices on the Fifth Circuit can be viewed quite easily. Due to their judgment, affirmative action was completely taken away from Texas’ universities. Although the Court ruled that the diversity rationale did not satisfy a state interest, Judge Wiener filed a separate special opinion in order to reject the notion that diversity could not be a compelling state interest. Because there was precedent that could have preserved affirmative action, *Bakke*, the question becomes why they would go against this precedent and cite other cases that “justify” their decision. This is where the neo-institutional model could shed light on the decision-making process by incorporating other external factors including judicial policy preferences and external government actors in the model.

The University of Michigan law school case was another set of circumstances where the Court was forced to decide if an admissions policy was narrowly tailored to serve its interest in diversity. The Court ruled that the policy used at the law school was legal because it only considered race as “plus” factor amongst many, as indicated in the *Bakke* case. The Court found that the program was narrowly tailored because it was not made in a fashion that made race the predominant factor in admissions, and it ensured that each applicant was weighed individually. White students were not harmed by the policy; therefore there rights were not violated under the 14th amendment rights. However, Justice O’Connor did make a statement which insinuated that the compelling interest in diversity may not be compelling in 25 years time; this is due to the progress made thus far. Precedent fairs well in explaining the actions involved in the Court’s judgment. The program was found to be narrowly tailored and did serve a compelling governmental interest in promoting diversity; however, Justice O’Connor cites no precedent for her statement about affirmative action in 25 years, she only uses evidence citing minority student enrollment has increased. This statement could have the same precedent effect that Justice Powell’s decision has had for the last 26 years (the diversity precedent was written in his opinion, just in the same way as Justice O’Connor’s statement is in her opinion). The conservative composition of the Court, president, and Congress, allows one to contend that because the Court had found a program that was

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\(^{11}\) *Wygant v. Jackson Board of Education* was a 1986 case involving a program in Jackson that protected minority teachers with limited seniority from layoffs at the expense of white teachers who had greater seniority. Justice Powell wrote the Court opinion that decreed the program was illegal because correcting past discrimination was not a compelling state interest, nor was the program narrowly tailored because it linked the percentage of minority teachers to minority students, which did not relate to addressing past discrimination. The *Croson* case was discussed previously.
legal, that their policy preferences and the constraints placed upon them by the institutions, facilitated Justice O’Connor’s statement about the usefulness of the affirmative action in 25 years.

Conclusion

John Micklethwait and Adrian Wooldridge, authors of *The Right Nation: Conservatism Power in America*, have highlighted America’s evolution into a conservative state. If one looks at the insurgence of conservative sectors of government, ranging from the presidency to the US Supreme Court, the right is winning the political battle on many fronts, including its influential power, its activism, and the status it has in American society (Micklethwait and Woolridge 2004). To contend that the influence of the growing conservative sector does not have any influence on the Court’s judgments is too ignore a part of the integral process that may help better predict and explain judicial behavior.

If one was to follow this pattern of growing conservatism, it can be inferred that the next major affirmative action decision could be a judgment that moves closer to the eventual dismissal of all affirmative action initiatives. Although the Supreme Court has yet to deliver a definitive judgment on the issue, the decision that may be the pivotal judgment on affirmative action may be the decision that ends it.

It is due to the increasing conservative attitude towards affirmative action that I have decided to pursue an analysis of the many diverse factors that may affect Supreme Court decision in higher education affirmative action cases. My preliminary look into what judges may base their decisions on, has only compelled me to continue this research further and more indepthly. Policy preferences may play a part into what the justices decide to concur and dissent to, but it is my opinion that other factors also shape their decisions. For future study, I will also look into the importance of justice interaction in determining the Court’s opinion. A look into the importance of amicus curiae briefs will also be examined for their correlation to the public importance of the issue. I will also be further analyzing the neo-institutional model because in issues of great public salience, the other institutions of the government may have more of an effect. This model is most appropriate for future research because it incorporates all potential influences in cases, such as institutional arrangements, environmental factors, the importance of precedent, and justice preferences. An incorporation of more quantitative analysis will also accompany my future research. The roles of public opinion, presidential appointment, Congressional opinion, amicus briefs, and presidential influence will be observed more closely and incorporated into a quantitative model. I have thus far utilized qualitative methods and the most appropriate next step is a quantitative model that seeks to more comprehensively explain judicial behavior in higher education affirmative action cases. Butler (2004) offers a framework for a future model:

**Insert Model 1 Here**

From *Bakke* to the recent University of Michigan cases, affirmative action has been an issue of great salience to the American public and the American government; therefore the Court has a more influential role. It is feasible to believe that in a situation where there is greater attention on the Court that the actions taken will be more closely watched. The Court’s actions in these cases deserve a closer look because they have the
potential to deliver a landmark decision on higher education affirmative action in the United States.

The policy of affirmative action may soon be a thing of the past. The children of 20 years from now may look at affirmative action as something of an ancient relic. Perhaps it will not be necessary; perhaps the idea of needing a program to help minorities will be archaic in both thought and actuality. However, stories of California, where affirmative action has been eliminated, tell of a different future. This future is where minorities are continually becoming less and less visible on college campuses. This future may be one where race-neutral policies lead to white race campuses and a country where de facto segregation is the untold law of the land. Only the Court can decide what will happen next and who will suffer or benefit because of it. Will the Court take a definitive stance or will it continue to evade the issue of outlining a substantive, practical guideline for affirmative action policy? My future research will attempt to answer this perplexing and crucial question.

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12 According to an analysis by the Tomas Rivera Policy Institute, acceptance rates for Latinos have dropped since 1997 by 38% at UCLA, nearly 43% at UC San Diego and 38% at UC Berkeley. Only UC Riverside maintained a somewhat level admission rate for Latino students. For African American students, the situation was no better. African American student acceptance rates fell by 37% at UCLA, 43% at Berkeley and an incredible 64% at UC San Diego. System wide, the minority acceptance rate dropped 24% (Pachon 2000).
Bibliography


