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This study seeks to study relevant precedent cases concerning affirmative action, the 14th Amendment equal protection clause, the 5th Amendment equal protection clause, and the Civil Rights Act of 1964, with the goal of predicting how certain justices will vote in the affirmative action case, Fisher vs. University of Texas at Austin. *I conclude that justices will debate numerous aspects at play, such as original intent, plain meaning, precedent, policy preferences, public opinion, personal experience, the federal government, and interest groups in order to take positions in the* Fisher vs. the University of Texas at Austin *case for the second time around with an intent to make a moving statement on affirmative action*

When the Supreme Court accepts a case for a decision on the merits presented by a party, it initiates a grueling decision-making process amongst nine justices with the objective of providing an immediate outcome for the parties to the case and a statement of general legal rules that apply to the nation (Baum 2013). Scholars have inquired about methods of this judicial process, and there is disagreement within the legal community about how the justices decide cases the way they do because it is the product of maybe not just one, but multiple intertwined forces that vary in importance amongst the justices that, operating together, shape decisions (Baum, p. 148). The following is a list that functions as a comprehensive theory of judicial decision making where both legal and political influences serve as justices' guiding framework for interpretation. Justices may take into consideration plain meaning of the words that are in the law, original intent of the framers of the Constitution or legislators, precedent, policy preferences, mass public opinion, personal experience, government institutions, and interest groups when choosing their positions for a case. Incorporating plain meaning and precedent are techniques that fall under the role of law as a component in decision making (Baum, pgs. 114-147 Epstein & Walker, pgs. 21-44).

Policy preferences, mass public opinion, personal experience, interest groups, and government are influences and techniques that fall under the broad role of politics and values in the second component of decision making. The majority of justices at least reflect on all of these at some point before coming to a decision because the Constitution is sometimes ambiguous and the various cases that come before the Court evoke non-legal considerations. However, there is little support from court members in admitting that they consider these factors alongside the dominant force of legality (Epstein, p. 33). In this essay, I will explain how three out of nine justices – Ruth Ginsburg, Clarence Thomas, and Antonin Scalia – have taken into consideration

one or more of these principles over the course of their October 2014 term. Specifically, I will study relevant precedent cases concerning affirmative action, the 14th Amendment equal protection clause, the 5th Amendment equal protection clause, and the Civil Rights Act of 1964, with the goal of predicting how they will vote in the affirmative action case, *Fisher vs. University of Texas at Austin* (2015). First, it is critical to understand what these influences mean and how they can be measured in various ways to see if it they play a role in justices' votes.

Plain meaning, or textualism, is an approach where justices' interpretations lie verbatim to the words of constitutional provisions and does not explore further meaning than the words therein. Justice Scalia explains how he adheres to this in his essay, *A Matter of Interpretation*. He asserts that the Constitution tells us not to nit-pick at detail, but to give words and phrases an expansive rather than narrow interpretation, and not an interpretation that the language will not bear (Scalia, p.37). I include this influence because he explicitly showed that it is important to his decision making. Measuring justices' preference for this approach can be determined by the frequency in which they cite definitions in the case opinion, defining words of the Constitution (Baum, p. 117).

Original intent is an approach that acknowledges that the framers of the Constitution chose their language carefully, so it is the court's duty to determine what the meaning of the language was (Epstein, p. 23). Many Supreme Court opinions contemplate the original intent of the framers, and Justice Thomas regularly uses this approach. Thomas wrote in part of the plurality opinion of a major case called *Parents Involved in Community Schools v. Seattle School District No. 1* (2007):

"My view of the Constitution is Justice Harlan's view in Plessy: 'Our Constitution is colorblind, and neither knows nor tolerates classes among citizens.' And my view was the rallying cry for

the lawyers who litigated Brown." He believes that the 14th Amendment equal protection clause bans any preferential treatment of minorities.

In the Seattle case, the majority ruled that public school systems cannot seek to achieve or maintain integration through measures that take explicit account of a student's race. Seattle public school programs sought to maintain school-by-school diversity by limiting transfers on the basis of race or using race as a tiebreaker for admission to particular high schools. While Scalia joined the majority, Justice Ginsburg joined the dissenting opinion with three others agreeing that the ruling undermines *Brown's* promise of integrated primary and secondary education that local communities have sought to make a reality (Greenhouse). Justice Ginsburg does not follow the original intent of the framers of the Constitution, like Justices Thomas and Scalia, rather she believes in a living constitution. Some critics say that Scalia's brand of legal interpretation is an impediment toward progress to today's standards of racial and gender equality.

Measuring justices' usage for this approach of original intent can be done by determining the frequency in which they reflect upon the framers or legislators discussing their opinion concerning a dispute of the law. *Stare decisis* is a term that means "let the decision stand," referring to a rule that has been long established within the courts that justices should decide cases based on previously established precedent in history (Baum, p. 30). This particular technique is valuable in that it generates predicable direction and stable law. With this in mind, the court rarely reverses its previous decisions and instead honors them. Whether a justice is writing a majority, dissent, or concurring opinion, citing precedents is a common basis upon which the opinion is based.

Stare decisis can be used as a means of measuring precedent's influence on a justice's decision. It is rare for the Court to take cases that are almost identical to precedent because the issue has already been ruled upon and they have to be selective due to the 7,000 cases on average they receive. On the contrary, the Court decided to take on *Fisher v. University of Texas* once again (Baum, p. 120). Sometimes when constitutional issues are involved, *stare decisis* may be overlooked (Epstein, p. 31). According to Lee Epstein and Thomas Walker, "Of the 129 precedent cases overruled between 1953 and 2001, about two-thirds involved constitutional issues."

Justice Thomas would account for this as he has written many opinions where he feels inclined to do so if precedent is faulty. Justice Scalia even insisted that Justice Thomas does not believe in *stare decisis* (Baum, p. 121). Herman Pritchett, one of the first scholars to study the importance of justices' personal attitudes, concluded during the 1940s that the justices were not following precedent; rather, they were motivated by their own preferences (Epstein & Walker, p. 34). Policy preferences are key techniques that vary more than any other influence from one justice to another. Justices' personal history—such as their family socialization, religion, career activities, etc.—mold their attitudes to take stances on policy issues.

Justices can take positions on cases that reflect their views of good policy before and during their appointment and advance ones they favor by swaying other justices. Justices Scalia, Thomas, and Ginsburg offer this insight into their personal ideology because they frequently speak to the press and write about judicial issues (Baum, p.22). It is harder to determine influences for justices we know less about, even though court opinions provide some insight. Particular policy preferences are organized as taking either a liberal or conservative position.

Liberal or conservative positions containing specific policy preferences concern civil liberty and economic issues.

Baum (2013) defines the liberal position of the Court as giving relatively heavy weight to the right of equal treatment by government and private institutions, procedural rights of criminal defendants, and substantive rights such as freedom of expression and privacy.

A conservative position, rather, gives great weight to values such as effective law enforcement and national security, which compete with the rights Liberals support. Conservatives are also less favorable to any government regulation of business practices (Baum, p. 124). Whether a particular justice is liberal or conservative depends on the frequency by which justices cast liberal or conservative votes (see figures 1-3, which compare the ideological direction of the decision to the ideological direction of the justice on a case-by-case basis). Research with mixed results seemingly implies that the influence of public opinion is not as notable as other considerations towards justice's decision making, but it is worth highlighting as it is relevant to the case of *Fisher v. University of Texas at Austin.*

Many students, parents, faculty, and universities as a whole across the country care about and have an opinion on the issue of using affirmative action in university admissions decisions. Justices might be swayed consciously or unconsciously to take what they perceive as the more popular side (Baum, p.141). According to surveys collected by the Pew Research Center in 2014 sampling 3,335 adults in the U.S., 63% of Americans said affirmative action programs designed to increase the number of black and minority students was a "good thing" compared to 30% who disagreed (Pew Research).

Public support from the general community and political officials strengthen the Court's ability to secure acceptance of its decisions whereas those who are responsible for carrying out

those decisions can also limit or overturn them (Baum, p. 140). The influence of public opinion is also existent in court opinions where justices legitimize their reasoning by attaching a jurisprudential standard to the law such as looking at, "evolving standards of decency," when determining whether a punishment violates the 8th Amendment (Epstein & Walker, p. 40). The court often must depend on the executive and legislative branch to give its decisions legitimacy so they may take these policymakers into account when they reach decisions (Epstein & Walker, p. 42). The most applicable governmental influence involving the case of *Fisher v. University of Texas at Austin* would be the U.S. solicitor general representing the United States as an interest group in favor of the University of Texas.

According to data located in the Supreme Court Compendium, the Solicitor General's office generally is able to convince the justices to adopt its preferred position (Epstein & Walker, p. 42). Out of 8 civil rights cases brought before the Roberts Court (from 2005-09) 62.5% of the time the United States won the case, and out of 102 cases total during that time period, 66.4% of the time the United States won (Epstein, p. 716)

Personal or life experiences are yet another major influence over the Court that editor and founder of *Scotusblog*, Amy Howe, recently elaborated quite well on at a University of Florida lecture this year (2015). Howe believes that having broader experiences gives us better law and gives the Court a little bit more legitimacy (2015).

She mentioned the following various examples of how the justices are influenced by their own personal experiences as evidence. Justice Sotomayor once admitted that based on her gender and Latino heritage, she views a case differently from any other justice. A memoir written by Justice Clarence Thomas described him growing up in Savannah, Georgia, where he spent most of his childhood growing up poor. He remembered the Ku Klux Klan having a convention with

nearly 250 members parading down the city's main streets. Decades later, he was on the bench when the Court heard *Virginia v. Black. Virginia v. Black* involved a challenge to a Virginia criminal law that made it a crime to burn a cross with intent to intimidate someone. Justice Thomas, who rarely speaks before the Court, did so in this case expressing his concern over the Federal Government's actions minimizing the symbolism and effects of the burning cross (Howe 2015).

Justice Thomas, the lone dissenter, said the burning cross was intended to cause fear and terrorize the population. He said in every culture certain things acquire meaning in which outsiders cannot comprehend. He said there was a common understanding of the Klan as a terrorist organization, and cross burning was a symbol intending lawlessness to instill fear and threaten physical violence. Therefore, he dismissed the majority's assertion that a burning cross is not always intended to intimidate, such an act can also be a statement of ideology. This connection is direct evidence of the influence of personal experience on his vote. In regards to affirmative action, Justice Thomas says it is racially discriminating. Thomas suffered stigma attending Yale where white students said he was admitted based on racial quotas. He also had a difficult time finding a job because employers thought he received special treatment being a product of affirmative action (~~Amy~~ Howe). However, Thomas eventually found his way and became (interestingly enough) an assistant secretary for civil rights at the Department of Education in the Reagan administration. Additionally, he joined the Office of Civil Rights and held position as Chairperson of the Equal Employment Opportunity Commission (EEOC) (Harvard Law, p. 9 & 10). Thomas' seven-page dissent in *Grutter v. Bollinger* (which I will go into detail later in this essay) stated that he believes minorities can survive and make

achievements without the interference of university administrators or the majority race in the U.S. (Harvard Law, p. 37)

As for Ruth Bader Ginsburg, she experienced gender discrimination that women today would find unimaginable. When she went on to attend Cornell University, they had a policy where females had no choice but to live in dormitories so the University could provide proper supervision over them. There was also a quota of 4 men to every 1 woman because space was limited. She was famously asked by a dean of Harvard Law School to justify taking the place of a man that would otherwise be in the class. Ginsburg had trouble finding jobs after law school, and at one point, Justice Frankfurter refused to conduct an interview with her because he thought it would be inappropriate to have a woman as a law clerk. At the time, many sign-up sheets for law firm interviews specified men only. She eventually landed a job as a clerk for a New York district judge who only hired her after a law professor promised him that he had a male student at Harvard standing by to take her place if things didn't work out. Ginsburg once stated to the press during the case of *Safford v. Redding* that some of her colleagues would not understand what a 13-year-old girl has gone through because they did not have the same experience as her. She also said being Jewish, a woman, growing up in Brooklyn, and even attending a summer camp provided her with a different life experience and perspective than the other justices (Howe).

Lastly, interest groups supporting parties' cases before the Supreme Court influence the Court's policies. Opinions of the Court address the arguments raised by the interest groups during oral argument of *Fisher v. University of Texas*. The government as an interest group wins justices' support far more often when its arguments also accord with justices' ideological positions (Baum, p. 145). The percentage of cases won (as mentioned earlier) puts the federal government in the best position to benefit from positive perceptions of the justices. Overall,

cases dealing with affirmative action attract far more participation from interest groups. For example, *Regents v. Bakke* was a case that involved admission of minority students to medical school where more than 100 organizations participated as interest groups split between both parties ((Epstein & Walker, p. 43). In comparison, 14 amicus briefs were filed in support of Petitioner Abigail Fisher and a massive 67 just for the University of Texas at Austin.

Moving forward, I will explore the background, constitutional issue, and arguments made surrounding affirmative action and the current case before the court, *Fisher v. University of Texas at Austin*. Affirmative action is an outcome of the 1960's Civil Rights Movement, intended to break the barriers that a history of discrimination made for minority groups and women at a disadvantage by providing them with equal opportunities in education and employment. According to the National Conference of State Legislatures, in 1965 only 5 percent of undergraduate students were African American (NCSL). Of the 17.5 million undergraduate students in fall 2013, about 9.9 million were white (57%), 2.9 million were Hispanic (17%), 2.5 million were African American (14%), and 1 million were Asian (6%) (2014). In 1997, the Texas legislature enacted a law requiring the University of Texas to admit all high school seniors who ranked in the top ten percent of their high school classes (Oyez).

After the University of Texas found that there were racial and ethnic differences within the undergraduate and state population, they modified its race-neutral admissions policy. The new policy took into account the top ten percent of in-state students for admission and then considered various factors for the rest of the applicants outside of the ten percent of their high school classes including a list of variables under academic and personal achievement indexes. The academic index is calculated based on standardized test scores and class rank, while the personal index calculated reflects weighted average of applicant's essays (2 required), leadership

abilities, awards, honors, work experience, extracurricular activities, socioeconomic status, family status, and race. However, no numerical values are ever assigned to any components of the PAI Index. Abigail Fisher, who was a white Texas resident, applied to the University of Texas and was denied admission in the summer and fall of 2008 (Cornell).

Fisher had a Liberal Arts AI of 3.1 and a Business AI of 3.1, because nearly all the seats in the undeclared major program in Liberal Arts were filled with Top Ten Percent students she would only be admitted if her AI exceeded 3.5 regardless of a perfect PAI score. Fisher claimed that her academic credentials exceeded those of admitted minority applicants. Fisher competed against 17,131 applicants for the remaining 1,216 seats for Texas residents that year in the fall. She moved forward with her claim by suing the University and challenging their admissions policy for their use of race as violating the 14th Amendment equal protection clause. The University of Texas defended by saying their use of race was a narrowly tailored means of achieving their interest in diversity and it is a single factor among many that are holistically reviewed in admissions (Cornell).

The United States District Court upheld the legality of the University's admission policy and the Fifth Circuit Court of Appeals affirmed. Fisher appealed to the U.S. Supreme Court to consider this question and the justices returned a 7-1 decision partially in her favor. The Court ruled that the 14th Amendment permits the consideration of race in university admissions decisions but only under a standard of strict judicial scrutiny. The Court of Appeals judgement was incorrect because they failed to verify or sufficiently examine whether the University policy could have used other race-neutral alternatives that would provide the same benefits of diversity (Santoro and Wirth). If the University does not satisfy strict judicial scrutiny, race cannot be used as a factor in admission decisions. The Supreme Court remanded the case back to the Fifth

Circuit Court of Appeals to revisit the issue to make sure the policy can sustain strict scrutiny review and reaffirmed the *Grutter* rule (Cornell).

After the benefit of additional briefing, oral argument, and exacting scrutiny, the Court of Appeals affirmed the district court's ruling in favor of the University of Texas again. Abigail Fisher on appeal to the Supreme Court again begs the question whether the use of racial preferences in university admissions can be sustained under Court interpretations of the Equal Protection Clause. Fisher now argues that strategically vague polices, shifting rationales, and stereotypical assumptions should not be permitted to triumph over her individual right to equal protection under the law and the polices still do not survive strict scrutiny because 86% of the African American and Hispanic students who enrolled in the fall of 2008 were admitted via the Top Ten Percent Plan. The University of Texas argues that Petitioner Abigail Fisher lacks standing due to her relief being moot so she does not meet Article III's minimum requirements. Also, they assert a compelling interest to consider race and the individualized consideration of race was necessary to complement the Top Ten Percent law.

The United States, as the major interest group in this case, asserts a critical national interest in qualified and diverse graduates for the Armed Forces. They argue the university concretely defines its educational objectives without identifying a demographic goal and it had not attained sufficient diversity to fully provide educational benefits in 2004 and 2008. The University of Texas alleged that it increased recruitment and budget spending having regional admission centers in particular areas in Texas and promotional campaigns toward minority applicants in response to diversity "plummeting" from the *Hopwood* decision. Educational benefits were defined in *Bakke*, *Grutter*, and *Fisher* as bringing unique perspectives to classroom debates, breaking down isolation and stereotypes, and cross-racial understanding. In the direct

precedent to this case, *Grutter v. Bollinger*, the Supreme Court ruled that the University of Michigan's admission policy stressing diversity through "critical mass" did not violate the 14th Amendment and critical mass was not equal to a quota, which would violate the 14th Amendment, decided by *Regents v. Bakke*).

Based just on prior opinions, concurrences and dissents, it is clear that Justices Scalia and Thomas would not uphold the University of Texas' admission policy (see figures 1 and 2) but Justices Ginsburg probably would. While it can be difficult to predict the actual outcomes of the case, some additional insight was provided listening to oral argument of this case to support my prediction. During oral argument, Justice Scalia asserted that diversity may not serve minority students well. He opposed remand to the District Court, arguing that the University of Texas is not entitled to a second chance to develop the record. Justice Ginsburg suggested that the Top Ten Percent Plan was designed to improve racial diversity and pointed out for a second time around that injunctive relief was not possible due to the fact that Ms. Fisher graduated from another institution already so there was no class action. Justice Thomas did not speak.

To conclude, I believe that the justices will take in all the numerous considerations such as original intent, plain meaning, precedent, policy preferences, public opinion, personal experience, the federal government, and interest groups in order to take positions in the *Fisher vs. the University of Texas at Austin* case the second time around because I think the justices intended to take the case on with an intent to make a moving statement on affirmative action. Taking the provided information into account accordingly, I believe justices Ginsburg will vote in favor of the University of Texas. Scalia and Thomas will vote in favor of Abigail Fisher. I also think that Justice Roberts, Alito, and possibly Kennedy will vote in favor of Abigail Fisher. Only

time will tell when we are able to find out the fate of affirmative action or if the 5th Circuit Court of Appeals will get shot down again.

Figure 1

Case Name	Decision	Justice	Ideo. Direction of the Decision	Ideo. Direction of Justice
**_Regents v. Bakke_ (1978)	5-4	-		-
• 14th Amendment (equal protect) • Civil Rights Act of 1964			Conservative Half/Half	
U.S. v. Paradise et al. (1987)	5-4	Scalia (dissent)	Liberal	Conservative
• 14th Amendment (equal protect)				
Johnson v. Transp. (1987)	6-3	Scalia (dissent)	Liberal	Conservative
• Civil Rights Act of 1964				
City of Richmond (1989)	6-3	Scalia (special concur)	Conservative	Conservative
• 14th Amendment (equal protect)				
Martin et al. v. Wilks (1989)	5-4	Scalia (majority)	Conservative	Conservative
Challenge to race based hiring practices • Civil Rights Act of 1964				
Metro Broadcasting (1990)	5-4	Scalia (dissent)	Liberal	Conservative
• 5th Amendment (fed equal protect)				

Figure 2

Adarand Constructors (1995)	5-4	Scalia (concur)	Conservative	Conservative
• 5th Amendment (fed equal protect)		Ginsburg (dissent)		Liberal
		Thomas (concur)		Conservative
Texas v. Francois (1999)	9-0	Scalia	Liberal	Liberal
• Affirmative action		Thomas		Liberal
		Ginsburg		Liberal
** *Gratz v. Bollinger* (2003)	6-3	Scalia (majority)	Conservative	Conservative
• 14th Amendment (equal protect)		Ginsburg (dissent)		Liberal
• Article III, Section 2				
• Civil Rights Act of 1964		Thomas (concur)		Conservative
• Reconstruction Civil Rights Acts				
** *Grutter v. Bollinger* (2003)	5-4	Scalia (dissent)	Liberal	Conservative
• 14th Amendment (equal protect)		Ginsburg (concur)		Liberal
• Civil Rights Act of 1964 (Title VI)				
• Reconstruction Civil Rights Acts		Thomas (dissent)		Conservative

Figure 3

Parents v. Seattle School(2007) 5-4	Scalia (majority)	Conservative	Conservative
• 14th Amendment (equal protect) • Civil Rights	Thomas (concur)		Conservative
	Ginsburg (dissent)		Liberal
Ricci v. Destefano (2009) 5-4	Scalia (concur)	Conservative	Conservative
• Civil Rights Act of 1964	Ginsburg (dissent)		Liberal
	Thomas (concur)		Conservative
** *Fisher v. Texas* (2013) 7-1	Scalia (concur)	Conservative	Conservative
• 14th Amendment (equal protect)	Ginsburg (dissent)		Liberal
	Thomas (concur)		Conservative
Schuette v. Coalition (2014) 6-2	Scalia (special concur)	Conservative	Conservative
• 14th Amendment (equal protect)	Ginsburg (dissent)		Liberal
	Thomas (special concur)		Conservative

Works Cited

Baum, L. (2013). *The supreme court 11th edition*. Thousand Oaks, CA: CQ Press, an Imprint of SAGE Publications, Inc.

Blake, J. (2013). *Three questions for clarence thomas*. Retreived from: http://www.cnn.com/2013/06/09/us/clarence-thomas-three-questions/

Cummings, A. (2005). Grutter v. bollinger, clarence thomas, affirmative action and the treachery of originalism: "The sun don't shine here in this part of town". *Harvard BlackLetter Law Journal, 21*. Retrieved from: http://www.law.harvard.edu/students/orgs/blj/vol21/cummings.pdf

Drake, B. (2014). *Public strongly backs affirmative action programs on campus*. Pew research center. Retrieved from: http://www.pewresearch.org/fact-tank/2014/04/22/public-strongly-backs-affirmative-action-programs-on-campus/

Epstein, L., Walker, T. (2004). Constitutional law for a changing america*: Rights, liberties, and justice 5th edition*. Washington, DC: CQ Press, a division of Congressional Quarterly Inc.

Fisher v. University of Texas. (n.d.). *Oyez*. Retrieved December 13, 2015, from: https://www.oyez.org/cases/2012/11-345

Howe, A. (2013). Interpreting the supreme court: Finding meaning in the justices' personal experiences. *The dunwody distinguished lecture in law series*. Retrieved from:http://www.floridalawreview.com/lectures/the-dunwody-distinguished-lecture-in-law-series/.

National Conference of State Legislatures (2014). Affirmative action overview. Retrieved from: http://www.ncsl.org/research/education/affirmative-action-overview.aspx

Santoro, T., Wirth, S. Fisher v. university of texas at austin (11-345). *Legal information institute supreme court bulletin.* Cornell University Law School. Retrieved from: https://www.law.cornell.edu/supct/cert/11-345

Scalia, A. (1997). A matter of interpretation: *Federal courts and the law*. Princeton, NJ: Princeton University Press.

Thomas G. Walker, Jeffrey A. Segal, Harold J. Spaeth, & Epstein, L. (Eds.) (2012). *The supreme court compendium, 5th edition*. (5th ed.). Washington, DC: CQ

The National Center for Education Statistics and U.S. Department of Education