How Can Analyzing Justice Thomas' Judicial Opinions About Affirmative Action Policy Reveal Potential Future Trends in Modern Supreme Court Decision-Making?

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ABSTRACT

This paper argues the historical context of affirmative action policies, how and why Justice Thomas' judicial opinions shaped affirmative action through his life and based on these, predict the potential future trends that Supreme Court decision-making may take. I also focused on the specific cases, such as Students for Fair Admissions (SFFA) v. Harvard College and University of North Carolina (UNC), Fisher v. University of Texas (UT), Grutter v. Bollinger, and Gratz v. Bollinger, to understand Justice Thomas' concurrence and dissent to make reasonable predictions regarding future affirmative action college admission race-based policies.

The purpose of this paper is to analyze recent affirmative action policies to determine how Justice Thomas' dissenting and concurring opinions affected these cases and whether future affirmative action decisions can be predicted. In section one, I provide an overview of relevant terms that are necessary to understand affirmative action. In section two, I will discuss arguments and analyze parts of the topic. Section three discusses the background of Justice Thomas' life and the things that influenced his decision to focus on affirmative action cases.

INTRODUCTION

Despite their long history, race-based college admission policies still attract headlines. Having witnessed last May's Supreme Court of the United States (SCOTUS) decision about affirmative action, it is not surprising that many students and families are expressing great interest in affirmative action, as well as concern about what the future holds for them. There are significant implications for students and educational institutions across the country because of the May 2023 affirmative action decision. In addition to addressing a complex issue that has been debated for decades, it has significant implications for the future of diversity in education. Affirmative action cases were a particular interest of Justice Thomas from the beginning of his education and throughout the duration of his life. Specifically, this paper discusses and analyzes how affirmative action cases can help us predict the future of race-based college admissions policies considering Justice Thomas' actions regarding affirmative action.

I.TERMS

In 1868, the 14th Amendment of the United States Constitution was ratified, granting citizenship to all persons born or naturalized in the country. Notably, the Fourteenth Amendment includes two clauses that would affect individuals' rights in the following years. First, the Equal Protection Clause mandates that all individuals must be treated equally under the law and that discrimination based on race, gender, or other factors is unconstitutional. Second, the Due Process Clause of the 14th Amendment guarantees that individuals have certain legal protections and can't be deprived of their rights arbitrarily or unfairly. The Due Process Clause contains two understandings of due process: procedural due process and substantive due process. Procedural due process is a legal principle that ensures individuals are treated fairly by the government when their rights, liberty or property are at stake. Substantive due process focuses on the content or substance of laws and regulations, ensuring they don't infringe upon fundamental liberties, regardless of the process used to implement them.

With the publication of Executive Order 10925, aimed to promote equal opportunity in employment for all persons regardless of race, color, religion, or national origin, by President John F. Kennedy in the early 1960s, a spark was ignited in the civil rights movement, stating that the time had come to actively promote equal treatment no matter what race, color, sex, religion, or national origin a person may possess. Affirmative action was introduced during the Civil Rights Movement of the 1960s, the movement had been going on for a while (some would say 1954, others would say the 40s, in response to the systematic discrimination faced by racial and ethnic minorities, as well as women, in employment and education. A key objective of the concept was to ensure that marginalized groups were afforded equal opportunities for advancement and inclusion. Through the history of affirmative action, threads of progress, controversy, and complexity have been woven together by the struggle to address historical inequalities through fairness, merit, and education. As a response to historic inequalities and to promote diversity, majority groups or historically advantaged groups have claimed they are now victims of reverse discrimination. However, these claims fail to realize the generations of discrimination, violence, and denied rights based on identity that marginalized communities experience, for example discrimination against racial groups during the 1900s by Jim Crow laws and rampant lynchings. Furthermore, even when formal discriminatory policies end, informal systems that effectively establish oppressive quotas for a specific group or category of individuals can emerge. These quotas are known as a de facto quota system, and they often arise as a reaction to past inequalities and biases faced by marginalized or underrepresented groups. Although not legally binding, they can have significant effects on access to education, employment, political representation, and various other aspects of society.

Education is an area where de facto quota systems are frequently observed. To foster diversity and provide equal opportunities, educational institutions may implement unofficial admission policies that give priority to applicants from specific backgrounds. For instance, universities may

aim to enhance the representation of students from disadvantaged communities, ethnic minorities, or individuals with disabilities.

FROM CIVIL RIGHTS TO EQUAL OPPORTUNITY: THE EVOLUTION OF AFFIRMATIVE ACTION

Affirmative action lawsuits are often brought by legal activists with specific agendas. In the case of Students for Fair Admissions, a group of Asian Americans students claimed they experienced discrimination during the admissions process at Harvard. Their argument was that Harvard preference Black and Brown applicants over Asian applicants, which directly resulted in their lack of admission. The case arose out of SFFA's claim that Harvard and UNC discriminate against Asian American applicants through their use of affirmative action policies. SFFA argued that these universities discriminated against Asian American students by systematically denying them admission in favor of other racial and ethnic groups. Justice Clarence Thomas, a conservative justice, played a significant role in the deliberations and decisions of the SFFA v. Harvard/UNC case. His opinions in the case had significant implications for issues pertaining to racial classifications and strict scrutiny. One significant decision made by Justice Thomas related to racial classifications. He argued that race-based affirmative action policies, such as those used by Harvard and UNC, are unconstitutional. He claimed that such classifications, even if intended to help disadvantaged groups, perpetuate discrimination and undermine the guarantee of equal protection under the law. Justice Thomas' decision to apply strict scrutiny to race-based affirmative action policies was significant. Strict scrutiny is a high legal standard that requires the government to show that a specific law or policy is necessary to achieve a compelling interest and is narrowly tailored to achieve that interest. Applying strict scrutiny to race-based affirmative action policies meant that the courts would closely scrutinize their justifications and determine whether they fulfilled their objectives without perpetuating or exacerbating racial inequalities. With a joint opinion on both cases, the court ruled in favor of Students for Fair Admissions, holding that the school's affirmative action policies violate the Equal Protection Clause of the 14th Amendment. According to the majority opinion of Chief Justice John Roberts, affirmative action used by schools in admissions does not satisfy the Grutter requirement, originally established by the Supreme Court in Grutter v. Bollinger, the requirement aimed to promote diversity and equal opportunity in higher education, of considering race narrowly. The court stated that it was incapable of evaluating the educational benefits of diversity, and that race has a negative impact on the admission of Asian American students to Harvard because of its diversity policy. As a result of Grutter v. Bollinger, the plaintiffs argued that racial preferences were unconstitutional and violated reverse discrimination in college admissions. Their argument was that it violated the Fourteenth Amendment's principle of equal treatment under the law. In response, the defendants (Harvard and UNC) claimed that affirmative action is intended to create a diverse student body that will enhance educational opportunities, like how the University of Michigan defended its affirmative action policy decades earlier. The concurring opinion of Thomas provides an originalist defense

of the colorblind Constitution, saying that "All forms of discrimination based on race, including so-called affirmative action, are prohibited by the Constitution."
According to him, the court's opinion clearly indicates that Grutter is "For all intents and purposes overruled." To ensure that underrepresented minorities have the opportunity to attend and succeed in higher education, the university argued that race should be considered as one factor among many others. The Supreme Court's analysis of Gratz v Bollinger focused on whether the affirmative action policy violated the Fourteenth Amendment's Equal Protection Clause. The Court considered two main issues: the strict scrutiny standard of review and the relevant standard of review for affirmative action policies. Several universities have stated that race plays a significant role in their holistic admissions process. In their briefs, Harvard College and University of North Carolina - as well as 60 other organizations - argued that diversity on campuses helps foster critical thinking and counter bias in students. Thomas repeatedly questioned the lawyers during the oral arguments in October 2022 regarding diversity's educational benefits.
As Thomas stated, "I have heard the word 'diversity' quite a few times, but I have no idea what it means." In his concurring opinion, Justice Thomas reiterated his disagreement with the argument that affirmative action is justified based on racial diversity in student bodies. He contended that two white students, one hailing from rural Appalachia and the other from a wealthy San Francisco suburb, may possess more diverse perspectives than two students from Manhattan's affluent Upper East Side attending prestigious schools, one of whom is white and the other black. Unlike the plaintiffs in the Grutter and Fisher cases, the plaintiff in the recent cases did not solely represent white students. Justice Thomas' influence extends beyond the bench in these cases. Attorney William Consovoy, who collaborated with Edward Blum in the Fisher case and the current cases before the court, was one of Justice Thomas' former clerks. Additionally, Justice Thomas' wife, Ginni, serves on the board of an organization that submitted an amicus brief for both cases, arguing against the constitutionality of affirmative action.
However, a great deal of Justice Thomas's life has been dedicated to ensuring that race should not be a factor in not just college applications, but also job applications, and in every aspect of our lives. Whether affirmative action cases are revived in the future or not, Justice Thomases in the future are likely to continue to defend affirmative action applicants' rights.

II. BACKGROUND

A. Justice Thomas

At the age of 16, Clarence Thomas was admitted to a Catholic boarding school to pursue his dream of becoming a priest. He was the first black student to be admitted to St. John Vianney. In 1967, Thomas entered the Conception Seminary at the college level. During this period of his education, Thomas had difficulty understanding the Catholic Church’s passive position towards civil rights issues. After Martin Luther King, Jr.’s assassination in 1968, he decided to give up his dream of becoming a priest. With a bachelor’s degree in English and Literature and a passion for civil rights, Thomas pursued a career in law and was one of the first black students to benefit from

Yale Law School's open admissions program. Thomas was one of 12 students who were admitted to Yale Law School. An admissions committee member told one of his classmates that there were no Black students qualified for the school. During an interview in 1980, Thomas stated, 'You had to prove yourself every day, since the presumption was that you were dumb and didn't deserve to be there.'

After a few years in this environment, Thomas became increasingly opposed to affirmative action as employers and colleagues credited his success not with hard work and dedication, but rather with the color of his skin and measures schools took to recruit Black students. After serving eight years at the Equal Employment Opportunity Commission (EEOC), President George H. W. Bush nominated Thomas to the District of Columbia Court of Appeals in 1990. At the time of his nomination, Clarence Thomas was a 43-year-old with barely a year of judicial experience when George H. W. Bush nominated him for the Supreme Court in 1991. As during his legal education and legal career before serving on the bench, others viewed his appointment as a form of affirmative action policies in effect. This resulted in him being called the "diversity voice" in court, a title that he would combat throughout his time as a Justice.

In the decades before Justice Thomas issued landmark rulings on affirmative action cases, he expressed opposition to the concept of racial preferences for college admissions and hiring. This opposition continued well into his legal career and in his legal opinions. The Gratz v. Bollinger and Grutter v. Bollinger cases are significant legal battles in the realm of higher education. These cases centered around the issue of affirmative action in college admissions and brought forth important questions surrounding race, equality, and meritocracy. Justice Thomas' dissenting opinion in Grutter v. Bollinger in 2003 strongly criticized the University of Michigan Law School's admissions policy that gave preference to minority applicants. His argument was that racial preferences contradicted the principles of equality and meritocracy, writing, "colleges and universities are educational institutions, not racial spoils systems."

The first affirmative action cases to reach the Supreme Court involved two white students who were denied admission to the University of Michigan ("UM"). The two cases came before the court concurrently - one at the university's undergraduate college and one at the university's law school in 2003. In Grutter v. Bollinger, the Supreme Court upheld the use of race as a factor in college admissions but set strict limits on how it could be implemented.

The Grutter case originated in 1997 when Barbara Grutter, a white woman, applied for admission to the law school at the University of Michigan. Grutter was denied admission, despite having strong academic credentials. She subsequently filed a lawsuit against the university, arguing that its admissions policies, which gave preferential treatment to underrepresented minority groups, violated her right to equal protection under the Fourteenth Amendment. The legal argument in the Grutter case revolved around the concept of affirmative action. Affirmative action refers to policies implemented by educational institutions that seek to promote diversity and inclusiveness by favoring certain minority groups in admissions. In Grutter's case, she claimed that the University of Michigan's use of race as a factor in admissions decisions was unfair and discriminatory against white applicants like her. The Supreme Court heard arguments in the Grutter case in April 1998.

In June 1998, the Supreme Court released its decision in Grutter v. Bollinger. In a 5-4 decision, the Supreme Court upheld the University of Michigan's admissions policy, ruling that the school's use of race as a factor in admissions was constitutional and did not violate the rights of white applicants like Grutter. The Court recognized the importance of diversity in education and the importance of promoting equal opportunities for underrepresented minority groups.

They argued that college admissions should be based solely on merit and that considering race as a factor creates unfair advantages for certain students. Justice Clarence Thomas, however, dissented from the majority. In his dissenting opinion, Justice Thomas argued that the court should have struck down the University of Michigan Law School's admissions policy. In his dissent, Justice Thomas argued that affirmative action policies violate the fundamental principles of equality and fairness. He believed that college admissions should be based solely on merit, and that the use of race as a factor undermines this principle. Justice Thomas took a strict view of the role of race in college admissions. He believed that the use of race as a factor results in discrimination against students based on their race rather than their individual qualifications. He emphasized the need to eliminate racial preferences to ensure equal treatment for all applicants. Justice Thomas' dissent in the Grutter v. Bollinger case highlighted his strong opposition to the use of race as a factor in college admissions. His dissent signaled a shift toward a more conservative viewpoint on affirmative action, and it became an influential opinion in the field of legal scholarship. The implications of Justice Thomas' dissent were far-reaching. It contributed to a growing conservative movement against affirmative action and sparked legal challenges to similar policies at other colleges and universities. The case also raised important questions about the role of race in society and the pursuit of equality in education.

On the other hand, the Gratz case reached a different conclusion. The Gratz and Bollinger v. Bollinger case centered around the question of whether race can be used as a factor in college admissions. The case arose after the University of Michigan implemented affirmative action as part of its admissions process. This policy allowed for the consideration of race as a factor in admissions to achieve a diverse student body. The plaintiff in the case, Alan Gratz, was a white applicant who was not admitted to the university. He alleged that the affirmative action policy violated his right to equal protection under the law. Gratz argued that he was denied admission solely because of his race, which violated the Fourteenth Amendment to the United States Constitution. The case eventually reached the Supreme Court, where a five-justice majority ruled in favor of the University of Michigan. The Court held that race could be considered as a factor to promote diversity and meet a compelling state interest. However, the Court also set out guidelines for the use of race in admissions, emphasizing that it should be used as a last resort and in a way that was narrowly tailored to achieve diversity.

Justice Thomas wrote a concurring opinion in the Gratz and Bollinger case, in which he expressed his disagreement with the majority's decision. In his concurring opinion, Justice Thomas argued that the use of race in college admissions is inherently discriminatory and violates the principles of equal treatment under the law. According to Justice Thomas, race-based affirmative action policies perpetuate the notion that individuals of certain races are inherently disadvantaged and

that it is necessary to treat them differently to ensure fairness. In his view, this contradicts the fundamental principles of equality and dignity that are enshrined in the Constitution. As well, Justice Thomas pointed out that affirmative action policies harm the individuals they intend to help and by discriminating against individuals based on race, these policies create a system of racial preferences that undermines meritocracy and rewards individuals based on factors beyond their control.

Justice Thomas' concurring opinion in the Gratz and Bollinger case expressed strong opposition to the use of race as a factor in college admissions. In his view, such policies violate the principles of equality and fairness and ultimately do more harm than good.

Thomas dissented again in Fisher v. University of Texas in 2013, writing that the Supreme Court should have overturned Grutter. Grutter's majority predicted that "25 years from now, racial preferences will no longer be necessary" to maintain diversity in schools. Despite this, research shows that racial disparities in colleges still exist today. The Fisher v. University of Texas case is a civil rights case that challenged the consideration of race in college admissions. The case centered around Abigail Fisher, a white student who argued that she was denied admission to the University of Texas at Austin (‘’UT Austin’’) due to affirmative action policies. Justice Clarence Thomas wrote a dissent in the case, where he argued that universities should not consider race in admissions decisions. In this opinion, he outlined his reasons for believing that race-based affirmative action policies are unconstitutional and undermine the principles of equal opportunity. The impact of Fisher v. University of Texas on college admissions was significant. The case was seen as a major setback for affirmative action, as it called into question the practice of considering race in admissions decisions. The case sparked a national debate about the role of race in college admissions and reignited the debate over affirmative action.

Following the Supreme Court's decision, universities across the country were required to make significant changes to their admissions policies. Many schools moved away from using race as a factor in favor of other holistic review methods, such as looking at factors such as academic potential, community engagement, and diversity on campus. In his dissent, Thomas maintained that Abigail Fisher was not denied equal protection under the law. According to him, the admissions process used at UT Austin did not discriminate against minorities, but rather sought to create a diverse and inclusive campus. According to Justice Thomas, the admissions process used by UT Austin was constitutional and did not violate the Fourteenth Amendment's equal protection clause.

According to the court's opinion, twenty years have passed since Grutter, and there has been no change in the practice of race-based college admissions. Students for Fair Admissions v. Harvard College / University of North Carolina (UNC), the cases behind that opinion, were heard by the Supreme Court in recent months. The Students for Fair Admissions v. Harvard/UNC case is a groundbreaking legal battle that has sparked debate and discussion regarding the admission policies of various universities. This case revolves around the question of whether race can be used as a factor in college admissions. The case revolves around an organization called Students for Fair Admissions (SFFA), which filed a lawsuit against Harvard University and the University of

North Carolina at Chapel Hill alleging that their admission policies discriminate against Asian American students. One of the key aspects of this case is the brief submitted by Justice Clarence Thomas. In his brief, Justice Thomas argues that college admissions policies which use race as a factor are unconstitutional and violate the principles of equal protection. He asserts that college admissions should be based solely on merit and that the use of race as a consideration creates unfair advantages for certain students. The implications of this case are far-reaching and could have significant implications for college admissions policies across the country. If SFFA's lawsuit is successful, it could force universities to abandon the use of race as a factor in admissions. This could result in a more colorblind admissions process, where students are judged solely on their academic and extracurricular activities. On the other hand, if Harvard and UNC can defend their admission policies, it could reinforce the notion that race can be a legitimate factor in college admissions, promoting diversity on campus. This could open the door for universities to continue considering race as a factor to ensure a diverse and inclusive student body.

Justice Thomas' decisions in the SFFA v. Harvard / UNC case had significant implications for affirmative action and the overall consideration of race in college admissions. On the positive side, Justice Thomas' decision to apply strict scrutiny to race-based affirmative action policies brought renewed attention to the need for educational institutions to carefully consider the fairness and effectiveness of their policies. It encouraged universities to evaluate their current admissions practices and ensure that they are promoting diversity and achieving their objectives in an equitable manner. On the other hand, Justice Thomas' decision against racial classifications in college admissions raised concerns among proponents of affirmative action. They argued that his interpretation of the law would limit the ability of universities to consider race as a factor to achieve diversity on campus. Justice Thomas' decisions in the SFFA v. Harvard/ UNC case highlighted the importance of fair, equitable, and inclusive college admissions policies. It sparked conversations and debates surrounding the role of race in college admissions and the role of affirmative action in achieving educational equity. The case continues to be a landmark decision in the field of education law and will likely shape future legal precedents and debates surrounding affirmative action.

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