

## Is Anyone Listening? The Politicization of the Judiciary and the Loss of Authority: An Initial Assessment

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### Abstract

Our study initiates an effort to determine if the recent politicization of the U.S. Supreme Court had meant its opinions have less impact on the lower courts who are expected to follow its direction and on the impacted parties upon which its ruling are applied. It is our contention that the court has become increasingly politicized and this politicization has reduced the Courts influence in lower courts and affected parties. We begin our study with the examination of how a recent Supreme Court opinion, *Fisher v. Univ. of Texas* (570 U.S., 2013) has been applied in the lower and appellate federal courts. This opinion strengthened the application of strict scrutiny in affirmative action cases. It was a well-publicized opinion and its directives were clearly stated in Justice Kennedy's majority opinion. It called on courts to apply a 'strong' version of strict scrutiny not only to the objectives being sought but also to the means being utilized. Our initial examination of the diffusion of this precedent shows no influence on lower or appellate courts. But the opinions of the Court are not for the judiciary alone. Our second examination involves how affected parties are reacting to the dictates of the Court. Staying with *Fisher*, we conducted a survey of public university admission staffs to determine if they have adjusted their admissions processes in response to the Court. We were surprised to discover no reaction. It is clear, the message of *Fisher* has been lost. We conclude with a brief discussion of where this leaves the Court.

Of the three branches of government, the American public has traditionally held the judiciary in the highest esteem. Unlike the two 'political' branches, Americans, even if they disagree with the Court, have respected its authority to render decisions that overturn a properly elected legislature or a executive operating under his official authority. But what if this were not the case? Instead, what if the American public and the officials in government viewed the Court as a third 'political' branch?

Our research begins with an assumption: the judiciary, in general, and the U.S. Supreme Court, in specific, is undergoing a politicization process that has not been witnessed since at least the Court Packing Era of the 1930s. By politicization, we mean that the Court, in perception or reality, is basing its judgments not solely on the facts before the Court and the objective application of the law but instead ideological or partisan influence is having a significant impact on the rulings of the Court, irrespective of the facts or the law. This is a highly controversial assumption but we accept this as a given. In this work, instead of demonstrating the veracity of his assumption, our focus is on how such a politicization impacts both the diffusion of Court precedent throughout the judicial branch and also whether the politicization of the Court lessens its ability to influence the behavior of impacted parties within society. We believe that as the Court has become politicized its ability to having its rulings followed has declined.

Our paper will proceed in the following manner: in part I we will discuss the recent scholarship suggesting a politicization of the U.S. Supreme Court and the process of diffusion of judicial opinions. In Part II we will detail our specific methodology including a brief description of the changing Court rulings on the used of affirmative action in the admissions process of public universities that led to the *Fisher v. Univ. of Texas* (570 U.S., 2013) ruling. In Part III we review the paucity of results from our study. In Part IV we offer concluding remarks.

**Keywords:** Judiciary; Perception; Judgments; Ideological; Influence; Scholarship

### Politicization and Diffusion

#### Politicizing the supreme court

Much has been written about the decline in the public perception of the U.S. Supreme Court and the judicial branch [1]. Americans believe politics played "too great a role" in the original health care cases surrounding the Affordable Care Act by a greater than two-to-one margin [2]. Over sixty percent of Americans express no to little confidence in the Supreme Court [3]. Academics continue to debate how much politics actually influences the Court, but Americans are excessively skeptical. The vast majority of Americans fail to know that, on average, almost half of the cases brought before the Supreme Court are decided unanimously, and the Justices' voting pattern split by the political party of the president to whom they owe their appointment in fewer than seven percent of cases [4]. Why the mistrust? We argue that Americans have increasingly viewed the government as being guided by interests outside of the general good. More specifically, we

suggest Americans believe the government is increasingly beholden to specialized, entrenched interests that have corrupted a political system. This is nothing new in relation to Congress and to a lesser extent the Presidency. What is new is that very recently, the distrust shared by Congress and the President has been applied to the courts.

The crafters of the Constitution designed a uniquely independent Supreme Court that would safeguard the Constitution. They feared

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that the political branches might be able to overwhelm the Court by turning the public against the Court and that the Constitution's strict boundaries on congressional power would give way. Elected officials of both partisan stripes have played into some of the Framers' fears for the Constitution by politicizing the decision and erasing the distinction between the Court's holding and the policy merits of the law or action under question. Politicization of the Supreme Court causes the American public to lose faith in the ability of the courts to render an objective judgment in any particular case. This loss in confidence then is returned into the judicial branch itself. As the viewpoint that the courts, and especially the Supreme Court, are rendering decisions outside the facts and law of the cases before them, members of the judiciary have begun to wander from the lessons of the Court in politically salient cases. If this is true, as we forward, lower level courts within the federal system should display an increased tendency to ignore the ruling of the Supreme Court. Instead of walking lockstep with the Supreme Court, lower courts will begin to shy away from Court precedent and render decisions that match the ideological or partisan preferences of the members of the lower court.

The independence of the judicial branch was not the given we have come to accept today. The antifederalists' primary argument against the judiciary was that it was too powerful without a congressional revisionary power on Court opinions [5]. Many of the early state constitutions that were enacted between the end of colonization and the ratification of the U.S. Constitution encouraged the state executive and legislature to remove, override, or influence judges. Rhode Island judges were called before the legislature to testify when they invalidated legislative acts [6]. The New Hampshire legislature vacated judicial proceedings, modified judgments, authorized appeals, and decided the merits of some disputes [7].

Instead, the founders created a Supreme Court that was independent from the political branches and insulated from public opinion. The Supreme Court would be the intermediary between the people and the legislature to ensure that Congress obeyed the Constitution. Congress could not be trusted to police itself for compliance with the Constitution's limited legislative powers. Courts would be "the bulwarks of a limited Constitution against legislative encroachments." [8] Still, the most of the founders believed Congress would overshadow the Supreme Court (and the executive, at least domestically). The Framers were so concerned about helping the Court repel attacks by the legislature that they considered boosting its power and inserting it into political issues. James Madison's draft of the Constitution included an additional check against congressional power, the Council of Revision [9]. Instead of the presidential veto, the Council would have placed several Supreme Court Justices on a council with the President or asked the President and the Supreme Court to separately approve legislation before it became law. Justices would have the power to oppose legislation on non-legal policy grounds. The Council is nowhere to be found in the Convention's final product, but delegates' arguments from the Council debates reveal a suspicion of Congress, fear for the Court's ability to defend itself, and concern for the Court's public reputation. Madison believed that even with the Council, Congress would be an "overmatch" for the Supreme Court and President and cited the experience of spurned state supreme courts.

*Experience in all the States had evinced a powerful tendency in the Legislature to absorb all power into its vortex. This was the real source of danger to the American Constitutions; & suggested the necessity of giving every defensive authority to the other departments that was consistent with republican principles. (Id. at 74).*

Delegates ultimately decided that politicizing the Court would undercut its legitimacy. Luther Martin, a delegate who later became Maryland's longest-serving attorney general, offered the most prescient comment on the subject: "It is necessary that the Supreme Judiciary should have the confidence of the people. This will soon be lost, if they are employed in the task of remonstrating [against] popular measures of the Legislature." (*Id. at 77*) "It was making the Expositors of the Laws, the Legislators which ought never to be done," added Elbridge Gerry, a Massachusetts delegate (*Id. at 75*).

The founders were concerned about the loss of public confidence in the Court's objectivity as the Court engaged in judicial policymaking. Of course, the Constitution does not force judges to "remonstrate" against legislation, but experience proves Martin to be correct. The members of the Supreme Court have been cognizant of this tension since the early period of the Court. Chief Justice Roberts started and ended his health care opinion with the basics—the important distinction between whether the Affordable Care Act is good policy from whether it is a constitutional law. Within two hours, President Obama and Mitt Romney, both Harvard Law School graduates and the former a professor of Constitutional law, told Americans the opposite. "Today, the Supreme Court also upheld the principle that people who can afford health insurance should take the responsibility to buy health insurance," said Obama [10]. Romney criticized the majority for deciding not to "repeal Obamacare." "What the Court did not do on its last day in session, I will do on my first day if elected President," said Romney [11].

Increasingly, the Court has become a political dartboard for politicians of both parties. The Court has been castigated for an 'activist' agenda while at the same time critiqued for its lack of action. President Obama told the public at the 2010 State of the Union address that "the Supreme Court reversed a century of law" with its *Citizens United* decision and suggested that the Court opposed honest elections. The ensuing image was even more damaging. With 48 million Americans watching, the camera panned to a cadre of expressionless Supreme Court Justices sitting in the front row while lawmakers sitting next to them rose to their feet and applauded [12]. Presidents Obama and Bush and members of Congress have derided the Court for its "unelected" nature, with President Obama publicly wondering whether "an unelected group of people would somehow overturn a duly constituted and passed law." [12].

Judges lack clear defenses. Judges would risk their credibility if they shouted back at the President, appeared on the Sunday morning talk shows, or held a press conference after a decision. Although the recent public appearances of several of the Justices on the Court, notably Justices Ginsburg on the left and Scalia on the right have challenged the traditional notion of a silent Judiciary. That being said, unlike speeches from members of Congress and the President, Supreme Court proceedings are difficult to follow without legal training. The media coverage of the Supreme Court can be incomplete or inaccurate. The first reading of the *Bush v. Gore* decision on the steps of the Court was consistently misinterpreted. More recently, FOX News and CNN famously misunderstood Chief Justice Roberts' oral opinion and misreported that the individual mandate had been invalidated. The publicly available audio recordings of oral arguments contribute little to public understanding of the Court. Even before the decision, the Republican Party doctored audio clips of Solicitor General Don Verrilli coughing and pausing during oral argument to suggest in an ad suggesting that the health care law was indefensible [13]. Politicization of the Court is dangerous because it primes the public for a power grab by the political branches. If the Court loses authority to check

political power and make unpopular decisions, it cannot enforce the Constitution with the same effectiveness. Without enforcement of the Constitution, Congress is free to invade constitutional rights and exceed its lawful powers.

This is not the first time the Court has seen its opinions challenged. The Supreme Court came frighteningly close to losing its independence when the Court made politically significant decisions striking down parts of the New Deal, and President Franklin D. Roosevelt responded with the Court-packing plan. His arguments alleged misconduct by the Court.

*The Courts, however, have cast doubts on the ability of the elected Congress to protect us against catastrophe by meeting squarely our modern social and economic conditions... The Court has been acting not as a judicial body, but as a policy-making body... We have, therefore, reached the point as a nation where we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself* [14].

Court opponents could repeat Roosevelt's words from seventy-five years ago today. Former Speaker of the House, Newt Gingrich, promised in his recent presidential primary campaign to employ the tactics of early state constitutions by ignoring disagreeable Court decisions and ordering Justices to testify to congressional committees [15]. Proposals to invade the Court's independence ignore the Framers' fears for enforcement of the Constitution without the Supreme Court. Madison believed if the legislature and executive united behind a law and convinced the public that it was in their interest, the people could not properly judge its constitutionality, even if it was patently unconstitutional. The "passions" of the people on the particular issues would prevail over well-reasoned constitutional judgment [9].

### Policy diffusion in the judiciary

Policy diffusion scholarship, or the scientific study of the process by which a policy innovation is disseminated to potential adopters, has a long and robust history in studies of policymaking. Policy innovations are simply new policy adoptions; the innovation represents the first time a particular agency, legislature, or government has adopted or implemented a particular policy. That scholars have chosen to describe the spread of policy innovations as "diffusion" implies that governments or governmental units influence one another to adopt the new policy [16]. While most studies of policy diffusion are conducted at the state level and focus on a legislature's decision to adopt a particular policy innovation, there exists a substantial body of literature on the ways in which policy innovations-defined more specifically as new rules or doctrines-spread across court systems. Like studies of legislative policy adoption, most studies of judicial diffusion investigate the transmission of precedent across state court systems [17-20], although scholars are increasingly interested in explaining the same process at the federal appellate level [21,22]. In general, theories of policy diffusion center around three sets of determinants: internal, external, and policy specific characteristics. Internal determinants include such factors as institutional structures and characteristics, public opinion, demographic factors, ideology (of both government and the populace), and economic variables [23-26]. External factors typically taken into consideration include the influence of regional neighbors, federal institutions, or historical events [27-29]. Finally, most diffusion models include determinants specific to the policy innovation itself; for instance, studies of innovation in criminal justice policy might include measures of crime statistics specific to each unit under observation.

The institutional structures and characteristics of specific courts, along with a well-developed system of judicial communication (via the publication of written opinions), have been particularly cited as having a significant impact on the likelihood that a court will adopt a legal innovation. Judicial diffusion appears to depend largely on internal determinants such as communication networks (e.g., legal reporting districts, citing doctrine in written opinions), cultural similarities (i.e., shared demographic profiles), and institutional structures and characteristics (e.g., level of court professionalism, caseload, and court prestige) of the courts in question [17-20,30,31].

In addition to studying the determinants of policy adoption and diffusion, scholars have expanded their scope of research to examine the mechanisms of diffusion. Studies of state legislatures show that states are more likely to adopt policies that have been successful in other states; thus, it appears that states actively learn from the experiences of their peers, waiting to adopt a policy until they are sure that policy will actually work [16,32]. Extending this logic to judicial diffusion, researchers have documented a similar mechanism at work. Emulation appears to take place over the long term, as policy innovations and judicial meaning evolve to become commonly accepted [32-34]. The process by which appellate courts develop the legal meaning of a concept in response to increasingly accepted judicial rhetoric can then be equated to policy learning [16,34].

Just as [32] suggests that simply having a high proportion of adopting neighbors does not guarantee that a state will adopt a policy innovation, regional influence does not appear to have a significant impact on the likelihood that an innovation will be adopted by a given court [17]. This is likely due to two factors. First, the courts' ability to adopt a precedent is dependent upon opportunity, or the actual supply of cases [17]. No applicable case on the docket? No adoption. Second, the idea of regional neighborhood influence is too narrow for judicial diffusion; the legal system has well-established channels of communication that do not rely on geographical proximity [17,20]. In fact, it is this system of written opinions and legal reporting that may be most responsible for the transmission of legal doctrine.

For example, all federal appellate opinions designated for publication are included in the Federal Reporters (rather than being separated out into regional publications), so a panel of judges from the First Circuit arguably has easy access to the legal rules established by the Fifth Circuit. Additionally, the hierarchical arrangement of courts within the federal system works to structure the patterns of diffusion. Courts that are lower in the hierarchy (e.g., trial courts, intermediate appellate courts) are bound by precedents established by their courts of last resort, and on matters of federal law, state courts are bound by federal court pronouncements. In the federal judiciary, the intermediate appellate courts are organized into regionally based "circuits"; each circuit cultivates its own body of precedent and, in the absence of Supreme Court guidance, can emulate or ignore other circuits' legal innovations as it sees fit.

Studies [18] found that courts are more likely to adopt a precedent from their peers when the two courts exist within the same regional communication channel (i.e., distance and legal reporting district). Consequently, it is likely that policy learning facilitates judicial diffusion, especially given the propensity of courts to cite the decisions of other courts and judges as a way to justify their own decisions [16,22].

Scientists [35] discuss the importance of widespread circuit acceptance of a rule; he finds that increased circuit support for a given rule heightens the probability that subsequent judges will adopt. This finding is underscored by another conclusion: that judges are less likely

to adopt the doctrine in question when a previous ruling includes a dissent [35]. Taken together, the impact of widespread circuit acceptance and presence of a dissenting opinion indicate the judges want to be sure of the “success” (in this case, defined as legal viability or “settled” meaning) of a new rule (see also [34]. Again, this mirrors the legislative diffusion process, as governments are more likely to adopt an innovation that has already proven to be successful at some level [32].

Similarly, [22] find that judges on the Courts of Appeals do seem to be influenced by the decisions and opinions of other circuits. However, this effect happens over time; early in the process of developing a new area of law, judges are more reliant on the characteristics of their own circuits. This finding provides support for the idea that judicial diffusion is a slow process that is driven by policy learning: judges wait to adopt an innovative rule or doctrine until they are assured of its success and support across other circuits [32,34,35]. The authors also note that circuits are more likely to cite outside opinions when making decisions in cases involving particularly difficult issues [22]. The logic is simple: in such cases the circuit majority is seeking additional justification to enhance the legitimacy of its opinion.

## Assessing the Impact of Politicization on the Diffusion of Court Rulings

### The tightening of scrutiny concerning application of affirmative action

In *Fisher v. Univ. of Texas*, 570 U.S. (2013) the majority opinion strengthens the level of strict scrutiny that must be applied in order for race-based admissions to meet a standard of constitutionality. There has been the legal contention and argument made that the fourteenth amendment proscribes the use of race as a factor in the admissions policy of a University. This was the main controversy in *DeFunis v. Odegaard*, 416 U.S. 312, (1974). DeFunis was a student that was denied admittance to the University of Washington’s Law School and subsequently filed suit, arguing that minorities of equal or lesser qualifications were admitted on the basis of their minority status. The case was eventually dismissed on procedural grounds as DeFunis was later accepted into the institution. By the time the Supreme Court was ready to hear the case, DeFunis was months away from graduating, and the suit was found to be moot. Despite the fact that the specific controversy was found to be moot in *DeFunis v. Odegaard*, Justices Douglas and Brennan wrote dissenting opinions arguing that the case should be adjudicated due to the social significance of the controversy, and because the lack of adjudication by the Court now would only lead to a duplication of the Court’s effort because the issue was certainly going to be brought forth again. Justice Douglas, Justice Marshall, and Justice White joined Justice Brennan’s dissent.

Four years later the Court heard the case of *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). The University of California Medical School at Davis held sixteen spots out of one hundred spots for “qualified” minority students, which would amount to a strict quota system of affirmative action in accepting applicants to a University. Allan Bakke applied two times to the school and was denied admission both times, even though Bakke’s qualifications were argued to have exceeded any and all of those of the minority students that were admitted. Being one of the most divided opinions ever offered in the history of the Supreme Court, and the first to fully consider affirmative action programs at universities, there were a total of six opinions authored. The judgment of the Court was delivered as a plurality, as none of the authored opinions gained a majority of Justices. Justice

Powell’s opinion became the opinion of the Court, and it struck down the special admissions policy of the University of California Medical School at Davis as it was a rigid quota system found to be in violation of the Fourteenth Amendment to the United States Constitution. Bakke’s admittance to the University was ordered. Justices Burger, Stewart, Rehnquist, and Stevens joined this portion of the opinion striking down of the quota program at the University. Justice Powell put forth that the University’s program specifically was unnecessary to further the State interest in diversity, and was invalid under the Equal Protection Clause (438 U.S. 307).

Despite the admissions program being struck down, the invalidation was only specific to the University of California Medical School at Davis. The Court found that race could indeed be considered, even under strict scrutiny, because the desired objective of a diverse student body was and is a compelling state interest. Justices Brennan, White, Marshall, and Blackmun joined Justice Powell in this portion of the opinion that found affirmative action constitutionally permissible under some circumstances (438 U.S. 311-312). To summarize the divided opinion of the Court: diversity of student body is a legitimate State interest that would allow for the consideration of race in admissions, however a strict quota system overly burdens individual liberties and is not narrowly tailored. Other means can be used, as noted by Justice Powell (438 U.S. 316). Of primary importance was the determination that the objective of achieving a diverse student body was indeed a compelling state interest.

The objective of considering race in admissions policies of universities, having been challenged in *Bakke* was further explored in the case of *Gutter v. Bollinger* 539 U.S. 306 (2003). Barbara Gutter was denied admission to the University of Michigan Law School despite having a 3.8 GPA and a 161 LSAT score. She filed suit against the University of Michigan Law School claiming to have been the victim of discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Once again, as in *Bakke*, the issue of whether or not there was a compelling state interest to consider race in admissions practices was to be decided. The Sixth Circuit of Appeals (2002 FED App. 0170P (6<sup>th</sup> Cir.)) held that the precedent set by Justice Powell in *Bakke* prevailed and was binding, that States had a compelling interest in the diversity of a student body of an institution of higher education. The Supreme Court affirmed this ruling, “endorses Justice Powell’s view that student body diversity is a compelling state interest that can justify using race in university admissions” (539 U.S. 308, 317).

The Court’s opinion, authored by Justice Sandra Day O’Connor, was joined by Justices Stevens, Breyer, Ginsburg, and Souter. In *Gutter*, the Court considered the means by which the objective is attained in further detail than had previously been considered in *Bakke*. Essentially, in *Bakke*, Justice Powell put forth an example of an admissions program that would pass constitutional muster (unlike that of the University of California Medical School at Davis’s program) by exploring the admissions practices of Harvard University, which could be considered acceptable to achieve the objective of diversity. Once again, in *Gutter*, Justice O’Connor explores this issue what would make a policy pass constitutional muster, and introduces the concept of the policy being “narrowly tailored.” The program of the University of Michigan Law School was found to be sufficiently narrowly tailored to achieving the objective of diversity which was already established in *Bakke*: “The Law School’s narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body is not prohibited by the Equal Protection Clause, Title VI, or § 1981. Pp. 322-344” (539 U.S. 307, 319).

The strict scrutiny used by Justice O'Connor and the majority opinion in *Grutter* had shifted focus from defining the objective of achieving a diverse student body as sufficiently in the State interest, as in *Bakke*, to also considering the means by which the objective is achieved as being necessarily narrowly tailored. The policies of The University of Michigan Law School were considered to pass both requirements. *Grutter v. Bollinger* also produced divided opinions, as the Court divided in *Bakke*. Justice O'Connor penned the majority opinion, in which it states that "The Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today" (539 U.S. 310). Justices Ginsberg, joined by Justice Breyer, authored a concurring opinion in which they did not agree that affirmative action measures would no longer be necessary in a quarter of a century.

The primary dissent, authored by Chief Justice Rehnquist and joined by Justices Kennedy, Thomas, and Scalia argued that the system used by the University of Michigan Law School was a thinly veiled quota system. Chief Justice Rehnquist argues that, in his opinion, the University of Michigan's admissions program is not narrowly tailored enough to pass constitutional muster:

I do not believe that the Constitution gives the Law School such free rein in the use of race. The Law School has offered no explanation for its actual admissions practices and, unexplained, we are bound to conclude that the Law School has managed its admissions program, not to achieve a "critical mass," but to extend offers of admission to members of selected minority groups in proportion to their statistical representation in the applicant pool. But this is precisely the type of racial balancing that the Court itself calls "patently unconstitutional."

In *Fisher v. University of Texas* 570 U.S. (2013), the focus case of this paper, the strict scrutiny standard is further elaborated upon in the majority decision. Abigail Fisher brought suit against the University of Texas in 2008 after being denied admission to the University. Her SAT scores would have fallen between the 25<sup>th</sup> and 50<sup>th</sup> percentile of the incoming class of the University of Texas. The Supreme Court's decision remanded the case back down to the lower courts, in a 7-1 ruling. Justice Kennedy authored the opinion of the Court. The Court found primarily that the Fifth Circuit did not apply the strict scrutiny necessitated by the ruling in *Grutter*. The opinion of the Court remanding the decision focused much more on the means by which the policy is implemented to achieve the State interest of diversity. Specifically, and of particular importance, is the determination that "strict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice."

This interpretation of the strict scrutiny standard for affirmative action policies is a shift in the burden of proof to the universities to show that not only does the program further the objective of diversity, but it also must be the least restrictive means of doing so in that every other option that is to be considered "race-neutral" must be insufficient in furthering the interest.

Justice Thomas, in a concurring opinion, argued to overturn the ruling in *Grutter* and argued that the use of race at all in admissions policies is "categorically prohibited by the Equal Protection Clause." Justice Scalia, also in a concurring opinion, echoed his dissent in *Grutter*: "The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception." The concurrences, as well as the majority opinion in the case, show a clear shift towards a stringent application use of strict scrutiny, *Fisher* makes an excellent test case to measure the influence of Court opinion. First,

it is a politically salient case that garnered significant media attention. It was considered one of the 'blockbuster' cases before the U.S. Supreme Court in its 2012-13 Term receiving above-the-fold, front page coverage the day of oral argument before the Supreme Court from most major newspapers [36]. In addition, the release of the final decision remanding the case back to the fifth circuit was carried live on most major cable news providers and covered extensively in the nation's top newspapers [37]. This ruling also contained a significant ideological component with its subject concerning affirmative action. This was not a case concerning the details of tax legislation or the application of the APA. It concerned a hotly debated topic. Also to our benefit, the ruling from the Court was clear. The directive to the lower courts and to the affected parties was evident in the opinion and little room was left for interpretation. Finally, the universe of affected parties was relatively small. Plus this universe of public institutions of higher education were primarily sophisticated parties that maintained their own legal staff to provide accurate transmission of this precedent. In short, *Fisher* is the ideal precedent to test the impact of the politicization of the Court on its ability to persuade others to follow its ruling.

## Testing the Theory

### The diffusion of court precedent to the lower courts

To test the impact of the Supreme Court's influence on lower court opinion, we conducted a search of all lower federal court opinions that cited *Fisher v. Univ. of Texas*, 570 U.S., (2013) on March 1, 2015 or twenty months beyond the decision date. This search produced a list of thirty cases decided throughout the federal court system in this time period (see Appendix I). This paucity of cases allowed us to investigate each to determine why *Fisher* was being cited. In the large majority of these cases, the use of our precedent was to ground the understanding of strict scrutiny in boilerplate language. These cases did not concern higher education or the application of affirmative action. Four lower court cases did pertain to affirmative action in an education setting. These cases are addressed in turn.

In October of 2013 the District Court of Maryland heard the case of *The Coalition for Equity and Excellence in Maryland Higher Education, et. al. v. Maryland Higher Education Commission* (Civil No. CCB-06-2773). The plaintiffs in the case argue that the defendants have not satisfied their affirmative duty to remove any and all vestiges of *de jure* segregation in higher education institutions. There has been historically a wide disparity (admitted by the defendants in the case) in funding to as well as opportunities born from traditionally white institutions as opposed to historically black institutions in the state. The plaintiffs in the case argue that these disparities trace historically back to the era of *de jure* segregation, which would indicate that the defendants indeed did not discharge their duty properly in affirmatively dismantling the discriminatory practices.

District Judge Catherine C. Blake concluded with a suggestion that the parties enter the process of mediation in order to find a suitable remedy for the harms caused to the plaintiffs. Both sides in the case assert that the State has succeeded in ending the segregation policies in higher education, but has failed in others. For this reason the Court "proposes to defer entry of judgment pending mediation or further proceedings if necessary to establish an appropriate remedy" (Civil No. CCB-06-2773 at 60).

This District Court's inclusion of *Fisher* in its findings is only tangential, as the case does not relate specifically to admissions policies in universities, but rather disparities between universities and how they are treated within and by the state. There are two references of *Fisher*

*v. University of Texas at Austin*. The first, on page 19, is in response to the State's argument that the plaintiffs do not have standing to sue. The State argued "that the court must look to the 'individual circumstances' of the plaintiffs to find an injury," and the Court found this assertion "overbroad" (Civil No. CCB-06-2773 at 19). The decision in *Fisher* was cited at this point to show, in a quotation, that "[t]he higher education dynamic' does not afford a state more deference where race-based policies are implicated."

The second citing of the *Fisher* case comes later on in the decision, as the Court was reaching its conclusion. On Page 58 of the opinion *Fisher* is used to set the bar for analysis at the level of strict scrutiny. "A 'serious, good faith consideration of workable race-neutral alternatives' in the higher education context does not supplant the strict scrutiny analysis that is warranted where race-based policies are implicated" (Civil No. CCB-06-2773 at 58). Rather, strict scrutiny analysis must be used at every step of the way.

A second case in which *Fisher* is cited comes in *Darren Kenny Lewis, Sr. v. Ascension Parish School Board* (08-00193-BAJ-RLB). The controversy in this case comes as a result of a redistricting and zoning measure enacted by the Ascension Parish School Board in order to address population growth of students. The new plan shifted students into different school zones, effective in the 2008-2009 school year. The plaintiff, as a result of two children being moved into different schools, filed suit claiming that the decision of the School Board "subjected nonwhite students in the East Ascension High School attendance zone to unequal educational opportunities, in violation of the Fourteenth Amendment to the United States Constitution, by 'feeding' a disproportionate number of at-risk students into the zone" (08-00193-BAJ-RLB at footnote 10). The plaintiff's requests were denied and the case dismissed by Chief Judge Brian Jackson of the United States District Court for the Middle District of Louisiana.

Once again, as in Civil No. CCB-06-2773, there is only a limited reference to *Fisher*. In this instance, reference to *Fisher* comes in the form of a quotation indicating that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people, and therefore are contrary to our traditions and hence constitutionally suspect" and later "[b]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, the Equal Protection Clause demands that racial classifications...be subjected to the most rigid scrutiny" (08-00193-BAJ-RLB at V.A.1.).

*Fisher* is cited in *Strehlke v. Grosse Pointe Public School System* that was decided in September of 2014. The U.S. District Court for the Eastern District of Michigan, Southern Division granted summary judgment for the school system against the plaintiffs who instituted a civil rights action claiming the school board and various school officials violated their rights under the First and Fourteenth Amendments to the United States Constitution, as well as various provisions of the Michigan Constitution. Specifically, Plaintiffs challenged the school system's demarcation of its high school attendance areas as well as an intra-district high school transfer policy on the basis that the policies violate the Equal Protection and Privileges and Immunities Clauses of the Fourteenth Amendment and the freedom of association protected by the First Amendment.

The principle plaintiff contention concerning the equal protection clause was that the defendants have denied students residing in plaintiffs' area of Grosse Pointe Farms equal educational opportunities as compared to students residing in the rest of Grosse Pointe Farms. (Am. Compl. [\*20] ¶ 47 ("Defendants failed to provide opportunity for public education to the school children resident in Plaintiff's area

of the Farms on equal terms with other school children in the Farms as proposed by the Supreme Court ... in *Brown v. Board of Education* [], 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954)[.]."). As the ruling notes, the basis of this claim, however, is not entirely clear. Plaintiffs do not allege that they are members of a protected class; rather, the only allegation at all implicating any class-based status is plaintiffs' assertion that the disputed area consists "of mostly low[er income] homes[]" and houses a "higher than average concentration of minority residents." (*Id.* ¶ 19.) The ruling suggests plaintiffs concede that the attendance boundaries are not animated by any impermissible bias, as they acknowledge that "high school enrollment in the GPPSS school district is based on residency... in the attendance area of the high school [.] (Pls.' Resp. 10-11.) With no clear proof of bias against a protected classification, the court was forced to grant summary judgment to the school district.

Our last case citing *Fisher* and dealing with education is *McFadden v. Bd. of Educ. for Ill. Sch. Dist. U-46* decided by U.S. District Court of the Northern District of Illinois, Eastern Division. This case concerns the allocation of seats within the district's English Language Learners (ELL) program and the district's gifted program. Plaintiff's argued that seats were being denied to worthy applicants in both programs due to the race or ethnicity of the applicant. The ruled that while the distribution of seats for the ELL program did not violate the equal protection clause, the district's method for determining who gains entrance into its gifted program did. In discussing the districts gifted program, the opinion notes, "Segregating public school children on the basis of race or ethnicity is inherently suspect. Programs that segregate public school children by ethnicity are subject to strict scrutiny, and the school district bears the burden to show that its actions are narrowly tailored to achieve a compelling governmental interest to have such a program. *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 720, 127 S. Ct. 2738, 168 L. Ed. 2d 508 (2007). To do so, the District bears the burden to prove 'that the reasons for any racial classification are clearly identified and unquestionably legitimate.' *Fisher v. Univ. of Texas at Austin*, 570 U.S., 133 S. Ct. 2411, 186 L. Ed. 2d 474, 2013 WL 3155220 (2013) (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989)). This is the only reference to *Fisher* in the opinion. It is evidently used as a vehicle to repeat the admonition of *Croson* of the application of strict scrutiny.

None of the four cases just outlined or any of the remaining twenty-six cases that cite *Fisher* specifically mentions the increased scrutiny demanded by the majority. It is as if the opinion has been left unstated.

### The diffusion of court precedent on affected parties

Courts, of course, are not the only institutions impacted by the rulings of the U.S Supreme Court. While we tend to focus on the impact of the Court's rulings as translated through subsequent court decisions, it is the affected parties that are most impacted by the Court's opinions. As such, it can be expected that these parties are most likely to alter their behavior in response to a Court ruling that does not correspond to their current manner of conducting business. This is exactly the case with *Fisher v. Univ. of Texas*, 570 U.S. (2013). As noted above, *Fisher* sends a clear dictate to a limited universe of impacted parties on how to alter their admissions process. Specifically, the majority opinion places the burden on university officials and admission officers to use the 'least restrictive means' to obtain a diverse student body. As Justice Kennedy remarked for the majority,

Once the University has established that its goal of diversity is consistent with strict scrutiny, however, there must still be a further

judicial determination that the admissions process meets strict scrutiny in its implementation. The University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference. Grutter made clear that it is for the courts, not for university administrators, to ensure that “[t]he means chosen to accomplish the [government’s] asserted purpose must be specifically and narrowly framed to accomplish that purpose.” 539 U. S., at 333 (internal quotation marks omitted)... Narrow tailoring also requires that the reviewing court verify that it is “necessary” for a university to use race to achieve the educational benefits of diversity. Bakke, supra, at 305. This involves a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications. Although “[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative,” strict scrutiny does require a court to examine with care, and not defer to, a university’s “serious, good faith consideration of workable race-neutral alternatives.” See Grutter, 539 U. S., at 339–340 (emphasis added). Consideration by the university is of course necessary, but it is not sufficient to satisfy strict scrutiny: *The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity.* If “a nonracial approach... could promote the substantial interest about as well and at tolerable administrative expense,” *Wygant v. Jackson Bd. of Ed.*, 476 U. S. 267, n. 6 (1986) (quoting Greenawalt, *Judicial Scrutiny of “Benign” Racial Preference in Law School Admissions*, 75 Colum. L. Rev. 559, 578–579 (1975)), then the university may not consider race. A plaintiff, of course, bears the burden of placing the validity of a university’s adoption of an affirmative action plan in issue. But *strict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice.* [Emphasis added].

Our second examination of the impact of the U.S. Supreme Court’s influence is measured by whether or not impacted parties have adjusted their behavior to the dictates of the Court. The passage above from *Fisher* clearly suggests public universities must examine all workable race-neutral alternatives. Alternatives do exist. The Texas system under question in the *Fisher* case is but one example. A majority of the seats available to incoming students to the University of Texas at Austin are provided for students who graduate in the top-10% of their senior class from a high school in the state of Texas. As American schools in general and Texas schools in particular have continued their resegregation over the past three decades, this almost ensures an ethnically diverse student body. Other plans are available as well. For instance, the same principle could be followed if universities accounted for the postal zip code of the primary residence of their applicants in the admissions process. As neighborhoods across Texas have become more racially and ethnically segregated, this would also be a means of obtaining a diverse student body without directly taking race or ethnicity into account.

We administered a short survey to the admission officials at a randomly selected two hundred and two public universities (Appendix II). These universities were randomly sampled from a list of all public universities in the United States (Appendix III). The survey was administered via an email link created utilizing Qualtrics over a four week period (March 1, 2015-March 29, 2015) with two follow-up email requests for participation sent approximately one week and two weeks after the initial request. Our response rate was low at slightly less than five percent as officials from only ten institutions completed the survey. What is most remarkable is that of the small number of completed surveys, none of those surveyed reported they took the race or ethnicity into consideration in any way during the admissions

process. In addition, when asked specifically if they had altered their admission process in any way in response to the dictates of *Fisher*, none of the respondents reported they did so. When specifically asked if they had considered race-neutral alternatives as a means to select a diverse student body, again none of the respondents reported that they did.

## Is Anyone Listening?

This research paper reports the initial efforts to assess whether or not the politicization of the U.S. Supreme Court and the judiciary has lessened the authority of the Court on both lower levels of the judiciary and impacted parties. While the evidence we provide suggests this is indeed the case in both circumstances, we are disappointed with our results. First, we trace the impact of a single case, *Fisher v. Univ. of Texas*, 570 U.S. (2013) to assess our assertions. This is fraught with all the difficulties of any case study. It is logically impossible to determine generalizability. In addition, there may not have been enough time for the dictates suggested in the majority opinion of *Fisher* to witness its full impact on the rulings of lower courts or alter the behavior of impacted parties. This is suggested both by the lack of cases found in the federal courts specifically applying *Fisher’s* suggested strong scrutiny and by the failure of impacted parties to report an alteration of their processes in the admissions process. This suggests further study is warranted. We plan to follow up this study with one that samples cases from across the legal spectrum that have been decided recently but not quite so recently.

Still even with acknowledging these limitations in the design and implementation of our study, it does suggest that the politicization of the courts is having a deleterious impact on its ability to have its rulings followed. We may be at the beginning of a new era in American governance in which the courts are no longer considered a ‘non-political’ part of our system. Instead they will be viewed as simply another part of our political system with all the foibles and weaknesses we traditionally associate with the more traditional branches of government. The implications of such a transformation are profound and likely to be unwelcome.

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