

# Affirmatively in Peril: Predicting Federal Judicial Decision Making in University Admissions Cases

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*The evolving federal jurisprudence on the use of race in university admissions places judges in the role of policymaker, given that their decisions have direct bearing on how universities conduct admissions. No one knows this better than those who bring test cases, and in a modern context, data analytics on judicial decision making can be used for good or ill in preparing for litigation in cases involving the use of race in university admissions. Using an empirical lens, I test the extent to which existing theoretical frameworks about judicial decision making can explain federal decisions in cases involving the use of race in university admissions policies—a highly politicized area of the law. Specifically, I seek to determine whether a judge’s background and socialized characteristics of the judge, idiosyncrasies of the court, or elements unique to the era in which the decision is made can predict a judge’s decision to afford deference to a policy involving the use of race in university admissions.*

*The results of my analysis indicate that race-conscious university admissions policies—also called “affirmative action”—are in peril. In addition, I interrogate the theoretical frameworks upon which the judicial decision-making literature relies. The results I present in this paper do not indicate strong support for the two frameworks that have drawn the most attention in the judicial decision-making literature: the “attitudinal” or “political cultures” theoretical frameworks. Instead, I find mixed support for the “behavioral” framework based on a moderate but statistically significant effect of the judge’s gender on the decision, suggesting greater deference among women judges to university admission policies. More importantly, I find significant and large effects for the era in which the Court decides each case, supporting evidence of a punctuated equilibrium and legalistic theoretical framework in my sample of cases. Finally, I cross-validate the model, using data points from multiple cases, removing them, and then predicting how the Supreme Court would have decided each case under the model. This analysis includes a prediction of how the 2022 Supreme Court is likely to decide Students for Fair Admissions, Inc. v. President and Fellows of Harvard College and Students for Fair Admissions v. University of North Carolina. This empirical inquiry provides insight into important questions about individual and organization decision making in the federal judiciary as well as how race-conscious admissions policies will fare before judicial decision makers. My analysis has direct implications for how the Supreme Court could ultimately decide the Harvard and UNC cases.*

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INTRODUCTION

Owing to the common law traditions of the American legal system, the federal courts are uniquely bound by and free to create precedent.<sup>1</sup> Increasingly, federal judges have taken leading roles in making decisions with important social and policy implications, especially those affecting the provision of education.<sup>2</sup> This is a marked shift from earlier positions taken by the federal courts, which historically refrained from making decisions affecting higher education institutions through a doctrine known as academic abstention.<sup>3</sup> Now, the federal courts have begun to do more than merely wade into the higher education arena. Today, they are responsible for determining and defining permissible and impermissible uses of race in university admissions policies.<sup>4</sup> As courts have trended toward involvement in resolving these disputes, new methods have emerged to anticipate how they might resolve

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<sup>1</sup> See, e.g., *The Common and Civil Law Traditions*, U.C. BERKELEY SCH. L., <https://www.law.berkeley.edu/library/robbins/pdf/CommonLawCivilLawTraditions.pdf> [https://perma.cc/YF7V-SPUD] (last visited Apr. 29, 2022); Maurice Rosenberg, *Anything Legislatures Can Do, Courts Can Do Better*, 62 AM. BAR ASS'N J. 587, 587-90 (1976); Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 AM. J. COMPARATIVE L. 419, 435 (1967).

<sup>2</sup> See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (holding that segregated schools were unconstitutional because they violated the Equal Protection Clause of U.S. CONST. amend. XIV); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) (upholding the use of busing of students to promote racial integration in public primary and secondary schools as constitutional); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (invalidating race-based quotas in university admissions, but opening the door for other permissible uses of race in university admissions); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (permitting the narrowly-tailored use of race as a “plus-factor” in university admissions, and recognizing that a diverse student body was compelling state interest).

<sup>3</sup> See Terrence Leas, *Higher Education, the Courts, and the Doctrine of Academic Abstention*, 20 J.L. & EDUC. 135, 165 (1991).

<sup>4</sup> See Robert M. O’Neil, *Judicial Deference to Academic Decisions: An Outmoded Concept?*, 36 J.C. & U.L. 729, 767 (2009).

these controversies. Thus, the study of judicial decision making in this domain is ripe for study using empirical methods.

Although judicial decision making has captured the interest of empirical legal scholars for decades,<sup>5</sup> modeling and explaining judicial decision making has become a complex process, even with the help of increasingly more available data analytics.<sup>6</sup> This complexity is due, in part, to the way that judicial precedent evolves over time. For example, the way in which the courts have interpreted the use of race in university admissions policies has undergone considerable change. Early cases challenging the use of race in university admissions sought to desegregate institutions of higher education but were largely unsuccessful. A number of these cases failed because state and federal courts, interpreting higher education institutions' policies of segregation under the precedent of *Plessy v. Ferguson*,<sup>7</sup> gave broad deference to university policies, including discriminatory admission policies.<sup>8</sup> Several Supreme Court decisions in this era of jurisprudence recognized that state actors in the higher education arena were not adequately providing to all citizens separate and equal access to and provision of higher education but made little to no effort to change the underlying separate-but-equal policies.<sup>9</sup>

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<sup>5</sup> See, e.g., Michael Heise, *The Past Present and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 820, 850 (2002); Howard Gilman, *What's Law Got to Do with It?: Judicial Behaviorists Test the "Legal Model" of Judicial Decision Making*, 26 L. & SOC. INQUIRY 465, 504 (2001); Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1, 38 (1998).

<sup>6</sup> Judge Posner offers insight, perhaps merely from his perspective, into the process of how judges make decisions: "Occasional legislators, judges are motivated by political considerations in a broad and sometimes a narrow sense of that term. In that open area, most American judges are legal pragmatists." RICHARD A. POSNER, *HOW JUDGES THINK* 78–92 (2008).

<sup>7</sup> 137 U.S. 587 (1896).

<sup>8</sup> See, e.g., *Missouri ex rel. Gaines v. Canada*, 11 S.W.2d 783 (Mo. 1938) (upholding Missouri's public policy of providing separate-but-equal education for black citizens was not prohibited by the United States or Missouri constitutions); *Sipuel v. Bd. of Regents of Univ. of Okla.*, 180 P.2d 135 (Okla. 1947) (maintaining that the systems of separate schools in the states was lawful under OKLA. CONST. art. 13, § 3, other statutory provisions pertaining to education in state law, and not offensive to U.S. CONST. amend. XIV); *Sweatt v. Painter*, 210 S.W.2d 442 (Tex. Civ. App. 1950) (affirming the decision of the lower court and holding that the state had effectively accomplished the mandates of separate-but equal-constitutional requirements by its "enormous outlay both in funds and in carefully and conscientiously planned and executed endeavor, in a sincere and earnest bona fide effort to afford every reasonable and adequate facility and opportunity guaranteed to [plaintiff] under the 14th Amendment, within the State's settled policy of race segregation in its public schools"); *McLaurin v. Okla. State Regents of Higher Educ.*, 87 F. Supp. 528 (W.D. Okla. 1949) (upholding the policy that black students were subject to separate learning conditions, as recognized and enforced by the university, rested upon a reasonable basis with foundations in the public policy of the state and did not operate to deprive black students of the equal protection of the laws). *But see* *Wichita Falls Junior Coll. Dist. v. Battle*, 204 F.2d 632 (5th Cir. 1953) (invalidating a race-based admission policy which required black junior college entrants to go to more expensive colleges located hundreds of miles away, outside of their local junior college district, although they met the entrance requirements to their local junior college district).

<sup>9</sup> See, e.g., *Missouri, ex rel. Gaines v. Canada*, 347 U.S. 483 (1938) (holding that when the state provides legal training, it must provide it to every qualified person to satisfy equal protection and cannot send citizens to other states to receive legal training on the basis of the citizen's race); *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631 (1948) (maintaining that the state, operating a law school for whites only, must provide the same for blacks); *Sweatt v.*

Eventually, the federal courts' interpretation of separate-but-equal higher education policies ceded to Equal Protection precedent; after the *Brown v. Board of Education*<sup>10</sup> decision, other contemporaneous desegregation cases before the federal courts were construed in the light of *Brown*, which overruled *Plessy*.<sup>11</sup> In the wake of *Brown*, federal courts became both enactors and enforcers of sweeping changes that introduced racial diversity in higher education and prohibited discrimination on the basis of race.<sup>12</sup>

Following these decisions, policymakers and universities began to construct race-conscious admissions policies to pursue equity—instead of segregation—in the admission of underrepresented minorities to universities. Often, these policies relied on the premise that diversity leads to an increase in a variety of measures of student success for all students—not simply for those students admitted under what came to be called “affirmative action.”<sup>13</sup>

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Painter, 339 U.S. 629 (1950) (invalidating a newly-established state law school for black students did not provide the equivalent educational opportunities offered to white students, denying black students' rights under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution); McLaurin v. Okla. State Regents of Higher Educ., 339 U.S. 637 (1950) (maintaining that requiring a student to attend class, sit, eat, and study apart from the other students because of his race impaired and inhibited his ability to study, to engage in discussions, exchange views with other students, and, in general, to learn his profession, in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution).

<sup>10</sup> 347 U.S. 483 (1954).

<sup>11</sup> See, e.g., Bd. of Sup'rs of La. State Univ. v. Tureaud, 225 F.2d 434 (5th Cir. 1955) (vacating and remanding the case for findings consistent with the Court's holding in *Brown*); Whitmore v. Stilwell, 227 F.2d 187 (5th Cir. 1955) (finding that a junior college district's refusal to admit student on the basis of their race was unlawful under the Fourteenth Amendment of the United States Constitution); Lucy v. Adams, 350 U.S. 1 (1955) (enjoining the state flagship university from denying black students admission on the basis of their race).

<sup>12</sup> See, e.g., Booker v. Tennessee Bd. of Educ., 240 F.2d 689 (6th Cir. 1957); Bd. of Sup'rs of La. State Univ. & Agr. & Mech. Coll. v. Ludley, 252 F.2d 372 (5th Cir. 1958); Gannit v. Clemson Agr. Coll. 320 F.2d 611 (4th Cir. 1963) (rejecting a state college's admission policy to deny admission to applicants on the basis of their race); Meredith v. Fair, 313 F.2d 532 (5th Cir. 1962) (adjudging Mississippi's governor in civil contempt for conduct taken with the deliberate purpose of preventing compliance with federal court orders requiring a black student's admission to a state university); Guillory v. Adm'rs of Tulane Univ., 306 F.2d 489 (5th Cir. 1962) and Hammond v. Univ. of Tampa 344 F.2d 951 (5th Cir. 1965) (preventing private universities—which based on the circumstances of their founding, the court found to be public institutions for purposes of the cases—from discriminating in admissions on the basis of race).

<sup>13</sup> In lieu of using the term “affirmative action,” this article employs the use of the term “race-conscious admission policies” to refer to all university admission policies that recognize a student's race. Prior research indicates that “affirmative action” race-conscious admission plans have indeed increased the probability of acceptance for underrepresented minorities. See, e.g., Mark C. Long, *Race and College Admissions: An Alternative to Affirmative Action?*, 86 REV. OF ECON. & STATS. 1020, 1033 (2004). Studies in this area have found that a diverse university population increases interaction among different racial and ethnic groups and ultimately leads to higher levels of student persistence. See, e.g., Mitchell J. Chang, *Does Racial Diversity Matter?: The Educational Impact of a Racially Diverse Undergraduate Population*, 40 J. C. STUDENT DEV. 377, 395 (1999). Several studies have found that having a diverse student body benefits not only educational outcomes, but also measures related to good citizenship and critical thinking skills. Patricia Gurin, Eric Dey, Sylvia Hurtado & Gerald Gurin, *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 HARVARD EDUC. REV. 330, 367 (2002); Anthony Lising Antonio, Mitchell J. Chang, Kenji Hakuta, David A. Kenny, Shana Levin & Jeffrey F. Milem, *Effects of Racial Diversity on Complex Thinking in College Students*, 15 PSYCH. SCI. 507, 510. (2004). These benefits can be realized through informal interactions

However, legal challenges to the use of race in university admissions intending to privilege minority racial groups began to mount in the 1970s, marked by a flurry of cases filed by non-minority and male plaintiffs, which redefined the very meaning—that is, the political valence—of the use of race in admissions.<sup>14</sup> The Supreme Court's 1978 landmark decision *Regents of the University of California v. Bakke*<sup>15</sup> provided the first set of guidelines to clarify the permissible and impermissible uses of race in admissions policies.<sup>16</sup> While the Supreme Court's decision in *Bakke* invalidated the use of quota-based systems to admit minority applicants, it also upheld diversity in higher education as a compelling state interest.<sup>17</sup> Since *Bakke*, federal courts have prohibited certain uses of race in admissions—such as allocating a set number of points to applicants on the basis of their race<sup>18</sup>—while largely deferring to policies involving the use of race in university admissions to achieve a diverse student body.<sup>19</sup>

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among students as well as programmatic endeavors at the university and classroom level. However, promoting race-conscious admission plans without attending to the needs of underrepresented students once they are admitted can produce negative outcomes for minority students in predominately white-institutions. Sylvia Hurtado, Adriana Ruiz Alvarado & Chelsea Guillermo-Wann, *Thinking About Race: The Salience of Racial Identity at Two- and Four-Year Colleges and the Climate for Diversity*, 86 J. HIGHER EDUC. 127, 155 (2015); Shaun R. Harper and Sylvia Hurtado, *Nine Themes in Campus Racial Climates and Implications for Institutional Transformation*, 120 NEW DIRECTIONS FOR STUDENTS SERVS. 7, 24 (2007).

<sup>14</sup> *Defunis v. Odegaard*, 416 U.S. 312 (1974) (declining to address the merits of a case, on mootness grounds, in which the Washington Supreme Court upheld a university admission policy considering for the purposes of furthering diversity); *Krohn v. Harvard L. Sch.* 552 F.2d 21 (1st Cir. 1977) (holding that a law school applicant failed to allege any connection between the school's allegedly discriminatory admissions policy and any activity on the part of the Commonwealth of Massachusetts for state action and equal protection to apply); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (9th Cir. 1978). *But see* *Gonzalez v. S. Methodist Univ.*, 536 F.2d 1071 (5th Cir. 1976) and *Henderson v. Fl. Bd. of Regents*, 569 F.2d 1309 (5th Cir. 1978) (rejecting minority applicants' claim that their applications for admission to a private and public university law school, respectively, were denied on the basis of their race).  
<sup>15</sup> 438 U.S. 265 (1978).

<sup>16</sup> *Id.* at 314.

<sup>17</sup> *Id.* Specifically, the Court's decision in *Bakke* shifted the permissible rationales from remedying past wrongs to advancing the benefits of educational diversity.

<sup>18</sup> *See* *Gratz v. Bollinger*, 539 U.S. 244 (2003).

<sup>19</sup> *See, e.g.*, *Doherty v. Rutgers Sch. of L.*, 651 F.2d 893 (3d Cir. 1981); *Hall v. State*, 791 F.2d 759 (9th Cir. 1986); *Davis v. Halpern*, 813 F.2d 37 (2d Cir. 1987); *Hopwood v. Univ. of Tex.*, 78 F.3d 932 (5th Cir. 1996); *Texas v. Lesage*, 528 U.S. 18 (1999); *Wooden v. Bd. of Regents of the Univ. of Ga.*, 247 F.3d 1262 (11th Cir. 2001); *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234 (11th Cir. 2001); *Farmer v. Ramsay*, 43 Fed.Appx. 547 (4th Cir. 2002); *Weser v. Glen*, 41 Fed.Appx. 521 (4th Cir. 2002); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Smith v. Univ. of Wash. L. Sch.*, 392 F.3d 367 (9th Cir. 2004); *Su v. Eastern Ill. Univ.*, 565 Fed.Appx. 520 (7th Cir. 2014). Importantly, in all but *Su*, these cases arise from challenges brought by white plaintiffs who were denied university admission and sought to overturn the admissions decision on the claim that their race was the motivating reason for their being denied admission. In essence, this is a reversal of the Civil Rights Era cases involving the use of race in university admissions listed at notes 8 and 9, *supra*. *But see* *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997) and *Schuetz v. Coal. to Defend Affirmative Action*, 572 U.S. 291 (2014). In *Wilson* and *Schuetz*, the courts held that state constitutional amendments banning the use of race from consideration in decisions by state entities, including state universities, did not violate the Equal Protection Clause.

Thus, with and without intending to do so, federal courts have indelibly shaped higher education policy through their jurisprudence in the evolving body of precedent that encompasses race-conscious university admissions cases.<sup>20</sup> In December 2015, the Supreme Court again heard oral arguments in a case—having remanded it once before on procedural grounds<sup>21</sup>—involving the use of race in university admissions. The Court’s decision in the *Fisher v. University of Texas*<sup>22</sup> [hereinafter *Fisher II*] case from June 2016, a narrow 4-3 outcome upholding the University of Texas’ admissions policy that considered race as a plus factor for only those students not admitted under the top 10 percent rule, permitted the continuation of a policy allowing in-state students whose high school grades placed them in the top 10 percent of their class to be admitted to a state university of their choice. Many expected *Fisher II* to potentially change the legal status quo, but ultimately, it had little effect other than to preserve precedent of cases like *Grutter v. Bollinger* that held race to be a permissible consideration as a non-binding factor in admissions.<sup>23</sup> However, much has changed since that decision.

Consider the composition of the Court. The Court has four new justices: Justice Ketanji Brown Jackson, who filled Justice Stephen Breyer’s seat following his retirement; Justice Amy Coney Barrett, who was confirmed

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<sup>20</sup> Largely, state policymakers have responded to federal court rulings to enact changes to policies impacting race-conscious admissions regimes. At present, eight states have enacted laws through legislative action (New Hampshire), executive order (Arizona, California, Michigan, Nebraska, Oklahoma, and Washington) or public referenda (Arizona, California, Michigan, Nebraska, Oklahoma, and Washington) that place an outright ban on the use of race-conscious university admission policies. For instance, in 1996, the U.S. Court of Appeals for the Fifth Circuit effectively banned the use of race as an admitting factor in Texas universities. *Hopwood v. Univ. of Tex.*, 78 F.3d 932 (5th Cir. 1996). However, this ruling was effectively struck down by the United States Supreme Court in 2003. *See Grutter*, 539 U.S. 306 (2003). Researchers investigating these bans have found that the number of minority students attending postsecondary education does not significantly decrease, but minority students are more likely to attend less selective institutions and less likely to graduate from selective institutions. Peter Hinrichs, *The Effects of Affirmative Action Bans on College Enrollment, Educational Attainment, and the Demographic Composition of Universities*, 94 REV. OF ECON. & STATS. 712, 722 (2012); Peter Hinrichs, *Affirmative Action Bans and College Graduation Rates*, 42 ECON. OF EDUC. REV. 43, 43-52 (2014). Similarly, other researchers have found that race-conscious bans chill the rate of minority enrollment in the states listed above. (*See* Grant H. Blume and Mark C. Long, *Changes in Levels of Affirmative Action in College Admissions in Response to Statewide Bans and Judicial Rulings*, 36 EDUC. EVALUATION & POL’Y ANALYSIS 228, 252 (2014)). However, at least one study—from the University of California system—found no substantial change in enrollment after California’s race-conscious admission plan was banned. K. L. Antonovics and R. H. Sander, *Affirmative Action Bans and the ‘Chilling Effect’*, 15 AM. L. & ECON. REV. 252, 299 (2012). In response to the legal challenges presented by affirmative action bans, some states have moved toward a “top X percent” program whereby universities guarantee admission to some percentage of in-state students based on a predetermined set of criteria. However, research indicates that these programs are ineffective because not enough minority students score in the top tier of high schools to make up the difference. Long, *supra* note 13, at 1033. Notably, this is the type of plan reviewed in *Fisher v. University of Texas*, 579 U.S. 365 (2016) [hereinafter *Fisher II*].

<sup>21</sup> *Fisher v. Univ. of Tex.*, 570 U.S. 297 (2013) [hereinafter *Fisher I*].

<sup>22</sup> 579 U.S. 365 (2016).

<sup>23</sup> *Id.*

following the death of the late Justice Ruth Bader Ginsburg; Justice Brett Kavanaugh, who assumed Justice Anthony Kennedy's seat on the Court after the contentious confirmation hearings; and Justice Neil Gorsuch, following a protracted process to fill the seat of the late Justice Antonin Scalia.<sup>24</sup>

Presidential administrations have also changed twice since *Fisher II*. The last presidential administration indicated its intention to redirect the Justice Department's resources to investigate and sue universities that it perceived to discriminate against white applicants,<sup>25</sup> despite the fact that Black and Hispanic students were more underrepresented at elite universities in 2015 than they were in 1980.<sup>26</sup>

Thus, with the Court agreeing to hear arguments in the *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* (hereinafter "*Harvard*") and the *Students for Fair Admissions v. University of North Carolina* (hereinafter, "*UNC*") cases, federal courts will once again take up the issue of the use of race in university admissions, solidifying the role of the courts as policymakers in higher education.

This article considers the evolving federal jurisprudence on the use of race in university admissions through an empirical lens. Specifically, it analyzes whether judicial decisions in these highly politicized cases can be modeled, explained, and predicted. I tested four theoretical frameworks from the literature about judicial decision making to determine the extent to which federal judicial decisions in these cases can be explained by several background characteristics of the judge, information about the courts handling the case, and the era in which the decision is made, among other indicators. Part I outlines the literature surrounding the theoretical frameworks developed to explain judicial decision making. Part II describes the following in detail: the motivations and research questions used in my analysis; the data, models, and variables utilized to test the four theoretical frameworks; and the limitations of my data and models. Part III introduces the results and findings from my analysis, which are bifurcated into sections on substantive and procedural court decisions. Part III also discusses a cross-validation of the model, using it to predict how the Supreme Court justices

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<sup>24</sup> See, e.g., Barbara Sprunt, *Amy Coney Barrett Confirmed to Supreme Court, Takes Constitutional Oath*, NPR, (Oct. 26, 2020, 8:07 PM), <https://www.npr.org/2020/10/26/927640619/senate-confirms-amy-coney-barrett-to-the-supreme-court> [<https://perma.cc/XZ8N-U8GK>]; Sheryl Gay Stolberg, *Kavanaugh Is Sworn In After Close Confirmation Vote in Senate*, N.Y. TIMES (Oct. 6 2018), <https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html> [<https://perma.cc/GL95-MU7H>]; Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, N.Y. TIMES, (Apr. 7, 2017), <https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html> [<https://perma.cc/2Z9L-PVLV>].

<sup>25</sup> Charlie Savage, *Justice Department to Take on Affirmative Action in College Admissions*, N.Y. TIMES (Aug. 1, 2017), <https://www.nytimes.com/2017/08/01/us/politics/trump-affirmative-action-universities.html> [<https://perma.cc/EHU6-XH2A>].

<sup>26</sup> Jeremy Ashekenas, Haeyoun Park & Adam Pearce, *Even with Affirmative Action, Blacks and Hispanics Are More Underrepresented at Top Colleges Than 35 Years Ago*, N.Y. TIMES (Aug. 24, 2017), <https://www.nytimes.com/interactive/2017/08/24/us/affirmative-action.html> [<https://perma.cc/L89T-YAFT>].

might decide the *Harvard* and *UNC* cases. I conclude with a summary of this article's contribution to the understanding of judicial decision making in the cases constituting my sample.

## I. THEORIES OF JUDICIAL DECISION MAKING

Empirical legal scholarship—in particular, a subset of empirical legal scholarship known as New Legal Realism—aims to leverage quantitative data to investigate, among other things, how judges make decisions in the cases before them.<sup>27</sup> To elucidate factors impacting judicial decisions, empirical legal scholars have tested theoretical frameworks of judicial decision making against a set of actual cases.<sup>28</sup> The majority of studies employing these methods attempt to reconcile the extent to which a judge's decision in a select sample of cases can be said to fit within the “behavioralist” or “attitudinal” theoretical frameworks.<sup>29</sup> To a lesser extent, the literature also considers whether the “sociological decision-making” or “political culture” and “punctuated equilibrium” theories can account for judicial decision-making patterns.<sup>30</sup> Other scholars have posited additional theories that are far more difficult to measure quantitatively, such as “psychological,” “phenomenological,” and “legalist” approaches.<sup>31</sup> Since the latter theories are nearly impossible to measure with available data, this article focuses instead on the utility of the behavioralist, attitudinal, political culture and punctuated equilibrium theories to explain judicial decision making.

The behavioralist and attitudinal theories express the idea that decision makers draw on their beliefs and values, whether firmly held or evolving, in

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<sup>27</sup> Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 851 (2008).

<sup>28</sup> See e.g., Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972) (offering an early, descriptive application of this method to a non-random selection of tort cases spanning the late nineteenth and early twentieth centuries); Tracey George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635 (1998) (testing attitudinal and strategic decision making theoretical frameworks to en banc cases heard by the U.S. Court of Appeals for the Fourth Circuit over three decades).

<sup>29</sup> See *id.* See also Isaac Unah & Ange-Marie Hancock, *US Supreme Court Decision Making, Case Salience, and the Attitudinal Model*, 28 L. & POLY 295 (2006); Cass R. Sunstein, Lisa Michelle Ellman & David Schkade, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 1–36 (John M. Olin Program in Law and Economics, Working Paper No. 198, 2003).

<sup>30</sup> See, e.g., James L. True, Bryan D. Jones, & Frank R. Baumgartner, *Punctuated-equilibrium Theory: Explaining Stability and Change in Public Policymaking*, in THEORIES OF THE POLICY PROCESS (Paul Sabatier, ed., 2019); BRIAN Z. TAMANAHA, REALISTIC SOCIO-LEGAL THEORY: PRAGMATISM AND A SOCIAL THEORY OF LAW (1997); Joel B. Grossman & Austin Sarat, *Political Culture and Judicial Research*, 1971 WASH. U. L.Q. 177 (1971).

<sup>31</sup> See, e.g., LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES (2013); see also RICHARD A. POSNER, HOW JUDGES THINK 20–36 (2008).



making policy determinations.<sup>32</sup> The behavioralist theoretical perspective also holds that background characteristics, such as race and gender, influence decision making. The attitudinal theoretical perspective suggests that later-developed characteristics, such as political ideology, often proxied empirically by the political party of an Article III judge's appointing president, indicate the partisan directionality of a judicial decision.<sup>33</sup> Relatedly, political culture theorists maintain that decision makers are influenced by the political cultures of their immediate environment; that is, the tenor of a political culture—or the institutional cultures attendant to associated groups like courts comprising a federal circuit—impacts decision making.<sup>34</sup> An alternate decision making theory, known as punctuated equilibrium theory, places a decision in the context of its era and, in this way, converges on a legalist approach.<sup>35</sup> This is not to say that punctuated equilibrium theory would suggest that a decision made in the context of an era is stagnant. Rather, punctuated equilibrium theory holds that after a period of stability, durable shifts occur to disrupt this stability, and after the change is taken up by the institutions of the era, it becomes a source of stability until the next durable shift disrupts the newfound stability.<sup>36</sup>

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<sup>32</sup> See Gilman, *supra* note 5, at 504; Charles A. Johnson, *Law, Politics, and Judicial Decision Making: Lower Federal Court Uses of Supreme Court Decisions*, 21 L. & Soc'y REV. 325, 340 (1987).

<sup>33</sup> It has been argued that there are really only two existing measures of the judicial ideology of Article III judges: (1) the political party of the appointing president and the Judicial Common Space Score. Corey Yung, *What is Judicial Ideology and How Should We Measure It?*, CONCURRING OPINIONS, (June 8, 2010); Judicial Common Space Scores rely upon “the norm of senatorial courtesy by integrating the voting records, based upon a standardized scale [from -1 to 1] of the nominating party . . . of the home state Senators of the judge nominated. . . [and] use the President's party to determine the direction of the ideology.” *Id.* See Lee Epstein, Andrew D. Martin, Jeffrey A. Segal & Chad Westerland, *The Judicial Common Space*, 23 J. L. ECON. & ORGS. 303, 325 (2007); see also Christina L. Boyd, *The Hierarchical Influence of Courts of Appeals on District Courts*, 44 J. LEGAL STUD. 113, 141 (2015) (using Boyd's Federal District Court Judge Ideology Data, <http://clboyd.net/ideology.html> [<https://perma.cc/2MNH-ZJSA>]).

<sup>34</sup> See, e.g., Karen S. Louis, Karen Febey & Molly F. Gordon, *Political Cultures in Education at the State and Local Level: Views from Three States*, in HANDBOOK OF EDUCATION POLITICS AND POLICY 52, 69 (Bruce Cooper, James Cibulka, Lance Fusarelli, eds. 2008) (ascribing political cultures to states and cities); Grossman & Sarat, *supra* note 30 (suggesting ways in which political cultures can be used to “sensitize and guide judicial research to a better understanding of environmental influences” in judicial decision making); GABRIEL A. ALMOND AND G. BINGHAM POWELL, JR., *COMPARATIVE POLITICS: A DEVELOPMENTAL APPROACH* 52 (1966) (defining political cultures as connecting “individual tendencies to system characteristics,” especially those in governmental institutions, such as the judiciary); Sidney Verba, *Comparative Political Culture*, in POLITICAL CULTURE & DEVELOPMENT 513 (Lucian W. Pye & Sidney Verba eds., 1965) (situating a political culture as “the system of empirical beliefs, expressive symbols, and values which defines the situation in which political action takes place,” which applies cleanly to milieu of the judiciary).

<sup>35</sup> Frank Baumgartner, Brian Jones & Peter Mortensen, *Punctuated Equilibrium Theory: Explaining Stability and Change in Public Policymaking*, in THEORIES OF THE POLICY PROCESS 59, 103 (Paul Sabatier & Christopher Weible, eds., 2014); KAREN ORREN & STEPHEN SKOWRONEK, *THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT* (2004).

<sup>36</sup> Elaine Romanelli & Michael L. Tushman, *Organizational Transformation as Punctuated Equilibrium: An Empirical Test*, 37 ACAD. MGMT. J. 1141, 1166 (1994).

While much of the existing research that uses a theoretical framework to explain judicial decision making is undermined by conflicting results, the literature examining judicial decisions from a behavioralist theoretical framework—i.e., whether background characteristics, such as race and gender, influence judicial decisions—provides mostly consistent results. For example, multiple studies in this area have found that differences in gender and race produce a meaningful difference in judicial outcomes.<sup>37</sup> Yet, while a few studies using this framework to review decisions found statistically significant effects of race and gender on judicial decisions, most concern general judicial decision making, and none considers cases related to race-conscious admissions policies.<sup>38</sup>

To explain judicial decision making, several studies have applied the attitudinal framework. This maintains that socialized characteristics, such as educational experience and political ideology, impact decision making. The results from these studies indicate that judges appointed by Democratic presidents tend to vote according to a more liberal ideology while their colleagues whom Republican presidents appointed tend to favor a more conservative ideology.<sup>39</sup>

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<sup>37</sup> See *id.* (discussing a bevy of cases that support behaviorist theory). Because data on socioeconomic upbringing, parental income, and first-generation status is slim to non-existent, data on a judge's race, among other characteristics are imperfect but decent proxies for such personal factors about judges in the sample and my employment of these data are consistent with the literature in the field, especially the literature engaging the behavioralist framework. See also Gillman, *supra* note 5, at 504 (2001) (applying, with fidelity, a behavioralist model to a broad set of cases).

<sup>38</sup> See Darrell Steffensmeier & Chester L. Britt, *Judges' Race and Judicial Decision Making: Do Black Judges Sentence Differently?*, 82 SOC. SCI. Q. 749, 751 (2001) (finding nominal differences between judges of different races in terms of sentencing patterns but that non-white judges tended to impose harsher sentences on criminal defendants at statistically significant levels); Jennifer L. Perisic, *Female Judges Matter: Gender and Collegial Decision Making in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1786–87 (2005) (finding significant gender effects in judicial decisions for the plaintiff in sexual harassment or sexual discrimination cases).

<sup>39</sup> See, e.g., Jilda M. Aliotta, *Combining Judges' Attributes and Case Characteristics: An Alternative Approach to Explaining Supreme Court Decision Making*, 71 JUDICATURE 277, 280 (1988) (linking a judge's affiliation with the Democratic party to voting in favor of equal protection claims); ROBERT A. CARP & C. K. ROWLAND, *POLICYMAKING AND POLITICS IN THE FEDERAL DISTRICT COURTS* 7 (1983); Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals, 1961-1964*, 60 AM. POL. SCI. REV. 374 (1966) (finding Democratic affiliation was a statistically significant predictor of judicial voting patterns on politically liberal issues); Jon Gottschall, *Carter's Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting on the U.S. Courts of Appeals*, 67 JUDICATURE 165, 174 (1983); Joel B. Grossman, *Social Backgrounds and Judicial Decision Making*, 79 HARV. L. REV. 155, 15591 (1966); William E. Kovacic, *Reagan's Judicial Appointees and Antitrust in the 1990s*, 60 FORDHAM L. REV. 49, 55 (1991) (comparing Reagan appointees to Carter appointees and finding the former to decide more conservatively in antitrust cases); Stuart S. Nagel, *Unequal Party Representation on the State Supreme Courts*, 45 JUDICATURE 62 (1961); Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-analysis*, 20 JUST. SYS. J., 219, 254 (1999); GLENDON A. SCHUBERT, *QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR* (1959); Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073, 1167–81 (1992) (analyzing employment discrimination cases and finding significant correlations between political party, appointing president, and judicial decisions); John R.

One particularly salient study, conducted by Professors Sunstein, Ellman, and Schkade, found that federal appeals court judges appointed by Democratic presidents are more likely to uphold affirmative action policies compared to judges appointed by Republican presidents.<sup>40</sup> Yet, this effect was minimized when a judge appointed by Democratic presidents sits on a three-judge panel with two other judges appointed by Republican presidents—what the authors of the study call “ideological dampening,” in which party differences are “leveled,” or wiped out.<sup>41</sup> However, other researchers investigating the decision behaviors of federal appeals court judges have found that political ideology and party affiliation are not always directly correlated and in some cases are not useful predictors of voting behavior.<sup>42</sup>

Nonetheless, studies correlating Supreme Court justices’ political ideologies and “voting” behavior have found that “partisanship and appointing president . . . are probably best considered surrogates for judicial attitudes, not causes of them—and, as such, are at least potentially independent of social background.”<sup>43</sup> Also, although no empirical attention has been paid to

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Schmidhauser, *Stare Decisis, Dissent, and the Background of Justices of the Supreme Court of the United States*, 14 U. TORONTO L.J. 194 (1962); Donald R. Songer, *The Policy Consequences of Senate Involvement in the Selection of Judges in the United States Courts of Appeals*, 35 W. POL. Q. 107, 119 (1982); C. Neal Tate, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946-1978*, 75 AM. POL. SCI. REV. 355 (1981); S. Sidney Ulmer, *The Political Party Variable in the Michigan Supreme Court*, 11 J. PUB. L. 352 (1962).

<sup>40</sup> Sunstein et al., *supra* note 29. Sunstein, et al., follow cases from 1978 to 2002, including a total of 155 cases involving affirmative action issues. The vast majority of these cases are outside the realm of my focus on race-conscious admission policies at universities. For example, besides a Lexis search of “affirmative action and constitution or constitutional,” the authors built their case universe using a Westlaw Key Cite of *United Steelworkers v. Weber*, 443 U.S. 193 (1979), a case involving affirmative action in the context of hiring processes. Also, while they do examine a number of cases involving race-conscious university admissions policies, their analysis begins with *Bakke*, and thus misses four decades of development in case law and political cultures related to these policies. Finally, to distinguish the analysis of Sunstein, Ellman, and Schkade from my own, these authors examined only the voting patterns of three-judge panels at the federal court of appeals level.

<sup>41</sup> *Id.* at 3.

<sup>42</sup> Frank B. Cross, *Decision Making in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1457–1515 (2003); Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491, 496 (1975) (finding Democratic affiliation was only a statistically significant predictor of judicial voting patterns on politically liberal issues in certain cases but not all, and instead finding that age was the most significant predictor of deciding a case on politically liberal grounds); Stuart S. Nagel, *Political Party Affiliation and Judges’ Decisions*, 55 AM. POL. SCI. REV. 843 (1961); Kenneth N. Vines, *Federal District Judges and Race Relations Cases in the South*, 26 J. POL. 337, 357 (1964); David W. Adamany, *The Party Variable in Judges’ Voting: Conceptual Notes and a Case Study*, 63 AM. POL. SCI. REV. 57 (1969) (analyzing judicial decision making in the state court context of the Wisconsin Supreme Court); Orley Ashenfelter, Theodore Eisenberg, & Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 281 (1995); Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1190 (1991) (examining race-based equal protection cases and finding no significant correlation between a judge’s political affiliation, appointing president, and the outcome).

<sup>43</sup> JEFFREY A. SEGAL AND HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL*, 232 (1993); *see also* Charles A. Johnson, *Law, Politics, and Judicial Decision*

the subject to date, Professor Amar observes that the justices sitting on the Supreme Court today have nearly identical resumes. This includes a common educational experience. With the exception of Justice Amy Coney Barrett, each sitting justice graduated from Harvard or Yale, both of which are firmly within the time-invariant top 14 law schools.<sup>44</sup>

Although the literature is fairly robust in examining the explanatory effect of the behavioral and attitudinal theoretical frameworks, considerably less is known about the explanatory applications of political culture and punctuated equilibrium theories to judicial decision-making. The first approach, political culture theory, posits that institutional cultures, particularly those comprising a political institution like a court, impact decision making. This approach tends to focus on specific levels of the court, such as the composition of the Supreme Court or a three-judge appeals court panel, as opposed to court systems more broadly. There is a paucity of research about the institutional influence of the court on judicial decision making. However, previous studies have considered the impact of prior judicial experience on appellate court decision making—with mixed results.<sup>45</sup> Some studies in this area seem to indicate that previous federal judicial experience has little impact on voting behavior.<sup>46</sup> Others find that prior judicial experience indeed predicts how a judge will decide a case involving civil rights issues at marginal but statistically significant levels.<sup>47</sup> Finally, these studies implicitly confirm that the link between judicial decisions and their temporal or cultural context—which lies at the heart of punctuated equilibrium theory—requires greater and more deliberate study to fill this gap in the literature. That link also provides a coarse proxy for determining the legalist approach to judicial decision making based on the controlling precedent of the given moment in which a case is decided.

Broadly speaking, each of these theoretical frameworks explains whether a judge's unique background and socialized characteristics influence

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*Making: Lower Federal Court Uses of Supreme Court Decisions*, 21 L. & Soc'y REV. 325, 340 (1987).

<sup>44</sup> See Akhil Reed Amar, *Clones on the Court*, ATLANTIC (Apr. 2015), <http://www.theatlantic.com/magazine/archive/2015/04/clones-on-the-court/386252/> [<https://perma.cc/B4MJ-TJ3L>]. Amar notes that “all went on to study law at Harvard or Yale (though [Justice] Ruth Bader Ginsburg defected to Columbia for her final year).” Often referred to as the “T14,” these schools have consistently ranked in the top 14 since the inception of the *U.S. News and World Report* rankings in 1987 (in alphabetical order): University of California, Berkeley, Boalt Hall School of Law; Columbia Law School; Cornell Law School; Duke University School of Law; Georgetown University Law Center; Harvard Law School; New York University School of Law; Stanford Law School; University of Chicago Law School; University of Michigan Law School; University of Pennsylvania Law School; University of Virginia School of Law; Yale Law School. See also, Christopher J. Ryan, Jr., *A Value-Added Ranking of Law Schools*, 29 FLA. J. L. & PUB. POL'Y 285, 308 (2019).

<sup>45</sup> See, e.g., George, *supra* note 28; Aliotta, *supra* note 39; Schmidhauser, *supra* note 39; Johnson, *supra* note 43; Sunstein, Ellman, & Schkade, *supra* note 29.

<sup>46</sup> Ashenfelter et al., *supra* note 42.

<sup>47</sup> See, e.g., HOWARD J. WOODFORD, JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS (1981).

how that judge will decide a case.<sup>48</sup> The findings on which of these characteristics matter most in effectuating a judge's ultimate decision to resolve a given controversy are mixed—depending on the jurisdiction, structural makeup of the court, the type of case under review, and the era in which the decision is made—not to mention somewhat outmoded. Especially in a time of fixation on, availability of, and litigants' devotion to data analytics, the methods these studies employ are ripe for reassessment and new application. This study provides such a reassessment and novel application. That is, these foregoing studies offer an instructive theoretical foundation for this study's primary inquiry and analysis.

## II. EMPIRICAL ANALYSIS

### A. *Motivations and Research Questions*

To help strengthen the sparse research in some areas and conflicting findings in other areas of the empirical legal literature on judicial decision making, this study endeavors to contribute to the understanding of judicial decision making through an applied approach to a particular set of cases at the nexus of the university and the law, politics, and race. Principally, I seek to investigate the ways in which judges afford deference to universities and their race-conscious admissions policies, and how, if at all, theoretical frameworks of decision making explain or predict the outcome of these cases. The primary reason for examining deference to an admissions policy—as an outcome—is due to the fact that a decision to uphold or reverse a given admissions policy changes in meaning over time; to wit, before *Brown*, upholding an admissions policy had a racially discriminatory effect, while after *Bakke*, upholding an admissions policy had largely the opposite effect. Thus, in this study, I test four theoretical frameworks: the behavioralist, attitudinal, political culture, and punctuated equilibrium theories of decision making in cases involving the use of race in university admissions. However, it may be fairly assumed that the legalist approach to decision making is bound up with the punctuated equilibrium theory, given that the legalist theory of judicial decision making relies on gradual evolution, followed by durable stasis, in legal precedent.

This study unpacks judicial decision making to its simplest attributes in order to determine which theory best explains judicial decision making in the federal cases involving the use of race in university admissions. It focuses on characteristics of the case, judge, and time in which the decision was made. To test behavioralist, attitudinal, political culture, and punctuated equilibrium theories, I ask and answer the question:

*To what extent do a judge's background characteristics and prior experiences, as well as the institutional culture of the court on which they sit*

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<sup>48</sup> Heise, *supra* note 5.

*and the era in which a decision is made predict how that judge would decide a case involving the use of race in university admissions?*

While other scholars have begun to test these theories around the margins, this study intends to contribute to the literature in four significant ways. Unlike previous works, this study bifurcates judicial decisions along the lines of their substantive and procedural bases; examines the voting behaviors of federal judges at all levels, and not merely at the Supreme Court or Circuit Court of Appeals levels; applies the Judicial Common Space Scores to a unique context; and provides a comprehensive consideration of all federal cases involving the use of race in university admissions which received at least an appellate court decision.

### B. Data

This study employs an empirical framework using an original dataset to answer the research questions outlined above. To create this dataset, I used the Westlaw search platform, utilizing several searching terms and connectors in an attempt to yield every case in the database involving the use of race in university admissions that received an opinion at the federal circuit court of appeals level or, higher still, and opinion by the Supreme Court.<sup>49</sup> The initial results yielded 1,283 opinions, many of which were irrelevant to my analysis, because this total included an overwhelming number of cases and decisions that did not involve the use of race in university admissions. Ultimately, I pared down the results to decisions from 102 courts across all levels of a case—from the court of first impression to the final appellate decision—comprising 314 unique judge observations, and accounting for individual voting decisions in 39 case groups.<sup>50</sup> I further bifurcated these decisions into

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<sup>49</sup> I attempted 14 search terms and connectors in total. Examples of these terms and connectors search include: “affirmative action’ & university & admission!”, “race & university & admission!”, and “equal protection’ & admission!”. To focus on consequential cases, I searched for all cases involving the use of race which received an opinion by a federal circuit court of appeals. I then vertically imputed the federal district court decisions in the cases, as well as the Supreme Court decisions in these cases, where applicable.

<sup>50</sup> By “case groups,” I refer to all component decisions in a case “tree”: decision(s) at a district court level; decision(s) at a court of appeal level; and, where applicable, decision(s) by the Supreme Court. Each case group is listed below by the citation for the highest court that reviewed the case and issued an opinion; however all opinions across the trajectory of the case were observed for analysis: Missouri, *ex rel. Gaines v. Canada*, 59 S.Ct. 232 (1938); Sipuel v. Bd. of Regents of Univ. of Okla., 68 S.Ct. 299 (1948); Sweatt v. Painter, 70 S.Ct. 848 (1948); McLaurin v. Okla. State Regents for Higher Educ., 70 S.Ct. 851 (1950); Wichita Falls Junior Coll. Dist. v. Battle, 204 F.2d 632 (5th Cir. 1953); Board of Sup’rs of La. State Univ. v. Tureaud, 74 S. Ct. 783 (1954); Whitmore v. Stilwell, 227 F.2d 187 (5th Cir. 1955); Lucy v. Adams, 76 S.Ct. 33 (1955); Booker v. Tenn. Bd. of Educ., 240 F.2d 689 (5th Cir. 1957); Bd. of Sup’rs of La. State Univ. v. Ludley, 225 F.2d 372 (1958); Meredith v. Fair, 313 F.2d 532 (5th Cir. 1962); Guillory v. Adm’rs of Tulane Univ., 306 F.2d 489 (5th Cir. 1962); Gannit v. Clemson Agr. Coll., 320 F.2d 611 (4th Cir. 1963); Hammond v. Univ. of Tampa, 344 F.2d 951 (5th Cir. 1965); DeFunis v. Odegaard, 94 S.Ct. 1704 (1974); Gonzalez v. S. Methodist Univ., 536 F.2d 1071 (5th Cir. 1976); Krohn v. Harvard L. Sch., 536 F.2d 1071 (1st Cir. 1976); Regents of the Univ. of Cal. v. Bakke, 98 S.Ct. 2733 (1978); Henderson v. Fl. Bd. of

substantive and procedural decisions on the basis of the court holding and judicial review. The 194 cases decided on substantive grounds form the analytical sample of my primary analysis. Original variables pertaining to my research question were hand-coded into a dataset, which I merged with the Federal Judicial Center's Biographical Directory of Federal Judges (BDFJ) dataset.<sup>51</sup> The BDFJ contains a rich set of biographical information on presidentially appointed judges who have served since 1789 on the U.S. District Courts, the U.S. Courts of Appeals, the Supreme Court of the United States, the former U.S. Circuit Courts, and the federal judiciary's courts of special jurisdiction. Ultimately, the observation total was further reduced by removing 29 observations for state court judges, who were not subject to the same appointment processes as the federal judges in the sample and for whom I have no equivalent biographical information. Finally, I allocated the observations by decision category, counting 224 substantive judicial decision observations and 190 procedural judicial decision observations, after accounting for overlapping decisions pertaining to both decision categories.

### C. Variables

Because of the mixed findings in the literature on judicial decision making, I selected an array of variables for analysis that correspond with the attitudinal, behaviorist, political culture, and punctuated equilibrium theories. The variables used in this analysis are categorized by characteristics of the judge, time period, court, and case. The majority of the variables in this analysis are observed at the judge level and coded as binary, including gender<sup>52</sup> and race.<sup>53</sup> I also coded a binary variable for whether a judge graduated

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Regents, 569 F.2d 1309 (5th Cir. 1978); *Doherty v. Rutgers Sch. of L.*, 651 F.2d 893 (3rd Cir. 1981); *Hall v. State*, 791 F.2d 759 (9th Cir. 1986); *Davis v. Halpern*, 813 F.2d 37 (2nd Cir. 1987); *Hopwood v. Univ. of Tex.*, 95 F.3d 53 (5th Cir. 1996); *Hopwood v. Univ. of Tex.*, 236 F.3d 256 (5th Cir. 2000); *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997); *Texas v. Lesage*, 158 F.3d 213 (5th Cir. 1998); *Smith v. Univ. of Wash. L. Sch.*, 194 F.3d 1045 (9th Cir. 1999); *Wooden v. Bd. of Regents of the Univ. of Georgia*, 208 F.3d 1313 (11th Cir. 2000); *Tracey v. Bd. of Regents of the Univ. of Ga.*, 247 F.3d 1262 (11th Cir. 2001); *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234 (11th Cir. 2001); *Farmer v. Ramsay*, 43 Fed.Appx. 547 (4th Cir. 2002); *Weser v. Glen*, 43 Fed.Appx. 547 (2d Cir. 2002); *Grutter v. Bollinger*, 123 S.Ct. 2325 (2003); *Gratz v. Bollinger*, 123 S.Ct. 2411 (2003); *Coal. to Defend Affirmative Action v. Granholm*, 501 F.3d 775 (6th Cir. 2006); *Coal. to Defend Affirmative Action v. Regents of Univ. of Mich.*, 701 F.3d 466 (6th Cir. 2012); *Schuette v. Coal. to Defend Affirmative Action*, 134 S.Ct. 1623 (2014); *Fisher v. Univ. of Tex.*, 133 S.Ct. 2411 (2013); *Coal. to Defend Affirmative Action v. Schwarzenegger*, 2010 WL 3340577 (N.D. Calif. 2010); *Coal. to Defend Affirmative Action v. Brown*, 674 F.3d 1128 (9th Cir. 2012); *Su v. E. Ill. Univ.*, 565 Fed.Appx. 520 (7th Cir. 2014); *Fisher v. Univ. of Tex.* [Fisher II], 579 U.S. 365 (2016); *Coal. to Defend Affirmative Action v. Brown*, 674 F.3d 1128 (9th Cir. 2012); and *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157 (1st Cir. 2020).

<sup>51</sup> *Biographical Directory of Federal Judges*, FEDERAL JUDICIAL CENTER, <http://www.fjc.gov/history/home.nsf/page/judges.html> [<https://perma.cc/V2EG-QTHX>] (last visited Apr. 29, 2022).

<sup>52</sup> I coded men as 0 and women as 1. I recognize that gender is non-binary, but the data afforded me no possibility of accounting for this.

<sup>53</sup> Similarly, I coded white judges as 0 and non-white judges as 1.

from one of the time-invariant top 14 law schools, as a measure of a common educational experience between judges, which may reflect a sort of educational and even a political conditioning, according to the attitudinal model traditions.<sup>54</sup> Federal district court experience is also binary, where prior or current federal district court experience is coded as 1, including active federal district court judges at the time the case was heard, federal district court judges sitting on a federal appellate panel by designation, and federal appellate judges who had previous presidential appointments to a federal district court. I also selected binary indicators of the facts underlying the cases in my dataset to establish controls on that basis for each case. In the models below, these controls are represented as a vector for the facts underlying each case. For example, like judges, plaintiffs are themselves coded by their gender<sup>55</sup> and race.<sup>56</sup> Lastly, non-institutional policies challenged by the plaintiff are coded as a binary indicator challenging a state law, constitutional provision, referendum or other policy that is not specific to a particular university is coded as 1, while challenges to institution-specific policies are coded as 0.<sup>57</sup>

I coded a number of variables in my analysis either categorically or continuously as raw number counts. Because political ideology is a nuanced concept, I employed a continuous variable to represent a judge's political ideology, using the Judicial Common Space Scores, which place a judge's "political ideology on a continuum, bounded by -1 and 1."<sup>58</sup> However, to fit with the scale of the dependent variable, I transformed the Common Space Scores, multiplying each by -1, so that a score below zero roughly comports with the expected ideology for judges nominated and confirmed by "liberal" presidents and above zero for judges nominated and confirmed by "conservative" presidents, given that much of the case sample takes place in the modern political era in which party affiliations have remained relatively stable indicators of political ideology.<sup>59</sup> The negative and positive values used to code the judge's political ideology can be read to correspond with the likelihood of the judge upholding or overturning, respectively, a university's admission policy in the modern context. Additionally, the number of years between the judge's first day of service on the federal bench and the date the

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<sup>54</sup> I coded judges with an LL.B. or J.D. degree from a top-14 law school as 1, and all other law schools as 0.

<sup>55</sup> Here, I coded males as 0, which comprise the overwhelming majority of my observations and females as 1.

<sup>56</sup> Similarly, I coded white judges, as 0 and non-white judges as 1.

<sup>57</sup> These controls are employed to acknowledge that, like much of the law, the legal context is subject to change. However, given that these cases represent formulaic challenges, the controls I employ make it possible to infer the functional constancy of the legal context across the sample.

<sup>58</sup> See Epstein, et al., *supra* note 33. This indicator is more nuanced than the assignment of -1 for liberal and 1 for conservative to each judge in the sample on the basis of the political party of the president who appointed the judge. Instead, it also contains components in its methodology that examine at representation from the parties comprising the House and Senate from the states from which the jurists' appointments originate, among other variables. See *id.* As such, it is a preferable variable to the binary model.

<sup>59</sup> See Orren & Skowronek, *supra* note 35.



case was heard by that judge is represented as a continuous variable. The time, or era, during which the case is heard is an original categorical variable that sheds light on differences between cases and controversies, plaintiffs' claims, and even the uses of race in admission from a historical perspective.

To measure precedent, I assigned values, from 1 to 3, to demarcate three distinct chronological eras of Supreme Court judicial precedent: pre-*Brown*, between *Brown* and *Bakke*, and post-*Bakke*.<sup>60</sup> This variable indicates the chronological time in which a decision was made as well as the era's landmark precedent. This era-related precedent is distinct from idiosyncratic precedent at the court of appeals level, for which I also seek to control; thus, I assign each case a value representing the court's territorial grouping by circuit, from 1 to 11, to identify the 11 circuit courts of appeals and the component district courts from which the case originated. I applied fixed effects by court grouping, because each court grouping is unique in its rules of procedure and controlling case law. While this is defensible for analysis on substantive decisions, it is the preferred model for procedural decision analysis. I also include a vector of case-specific controls, such as plaintiff characteristics and characteristics of the challenged admission policy. Then, I assign a case identification variable, from 1 to 39, given the unique properties of decisions on the same controversy; this allows me to provide conservative estimates of coefficients on the key independent variables when I cluster standard errors by case in the non-naïve models.

Finally, I bifurcated the dependent variable according to the court's decision as to whether the court decided the case on the merits or dispensed of the case on procedural grounds. For substantive decisions, which comprise the primary analytical sample, the binary variable for the judge's decision to overturn the admission policy is coded as 1, while upholding the policy is coded as 0. Cases that were not decided on the merits were given a missing value under the substantive decision variable. In the event that the court dispensed with the case on procedural grounds, the decision receives a value of 1 if the judge upheld the lower court's decision and 0 if the decision was overturned. Unlike the studies preceding this analysis, I operationalized the dependent variable in my analysis as the deference to which the court affords a university's admission policy.<sup>61</sup> Again, this is because the meaning of a judicial decision to overturn or uphold a race-conscious admission policy has

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<sup>60</sup> I gave those cases in which plaintiffs sought to have equal or desegregated access to higher education prior to the *Brown* decision a value of 1. I gave the cases decided after *Brown* which sought to enforce *Brown's* holding in the context of higher education a value of 2. Beginning with *Defunis*, from which *Bakke* famously followed, I gave a value of 3 to the cases in which the use of race in admissions to promote a desegregated and diverse learning environment was challenged. Originally, I gave the cases following *Grutter* a separate value of 4, but in the final analysis, I collapsed this class of cases into 3. Thus, the eras comprise: (1) challenging racially discriminatory policies; (2) desegregating the higher education landscape; and (3) challenging the use of race in admissions as a tool to promote diversity based on the Equal Protection Clause. Additionally, this variable serves as an indicator of the controlling precedent upon which later cases in an era relied.

<sup>61</sup> See Unah & Hancock, *supra* note 29; Segal & Spaeth, *supra* note 43.

fundamentally changed multiple times in the last century. As such, my analysis focuses on the relationship between the federal courts and the university—vis-à-vis university admissions policies—over time, regardless of what these relationships mean from a political perspective.

#### D. Regression Model

The full model, below, combines elements from each of the above referenced theories, looking within circuit court group, to account for idiosyncratic precedent affecting judicial decision making:

#### EQUATION 1: FULL MODEL

$$DECISION_i = b_0 + b_1 RACE_i + b_2 GENDER_i + b_3 T14_i + b_4 JCS_i + b_5 DISTCRT_i + b_6 BENCHYRS_i + b_7 CRTGRP(FE)_i + b_8 ERA_i + b_9 CASE_j + e_i$$

I built incrementally toward this full model, testing each theoretical framework in turn, through naïve modeling processes. First, I modeled the behavioralist approach by specifying a judge's decision as a function of background characteristics—such as race and gender—specific to that judge, controlling for a vector of case-specific characteristics, collapsing variables about the litigants and the underlying policy being challenged.

#### EQUATION 2: BEHAVIORALIST MODEL

$$DECISION_i = b_0 + b_1 RACE_i + b_2 GENDER_i + b_3 CASE_j + e_i$$

Next, I specified an attitudinal model, which considered the “political” affiliations of a judge as indicators of the judge's decision, including the educational conditioning of the judge and the judge's ideology. To do this, I proxy the judge's ideology by using the Judicial Common Space score of the judge, along with a vector of case-specific characteristics.

#### EQUATION 3: ATTITUDINAL MODEL

$$DECISION_i = b_0 + b_1 T14_i + b_2 JCS_i + b_3 CASE_j + e_i$$

Then, I modeled the judge's decision as a function of the judge's engagement with the institutional subcultures of the federal bench, such as whether the judge had experience as a district court judge, the number of years the judge had served on the federal bench—in order to apply more precisely a political culture framework to my sample—also controlling for a vector of case-specific characteristics.

## EQUATION 4: POLITICAL CULTURE MODEL

$$DECISION_i = b_0 + b_1 DISTCRT_i + b_2 YRSBENCH_i + b_3 CRTGRP(FE)_i + b_4 CASE_j + e_i$$

Lastly, to test the punctuated equilibrium theory, I specified a model in which a judicial decision is a function of the era in which it was made, controlling for case variables.

## EQUATION 5: PUNCTUATED EQUILIBRIUM THEORY MODEL

$$DECISION_i = b_0 + b_1 ERA_i + b_2 CASE_j + e_i$$

In Part III, I describe my analysis of these models using ordinary least squares (hereinafter “OLS”), with fixed effects, and logistic regression, with fixed-effects specifications.

*E. Limitations*

When I began this study, I endeavored to create a sample representing every case that received an appellate judicial opinion and arose from a race-conscious admissions controversy. It is possible, but unlikely, that some cases involving the use of race-conscious admission policies are not included in the analysis. However, I consider this sample to be the most complete collection of cases, composed of the most important cases—those which received an appellate court decision—involving the use of race in university admissions.

Yet, this is not the only potential limitation of this study. The very method of analysis has only relatively recently gained acceptance in the legal academic community. Critics of legal empiricism argue that complex legal decisions cannot be condensed into a binary decision code based on whether judges sided with the majority or the dissent. Nevertheless, this analysis focuses on whether courts defer to university policies regardless of the nature of the policy, and quantitative analyses offer substantive insight into the specific climate in the eras in which these decisions are made.

A legitimate concern with this sample, however, is that it contains limited representation of judicial subgroups, such as non-white and women judges. This fact reflects a non-diverse judiciary writ large, and future research should investigate and clarify how race and gender influence voting behavior. Additionally, the ways in which individual appellate judges are assigned to three-judge panels—a subset of the decisions in the sample—may involve influences that are non-random. I have attempted to mitigate these non-observable factors by controlling for the background characteristics, like race and gender, that might lead to non-random assignments in the data. Other scholars have argued that this process, much like the case assignment

process at lower court levels, is effectively random and poses no problem for assumptions of independence.<sup>62</sup>

### III. FINDINGS

#### A. Descriptive Statistics

Descriptively, the data paint an unsurprising, although stark, portrait of the American judiciary—at least with respect to the Article III judges who have presided over cases involving the use of race in university admissions. It is predominately white and male. Only 13.77% of the 334 unique judges in the sample are women, while 8.68% are non-white.<sup>63</sup> Of the substantive decision analytic sample, 9.80% of the 204 judges comprising this sample are women and 8.33% are non-white. The 39 case groups, which constitute the analytic sample, occur in the three eras approximately corresponding to the following timeline: pre-*Brown*, *Brown* to *Bakke*, and post-*Bakke*. Approximately 14.44% of the cases occur in the first era (before *Brown*), 20.71% occur in the second era (between *Brown* and *Bakke*), and the remaining 64.85% occurred in the third era (after *Bakke*).<sup>64</sup> Judges' decisions from my analytic sample of cases decided on substantive grounds adhere to the following distribution: 21.08% from the first era, 19.61% from the second era, and 59.31% from the third era. Finally, the judges in the full sample and substantive decision analytic sample are relatively evenly balanced on the following: the political party of the judge's appointing president; whether the judge received legal education from a top-14 law school (a proportion which has only grown over time); and whether the judge has district court experience.

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<sup>62</sup> Sunstein, Ellman & Schkade, *supra* note 29.

<sup>63</sup> See Table 1.

<sup>64</sup> See *id.*

TABLE 1: DESCRIPTIVE DEMOGRAPHY OF JUDGES

Entire Sample		Substantive Analytical Sample	
<i>Judge Gender</i>		<i>Judge Gender</i>	
Male	86.33	Male	90.20
Female	13.77	Female	9.80
<i>Judge Race</i>		<i>Judge Race</i>	
White	91.32	White	91.67
Nonwhite	8.68	Nonwhite	8.33
All values are reported as percentages. All values are statistically significant below the $p < 0.01$ level.			

Looking at conditional means, by decision, of each variable, I also observe that judges who are men are less likely than judges who are women to give deference to race-conscious admissions policies.<sup>65</sup> More often than not, white judges decided to overturn race-conscious admissions policies, while non-white judges decided almost evenly for and against those policies. Judges appointed by liberal presidents may give less deference to these policies than their colleagues appointed by conservative presidents. And, judges who attended an elite law school may be more likely than not to give deference to these policies; however, results on this variable are not statistically significant.<sup>66</sup> That said, judges with federal district court experience are more likely to defer to a university's admission plan than judges without federal district court experience.<sup>67</sup> Finally, and most notably, the decisions in the first two eras of cases—that is, decisions made before *Bakke*—overwhelmingly overturn a university's use of race as a factor in admission, which corresponds with the massive litigation associated with the desegregation of higher education in the second era.<sup>68</sup> However, in the third and latest era, the judges in the sample are much more likely to defer to the university's use of race in admissions, reflecting support of affirmative action policies.<sup>69</sup>

<sup>65</sup> See Table 2.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> See *id.* Note that the majority, or 70.2%, of the cases in my sample arose from challenges to institutional policies. From the cases in my sample, white plaintiffs comprise just over half—or 53.3%. Last, 73.5% of the cases in my sample contain at least one male plaintiff, while just 49.3 percent of the cases in my sample contain at least one female plaintiff. Most of the cases in my sample—36.4%—were heard before the Supreme Court, which was more likely to overturn than uphold race-conscious university admissions policies. 24.9% of cases in my sample arose through Fifth Circuit jurisdictions, and an additional 7.2% came from Eleventh Circuit jurisdictions. Both of those courts were more likely to overturn race-conscious admissions policies. However, in the Ninth Circuit, where 7.2% of the cases were heard, the judges were more likely to defer to institutions. Jurisdictions in the Sixth Circuit heard 14.6% of the cases in my sample, and were only marginally to overturn than uphold race-conscious admissions policies.

TABLE 2: DESCRIPTIVE MEANS

Entire Sample		Substantive Analytical Sample	
<i>Judge Gender</i>	Mean of Decision	<i>Judge Gender</i>	Mean of Decision
Male	0.65	Male	0.588
Female	0.19	Female	0.423
<i>Judge Race</i>		<i>Judge Race</i>	
White	0.62	White	0.575
Nonwhite	0.40	Nonwhite	0.522
<i>Presidential Appointing Party</i>		<i>Presidential Appointing Party</i>	
Conservative	0.59	Conservative	0.491
Liberal	0.63	Liberal	0.646
<i>T-14 Law School Graduate</i>		<i>T-14 Law School Graduate</i>	
Yes	0.58	Yes	0.535
No	0.64	No	0.614
<i>District Court Experience</i>		<i>District Court Experience</i>	
Yes	0.49	Yes	0.502
No	0.72	No	0.693
<i>Decision Era</i>		<i>Decision Era</i>	
1 <sup>st</sup> Era (1938-53)	0.86	1 <sup>st</sup> Era (1938-1953)	0.884
2 <sup>nd</sup> Era (1953-73)	0.88	2 <sup>nd</sup> Era (1953-73)	0.814
3 <sup>rd</sup> Era (1973-Present)	0.41	3 <sup>rd</sup> Era (1973-Present)	0.349
All values are reported as conditional means on the decision: 0 for uphold and 1 for overturn. All values are statistically significant below the $p < 0.01$ level, except for T-14 Law School Graduates.			

Finally, once in a while, patterns emerge that require further exploration. One such curiosity is that the reporter page counts of recent opinions were substantially longer than their pithier, older counterparts. As shown in Table 3 below, the length of the judicial opinions in these cases increases at a statistically significant rate over time. Perhaps modern jurists have taken the adage that the pen is mightier than the sword a bit too literally.<sup>70</sup>

<sup>70</sup> See Table 3.

TABLE 3: OPINION LENGTH (BY REPORTER PAGE COUNT) OVER TIME

Entire Sample		Substantive Analytical Sample	
First Era	3.25	First Era	2.85
Second Era	3.91	Second Era	4.38
Third Era	23.18	Third Era	26.93
All values are reported as means of page count lengths as appearing in the cited reporter. All values are statistically significant below the $p < 0.01$ level.			

### B. Substantive Decision Model and Results

#### 1. Regression Specifications

To provide conservative estimates of the effects of the variables of interest on a judicial decision, I report robust or clustered standard errors and apply within-court fixed effects in the following regression specifications. Also, given that the dependent variable is a binary variable, I initially fitted this model to a logistic regression specification, where I observed the same effects as the fixed-effect OLS regression results reported below.<sup>71</sup> However, I do not present the estimates from the logistic regression analysis here for two principal reasons: (1) OLS results, indicating marginal probabilities of changes to a judge's decision by each covariate coefficient, are more accessible for interpreting estimates across models than logistic regression, which uses logged odds ratios; and (2) the directionality and magnitude of the logistic regression coefficients, as well as the standard errors and statistical significance, are nearly identical to the OLS regression models.<sup>72</sup> As such, and for the convenience of the readers, I present OLS regression estimates, with court grouping fixed effects, in the regression tables below.

In the first regression model, I regress the judge's substantive decision on the judge's race and gender. I find that this model is split in terms of statistical significance. The effects are both negative in directionality—suggesting that women or non-white judges are more likely to uphold race-

<sup>71</sup> Although I report my results using my OLS models, I note that my logit model coefficients are substantially the same as my OLS models up to hundredth decimal point. Additionally, because the logit models are more difficult to interpret, I chose to report the OLS models, which describe the predicted probability of the coefficients at predicting the judicial deference to university admission policies.

<sup>72</sup> I also specified a probit model with a variable combining female and non-white to comprise a minority category and the statistical significance on the covariates remained same as featured in the OLS and fixed effects results below in Tables 4 and 5.

conscious admission policies—only the coefficient on gender is statistically significant under the behavioralist model specification; however, the magnitude of the effect on gender, controlling only for characteristics of the case and the judge's race, is substantial, implying mixed success for the naïve specification of the behavioral model.<sup>73</sup> Moreover, the coefficient on a judge's gender not only maintains directionality and relative magnitude of effect across all models in which it is included, but it is also statistically significant to at least the  $p < 0.01$  level.

In the second model, the attitudinal covariates—legal education and judicial ideology—are both marginally negative and statistically significant in this model. Thus, a judge that attended an elite law school would, on average, have a slightly larger marginal probability of upholding the admissions policy. Similarly, the judge's ideology, according to the Judicial Common Space Score, is negatively correlated with a decision to overturn a race-conscious policy. Although these results are statistically significant, the magnitude of the coefficients is minimal, suggesting that the attitudinal model, on its own, is a poor predictor of judicial decision making for cases in the sample.

The third model, based on the political culture theory, presents dubious explanatory ability. The coefficient on a judge's federal district court experience indicates that a judge with district court experience is almost 10 percent more likely to uphold a race-conscious admission policy, but this effect is not statistically significant either on its own or in the full model. Similarly, the number of years for which the judge has served on the federal bench before hearing a case in the sample seems not to be a significant predictor of a judge's substantive decision in the sample. This result indicates that the political culture theory framework is not suitably explanatory of substantive judicial decisions in the sample.

The fourth model, testing punctuated equilibrium theory, is the sparsest of the four specifications, though large in effect and statistical significance. It also yields the predictor variable with the greatest magnitude of effect in the full model. Its coefficients are also among the most challenging to interpret, requiring elucidation based on decisional history. Prior to *Brown*, federal courts overturned race-conscious admissions policies in the light of *Plessy* on the basis that they did not provide separate and equal higher education accommodations for minorities. Between *Brown* and *Bakke*, federal courts largely overturned admissions policies because universities did not adopt or sought to circumvent the precedent of *Brown*. And finally, after *Bakke*, the federal courts have clarified the permissible and impermissible use of race in

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<sup>73</sup> One notable finding in my analysis along these lines is visible in the full specification of the naïve model: that judges included in my analysis whose race is non-white were more likely to overturn race-conscious admissions policies, but just outside of the statistically significant threshold level. See e.g., *Grutter v. Bollinger*, 539 U.S. 306, 349 (2003) (Thomas, J., dissenting in relevant part); *Fisher v. University of Texas*, 631 F.3d 213, 247 (5th Cir. 2013) (Garza, J., concurring). This finding is roughly equivalent to the tokenism finding presented by Steffensmeier and Britt, *supra* note 38.



admissions, overturning policies in the latter cases. The coefficient on the era variable compares the present era to the era of cases before *Bakke*; thus, the coefficient can be interpreted as comparing a judge's decision in its corresponding era to the first and second eras of cases—the most active era to date in substantive judicial decisions to overturn race-conscious admission policies. Because these eras are inextricably linked to judicial precedent, it may be fairly stated that this coefficient represents the effect not only of the era in which the decision is made but also of the controlling precedent of the day. This coefficient indicates that judges in post-*Bakke* era were more than 44 percent more likely to uphold a race-conscious admission policy than were judges in the earliest cases in the sample—remembering that many of the policies in the latest era were created in service of promoting the admission of minority university applicants. Additionally, the statistical significance is a remarkable  $p < 0.001$ . This result strongly supports the explanatory power of the punctuated equilibrium theory and of legalist decision making.

In the full model, I stack all of the foregoing model specifications vertically to control for iteratively greater groups of judicial characteristic covariates. Here, I report robust standard errors but offer a superior model with standard errors clustered by case in the second sensitivity specification. This is because cases arising from the same controversy have the same intrinsic properties, which is an appropriate requirement for clustering to ensure conservative effect estimates. For these reasons, and because it explains more of the variance in the substantive judicial decisions in the sample, the sensitivity analysis focuses on the specification with court fixed effects and standard errors clustered by case group.

Each of the covariates described above, apart from era, attempts to capture the background and socialized characteristics of a judge, testing the behavioralist, attitudinal, and political culture theories against judges in the sample. The results from these specifications show that the attitudinal and political culture frameworks do not fully explain the judicial decisions in the sample at statistically significant levels. Their inability to explain substantive judicial decisions is particularly noticeable upon inclusion in the full model, where only gender survives statistical significance thresholds.

Thus, the behavioral framework remains mixed, and the punctuated equilibrium theory framework explains substantive judicial decisions at statistically significant levels, even when using attitudinal and political culture framework model specifications as controls. These results seem to indicate that: (1) one element of the judge's lived experiences, their gender, influences judicial decision-making patterns; and (2) the modern era of judicial decision making in race-conscious cases may not be characterized by judicial self-indulgence, as popular narratives suggest. More importantly, these results underscore the fact that the era—and the precedent—in which a decision is made matters and would support the underlying tenets of punctuated equilibrium and legalist theories, the former of which holds that judges render decisions to advance policy in a saltatory fashion, after which the decision becomes the mode, as characterized by policy stasis. But this fact means that

durable shifts that upend standing precedent can lurk around the corner, as my predictive model, described in the next section of this article suggests.

TABLE 4: OLS REGRESSIONS WITH SUBSTANTIVE DECISION AS OUTCOME AND COURT-GROUP FIXED EFFECTS

	(1) Full	(2) Behavioralist	(3) Attitudinal	(4) Political Culture	(5) PET
Judge Race (Non-white)	-0.06 (0.11)	-0.21 (0.11)			
Judge Gender (Female)	-0.35 <sup>***</sup> (0.10)	-0.55 <sup>***</sup> (0.13)			
T-14 Graduate	-0.09 (0.07)		-0.17 <sup>*</sup> (0.08)		
Judicial Ideology (JCS)	-0.17 (0.09)		-0.15 <sup>**</sup> (0.05)		
District Court Experience	-0.06 (0.07)			-0.09 (0.08)	
Years on the Federal Bench	-0.00 (0.00)			-0.01 (0.00)	
Post- <i>Baake</i> vs. Pre- <i>Baake</i> (3 <sup>rd</sup> Era vs. 2 <sup>nd</sup> and 1 <sup>st</sup> Eras)	0.36 <sup>***</sup> (0.06)				0.44 <sup>***</sup> (0.03)
Constant	0.51 <sup>*</sup> (0.23)	0.68 <sup>***</sup> (0.08)	0.73 <sup>***</sup> (0.10)	0.39 (0.25)	0.84 <sup>***</sup> (0.09)
Observations	201	201	201	201	201
Adjusted $R^2$	0.45	0.29	0.24	0.30	0.38

Note: 0 = Uphold, 1 = Overturn; Robust standard errors in parentheses.

<sup>\*</sup>  $p < 0.05$ , <sup>\*\*</sup>  $p < 0.01$ , <sup>\*\*\*</sup>  $p < 0.001$

TABLE 5: PREFERRED OLS REGRESSION SPECIFICATION WITH SUBSTANTIVE DECISION AS OUTCOME

	(1) Court Fixed Effects	(2) Court Fixed Effects with SE Clustered by Case
Judge Race (Non-white)	-0.0628 (0.106)	-0.0628 (0.102)
Judge Gender (Female)	-0.352 <sup>***</sup> (0.103)	-0.352 <sup>***</sup> (0.0690)
T-14 Graduate	-0.0851 (0.0674)	-0.0851 (0.0506)
Judicial Ideology (JCS)	-0.1699 <sup>*</sup> (0.0846)	-0.1699 (0.0942)
District Court Experience	-0.0600 (0.0661)	-0.0600 (0.0943)
Years on the Federal Bench	-0.00392 (0.00315)	-0.00392 (0.00412)
Post- <i>Baake</i> vs. Pre- <i>Baake</i> (3 <sup>rd</sup> Era vs. 2 <sup>nd</sup> and 1 <sup>st</sup> Eras)	-0.361 <sup>***</sup> (0.0643)	-0.361 <sup>***</sup> (0.0976)
Observations	201	201
Adjusted $R^2$	0.449	0.449

Note: 0 = Uphold, 1 = Overturn; Robust standard errors in parentheses.  
<sup>\*</sup>  $p < 0.05$ , <sup>\*\*</sup>  $p < 0.01$ , <sup>\*\*\*</sup>  $p < 0.001$

## 2. Sensitivity Tests

I employed a variety of methods to further test the sensitivity of the results from the naïve model specifications. First, to account more precisely for previously unexplored relationships in the political culture model, I interacted the years of service on the federal bench term with the court-grouping term. The coefficients produced from these interactions demonstrate that an additional year of service has a marginal effect in a particular court-grouping on substantive judicial decisions in the sample. I also used higher-order polynomial specifications of year to model nonlinear relationships between this interaction and the outcome of interest. I also interacted the binary components of the behavioralist model with one another and with the components of the attitudinal model to analyze subgroup effects. However, none of the interaction terms yielded statistically significant results. Because of the model fit that the non-interacted models provide, I believe that the parsimo-

nious model specifications are ideal for the analysis of substantive judicial decisions involving the use of race in university admissions.

### C. Procedural Decision Results

Given that judicial decisions do not always touch the merits of the case at bar and are sometimes confined to procedural precedent instead, I initially bifurcated the judicial decisions in the sample into two categories: substantive and procedural. In this section, I separate the procedural decisions—those based solely on procedural precedent—from the sample for analysis.<sup>74</sup> I employ the same analytical methods used in the naïve models for substantive decisions above. As in the substantive decision analysis, I report OLS results with robust standard errors for the procedural decision analysis below.

Tested against procedural decisions, I see that none of the indicators and model specifications in my substantive decision analysis predict a judge's procedural decision at a statistically significant level, except for the political cultures theory. I find mixed results for the explanatory framework of the political cultures theory in the context of procedural judicial decision making. Although a judge's experience on the district court is not a statistically significant predictor of procedural judicial decision making in the sample, I observe that a judge's years on the federal bench is a marginal predictor of deference to the lower court's holding. And certain court groupings, like the Ninth Circuit, are substantially more deferential to lower court holdings in the sample than comparison court groupings, such as the First Circuit. Despite the lack of statistical significance of most of the predictors of procedural judicial decisions, I also observe that while the effect sizes are often similar to those in the substantive decision regression results, the directionality here is mostly positive or close to zero. This implies that if were they statistically significant, most covariates would be positively associated with overturning a lower court's procedural decision. Notably, the only other systematically negative predictor in the OLS estimates is the comparison of the first era of cases (pre-*Brown*) to the second era of cases (between *Brown* and *Bakke*). The coefficient on this covariate, however, is not statistically significant.

As with the substantive decision model sensitivity specifications, I interacted years of judicial service with court grouping, employed a fixed-ef-

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<sup>74</sup> The decisions in my procedural sub-sample did not venture to discuss the merits of the case; rather they were decided on procedural grounds, such as: whether a three-judge panel district court should have heard the case instead of a single district court judge, see *Bd. of Sup'rs, La. St. Univ. v. Tureaud*, 225 F.2d 434 (5th Cir. 1955), whether a defendant should be enjoined from discriminatory action, see *Ludley v. Bd. of Sup'rs of La. St. Univ.*, 150 F. Supp. 900 (E.D. La. 1957), and whether an appeal and motion for injunction should be expedited, see *Meredith v. Fair*, 298 F.2d 696 (5th Cir. 1962). Several of the judicial decisions regarding the use of race in university admissions were decided on purely procedural grounds. While procedural decisions seem commonplace and unrelated to the ultimate considerations of my analysis regarding judicial decision making, I have attempted to analyze them in the same way as a substantive case to discern whether the same patterns hold across decision types.

fects analysis using within-court differences, and clustered standard errors by case. I used this procedure to test whether these coefficients and their directionalities changed when I examined within-group differences. The problems I observed in the naïve specifications seeking to explain procedural judicial decision making were not ameliorated by the sensitivity model specifications. The results from the sensitivity analysis indicate that directionalities remained relatively constant between the two estimating techniques. Also, all the positive predictors of procedural judicial decisions remained statistically insignificant. Notably, the one statistically significant, albeit negative, predictor—the comparison between the third era and the second era of cases—only classified as such with robust standard errors and court fixed effects, dropping out of significance when case fixed effects are employed.

In summary, the results from this analysis illustrate the difficulty associated with trying to predict a judge's procedural decision-making processes based on observable information. The amount of variance in the procedural decisions explained by each of the specifications of these models is very low. Perhaps the low predictive power of these models indicates the nuanced and binding nature of the common law and circuit specific procedural precedent. The results from the procedural judicial decision analysis show that none of the theoretical models adequately accounts for a judge's decision to overturn or uphold a lower court's procedural finding.

TABLE 6: OLS REGRESSIONS WITH PROCEDURAL DECISION AS OUTCOME

	(1)	(2)	(3)	(4)	(5)
	Behavioralist	Attitudinal	Political	PET	Full
			Culture		
Judge Race (Non-white)	0.14 (0.14)				0.12 (0.14)
Judge Gender (Female)	0.04 (0.12)				-0.11 (0.12)
T-14 Graduate		0.12 (0.08)			0.06 (0.09)
Judicial Ideology (JCS)		0.11 (0.13)			0.09 (0.13)
District Court Experience			-0.02 (0.08)		-0.07 (0.10)
Years on the Federal Bench			-0.01** (0.00)		-0.01* (0.01)
Ninth Circuit vs. All Others			-1.00** (0.31)		-0.99** (0.36)
Post- <i>Baake</i> vs. Pre- <i>Baake</i> (3 <sup>rd</sup> Era vs. 2 <sup>nd</sup> and 1 <sup>st</sup> Eras)				-0.24 (0.22)	-0.21 (0.25)
Constant	0.55*** (0.08)	0.52*** (0.09)	0.81** (0.26)	0.54*** (0.08)	0.77* (0.32)
Observations	164	143	163	165	143
Adjusted $R^2$	0.10	0.10	0.25	0.10	0.26

Note: 0 = Uphold, 1 = Overturn; Robust standard errors in parentheses  
\*  $p < 0.05$ , \*\*  $p < 0.01$ , \*\*\*  $p < 0.001$

#### D. Predictive Decision Results

To test how well the model predicts judicial decisions, I used two cross-validation measures. First, I removed a case's data points from observation in the sample at random and re-regressed the covariates at their marginal values for each justice based on the new weighting without the case. Then, I removed another case to test the difference between the two.<sup>75</sup> I then applied this process iteratively, exchanging weights generated from the missing case

<sup>75</sup> I performed this using the leave-one-out-cross-validation, or "looov," in Stata. This process reported high-pseudo r-squared values, exceeding 0.5, which is the square of the correlation coefficient of the predicted and observed values of the dependent variable.

observations.<sup>76</sup> For example, in the following cases, *Bakke*, *Grutter*, and *Fisher II*, I have taken the liberty of predicting how the Court could decide the case based on the full explanatory substantive decision model. As such, I have attempted to predict the linear probability of each justice to vote for overturning the underlying policies with which they were confronted on an individual basis, given each justice's unique values of judicial decision-making inputs relative to the controlled, constant variables of the case. These results are displayed in the figures below.

In predicting *Baake*, the model shows its vulnerability, erring on the prediction that one justice—Justice Byron White—would decide to overturn a policy he ultimately chose to uphold. However, the *Bakke* case is complex for a few reasons. First, a plurality decided the case, with Justice Powell acting as the swing vote, agreeing with both Justices Brennan, White, Marshall, and Blackmun that California's affirmative action objective was permissible, and also with Chief Justice Burger and Justices Stewart, Rehnquist, and Stephens that the policy discriminated against the petitioner. Second, the decision was unique in that *DeFunis v. Odegaard* and *Bakke* were the first of their kind brought before the federal courts that would define the era of white plaintiffs challenging race-conscious admissions policies.<sup>77</sup> Because they signaled a paradigm shift, it may be fairly assumed that the justices' decisions would not be predictable on matters of first impression. Still, the model correctly identifies the decision of eight of the nine justices in the case, missing Justice White's decision by a hair—under five percentage points.<sup>78</sup> The slim margin by which the model missed Justice White's vote in *Bakke*, as shown in Figure 1, indicates that the model works well on the whole but must ultimately encounter the human component of judging and judicial decision making, something the data like the Judicial Common Space scores cannot precisely pin down in all cases.

The model improves by correctly predicting eight of the nine justices' decisions in *Grutter*, missing Justice Souter's decision by less than two percentage points but still well within the confidence interval.<sup>79</sup> It may be safe to say that the near miss on Justice Souter's decision in *Grutter*, like the near miss on Justice White's decision in *Bakke*, can be attributed to fact that they were both notable for having decided many cases in a manner inconsistent with the political persuasions of the administrations that appointed them. Notably, however, the model correctly identifies the decision of the other eight justices in the case—which ultimately upheld the University of Michi-

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<sup>76</sup> I performed this using the *k*-fold cross-validation command in Stata, or "crossfold." This command splits the data randomly into *k* partitions, then for each partition it fits the specified model using the other *k*-1 groups and uses the resulting parameters to predict the dependent variable in the unused group. This process also indicated high values for measures of goodness of fit, including the root mean squared error and the mean absolute error. Each of these tests indicate a strong cross-validation of the model.

<sup>77</sup> See *DeFunis v. Odegaard* 94 S.Ct. 1704 (1974); *Regents of the Univ. of Cal. v. Bakke*, 98 S.Ct. 2773 (1974).

<sup>78</sup> See *id.*

<sup>79</sup> See *Grutter v. Bollinger*, 123 S.Ct. 2325 (2003).

gan's race-conscious admissions policy—with relative statistical ease and strength.

The model also correctly predicts six of the seven decisions of the justices who took part in the *Fisher II* decision. *Fisher II* is unique in that the decision was rendered after the passing of Justice Antonin Scalia but before his eventual replacement, Justice Neil Gorsuch, had been confirmed.<sup>80</sup> Additionally, Justice Elena Kagan—then, the Court's most recent appointee—recused herself from the case, leaving the decision in the case to just seven Supreme Court justices.<sup>81</sup> In its prediction, the model has another near miss (by less than four percentage points, and still within the confidence interval), this time on Justice Anthony Kennedy's decision in the case. Given that that Justice Kennedy authored the majority opinion in the case upholding the Texas admissions plan, the model's near miss on Justice Kennedy's voting outcome reveals once again that the model is not completely failproof.<sup>82</sup> However, the discrepancy between prediction and reality is another reminder of the human element present in judicial decision making, as well as a reminder of the important swing vote that Justice Kennedy wielded during his tenure on the Court.<sup>83</sup> The model may have missed on Justice Kennedy's opinion because of its overweighting his significant experience on the federal bench at the time the case was heard, and his status as a white man, educated at a top-14 law school, who had overturned policies previously in the dataset. For additional experimentation, I had the model provide Justice Kagan's non-existent decision in the case, even though she abstained from the decision. It seems to me that the model correctly pegs how she would have sided in *Fisher II*, although that projection is purely conjectural, given Justice Kagan's recusal in the case.

Significant changes to the Court's composition since the *Fisher II* decision highlight the fact that now, more than ever, a test case could succeed at overthrowing the longstanding precedent supporting race-conscious admissions. Much has been made of this, with respect to three of President Trump's nominees, and one of President Biden's nominees, sitting on the Court since the last major university admissions cases wound their way to the High Court. The new composition of the Court surely will affect how the current justices could decide the cases before them in the 2022-23 term.

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<sup>80</sup> See, e.g., Kenneth W. Starr, *Gorsuch Gets Comfortable in Scalia's Chair*, WALL ST. J. (Jun. 14, 2017, 7:30PM), <https://www.wsj.com/articles/gorsuch-gets-comfortable-in-scalias-chair-1497483009> [<https://perma.cc/99BA-CF7K>].

<sup>81</sup> See, e.g., Ariane de Vogue, *Supreme Court Upholds University of Texas Affirmative Action Plan*, CNN (June 23, 2016, 2:19PM), <https://www.cnn.com/2016/06/23/politics/supreme-court-abortion-affirmative-action-texas-immigration/index.html> [<https://perma.cc/CAF5-UVRK>] (noting Justice Kagan's recusal from the case).

<sup>82</sup> See *Fisher v. University of Texas* [*Fisher II*], 579 U.S. 365 (2016).

<sup>83</sup> See, e.g., Colin Dwyer, *A Brief History of Anthony Kennedy's Swing Vote—and the Landmark Cases It Swayed*, NPR (June 27, 2018, 7:00PM), <https://www.npr.org/2018/06/27/623943443/a-brief-history-of-anthony-kennedys-swing-vote-and-the-landmark-cases-it-swayed> [<https://perma.cc/RG56-SS8H>].



The two cases the Court will hear this term share commonalities. In the *Harvard* and *UNC* cases, the petitioner is the same: Students for Fair Admissions. The Court granted both cases a writ of certiorari in January 2022 and consolidated them for hearing. These cases present another opportunity for the Court to revisit the use of race in university admissions.<sup>84</sup> Yet, each case has its own idiosyncrasies and possibility of different outcomes.

In *Harvard*, the First Circuit Court of Appeals has already upheld the private university's admissions policy, dismissing the petitioner's claim that Harvard's policy discriminates against Asian American applicants, in violation of Title VI of the Civil Rights Act.<sup>85</sup> However, in *UNC*, the admission policy under the Court's scrutiny is a product of state- and institution-specific construction. In this case, the Court granted certiorari before the Fourth Circuit Court of Appeals made its ruling on the use of race in the University of North Carolina's institution-specific and public system-wide admissions policies, which the petitioner argues violates not only the Civil Rights Act but also the Equal Protection Clause of the Fourteenth Amendment.<sup>86</sup> Thus, the difference between public and private institutions, institution-specific and system-wide policies, and even lower court decisions will almost certainly have bearing on the cases' outcomes, despite their consolidation.

But is it a foregone conclusion that "affirmative action" is in peril? And may these cases open the door to the next durable shift that punctuated equilibrium theory portends? Or might the human element of judging and judicial decision making reveal another Justice White, Justice Souter, or Justice Kennedy—a justice that bucks expectation and sides with his or her conscience? The answer will be revealed in time, but the model anticipates that this is unlikely.

According to the model, in *Harvard*, it is unlikely that the case would be decided on anything less than a 5-3 majority, in favor of rejecting the admissions policies. A 6-2 majority rejecting the policy seems more likely and is borne out by the model, which predicts the same majority-minority distribution to overturn the admissions policy in both *Harvard* and *UNC*. The primary reason the model for *Harvard* is based on an 8-justice composi-

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<sup>84</sup> Adam Liptak & Anemona Hartacollis, *Supreme Court Will Hear Challenge to Affirmative Action at Harvard and U.N.C.*, N.Y. TIMES (Jan. 24, 2022), <https://www.nytimes.com/2022/01/24/us/politics/supreme-court-affirmative-action-harvard-unc.html> [https://perma.cc/ESL8-HPKX].

<sup>85</sup> *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157 (1st Cir. 2020).

<sup>86</sup> *Students for Fair Admissions, Inc. v. Univ. of N.C.*, No. 1:14CV954, 2021 U.S. Dist. LEXIS 255358 (M.D.N.C. Oct. 18, 2021). Because the *UNC* case has only received a ruling from the United States District Court for the Middle District of North Carolina, in a decision by Judge Loretta C. Biggs, the case was not eligible for the dataset, given that the Fourth Circuit Court of Appeals has yet to issue a ruling on the case, even before the Supreme Court granted it a writ of certiorari upon consolidation with the *Harvard* case. See, e.g., Scott Jaschik, *Supreme Court Takes Affirmative Action Cases*, INSIDE HIGHER ED (Jan. 31, 2022), <https://www.insidehighered.com/admissions/article/2022/01/24/supreme-court-will-hear-harvard-and-unc-affirmative-action-cases> [https://perma.cc/9TUF-GU72].

tion is due to the recent announcement of Justice Stephen Breyer's retirement and his replacement's, Justice Ketanji Brown Jackson's, likely recusal in the case.<sup>87</sup> Thus, without Justice Brown Jackson's support and presence on the Court, a 6-2 majority appears the most probable result in this case. Even if Justice Amy Coney Barrett were to side with her more "liberal" colleagues—as the model suggests could be possible<sup>88</sup>—it would still not be enough to overcome a 5-3 majority in favor of rejecting Harvard's admission policy.

In *UNC*, Justice Brown Jackson's likely vote supporting North Carolina's admissions policy would not be enough to overcome the 6-3 majority that appears likely to overturn in that case. Taken together, the Court's decisions in these cases are more likely than not to chip away at, or altogether to rewrite, what race-conscious admissions policies lawfully entail. Given the real possibility of these results, and without any genuine hope for any other justice's defection from the model's predictions, the model seems to offer a glimpse, if bleak, of the future of race-conscious admissions policies.

Like any prediction, however, this one is speculative. Yet, the relative accuracy of the model provides a statistically reliable method for explaining and even predicting judicial decision making in cases involving the use of race in university admissions over time. But beyond using the model to predict judges' decisions against a theoretical backdrop, the primary purpose of making these data-based predictions is not to tell testcase conjurers what they already know. Rather, the importance of these predictions lies in affording universities the time they need to innovate by alerting them to the likelihood of a decision that changes the legal landscape in university admissions policies in the very near future.

It has been over forty years since Justice Powell's concurrence in *Bakke* articulated the prevailing purpose of the use of race in university admissions: to provide justifiable educational benefits to all.<sup>89</sup> And twenty years have passed since Justice O'Connor's decision in *Grutter*, which started the clock running on a re-examination of the use of race in university admissions.<sup>90</sup>

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<sup>87</sup> See, e.g., Pete Williams, *Justice Stephen Breyer to Retire from Supreme Court, Paving Way for Biden Appointment*, NBC NEWS (Jan. 26, 2022, 4:59PM), <https://www.nbcnews.com/politics/supreme-court/justice-stephen-breyer-retire-supreme-court-paving-way-biden-appointment-n1288042> [<https://perma.cc/G7BJ-FDAR>]; and Lauren Camera, *Jackson Will Recuse Herself from Harvard Affirmative Action Case if Confirmed to Supreme Court*, U.S. NEWS & WORLD REP. (Mar. 23, 2022, 4:38PM), <https://www.usnews.com/news/politics/articles/2022-03-23/jackson-will-recuse-herself-from-harvard-affirmative-action-case-if-confirmed-to-supreme-court> [<https://perma.cc/3JX6-ZTSP>] (noting that Justice Brown Jackson plans to recuse herself in the case, given her service on the Harvard Board of Overseers).

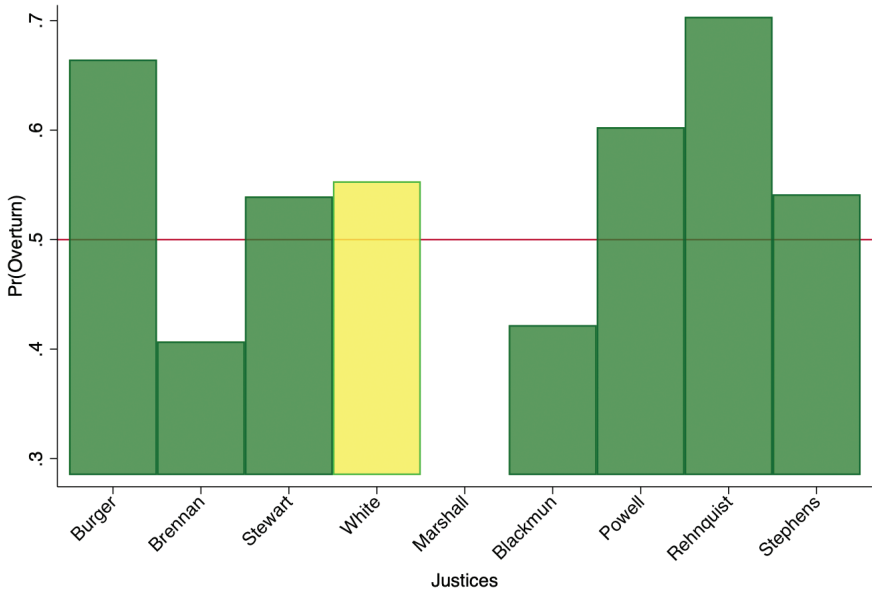
<sup>88</sup> The model for the *UNC* case suggests that Justice Coney Barrett is within nine percentage points of a decision to uphold the public institution's admissions policy, falling outside of the confidence interval. However, in the *Harvard* case, the model predicts that Justice Coney Barrett would overturn the private university's admissions policy by a smaller margin, just seven percentage points, suggesting the same result as *UNC* but a closer case for affirming the policy. See Figures 4 and 5.

<sup>89</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

<sup>90</sup> In the majority opinion, Justice O'Connor controversially stated that racial preferences would no longer be necessary in twenty-five years. See *Grutter v. Bollinger*, 539 U.S. 306, 310

Thus, more than 40 years of judicial precedent has clearly established what many studies have as well—that the benefits of a diverse learning environment are manifold for all who participate in academic settings. Race-conscious admissions policies, particularly those that are individualized and evaluate prospective students on a case-by-case basis, only further the goal of promoting diversity and equity in postsecondary education. To undo this precedent is to undo the progress that universities across the country have worked toward for more than four decades. Yet, it would seem that this progress will hit a roadblock, sooner or later, if universities cannot pivot to new strategies, such as a move toward class or income-based affirmative action, to ensure diverse and equitable learning environments for their students. This is the challenge universities face, no matter the Court’s decision in *Harvard* or *UNC*, for the Court seems primed to change the playing field, yet again.

FIGURE 1: PROBABILITY OF OVERTURN: *BAKKE V. REGENTS* (1974)




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(2003); and Joel K. Goldstein, *Justice O'Connor's Twenty-Five Year Expectation: The Legitimacy of Durational Limits in Grutter*, 67 OHIO ST. L.J. 83 (2006).

FIGURE 2: PROBABILITY OF OVERTURN: *GRUTTER V. BOLLINGER* (2003)

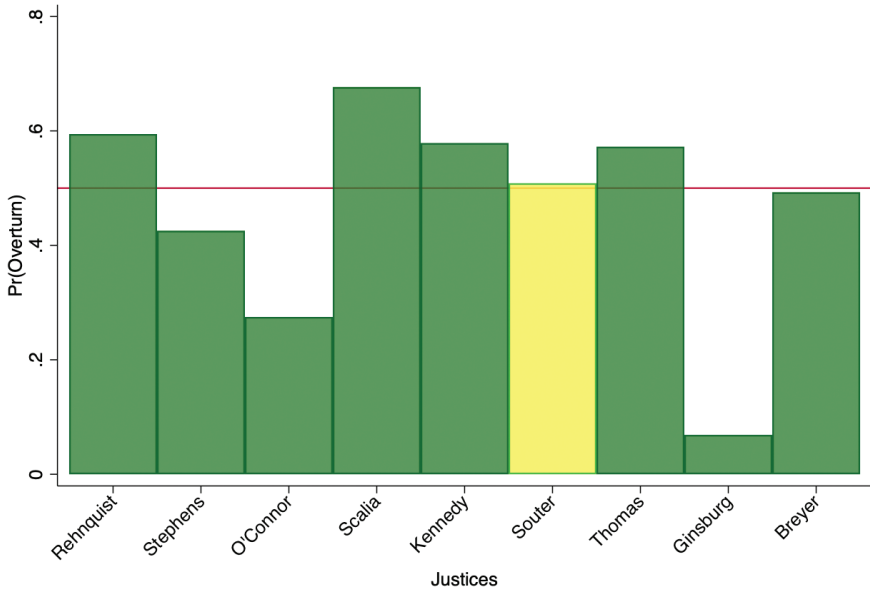


FIGURE 3: PROBABILITY OF OVERTURN: *FISHER V. TEXAS* (2016)

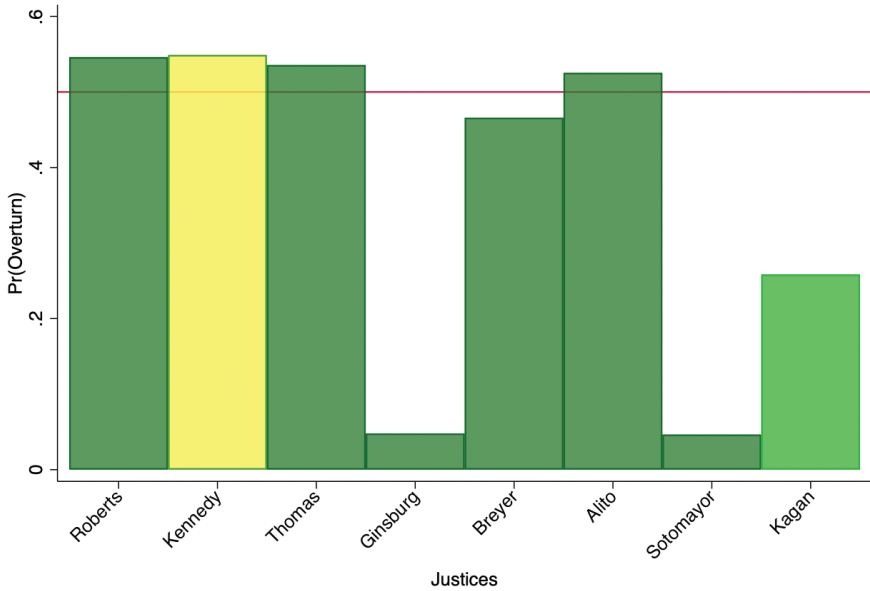


FIGURE 4 PROBABILITY OF OVERTURN: *SFFA v. HARVARD* (2022)

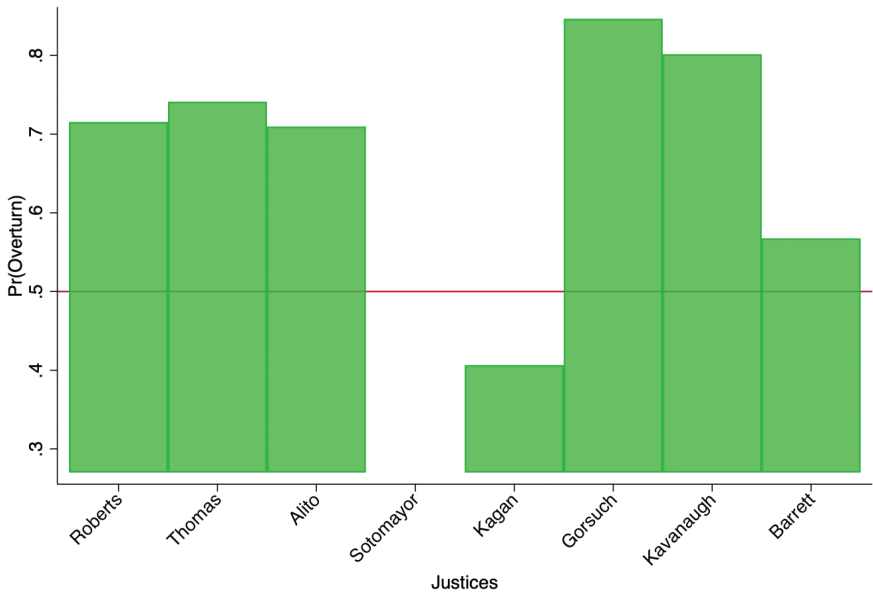
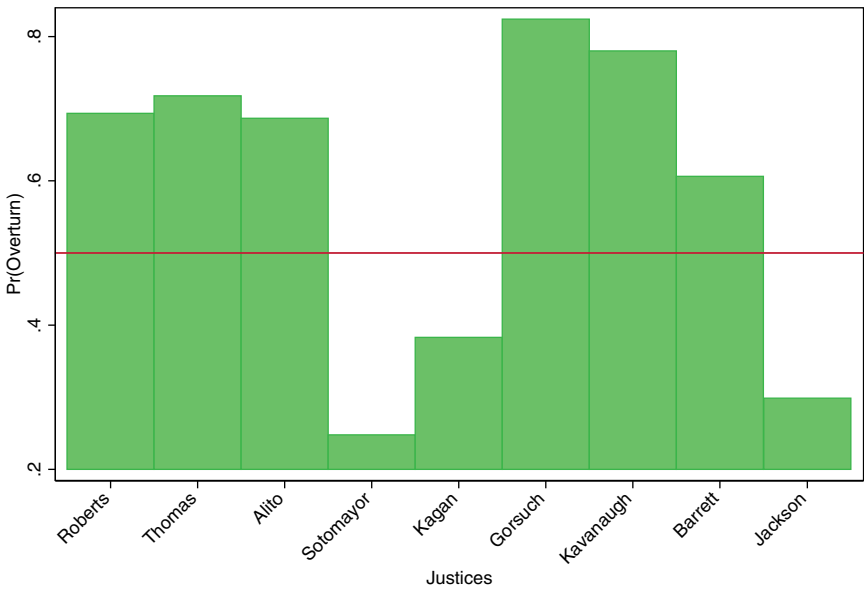


FIGURE 5 PROBABILITY OF OVERTURN: *SFFA* (2022)



## CONCLUSION

Federal judges occupy significant roles in policymaking. Until relatively recently, the federal judiciary did not venture into the domain of determining the validity of the policies of higher education institutions. Cases brought to the federal courts under claims arising from the Equal Protection Clause of the 14th Amendment have provided federal judges with the necessary constitutional hook to be able to affect higher education policy by clarifying, proscribing, and affirming the uses of race in university admissions. Sustained and increasing interest in data analytics has put members of the judiciary in the spotlight, as attempts to predict their decision-making patterns have captured the interest of potential litigants and academics alike.<sup>91</sup> Yet, the inputs to judicial decision making in cases regarding the use of race-conscious policies in higher education has heretofore been unexplained.

This study tested whether a judge's substantive decision to afford deference to a policy involving the use of race in university admissions could be predicted from background and socialized characteristics of the judge, idiosyncrasies of the court, or elements unique to the era in which decisions are made. The results do not indicate strong support for the attitudinal or political cultures theoretical frameworks, which have drawn much attention in the judicial decision-making literature, to explain substantive or procedural decisions. Instead, I find mixed effects supporting behavioral decision-making theory when examining substantive judicial decisions. The key element of this framework rests on the statistically significant effect found in a judge's gender, suggesting a stronger deference to university policy among women judges in the sample that permeates substantive judicial decision making.

Last, and perhaps most importantly, I find significant and large effects for the era in which a decision is made, particularly in substantive decisions. This result supports evidence of a punctuated equilibrium theoretical framework, as well as the legalist decision-making theory, in the sample of cases. This is particularly true in the modern era in which judge-made substantive decisions since *Bakke* are much more likely to uphold these policies than any other previous era, suggesting a possible return to the academic abstention doctrine.<sup>92</sup> The Supreme Court has also consistently narrowed the ways that universities may use race in admissions policies, including in *Fisher II*, with

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<sup>91</sup> See, e.g., Peter A. Hook, *A Framework for Understanding, Using, & Teaching Litigation Analytics*, AALL SPECTRUM 20-23 (Nov./Dec. 2021); and Lance B. Eliot, *Legal Judgment Predictions and AI*, Master Class Series Paper L007 (2021).

<sup>92</sup> See Julee T. Flood, *Judicial Influence on Academic Decision-Making: A Study of Tenure Denial Litigation Cases in which Higher Education Institutions Did Not Wholly Prevail* (May 2012) (unpublished dissertation, University of Tennessee at Knoxville), [http://trace.tennessee.edu/utk\\_graddiss/1293](http://trace.tennessee.edu/utk_graddiss/1293) [<https://perma.cc/X3KW-ADS5>] (last visited Apr. 29, 2022). "Traditionally deferential to academia, courts have usually sided with institutional autonomy and have been reluctant to interfere with matters of academic concern." *Id.* at 6 (citing WILLIAM KAPLIN AND BARBARA LEE, *THE LAW OF HIGHER EDUCATION*, 4 (2006); TERRY L. LEAP, *TENURE, DISCRIMINATION, AND THE COURTS* (1995); J. DOUGLAS TOMA, *MANAGING THE ENTREPRENEURIAL UNIVERSITY: LEGAL ISSUES AND COMMERCIAL REALITIES* (2011)).

some justices arguing for a shorter timeline to end such policies than that which Justice O'Connor proposed in *Grutter*.<sup>93</sup> Thus, given the Court's current composition and the last executive administration's scrutiny of affirmative action policies, the way that race is used in admissions policies could be changed drastically by the next test case. This model presents a viable method of predicting how the Court will decide.

Though the findings of this article suggest that rulings in the post-*Bakke* era are more likely to defer to a university's race-conscious admissions policy, the practical implications of those decisions are more complex.<sup>94</sup> This empirical inquiry provides insight into questions about judicial use of academic abstention and deference, as well as how race-conscious admissions policies will fare before judicial decision makers given the temporal context of the cases and controversies involving race-conscious university admissions policies. However, as the predictive models in my analysis reveal, the landscape in university admissions—whether at private or public institutions—will more than likely undergo a significant change and perhaps durable shift away from the policies that have defined the last twenty or even forty years. It is my hope that the future of race-conscious university admissions practices predicted by my models catalyzes universities and policymakers to square admissions policies with the federal courts' interpretation of the constitutional requirements of the Equal Protection Clause, while supporting underrepresented minority student access to higher education and promoting strong communities that value diversity, equity, and inclusion.

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<sup>93</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 310 (2003).

<sup>94</sup> Hurtado, Alvarado & Guillermo-Wann, *supra* note 13; Angela M. Locks, Sylvia Hurtado, Nicholas A. Bowman & Leticia Oseguera, *Extending Notions of Campus Climate and Diversity to Students' Transition to College*, 31 REV. OF HIGHER EDUC., 257–85 (2008).

## APPENDIX

TABLE A1: CASES BY HIGHEST COURT DECIDED

<i>Case Name (by Date Originated)</i>	<i>Rep. Cite</i>
Missouri ex rel. Gaines v. Canada	59 S.Ct. 232 (1938)
Sipuel v. Board of Regents of the University of Oklahoma	68 S.Ct. 299 (1948)
Sweatt v. Painter	70 S.Ct. 848 (1950)
McLaurin v. Oklahoma State Regents for Higher Education	70 S.Ct. 851 (1950)
Wichita Falls Junior College District v. Battle	204 F.2d 632 (5th Cir. 1953)
Board of Supervisors of Louisiana State University v. Tureaud	74 S.Ct. 783 (1954)
Whitmore v. Stilwell	227 D.2d 187 (5th Cir. 1955)
Lucy v. Adams	76 S.Ct. 33 (1955)
Booker v. Tennessee Board of Education	240 F.2d 689 (6th Cir. 1957)
Board of Supervisors of Louisiana State University v. Ludley	252 F.2d 372 (5th Cir. 1958)
Meredith v. Fair	305 F.2d 343 (5th Cir. 1962)
Guillory v. Administrators of Tulane University	306 F.2d 489 (5th Cir. 1962)
Gannt v. Clemson Agricultural College	320 F.2d 611 (4th Cir. 1963)
Hammond v. University of Tampa	344 F.2d 951 (5th Cir. 1965)
DeFunis v. Odegaard	94 S.Ct. 1704 (1974)
Regents of the University of California v. Bakke	98 S.Ct. 2733 (1978)
Gonzalez v. Southern Methodist University	536 F.2d 1071 (5th Cir. 1976)
Krohn v. Harvard Law School	552 F.2d 21 (1st Cir. 1977)
Henderson v. Florida Board of Regents	569 F.2d 1309 (5th Cir. 1978)
Doherty v. Rutgers School of Law	651 F.2d 893 (3rd Cir. 1981)
Hall v. State of Hawaii	791 F.2d 758 (9th Cir. 1986)
Davis v. Halpern	831 F.2d 37 (2nd Cir. 1987)
Hopwood v. University of Texas (I)	78 F.3d 932 (5th Cir. 1996)



<i>Case Name (by Date Originated)</i>	<i>Rep. Cite</i>
Hopwood v. University of Texas (II)	236 F.3d 256 (5th Cir. 2000)
Coalition for Economic Equity v. Wilson	122 F.3d 692 (9th Cir. 1997)
Smith v. University of Washington Law School	392 F.3d 367 (9th Cir. 2004)
Texas v. Lesage	120 S.Ct. 467 (1999)
Wooden v. Board of Regents of the University of Georgia	247 F.3d 1262 (11th Cir. 2001)
Johnson v. Board of Regents of the University of Georgia	263 F.3d 1234 (11th Cir. 2001)
Gratz v. Bollinger	123 S.Ct. 2411 (2003)
Grutter v. Bollinger	123 S.Ct. 2325 (2003)
Farmer v. Ramsey	43 Fed.Appx. 547 (4th Cir. 2002)
Weser v. Glen	41 Fed.Appx. 521 (2nd Cir. 2002)
Schuette v. Coalition to Defend Affirmative Action	134 S.Ct. 1623 (2014)
Fisher v. University of Texas (I)	133 S.Ct. 2411 (2013)
Fisher v. University of Texas (II)	136 S.Ct. 2198 (2016)
Coalition to Defend Affirmative Action v. Brown	674 F.3d 1128 (9th Cir. 2012)
Su v. Eastern Illinois University	566 Fed.Appx. 520 (7th Cir. 2014)
Students for Fair Admissions v. President & Fellows of Harvard Coll.	980 F.3d 157 (1st Cir. 2020)

