

## **Why Supreme Court Justice Clarence Thomas is wrong about Affirmative Action**

### **Abstract:**

In his recent legal opinion in the affirmative action case of Abigail Fisher v. University of Texas at Austin, Supreme Court Justice Clarence Thomas continued to champion his status as one of the leading opponents of Affirmative Action. He has once again raised the ire of not only the majority of the black community, but also of many others who have benefitted or who may benefit from Affirmative Action in future years. This paper seeks to go beyond the personal attacks and backlash aimed at Justice Thomas, and instead addresses the legal arguments posed by his written legal opinion, which opposes the policy of Affirmative Action.

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### **Abigail Fisher v University Of Texas at Austin**

The Supreme Court Case of Abigail Fisher v University of Texas at Austin (2013) originated as a challenge to the University of Texas' in its Higher Education admission policy. Specifically, it involved admission to the University of Texas Law School. In a 7-1 vote, the U.S. Supreme Court remanded, or sent the case back to the U.S. Court of Appeals to be reconsidered (Mears, 2013). The Court of Appeals was asked to review if the University of Texas had used the legal concept of strict scrutiny to determine if its admission policy denying Abigail Fisher into its law school was fair. The ruling stated

that the University must first demonstrate that no workable race-neutral alternatives are available that will allow the University to achieve its desired diversity results. The decision means that Affirmative Action was not overturned or ended as some might have expected, but in effect needs to be studied more. In her case Abigail Fisher has tried to claim a public victory. However, the fact that the case was remanded tends to support the University of Texas admission policy. Abigail Fisher went on to finish Law School at LSU. Another Supreme Court Affirmative Case on the near horizon from Michigan, (*Schuette v Coalition to Defend Affirmative Action* (2012)), may eventually bring clarity to the arguments. The issue in the Michigan case is whether a voter approved state ban on Affirmative Action in college admissions violates the U.S. Constitution. Oral arguments are scheduled for that case this fall.

In being denied admission to the University of Texas Law School, Abigail Fisher claims she had been denied her constitutional rights under the 14<sup>th</sup> Amendment Equal Protection Clause of the Constitution. She contended other students, whom she felt were less qualified than her were admitted. The University of Texas rebutted by saying that their admission policy reflected the need for Diversity in Higher Education. Some of the other students admitted by the school were minority students. She feels Affirmative Action played a role into their acceptance because she had higher test scores than some of the other students who were admitted. The issue devolved into whether race should be used to help determine who was qualified to be accepted for admission into the law school. The University of Texas felt it was well within the law as cited within the *Grutter v. Bollinger* and *Regents of the University of California v. Bakke* cases, Those cases had

first established the legal principals regarding the need for diversity in Higher Education and concluded by stating that race was indeed one of the many factors that could be considered in the process.

The University of Texas enrolls some 52,000 students. In accordance with a holistic admission policy created with the passage of Texas House Bill 588, state high school students finishing within the top 10 per cent of their class are automatically accepted to their first choice institution. The law was passed to avoid the ramifications of Hopwood v. Texas (1996) which held that the “School of Law may not use race as a factor in deciding which applicants to admit in order to achieve a diverse student body, to combat the perceived effects of a hostile environment at the law school, to alleviate the law school's poor reputation in the minority community, or to eliminate any present effects of past discrimination by actors other than the law school”. The 10 per cent rule accounts for three quarters of the student body. Abigail Fisher did not qualify under this process and had to try and gain entrance along with a second pool of students through another highly competitive process (Mears, 2013).

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Both Justices Antonin Scallia and Clarence Thomas concurred with the courts ruling in the Fisher case, but in a separate opinion, Justice Thomas went on to explain why the Affirmative Action policy itself should be ruled unconstitutional. In his opinion he directly addresses Diversity and College Admissions and why he would overrule Grutter v. Bollinger (2003).

## **Affirmative Action**

Affirmative Action came about as a legal remedy to help reverse the negative effects of prejudice caused by years of past discrimination. Its goal was to make sure minorities have an equal opportunity in schools and at the workplace. It is a means of establishing diversity and eradicating the caste type system in America that has its roots in slavery, peonage, segregation of Jim Crow, and imprisonment directed mainly at blacks (Goff, 2013). From a legal standpoint, its purpose is to make a person whole in the sense as to put them in a place of opportunity that he or she would have been, had their been no past illegal discriminatory practices. Although the original intent of Affirmative Action may have been to remedy past discrimination imposed on the descendents of African slaves ravished by racism and a mere three generations removed from the cotton fields of the South, Affirmative Action was not created for one race. Studies have shown that the children of immigrants, middle class blacks, and in particular, white women have been the greatest beneficiaries of it. (Curry & West, Eastland, 1997; 1996; Horne, 1992; Malamud, 1997). Most people, who oppose it, see it simply as either a black versus white paradigm, an illegal quota system for unqualified or under qualified minorities, or as a direct attack on white males in our society. It is neither. It is about equal opportunity based upon past discrimination.

## **Supreme Court Justice Clarence Thomas**

Clarence Thomas was born in rural Georgia in 1948. He is an Associate justice of the United States Supreme Court. He was appointed in 1991 by President George H.W. Bush to replace retiring Supreme Court Justice Thurgood Marshall. He faced a bitter fight during his confirmation hearing after being charged with sexual harassment by Anita Hill. He is only the second African American to serve on the Supreme Court. He also served as the chair of the Equal Opportunity Commission (EEOC), and as a judge in the U.S. Circuit Court of Appeals. Oddly enough, he memorized the speeches of Malcolm X as a young angry campus radical in the 1960's and used Affirmative Action to gain admission to Yale (Blake, 2013b). Although he has benefitted from Affirmative Action, he seems to have resented it partly because he felt other people thought less of him in receiving his education and in applying for jobs. He opposes it now because he feels that it violates the U. S. Constitution.

### **Justice Thomas Concurring Opinion**

Justice Thomas concurring opinion is most interesting. He writes his concurring opinion in III main parts using stare decisis and case law to cement his arguments. He raises several secondary points. Justice Thomas might be looked at as what Justice Hugo Black described as a strict constructionist, which is a legal philosophy that limits or restricts judicial interpretation. More specifically, he might be described as an "originalist", as defined by Mark Holzer. In his book *The Supreme Court Opinions of Clarence Thomas*. He demonstrates how conservative judges use this approach to limit their written legal

opinions as to what they believe is the original intent of the Constitution, These judges believe their opinions should remain consistent with the Constitution as it was written and within the original intent of the founding forefathers (Blake 2013b).

Justice Thomas writes his concurring opinion based upon his interpretation of the Fourteenth Amendment of the Constitution. It provides that no State shall “deny to any person ... the equal protection of the laws”. He cites *Missouri v. Jenkins* (1995) which states “at the heart of this {guarantee} lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups”. He does acknowledge that there have been exceptions as in cases that involve National Security {*Korematsu v. United States* (1944)}, involving Japanese internment during WWII, or in cases where the “direct damage” has actually been caused by the government. In order to overcome these guarantees of the Fourteenth Amendment, the state must show that it has a “compelling government interest” and narrowly tailored to that end”, as cited in *Johnson v. California* (2005). At the heart of the Fisher case is the question as to whether the goal of Diversity in College Admissions, as it applies to Affirmative Action amounts to a compelling “state interest”. Obviously, Justice Thomas does not feel that diversity meets the test. Many academic scholars would disagree.

Dr. Dorothy F. Garrison Wade and Dr. Chance W. Lewis of Colorado State who have traced the history of Affirmative action over 40 years wrote in the 2004 Summer Journal of College Admissions that the “objective of Affirmative Action is confirmed in many U.S. Court rulings that have upheld court cases in favor of institutions when justification

for race-conscious policies demonstrated a compelling interest. Compelling interest is divided into ‘remedial interest’, which includes remedy of past discrimination and ‘non-remedial interest’, which promotes educational diversity, reduces racial isolation or promotes educational research” (Garrison-Wade & Lewis, 2004). The University of Texas in its admissions policy is trying to promote educational diversity, which ultimately benefits all of society.

Here is where Justice Thomas’s argument begins to get a little off. He cannot see how diversity on the part of The University of Texas and the educational benefits flowing from such diversity go hand in hand. He takes you through a litany of cases starting with *Brown v. Board of Education* (1954), *Lee v. Washington* (1968), *McLaurin v. Oklahoma State Regents for Higher Ed.* (1950), *Regents of the Univ. of Cal v. Bakke* (1978), *Allen v. School Bd. of Prince Edward Cty.* (1959), *Sweat v. Painter* (1950) to explain how any use of race amounts to discrimination and race balancing which he feels is patently unconstitutional. He somehow takes the arguments used by segregationists and the arguments used by slave owners and puts them in the same context as the *Grutter* and *Fisher* cases. In those arguments segregationist and slaveholders argued that segregation and slavery actually benefitted the black race, thus cancelling out the need for diversity, or in their time frame, the need for integration. The segregationist said that by keeping black and white children separate in schools; they protected the black children from hostile whites. Slave owners argued that to an extent slavery was in some ways benevolent in that it civilized the slaves. Justice Thomas then tries to illustrate that just as the Court had rejected those arguments as illegal discrimination under the Constitution,

the use of race in the current Grutter and Fisher case is equally as wrong. The difference is that the segregationist and slaveholders argued that race was necessary to achieve their desired benefits, which was segregation for the purpose of establishing a segregated society. The University of Texas counters by saying that race is but one factor in trying to achieve its ultimate goal which is diversity of its student body. One argument would automatically discriminate against an entire race simply because of the color of their skin, whereas the other argument is saying that skin color may or may not be a factor in the overall process of determining admission to the University's Law School.

Justice Thomas then steps out on the judicial plank a bit further, by directly attacking Affirmative Action and Diversity in admission policies. "The worst forms of discrimination in this Nation have been accompanied by straight-faced representations that discrimination helped minorities", he writes in his concurring opinion of *Abigail Fisher v University of Texas at Austin* (2013). He then goes back to the segregationist arguments as to how they tried to justify racial segregation, in that segregation developed black leaders such as Booker T. Washington, Dr. Martin Luther King and Thurgood Marshall. He notes that the same argument also allowed for the existence of Historically Black Colleges and Universities. Those arguments were clearly rejected by this same court some 60 years ago when trying to justify how race helped accrue educational benefits to blacks, he writes. Justice Thomas explains how those arguments were also rejected and again argues that those arguments are just as irrelevant today in trying to justify those educational benefits The University of Texas is trying to achieve as a part of diversity today. He writes as if diversity were some cruel hoax played on minorities, he



tries to illustrate by statistics how some minorities are less prepared than their peers in these schools and how they might be better off in lesser ranked schools. This argument is uncomfortable at best (notice how he leaves Asians out in his statistical calculations). Somehow he misses the entire point of Affirmative Action and Diversity. It is about creating opportunity. There are no guarantees of success. Sometimes there are indicators of success, but no one can know which individual student will actually make it and which one won't. Under the University of Texas admission policies, all students are at least minimally qualified to be able to do university school work. At some point students should realize that the personal bias and prejudices regarding race that Justice Thomas writes about are likely to always be around and are more reflective of the person or people trapped in those mindsets, rather than the students themselves.

### **Economic Affirmative Action**

Indeed, the American landscape has changed today. Blacks are no longer the largest minority. Hispanics are now the largest minority group, with Asians being the fastest growing minority. Gay Rights have moved to the forefront as the next civil rights movement. The Supreme Court has tilted to the right with five conservative judges (Blake, 2013b). The future of Affirmative Action may lie in the balance as the nation awaits the outcome of the second big Affirmative Action case in *Schutte v. Coalition*. That Michigan case will go a long way and have a significant impact on how in the near future; America will view both Affirmative Action and Diversity. Justice Thomas writes about Affirmative Action as if he's trapped in some past time frame .Affirmative Action

is not dead but to argue it in terms of mostly black vs. white is outdated. Some speculate that Colleges are going to create diversity by using class instead of race to meet its diversity requirements. Richard Kahlenberg, dubbed the “intellectual father” of economic affirmative action in his paper “A Better Affirmative Action”, says class affirmative action is something all Americans could support. “Even the most right-wing justices, like Clarence Thomas have said they support the idea of race-neutral affirmative action for economically disadvantaged students,” he says (Blake, 2013a).

This Class Economic Action would pose some interesting question. What would happen if class replaced race in terms of Affirmative Action and its use in trying to achieve diversity? Would it be economically prohibitive for the University? Would poverty then become the one overriding factor to be used to achieve diversity? Would the 85 per cent of the students, who are the children of wealthy or middle income immigrants and blacks, now be excluded? Would Legacy programs, where the children of alumni, (preferably wealthy alumni), who are automatically admitted now have to be reviewed? After all, there are only so many spots available. What about sports? Will athletes still be counted for diversity purposes? Are the wealthy being denied equal protection under the law, when a less or equally qualified poor student is admitted to a school before them. Such an admission policy may be race-neutral, but how would Justice Thomas rule if race was indeed a factor, even between poor applicants of different minority races, but who are otherwise equally qualified. Whose equal protection rights would then be violated?

Conclusion

Justice Clarence Thomas is wrong about Affirmative Action. In some form or another it is still needed in America. The University of Texas did not violate the equal protection rights of Abigail Fisher in its Law School Admissions Policy. While we have made much progress regarding race in this country, race still matters. Despite the election of a black president, many minorities can still feel the gentle backlash of the vestiges of past racism on a daily basis. As noted in Justice Ruth Ginsberg's dissenting opinion, it cannot be ignored. The University followed the law in its admissions policy as decided by *Grutter v. Bollinger* (2003). The Court of Appeals properly decided the case the first time and its review should reveal the Holistic admission policy adopted by the University from the Harvard model is indeed the best model to achieve the desired diversity in its Law School. The Holistic approach which uses multiple criteria such as interviews, essays, test scores and community service is the best approach to be followed. If the University would drop the dual model of admissions and only use the top 10 per cent model, even more problems would be created as some school districts have already been historically segregated by race. One might argue that the top ten percent of one high school is not equal to the top 10 per cent of another school. Some kids might even transfer from a higher performing school to a lower performing school just to be ranked into their top 10 per cent. This would then get them automatically admitted to their school of choice. This could completely defeat the desired goal of diversity. Studies have shown that without Affirmative Action the percentage of minorities in Higher Education actually declines (Hoxby, 2012). Using race as one of many factors does not violate Abigail Fisher's equal protection rights as she was not denied admission because of her race, but because she

fell into a pool of other qualified candidates, some of whom were admitted and some of whom were not. Using the Holistic approach, this decision is rightly left up to the University.

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