Why Strict Scrutiny Requires Transparency:
The Practical Effects of *Bakke*, *Gratz*, and *Grutter*[1]

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Draft of August 22, 2011

I. <u>Introduction</u>

As the 2002-03 term of the United States Supreme Court unfolded, few if any of its pending cases received as much media attention as the twin bill of affirmative action cases. In *Grutter v. Bollinger* and *Gratz v. Bollinger*, the court had taken on two distinct challenges to affirmative action policies at the University of Michigan. Barbara Grutter was challenging a racial preference system built into UM's undergraduate admissions, and Jennifer Gratz was challenging the use of racial preferences by UM's School of Law.   Through the briefing, oral argument and subsequent court deliberations, most of the betting ran against the university. Recent Supreme Court decisions had struck down affirmative action plans in employment and contracting; a majority of the current justices had records hostile to racial preferences in nearly all contexts. Moreover, most elite colleges and professional schools had been using racial preferences to favor minorities in admissions for over thirty years, and nearly everyone conceded that such programs should not persist indefinitely.   On June 27th, 2003, the Court announced both decisions. In *Gratz v. Bollinger*, a 6-3 majority of the Court ruled that UM's undergraduate admissions system was patently unconstitutional; in *Grutter v. Bollinger*, the Court held by a slender 5-4 vote that the law school's system survived constitutional scrutiny, but only subject to a number of constraints and only temporarily. On its face, this seemed like a stinging rebuke to the university's policies and a considerable narrowing of the scope of affirmative action. Yet the front pages of newspapers across the country the next day showed a gleeful Mary Sue Coleman – the president of the university – literally jumping for joy on news of the decisions. The question must be asked: why was this woman smiling?

The remarkably simple answer is this: President Coleman knew that, in practice, the *Grutter* and *Gratz* decisions would have little effect on the scale and effects of the university's affirmative action policies. Indeed, as I will discuss in this chapter, *Grutter* and *Gratz* – along with their progenitor, *Bakke v. University of California* -- have collectively had effects almost directly opposite to those articulated in the decisions. At least among public law schools in the United States, and at the University of Michigan's undergraduate college itself, racial preferences became larger, not smaller, after *Grutter* and *Gratz*; particular racial classifications became more, not less, determinative of admissions decisions; and for most schools, the entire process – far from doing away with "mechanical" admissions processes, became more mechanical than ever. An era when higher education would embrace race neutrality, which Justice O'Connor (the architect of *Grutter*) confidently predicted would arrive in the 2020s, now seems further away than ever.

This is unusual: while Supreme Court decisions do not always have the sweeping effects implied by their words (Canon & Johnson 1999, Rosenberg 2008), they do tend to push on-the-ground behavior in the direction laid down by the Court. At worst, one would think, a Court holding would have no effect at all. So producing effects opposite to those pronounced by the Court is a remarkable, if dubious,

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legacy of *Grutter* and *Gratz*, and it makes these cases, along with their legal forbears, interesting material for a case study in the exercise of judicial authority. Examining the on-the-ground effects of these decisions also helps us think about how the Court can operationalize the idea of strict scrutiny – the standard that, in theory, governs affirmative action law.

II.   A Few Facts About Admissions Preferences

Grutter, *Gratz*, and *Bakke* are intrinsically interesting because most readers have experienced the remarkable opacity of college and university admissions. Elite and advanced-degree schools thrive on the allure of selectivity, and like all allurements, this one depends on a certain air of mystery. Listen to any admissions officer's speech on "how to get in" and you will know exactly what I mean. The mystique of higher education admissions is also quite important in understanding the challenge of judicial regulation. Let us begin, then, with a brief glimpse behind the veil.

Both elite universities and professional schools introduced "pro-minority" racial preferences in the late 1960s, an innovation that capped a very turbulent generation of change in admissions. Before World War II, very few schools in the United States were truly "selective" in the modern sense (Lemann, 1999; Karabel, 2005). Nearly all schools admitted the bulk of their applicants. A few elite ones had admission exams, and a number of prestigious schools placed various social obstacles in the path of admission.[2] Postwar America, however, witnessed an explosive growth in college enrollment,[3] and middle-class Americans began to think their smart children could legitimately aspire to attend famous schools and pursue elite professions. The elite schools themselves, faced with unprecedented demand and the rapid emergence of science, technology, and quantitative social science as subjects of intense national interest, were rapidly injecting an ethos of meritocracy into many aspects of their operations, including admissions. The schools embraced standardized tests as a means of reducing "class" prejudice, and embraced the idea that competitive admissions should be based primarily on objective "merit". To protect the children of alumni and college sports, schools used "legacy" and athletic preferences as well, but meritocratic criteria were dominant by the 1960s, as elite schools found themselves admitting only a third, a quarter, or even a fifth of their applicants.[4]

Part of the new meritocratic vision embraced greater ethnic and racial diversity, and both elite college campuses and professional schools undoubtedly became more open and welcoming places in the early 1960s. But by the mid-1960s, many colleges realized they would have very small black enrollments without special efforts. Unprecedented levels of college activism, initially focused on the Vietnam War but soon spreading to other issues, also put an intense spotlight on the "racial climate" on campuses and the paucity of black students. Consequently, over a relatively short period between 1967 and 1970, dozens of elite and professional schools adopted special minority admissions programs. These usually involved some special outreach efforts, but always also included "preferential" admissions for blacks (and soon, Hispanic) applicants, meaning that low or middling test scores and grades were discounted.

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[2] Jewish quotas, preference for established schools, etc.

[3] College enrollment rose by a factor of five between the eve of WWII and the late 1960s (Historical Statistics of the United States, Millenial Edition, 2-441).

[4] Admissions at elite schools have continued to become more competitive at the elite schools, albeit at a slower rate (and in part simply because more students strategically apply to many universities). The most elite schools today admit only 10-12% of their applicants (US News).

College administrators initially based racial preference programs on three key premises. First, they believed it was essential for colleges to do their part to foster the development of minority leadership in the nation, both in politics, in the professions, and in the technocratic elite. Second, they believed that it would take some time, perhaps a generation, for the effects of civil rights programs to kick in and correct the effects of poverty and poor education on black students. Third, they knew colleges would be accused of hypocrisy if they could not generate reasonably significant numbers of minority students, since they obviously had no qualms about using preferences for athletes and (in private colleges, at least) legacies. Under these circumstances, instituting preferences large enough to generate substantial minority enrollments (i.e., very large race preferences) seemed like an obvious step, and one they hoped would rapidly fade as racial gaps in academic preparedness declined.

As a significant number of schools instituted minority preferences, still others felt compelled to follow suit, in part because the preferences of other schools suctioned up all the available minority students who could be admitted on race-neutral grounds. By the mid-1970s, preferences were pervasive at the top two hundred undergraduate programs outside the South and in most law and medical schools, and continued to spread in subsequent years.

After several decades of rapid evolution, higher education admissions systems had reached a kind of stasis by the late 1970s. Although there have been some subtle changes since then, almost any important, substantive fact one could adduce about elite and professional-school admissions today would have held thirty-five years ago. The irony is that it is this exact era when an array of schools have faced legal challenges and, in the perception of outsiders at least, universities have had to pass through one gauntlet after another. A question to keep in mind as we proceed is whether the net effect of this legal ferment has been to solidify, rather than disrupt, the ways that universities factor race into admissions.

The essential, continuing elements of racial preferences have been these:

1) Racial preferences are driven by gaps in levels of academic preparedness. Ever since college admissions officers started thinking seriously about race in the 1960s, they have realized that the median black applicant has academic credentials (e.g., test scores and grades) dramatically below the median white student. In the mid-1970s, for example, the median black typically had credentials around the 10th percentile of the typical white[5]). Any specific threshold of credentials established as an academic target (say, presumptively admitting students at the 70th percentile and above) would have the effect, then, of admitting whites at ten times the rate of blacks. (Smaller but analogous gaps exist between Hispanics and whites.) Nearly all university preference systems are driven by this fundamental conundrum. And all predictions that racial preferences would fade over time have been premised on the belief that these racial credential gaps would themselves largely disappear. But while access has increased dramatically (black college enrollment, for example, increased nearly tenfold from 1968 to 2008 (Statistical Abstract 1981, 2010)), the relatively level of minority preparation has improved only modestly (the median black credentials in most higher education application pools is now at about the 15th or 20th percentile of the white distribution). Thus, the absolute number of high-credential blacks

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[5] "Percentile" is a distributional term, in which the lowest ranking student is said to be at the 0th percentile, and the top ranking student at the 100th percentile. If someone is at the 10th percentile, that means that 10% of the students are ranked below them, and 90% are ranked above them.

and Hispanics has increased sharply over time, but race-neutral methods would still tend to produce results that disproportionately exclude blacks and Hispanics.[6]

2) Consequently, racial preferences are not "tie-breakers", but rather a central factor that transforms the application of the typical affected candidate. Most admissions officers more or less "race-norm" applicants – that is, they consider the academic preparedness of each candidate relative not to the general admissions pool, but relative to the preparedness of other candidates of the same race. This does not necessarily mean that admissions decisions are racially segregated; it does mean that the admissions officer is at least making a mental adjustment of test scores and grades based on the race of the applicant.

3) Since the "preparedness gap," relative to whites, is on average different for Hispanics, blacks, and American Indians, the size of racial preferences are, usually, correspondingly different for each of these groups as well. Especially where there are large numbers of both Hispanic and black applicants, administrators are careful to calibrate preferences to roughly correspond to the relative size of their applicant pools. For example, suppose that 10% of a school's applicants were black, and 5% were Hispanic. Using the same size preference for both groups would produce something like a 2:1 ratio of Hispanic-to-black admits; since the school wants admissions to be reasonably close to application ratios, race-specific calibration of preferences is adopted.[7]

4) Preferences come with costs, especially for the beneficiaries. In the early days of affirmative action, there was much speculation (and hope) that minority students admitted with large preferences would "catch up" in academic skills and achieve levels of academic distinction comparable to their classmates. Scholars now agree that this happens occasionally, but is not the typical outcome. The median black student admitted with a large preference tends to end up with grades that put her somewhere near the 10th percentile of the GPA distribution (this holds in both colleges and graduate schools), and median Hispanic student (who receives a smaller preference) tends to end up around the 25th percentile of GPA. (Minority students admitted without preferences, in contrast, perform pretty much the same as everyone else.) More controversial is the question of whether the low grades that result from preferences are associated with other problems – less learning, stigma, loss of academic self-confidence, a tendency to switch into less rigorous academic majors, lower graduation or professional certification rates, and worse earnings in the long-term. [References and note]

Although many of the ideas in (4), above – often clumped together as the "mismatch hypotheses" – are disputed, there is not much disagreement, especially among admissions officers themselves, that (1) through (3) accurately characterize university preference programs. Indeed, over the years enough data about admissions systems has leaked out that these basic features can hardly be denied.

III. The Structure of Preferences

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[6] Discuss evidence on this point briefly.

[7] Among Hispanics, Cuban-Americans tend to substantially outperform other Hispanic groups on standardized tests; many schools will therefore have different preferences for Hispanic sub-groups. Similarly, on the West Coast, many schools have different ethnic-specific preferences for various Asian ethnicities.

The Supreme Court's first substantive decision on university preferences came in *Bakke*. The University of California at Davis School of Medicine had an unusually rigid preference system; the school set aside sixteen out of one hundred spots in its medical school for minority applicants. This was a true "quota" system. Since "quota" is such a lightning-rod term in affirmative action discourse, it is worth discussing its meaning in some detail, and distinguishing it from other preference systems. Indeed, since the Supreme Court's efforts to regulate affirmative action have often been suffused with ambiguity, some conceptual and terminological precision now will pay large dividends when we examine the Court's decisions.

Consider two similar schools that each enroll one hundred new students every fall. School A has a rigid quota of sixteen minority spots, while School B has a flexible "goal" of enrolling sixteen minorities per year, on average, over many years. The rigid quota puts School A at two disadvantages. First, if the pool of minority applicants is particularly thin in some years, School A must admit some particularly weak applicants to meet its annual quota. School B, in contrast, can admit extra minorities in years with strong applicant pools, and fewer minorities in lean years, thus maximizing the quality of its minority students over time. Second, School A must make admissions in waves, since it cannot predict its yield rate exactly (especially with a group as small as its minority quota). It will admit some students in April, see how it fares in yield, and then admit additional students off its waitlist over the summer. These students will tend to be significantly weaker, since the strongest wait-list students will probably have accepted offers from other schools to nail down their plans. School B does not need to play this inefficient game. It can admit its strongest minority candidates based on average yield rates over time; if in the end it falls short this year, it will make it up later.

Thus, regardless of how one feels about preference policies, quotas are not very good ways to implement them because of their rigidity. They are likely to exist only if a school's administration is so bureaucratic, or so dysfunctional, that policy-makers cannot trust policy implementers to pursue a flexible goal in good faith over a period of time. A quota guarantees results at the cost of efficient implementation.

From a legal standpoint, quotas are particularly troublesome. They imply a spoils system, in which politicians or administrators simply carve up state benefits into racial "shares". They also make explicit a process in which applicants of different races are not directly compared with one another. Under the Davis quota, it didn't matter whether there were one hundred, or five thousand, white applicants with stronger credentials than the 16th enrolled minority.

Consider, by way of contrast, a "point" system. Suppose that School B considers a combination of factors in admitting students: SAT scores, high school grades, work experience, community service, letters of reference, leadership qualities, and so on. Suppose that it awards points depending on the level of achievement in each of these areas, and admits students who pass some threshold of total points – say, 800 points out of 1000 possible. Finally, suppose that under this system, only an average of five percent of the admitted students are minorities, but that if School B adds 100 points to each minority student's file, then an average of sixteen percent of its admitted students are minorities.[8] To achieve the racial diversity it seeks, School B adopts this point system.

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[8] For purposes of simplicity in this example, I assume yield rates are similar across races.

Even though the two systems produce identical results over the long term, School B's "point system" has several advantages over School A's quota. The point system will produce rising and falling numbers of minority students from year to year as the strength of the minority pool fluctuates. There is no chance under the point system that the school will be forced to admit an incredibly weak minority applicant just to meet the quota; every admitted minority must have at least 700 points on the "non-racial" admissions criteria. Moreover, under the point system majority and minority students are not completely isolated from competition with one another; if the majority pool gets stronger, so that the school raises its admissions threshold to 820 from 800, then minority students will now have to meet a higher (720) threshold as well. Very importantly, the point system is transparent – at least to those administering it. In this design, admissions officers understand how race trades off with other factors, and it is easy to predict such things as the SAT credential gap between admitted majority and minority students.

Now consider a third system, which uses neither points nor quotas, but rather relies on an admissions officer to read the files of all the applicants, to make mental note of all the relevant factors in admission and all the characteristics of all the applicants, and to decide who should be admitted. Such a system used to be called "discretionary" (i.e., based on the discretion of the admitting officer) but has now come to be known as "holistic". Although a holistic system sounds quite different from a point system, the difference is more apparent than real. If professors are evaluating a few candidates for a new faculty position, or a department chair is comparing a handful of applicants for a graduate fellowship, it is possible to think of the selection as "holistic", in the sense that dozens of individual characteristics are weighed and compared in an overall, largely intuitive judgment. But when a college or professional school is considering thousands of applicants for hundreds of spots, the process is necessarily algorithmic – the admissions officer or officers have *some* methodology for weighing the various elements of a file against one another. The only question is whether the algorithm is applied systematically (with an explicit formula) or capriciously. An internally inconsistent system wouldn't serve anybody's interests, so no matter whether a school considers its decisions to be formulaic or not they almost certainly are. Given enough time and patience, an investigator could reconstruct the implicit algorithm used by an admissions officer, even one who thinks her admissions decisions are purely intuitive.[9]

Of course, even in a point system, not every element is objective; determining the strength of a candidate's writing or the quality of a recommendation ordinarily involves both objective and subjective assessments. The distinction between a "point system" and a "holisitic" approach is not really about whether "objective" elements of an application, like test scores, are given more weight, but whether the various elements of applications are compared consistently.

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[9] For example, the investigator could first collect all the avowedly quantitative information used by the officer, such as test scores and grades. Next, the investigator would give the officer pairs of applicant files, and ask her to say which file has the stronger letters of recommendation, the greater hardship overcome, and so on. With enough pairwise rankings, the investigator could create an ordinal ranking of the files according to the various subjective criteria used by the officer. With this information, the investigator could create and run a logistic regression in which the admissions decision is the outcome, and the various quantitative data and the subjective ordinal rankings are the independent variables. The coefficients produced by this regression would tell us the relative weight given to each factor, and the "score" each applicant earns on each factor. If the admissions officer made internally consistent distinctions among applicants, then the regression equation would be able to "predict" the officer's decisions with perfect accuracy.

This extended discussion of admissions methods may seem tedious, but as we shall see, it goes to the heart of Supreme Court jurisprudence on affirmative action in higher education.

IV. *Bakke v. University of California at Davis*

Lawsuits challenging racial preferences in college and university admissions are difficult to bring. Few students know much about how preferences or college admissions work; even fewer know whether they were in the ideal "zone", where they can show they would have been admitted to a school "but for" the school's use of racial preferences.[10] Still fewer want to put their education on hold while pursuing expensive, complex, and difficult litigation.[11] Given the relative handful of challenges that have been brought, a remarkable number of them have turned into major cases.

The first pivotal case was brought by Allan Bakke, a young engineer and Marine veteran who wanted to become a doctor. His challenge to the University of California, Davis Medical School had all the right ingredients: Bakke was a strong candidate; he did not enter another medical school after starting his suit, and, as mentioned above (in Part III), Davis used an explicit set-aside, or quota, for minorities in selecting medical students. The issue deeply divided a Court which was, on the whole, more liberal than the present Court. Justices Brennan, White, Marshal, and Blackmun held that racial preferences to correct general societal discrimination should be permitted, temporarily, in higher education. Justices Stevens, Stewart, Burger, and Rehnquist held that any consideration of race violated Title VI of the 1964 Civil Rights Act. The ninth Justice, Lewis Powell, wrote the deciding opinion, siding with the conservative camp to find the University of California's racial quota illegal, but siding with the liberal camp to hold that universities were not completely precluded from considering race in admissions decisions. Race, he found, could be used as one of many factors taken into account by a university in pursuit of its legitimate desire to create a diverse student body:

> Race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.[12]

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[10] Employment discrimination cases are more common than other types of civil rights cases because the plaintiff is usually an "insider" who is fired or denied a promotion, and thus has lots of inside knowledge and, probably, a large number of specific grievances. (Donohue and Siegelman, 1991) Potential affirmative action challenges, in contrast, are just the opposite – they have little knowledge of any specific university, and tend to view a rejection from any one school as relatively inconsequential.

[11] This is the moral of *DeFunis v. Odegaard*, a suit challenging preferences that made it all the way to the Supreme Court in 1974. The Court ultimately declined to issue a substantive ruling on the ground that the plaintiff, Marco deFunis, had nearly finished college at another school by the time the case reached the Court, thus mooting the question of whether he should have been admitted to the University of Washington.

[12] Powell drew this account of a "permissible" use of race from a brief submitted by Harvard College; he even explicitly endorsed a Harvard-like admissions system as constitutional.

Powell's holding thus precluded quotas – which clearly did insulate minorities from direct competition – but seemed consistent with either a "point" system or a "holistic" approach. The critical ambiguity in Powell's opinion concerned just how much weight might be given to race. Powell's words, in the paragraph above and other passages, seemed to envision a system in which colleges first determined (using test scores and past school performance) who met an academic threshold sufficient to make success at the school probable. From the resulting field of candidates, the school would pick a mix of students reflecting a diverse set of non-academic or quasi-academic qualities. But at the vast majority of professional schools and elite colleges, admissions officers faced a great dearth of strong minority students in their applicant pools. The schools routinely admitted minority students at great risk of failure. And race was not simply another diversity characteristic. The weight given to race at a great many schools far exceeded the weight given to all other diversity factors *combined*. Such practices were obviously in tension with the spirit of Powell's words, but his decision only explicitly banned quotas.

Powell seems to have been well aware of this problem. According to John Jeffries's excellent biography (1994), Powell approached *Bakke* pragmatically. He felt that merely affirming the California Supreme Court – and prohibiting racial preferences in education – would be too dramatic a step to take in 1978; some time was needed to give blacks a foothold in the leadership rungs of society. But he found outright quotas offensive, and thought explicit set-asides would become rigid and divisive. He wanted a solution that seemed to curtail preferences while not precluding them, and he wanted a rationale that did not empower every college to engage in broad social engineering.

For more than a generation, the Supreme Court had consistently applied "strict scrutiny" to racial classifications; under this standard, governments using racial classifications must show that they have a "compelling interest" motivating the use of race, and that the means employed to achieve that interest are not merely reasonable, but "narrowly tailored" to achieve the government's purpose. Virtually all forms of government discrimination prevalent in the 1950s and early 1960s fell before such a standard, but many argued that "strict scrutiny" was not the proper standard for "benign" discrimination programs, like the Davis quotas, where politically weak groups were favored. But in keeping with his view that minority preference programs should be temporary, and not become entrenched, Powell thought it essential to keep the "strict scrutiny" standard. By defining a public university's interest in diversity as a "compelling interest", and by suggesting that race could be only one of many factors in the diversity mix, Powell found a rationale that simultaneously (a) worked as a legal argument, (b) achieved his various goals in the case, and (c) achieved a compromise on a socially divisive issue.

The cost of these successes was an opinion that was hopelessly vague. Powell's opinion laid out no timetables, no test of how a university would demonstrate its "compelling interest" in diversity, and no guidance on when the size of a racial preference crossed an impermissible line. He even suggested that an attraction of a "diversity" program, like the one used by Harvard College, was that there was no "facial" (e.g., declared) intent to discriminate. As Jeffries points out, "This was pure sophistry. Harvard did not – and could not – deny that race was a factor in admissions. By refusing to look beyond "facial intent" in situations where the fact of racial preference was open, acknowledged, and indisputable, Powell simply penalized candor. Stripped of legalisms, the message amounted to this: 'You can whatever you like in preferring racial minorities, so long as you do not say so.'" (Jeffries, 1994)

Universities got the message. Quotas disappeared after *Bakke*, but as noted above, strict numerical quotas were almost invariably foolish and inefficient methods of implementing policy anyway.

In their place came "diversity" programs that usually listed many student characteristics of interest to the school, and did not mention that race was preeminent among these. Schools maintained racial goals, but were generally careful not to articulate these as specific numbers. An admissions officer would understand from general administrative discussions that racial diversity was very important; she would then produce a student body that reflected, racially, the makeup of the applicant pool. Administrators could then signal that the weight given to race should go up ("we need better representation") or go down ("we need to pay closer attention to minimum credentials") at the margins.

Substantively, *Bakke* left racial preferences perfectly intact. An exhaustive study by political scientists Susan Welch and John Gruhl found that Bakke had no noticeable effect on minority enrollments at either law or medical schools. A survey of law school admissions officers found that only one in a hundred respondents felt that Bakke had a "significant" impact on their own school's policies (even though a large majority conceded that *other* law schools had had racial quotas before Bakke).[13] I am aware of no similar study done at the undergraduate level, but the available evidence shows black enrollments rising, not falling, at elite colleges after *Bakke*. (Bowen and Bok, 1998) Thirty years after the decision, the proportion of "underrepresented minorities" at the UC Davis Medical School was 16.8%.[14]

Although the advent of Reagan administration in the 1980s portended a new assault on affirmative action, nothing of the sort happened in the realm of higher education. Frank Dobbin has argued in his fascinating book, Inventing Equal Opportunity (2009) that by the 1980s, a diversity ideology had taken firm hold in much of corporate America; human resource directors evolved a language that legitimated hiring preferences as a strategy that increased efficiency and diminished the threat of litigation, so federal prodding – once important in pushing firms to hire minorities – was now irrelevant. Whatever zeal existed in the corporate sector for diversity, it paled in comparison to the thorough embrace of this ideal in higher education. (Maranto et al 2009) Preference policies solidified at flagship state universities, elite colleges, professional schools, and many doctoral programs, and spread through the South, where preferences had not been much used in the 1970s. Accreditation agencies increasingly considered a school's track record in fostering "diversity" as a key part of its mission, which often, in effect, required a school to have racial goals comparable to those of its peers. (US Civil Rights Commission, 2008)

Nonetheless, a second wave of challenges to higher education preferences gained traction in the 1990s. Under the influence of several appointments by Presidents Reagan and Bush had nudged the Supreme Court to the right, and in areas other than education the Court had sharply narrowed the permissible scope of preferences. Intellectual debate about the continued logic of, and need for, racial preferences surfaced even among centrists and progressives in a way it had not in the 1980s. (Jencks, 1992; Thernstrom and Thernstrom, 1997) Affirmative action showed signs of becoming a national political issue. President Clinton anticipated public restiveness on the issue with his 1995 initiative to "mend" rather than "end" affirmative action, and in 1996 California became the first of a series of states to ban racial preferences at public universities by popular initiative.

Into this environment came the second major court challenge to university preferences. In 1992, Cheryl Hopwood and (ultimately) three other applicants who had been rejected by the University of Texas School of Law filed suit in federal court, alleging both statutory and constitutional violations of her civil rights. After a district court opinion that, Powell-like, offered half a loaf to each party, the Fifth

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[13] Welch & Gruehl…

[14] This figure, unlike the 16% quota litigated in Bakke, did not include Asians. (Princeton Review, 2009 at 244)

Circuit Court of Appeals ruled strongly against the use of racial preferences, even finding that Bakke was no longer good law because of subsequent Supreme Court decisions in areas outside higher education. This decision effectively banned the use of race in university admissions throughout the Fifth Circuit (Texas, Louisiana and Mississippi). When the Supreme Court declined to grant certiorari in *Hopwood*, many observers concluded that a national prohibition was only a matter of time.

A coalition of anti-preference lawyers and nonprofits decided to put this idea to the test with two lawsuits in federal court challenging different admissions practices at the University of Michigan. *Gratz v. Bollinger* challenged the use of race by Michigan's undergraduate college, and *Grutter v. Bollinger* challenged racially preferential admissions at Michigan's Law School. In both suits, the plaintiffs focused on the two key facts: administrators at both schools used racial preferences openly, and they used them on a large scale.

The battle was joined on an epic scale, for observers on all sides saw the case as the last stand for state-sponsored affirmative action policies. The University of Michigan commissioned significant internal research on the benefits of the preference programs; media coverage was intense; and, as the case progressed, *amici* briefs poured into the courts in record numbers.

The plaintiffs won victories in both cases in the lower court, though the judge in *Gratz* held that amendments to Michigan's undergraduate policy, undertaken since the commencement of litigation, had rendered it constitutional. On appeal, the Sixth Circuit took *Grutter* up en banc and reversed in favor of the University. The Supreme Court then took the unusual step of not only granting cert to *Grutter*, but taking *Gratz* directly from the district court, so that it could hear both appeals together.

The Court faced two cases that had a few differences but were dominated by similarities. Both Michigan's undergraduate program and its law school were elite programs, and were therefore highly selective.[15] Both schools were therefore highly selective, though the law school was more so. Both schools drew many of their students from out-of-state, though again the law school had a more genuinely "national" student body. In both schools, black and Hispanic applicants had much lower average credentials than white and Asian applicants, and under most conceivable color-blind policies, would be admitted at significantly lower rates.

There were three significant differences between the two programs. The College was a much larger program, and thus received many more applications – between fifteen and twenty thousand each year, compared with between three and four thousand for the Law School. And the College, like most undergraduate colleges, took significant account of a larger number of factors in its admissions decisions than did the law school. As in most of legal education, Michigan Law School's admissions decisions could be largely predicted by simply knowing a student's LSAT score, college GPA, and race. At the college, in contrast, many different test scores were relevant (SAT I, achievement tests, AP exams), and more attention was paid to the student's area of interests, essays, socioeconomic status, and so on. The scale and complexity of the undergraduate admissions process led to a third difference: the College used an explicit point system, while the Law School did not.

As in *Bakke*, the Supreme Court was closely divided on the question of racial preferences at a public university. Three Justices (Ginsburg, Souter and Stevens) considered both programs to be

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[15] Michigan's undergraduate college was (and is) considered among the top three or four undergraduate public universities in the nation; it's law school was (and is) generally ranked first among public law schools, and even including private schools like Yale and Harvard, ranked among the top six or seven.

constitutional; four Justices (Rehnquist, Kennedy, Thomas and Scalia) considered both to be unconstitutional. Of the two Justices in the middle (Breyer and O'Connor), Breyer wrote only a brief and not very revealing opinion to explain the distinction between the two. Thus, O'Connor's opinion proved to be as important in this round as Powell's opinion was in *Bakke*.

Justice O'Connor followed Justice Powell's footsteps, at least to a certain point. Like Powell, she viewed the pursuit of "diversity" as the key rationale for racial preferences; she held that public universities have a compelling interest in fostering this diversity, which meant that even under the "strict scrutiny" triggered by a racial classification, it might survive. The question was how race could be used, and here, O'Connor spelled out a seemingly challenging list of criteria for a valid racial preference system:

1) A university must, in good faith, determine that a diverse student body is essential to its educational mission and that race is an essential element of this diversity;
2) Each student given a racial preference must be selected because of the student's unique ability to contribute to the school's diversity; race by itself, in other words, should never be "the defining feature of his or her application", the school should instead use race only when it intersects with other diversity-enhancing characteristics;
3) No group of minority students can be "insulated" from competition with all other students; rather, if a school chooses to consider race at all it must "consider all pertinent elements of diversity in light of the particular qualification of each applicant."
4) Numerical targets for race representation were not permissible, though schools could seek a broad "critical mass" of minority students. "Racial balancing" was "patently unconstitutional."
5) Schools using race must demonstrate that race-neutral methods of achieving their diversity objectives are inadequate, and that race consideration itself is only a "temporary" expedient.

With these principles in hand, O'Connor rather easily struck down the College's racial preference system. Clearly, giving a large point boost to every black and Hispanic student violates at least the second of the above principles, and arguably the third as well. But O'Connor simultaneously, and rather mysteriously, concluded that the Law School easily met these same criteria.

On some counts, it was obvious that O'Connor went out of her way to find the Law School in compliance with her tests. On the first criteria, she found that ['good faith' will be presumed, absent a showing to the contrary.] Since the test itself came from her opinion, it was hard to see how the plaintiff could have been expected to show, at the trial phase of the case, the university's "bad faith". On the fifth criteria, she wrote that "we take the Law School at its word that it would 'like nothing better than to find a race-neutral admissions formula' and will terminate its race-conscious admissions program as soon as practicable," even though there was no evidence in the record that the Law School had experimented with race-neutral methods or reduced (rather than expanded) the scope of its racial preferences over time. O'Connor expressed confidence, again without citing evidence, that preferences would be gone by the year 2028.

But the greatest difficulty with O'Connor's opinion was her seeming confusion about the effect of a point system and her belief that the Law School "actually gives substantial weight to diversity factors besides race." To see the difficulties in her views, it is helpful to inspect the data in Tables 1 and 2, which are calculated from the UM College and Law School's admissions decisions in 1999 –

information that was before the Court but not presented in this way. The two tables use a simple academic index: a scale that runs from 0 to 1000 and is calculated for each student from their test scores (SAT I for the College; LSAT for the Law School) and their recent grades (high school GPA for the College; college GPA for the Law School).[16] The index is simple, but it powerfully illustrates some basic dynamics of the two admissions systems.

Table 1
Undergraduate Admissions Rates at the University of Michigan, Nonresidents Only, 1999
By Academic "Index" and Race

Admissions Rate for Nonminority Applicants		Admissions Rate for Underrepresented-Minority Applicants	
900 and above	99.6%	800 and above	98.4%
850-899	93%		
800-849	68%		
750-799	30%	750-799	90%
700-749	7%	700-749	89%
Under 700	5.4%	650-699	48%
		600-649	21%
		Under 600	7%

Table 2
Comparative Admissions Rates at the University of Michigan Law School, 1999
By Academic "Index" and Race

Admissions Rate for White Applicants		Admissions Rate for Black Applicants	
850 and above	97%	710 and above	96%
830-849	91%		
810-829	70%		
790-809	44%		
750-789	16%		
710-749	5%		
Under 710	2%	690-709	90%
		670-689	72%
		650-669	38%
		610-649	22%
		570-609	11%
		Under 570	0%

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[16] The relative weights for each school's academic index were determined by regressing applicant characteristics on admissions outcomes, and using these coefficients to determine weights. In other words, the weights reflect, as best we can determine, the relative weight given to test scores and grades by admissions officers.

Note, first, that for the "majority" race, the index is more closely related to admissions outcomes at the Law School than at College.   At the College, there is a difference of at least one hundred fifty index points between the ranges where non-minorities have a very low chance of admission (i.e., the "under 750" index range) and a very high chance of admission (i.e., the "900 and above" range). At the Law School, there is an analogous swing in admission probabilities over a mere one hundred point range (compare "710-749" for whites with "850 and above").[17] This implies that the Law School is placing great weight on this simple index, and less weight on other factors (a conclusion that can also be demonstrated mathematically).

Second, and more important, the overall weight given to race is evidently greater in the Law School data than in the College data. As close inspection of these tables will suggest, and as more complex analysis confirms, being "black" is equivalent, in Law School decisions, to being awarded an extra 140 index points; at the College, the 15-point boost given to minorities translates to about 120 points on the academic index shown here. (Ayres and Foster, 2006)

If we put these two observations together, a third conclusion follows: blacks at the Law School were operating on a completely different admissions track from whites, one more different (more segregated) than the separate tracks created by the College's "point" system. In the academic index range at the Law School where white admissions rates varied (710 and above), blacks were essentially guaranteed admission. And at the admission categories where blacks were actually in competition for spots (709 and below), whites had virtually no chance of admission. O'Connor's claim that "the Law School frequently accepts nonminority applicants with grades and test scores lower than URM applicants who are rejected" is simply untrue, unless she is using "frequently" in absolute terms and half-a-dozen instances in each admissions cycle qualify. Certainly it happened ***much less*** often at the Law School than at the College, in both absolute and relative terms. The College, meanwhile, obviously took greater account of diversity factors other than race; indeed, the school's point system gave roughly the same weight to socioeconomic background as to race, making it a comparatively rare oasis of class diversity in a nation full of elite colleges serving only affluent students.[18]

Like Justice Powell, O'Connor plainly wanted to give half a loaf to both the critics and the proponents of racial preferences at universities. But, even moreso than in Powell's case, O'Connor's lack of analytic rigor made a mess of her opinion; she simply did not understand the actual operation of either the College or the Law School admissions systems. She invalidated "point" systems without any substantive or logical reason for doing so, and she approved a system – the law school's "holistic" method -- that embodied the actual harms that most concerned her.[19] The net message for anyone paying close attention seemed to be that schools could do what they liked, so long as they sounded the right intentions and did not sufficiently quantify their work so that an outsider could readily determine how their preferences worked. No wonder Mary Sue Coleman was smiling.

V. *Impact of Grutter and Gratz*

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[17] The same distinction applies to minority admissions: at the College, there is a 200-point gap between "almost certain" admits and "almost certain" rejections among underrepresented minorities; at the Law School an analogous swing occurs over merely 140 index points.

[18] [Cite to Sander (2011), Kahlenberg…]

[19] Note that Ayres and Foster (2006) reach the same analytic conclusions I did in Sander (2004).

University of Michigan. If *Grutter* and *Gratz* mattered anywhere, they should have mattered at the University of Michigan. After all, the College's methods of using race in undergraduate admissions had been specifically ruled unconstitutional by the Supreme Court. One might have expected dramatic changes in both methods and outcomes. Can we tell what happened?

Table 3, below, replicates the analysis presented in Table 1 on Michigan's undergraduate college – except it uses admissions data from 2006, three years after Grutter.[20] Since, post-Gratz, the university was no longer treating race as a two-category phenomenon (URMs vs. non-URMs), Table 3 compares two specific racial groups: blacks and Asians.

In the 2006 regime, things have changed, but not necessarily in the way Justice O'Connor may have envisioned. There is still a broad range of index scores within which blacks are guaranteed admission. And, in the lower index categories, there are much greater disparities between black and Asian admission rates in 2006 than existed between URM and non-URMs in 1999. There are thus many more cases in 2006 where race appears to be "the determining factor" in admissions. Not surprisingly, statistical analysis shows race was given more weight in 2006 than in 1999.

Table 3
Undergraduate Admissions Rates at the University of Michigan, Nonresidents Only, 2006
By Academic "Index" and Race

Admissions Rate for Asian Applicants		Admissions Rate for Black Applicants	
900 and above	75%		
850-899	36%	800 and above	96%
800-849	11%		
750-799	5%	750-799	72%
		700-749	43%
Below 750	3%	650-699	27%
		Under 650	14%

Even more ironic is the emergence of "racial balancing" in UM College admissions after *Gratz*. Under the school's challenged system, applicants got points if they were "underrepresented minorities" ("URMs") – that is, black, Hispanic, or American Indian. Race did not otherwise factor into admissions, so URMs got one type of preference, and anyone of another race got none. By 2006, however, the College was engaged in full-scale racial engineering: blacks received much larger preferences than Hispanics, who received large preferences over whites, who received preferences over Asians. The tendency, if not the motive, of this multi-tiered discrimination was to keep admissions closely aligned with the racial composition of applicants. If this was not racial balancing, what could be?

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[20] This is the year Michigan voters passed Proposition 2, which prohibited the use of preferences; while the constitutionality of Prop 2 is still being litigated, the 2006 data offers the best chance to see how UM's undergraduate program implemented *Gratz* and *Grutter*. In calculating the 2006 index, I have used a slightly different formula to reflect changes in the relative weight UM gave to the SAT (and the shift of the SAT to a 2400-point scale). Note also that both Table 1 and Table 3 focus on out-of-state admissions, to control for the significant effect in-state residency has on admissions of all groups (the racial disparities reported here are not very different for in-state than out-of-state applicants).

In the 2006 data, we have information on the socioeconomic status ("SES") of each applicant. Strikingly, many Asians and whites with relatively low SES are denied admission in index ranges where many blacks with high SES are admitted. There is no evidence in this data that black applicants are evaluated individually to determine what special contribution their race might make to UM's educational environment. Rather, blacks are evaluated to see which ones with relatively low index scores can be admitted with the least chance of academic failure.[21]

In other words, the College's move to a "holistic" system in the wake of *Gratz* produced outcomes in which race was a more pervasive and heavily weighted factor, where every race was treated differently, and where socioeconomic diversity played a thoroughly subordinate role to race. None of these developments, of course, were known to Michigan voters, who approved by large margins a ballot initiative at the end of 2006 that sought, like California's Proposition 209, to ban the use of race altogether in state programs (including the University of Michigan). The enforceability of that ban is still unresolved at this writing (summer 2011).

Patterns at law schools. Next to the University of Michigan itself, the part of higher education that might have been most introspective after *Grutter* and *Gratz* were the nation's public law schools. For one thing, it was a law school admissions system that had received particularly intense scrutiny; one might have expected law schools to examine their own systems to make sure these had the characteristics vouchsafed by the Court. For another, *Grutter* marked the third challenge in a decade to racial preference systems used by law schools; these institutions were clearly unusually vulnerable to attack. One might thus have expected admissions systems to (a) become less mechanical, (b) institute smaller racial preferences, (c) grant racial preferences more inconsistently, and (d) eliminate distinctions in the racial treatment of favored groups.

Yet, so far as we can tell, public law schools tended to do exactly the opposite. Racial preferences generally became more mechanical, more consistent, larger, and continued to use different size preferences for Hispanics and blacks.

I make these claims with the aid of unusually good data on law school admissions both before and after *Grutter*. In 2003, a research assistant and I wrote to a number of law schools with public records requests,[22] and secured anonymized, individual-level admissions data from seven schools. In 2007, my staff and I made a more systematic effort, contacting nearly all the seventy-odd public law schools in the United States. In this round we secured data from forty law schools, including six that had responded in 2003. These forty are broadly representative of public law schools in the United States. The number of variables we obtained varied from school to school, but for all applicants at all schools, we have LSAT scores, undergraduate grades, race, and application outcome – the data needed to do the sort of basic analyses illustrated in Tables 1, 2, and 3.

In Table 4, I present four summary measures of how law school admissions systems operated before and after *Grutter*. The first two rows show estimates of how "mechanical" the admissions processes are. To measure this, I use the simple device of the Somers' D, which is a measure of how well one can predict a binary outcome. Admissions decisions are "binary" because there are essentially

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[21][Show more detailed analyses: (a) perhaps an excerpt from the spreadsheet, or (b) an analysis of Asians and blacks in the 690-749 range.]

[22] FOIA – briefly explain law?

two possibilities: accept or reject the applicant.[23] With this data, one can run a logistic regression analysis and predict who is admitted, and one can measure how accurate are the predictions. Suppose, for example, that a law school admits half of its applicants. If asked to predict the outcome of "application 3759", with no knowledge of the applicant's individual characteristics, any guess one made has a 50/50 chance of proving correct. But suppose that if one knows each applicant's LSAT score and undergraduate GPA ("UGPA"), one can make correct guesses 80% of the time. The error rate has fallen from 50 out of 100 to 20 out of 100, a 60% reduction. The Somers' D would thus be .60. Note that with *all* of the information used in admissions decisions, one could in principle achieve a Somers' D of 1.00. With the few pieces of data we do have, any Somers' D over .80 suggests a simple and fairly mechanical system. Indeed, the Somers' D for University of Michigan's college under the pre-*Grutter* formula system was .81.

With the same regression analysis, one can determine the relative importance of various admissions factors. For example, if we predict admissions outcomes and include LSAT, UGPA, in-state residency, and race, the resulting regression equation will tell us the association between a change in any factor and the change in admission probability. This is not conclusive, because there are other factors not in one's equation that shape admissions (e.g., college quality, letters of recommendation, public service, the application essay). However, the closer one's Somers' D gets to 1.00, the less scope there is for unmeasured factors to have any influence. In other words, if one can predict admissions outcomes from these factors with a high degree of accuracy, one can infer that no other factors figured importantly in admissions decisions.

Table 4 also includes averages calculated from the "odds ratio" for black admissions (relative to white admissions) at each law school. The odds ratio is a descriptive statistic generated by a logistic regression. In very approximate, intuitive terms, the square root of an odds ratio indicates how much more likely a black is, relative to a white, to be accepted by a law school, at a credential range where both groups have a non-zero chance of admission or rejection. [Give illustrative odds ratio for Tables 1 and 2]

Table 4
Characteristics of Law School Admissions Before and After Grutter

Characteristic	Six Public Law Schools		Forty Law Schools Post-*Grutter*, 2005, 2006, and 2007 Admissions Cycles [check these]
	Pre-*Grutter*: 2002 & 2003	Post-*Grutter*: 2005, 2006, 2007	
Somers D, all decisions	.82	.85	.86
Somes' D, decisions on black applicants	.76	.85	.88
Preference size (in LSAT points), black applicants	11.2	12.7	13.1
Median "odds" ratio, black-to-white admissions	102	138	150

Note: All figures are averages for the observed admissions cohorts across schools, unless otherwise noted.

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[23] Other outcomes….

[Black/Hispanic differences?]
[Also include analysis to row 1 to show impact of race]

The patterns shown in Table 4 are striking. By all four measures, law school admissions became, on average, more mechanical and more focused on race after the *Grutter* decision. Notably, the increase in Somers' D is particularly large and abrupt for black applicants. (Recall that, to Justice O'Connor, the sine qua non of a constitutional use of race was considering the *unique* contributions particular minority students could make to a school's diversity.) The average Somers' D for blacks of .88 in our forty-school sample means that, at many law schools, admissions officers are effectively segregating admissions and simply admitting all but two or three of the highest-credential black applicants, while rejecting hundreds or thousands of applicants of other races with identical credentials.[24] These data suggest very narrow definitions of diversity indeed.

Of the six law schools for which we have before-and-after data, only the University of Michigan Law School – the subject of *Grutter* -- showed significant signs of moving towards a significantly less mechanical admissions process in the years following the decision, with Somers' D scores for all admittees falling below .75. This is no accident; Dean Evan Caminker has told me that the school deliberately tried to make its admissions more multi-factored even before the Supreme Court's decision in *Grutter*.

The data on preference size and odds ratios shows an increased focus on race after *Grutter*, and an increasing tendency to insulate black admissions from other admissions decisions. [Discuss Hispanic preferences…]

What are the reasons for these patterns? At these we can only really guess, since any law school dean (or head of admissions) would obviously act at her great peril in candidly discussing admissions rationales. But a variety of evidence supports the hypothesis that several institutional forces are at work:

1) As Mary Sue Coleman's reaction in front of the Supreme Court illustrated, most of the higher education establishment felt much more relief than concern about the *Gratz/Grutter* framework. Even before analysts demonstrated that Michigan's law school gave greater weight to race than Michigan's undergraduate program, it was obvious that O'Connor, like Powell before her, had placed much more emphasis on institutional form than substantive outcomes.

2) The advantages of formulas, as a means of efficiently summarizing complex information about individual applicants, were too great to be dispensed with by many (and perhaps the great majority) of universities, colleges and professional schools. The key to staying out of trouble was to not give a specific assignment of points to race. Schools consequently moved to one of two methods: (a) informally segregated admissions, or (b) "holistic" processes that were carefully cultivated to produce specific and predictable racial results.

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[24] Recall that a Somers' D of .88 means that about 94% of all admissions decisions can be predicted knowing only the LSAT, UGPA, and race of the applicant. Keep in mind, too, that these figures are minimums; if we knew about other factors considered in admissions (e.g., recommendations, disciplinary records, etc.) we would get still closer to perfect prediction.

3) All admissions officers realized if they increased the level of "individualized assessment" they gave to minority candidates, it would be necessary to delve further down (credential-wise) into the minority pool to admit the requisite number of students. In other words, factoring in more "soft" considerations, such as a student's community service or socioeconomic status, would necessarily mean giving less weight to "hard" credentials, like LSAT and college grades. Yet admissions officers were usually aware that admitting students with lower hard credentials would hurt their school's graduation and bar passage rates. This logic led them to resist the holistic approach most doggedly when considering minority students, even though it was with racially-preferred students that O'Connor envisioned the most individualized assessment.

4) Schools felt themselves more than ever pulled into a competitive process in which eliteness ratings were importantly influenced by both the credential level of their students (median LSATs and college grades) and by the school's "diversity" (URM) numbers. Both pressures pushed them towards admissions that were simpler – driven by scores, grades and race – rather than more complex.

5) A guiding principle of Justice O'Connor's decision – and a value clearly shared by most of the Court – was that universities should have the autonomy to decide whether diversity is necessary to their educational mission, and – within limits – what form that diversity should take. This implies that accreditation bodies – external agencies that decide whether schools are meeting minimum standards – should not judge the diversity policies of schools (aside, of course, from making sure civil rights law are not violated). Yet the available evidence suggests that these bodies continue to be quite heavy-handed in mandating and enforcing "diversity" policies that cannot be met without the use of large racial preferences. (USCCR 2008)

VI. *Affirmative action and judicial policy-making*

Over the past generation, the impact of judicial decisions has become an intellectually rich and active area of research (Canon and Johnson, 1984, 1999; Rosenberg, 1991). Courts have very limited capacity, and not much inclination, to insure that decisions are actually implemented. A great deal depends on whether decision-makers affected by the decision (in this case, university administrators) are in sympathy with a holding, believe that disobedience can be readily detected, and fear the consequences of an enforcement lawsuit. (White, 2001)

When addressing matters that rivet and deeply divide American society, the Supreme Court has usually treaded with caution. As Michael Klarman argues in his insightful history of the Court's civil rights decisions, Court decisions often reflected public opinion at least as much as they shaped it. Justices were wary of issuing decisions that were unlikely to be implemented; and when the Court did lead, it usually avoided getting very far in front of emerging social consensus. (Klarman 2004) In affirmative action, the Court faced an unusual kind of public division. Opinion polls and popular votes on "preference bans" showed that a majority of Americans opposed racial preferences (and would be even more opposed if they knew how large and mechanical these preferences were at many universities). But institutional leaders in the United States strongly favored them – not just at universities, but in the corporate world and even the American military. The briefs submitted to the

Court, which provide a rough index of at least how "elites" weigh in upon an issue, ran overwhelmingly in favor of racial preferences for both *Bakke* and *Grutter/Gratz*. Powell and O'Connor both presumably knew that, given the high allegiance of university administrators to preference systems, obedience to a sweeping restriction of affirmative action was not a foregone conclusion. (Lipson 2007, 2009)

Under the circumstances, it is not surprising that Powell and O'Connor both hit upon the idea of banning some very visible *symbol* of affirmative action -- quotas in *Bakke* and point-systems in *Gratz* – while remaining somewhat vague about what sort of preferences *were* permitted. In this way, the Justices struck politically viable compromises and made it likely that at least on the face of things, practices would appear to change.

But a steep price was paid. As others have shown, Supreme Court decisions that set vague standards are particularly likely to be half-heartedly implemented, or even completely ignored, by the government actors with relevant operational responsibilities. (Staton and Vanberg, 2008) But in the affirmative action cases, the stakes were higher; the Court was interpreting the application of its most exacting standard – strict scrutiny – to the delicate issue of reverse discrimination. In not only allowing preference programs to survive strict scrutiny, but creating vague standards, the Justices sent a double message: not only were the particulars vague, but the underlying standard was made soft, rather than formidable.

From what we know of Justice Powell's motivations in *Bakke*, he did seek a meaningful curtailment of preferences; certainly he wanted to avoid the long-term entrenchment of race as a central criteria for allocating university spaces. But *Bakke* led to just that type of entrenchment. We know less, for now, about Justice O'Connor's motives, but it is hard to imagine she secretly hoped her decision would move on-the-ground practices in the opposite direction from her stated principles. Indeed, remarks O'Connor has made since her retirement suggest she regrets the vagueness of *Grutter*. In both cases, the central error made in these decisions was to make the operation of preference systems more opaque, rather than more transparent.

Transparency in this context means two things: first, that those monitoring university behavior can readily measure the size of racial preferences; and second, that the standards governing the use of preferences be concrete enough so that monitors can determine with some confidence whether a standard is violated. Point systems are obviously helpful in attaining these goals, but they are not essential. Justice Powell could have, for example, held that racial preferences could be no larger than those extended based on socioeconomic disadvantage. Justice O'Connor could have made her vague twenty-five year timeline more concrete by requiring that universities cut the size of their racial preferences at least in half every ten years. So long as these sorts of standards are accompanied by a requirement that universities engaging in racial preferences create anonymized, public datasets that record key applicant characteristics and admission decisions, the decisions become almost self-executing. Without transparency, "strict scrutiny" becomes literally a contradiction in terms.

Transparency would have collateral benefits, as well. A requirement that universities provide data on other types of diversity factored into admissions would make far more public the extraordinary lack of socioeconomic diversity at nearly all professional schools and elite colleges. (Kahlenberg, 1996; ---, 2004; Sander 2011) Data on student outcomes would make it far easier to document the extent of the "mismatch" phenomenon. Transparency would not only help make the Supreme Court's holding tangible and enforceable; it would also lead to a common empirical understanding of affirmative action, and a level of accountability in higher education, that has been sought, but missing, for many years.

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