

When Hope Lies with the Courage of a Cowardly Lion:
Social Science, Race, and Judicial Political Affiliation in Contemporary Race
Conscious Admissions Cases

Crystal Gafford Muhammad¹

North Carolina State University

Department of Adult & Higher Education

300 N Poe Hall, Campus Box 7801

Raleigh, NC 27695-7801

crystal_muhammad@ncsu.edu

919.515.6295

¹ **Crystal Gafford Muhammad** is an Assistant Professor at North Carolina State University College of Education in the Department of Adult and Higher Education where she teaches Higher Education Law, Politics, and Race in Higher Education; J.D., University of Virginia School of Law (1998); Ph.D., University of Virginia Curry School of Education (2003). Dr. Muhammad is also the 2003 first-place winner of the American Association for Higher Education's Black Caucus Doctoral Student Award and fellow of the 2003 Higher Education Law Roundtable hosted by The Institute for Higher Education Law and Governance at the University of Houston Law Center.

Cowardly Lion: Courage.
What makes a King out of a slave?
Courage.
What makes the flag on the mast to wave? Courage.
What makes the elephant charge his tusk in the misty mist or the dusky dusk?
What makes the muskrat guard his musk? Courage.
What makes the Sphinx the 7th Wonder? Courage.
What makes the dawn come up like THUNDER?! Courage.
What makes the Hottentot so hot?
What puts the "ape" in ape-ricot?
Whatta they got that I ain't got?

Dorothy & Friends: Courage!

Cowardly Lion: You can say that again.

- The Wizard of Oz (1939)

Introduction

Through his alter ego of Geneva Crenshaw, Derrick Bell in *And We Are Not Saved* travels back in time to the 1787 Constitutional Convention in an effort to warn the framers of the legacy of inequality they were about to enshrine in the American (U.S.) Constitution.² Yet, the most prized interests of the framers – the pursuit of “happiness,” their wealth and their power – proved too tempting. The result was a bedrock of American (U.S.) law, the Constitution, which cemented the disempowerment of anyone not wealthy, not male, and not White. As Geneva Crenshaw observes, the framers were politicians, just like politicians of our time, whose ultimate interest is to preserve their personal interests. While not necessarily partisan,

² Derrick Bell, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987).

judges of the present time are political beings with political philosophies that shape the law in favor of inequity.

Employing the critical race theoretical frame of the price of racial remedies, this paper uses statistical analysis to document the influence of judicial political affiliation in the outcomes of contemporary race conscious admissions cases.³ Part I begins with an overview of Critical Race Theory (CRT) from a historical perspective. As a chief criticism of critical race theorists is the over-reliance on voice scholarship, the paper advances that CRT generation next should set out to empirically test the theoretical frames put forth by CRT founders.

Towards that end Part II presents an analysis of district and circuit court opinions at the level of individual judges prior to the Supreme Court's rulings in *Gratz* and *Grutter v. Bollinger*. The statistical analyses employed support the conclusion that the outcomes of these cases rest on the political affiliations of the judges, confirming the terse Critical Legal Studies (CLS) critique that "its all political".

Going beyond the CLS critique and centering my work in critical race theory, in Part III I ground my findings in Derrick Bell's price of racial remedies framework. What is most interesting here is that in the aggregate, the rule of judges in the arena of race conscious admissions run contrary to the Hamiltonian ideal of the courts as protectors of "minority" rights. While this finding is truer with respect to Republican

³ The cases grouped under the umbrella term of race conscious admissions are those voluntary desegregation cases in the K-12 context and affirmative action in admissions cases adjudicated from the mid-1990s to 2003, when the Supreme Court rendered its decisions in *Gratz v. Bollinger*, 122 F.Supp. 2d 811 (MI 2000), *cert. granted*, 537 U.S. 1044 (2002), *decided*, 539 U.S. 244 and *Grutter v. Bollinger*, 137 F.Supp. 2d 821 (MI 2001), 288 F.3d 732 (6th Circ. 2002), *cert. granted*, 537 U.S. 1043 (2002), *decided*, 539 U.S. 306.

judicial appointees, the support of “minority” rights by Democratic-appointees is noticeably less intense than Republican-support of majoritarian interests. This stands to reason as the hope of the continuation of affirmative action policies rest with the courage of cowardly lions: judges wedded to liberal formalistic inquiry, adjudicating a part from past, present, and future realities. Within the price of racial remedies framework Bell argues that Whites, even liberals, are not willing to surrender privilege and property interests without a trade a points that are pareto optimal for Whites.

While the perception of affirmative action in admissions is that it is a zero sum game, affirmative action as supported by the goals of educational institutions to reap the educational benefits of diversity actually presents a point at which interests converge. Students of color gain access to elite institutions while the institution uses them to spark the creativity and critical thinking skills of their White counterparts. In this vein the Supreme Court was willing to uphold the interests of the University of Michigan to create a diverse class. Part IV concludes with the neatly contained Hollywood-styled aspiration of Justice O’Connor in *Grutter v. Bollinger*. Twenty-five years will come and the groundwork has been laid for cowardice to prevail to the detriment of equity.

Part I – Towards a New Era in Critical Race Theory

A. CRT Beginnings

The change of the Supreme Court from the era of the Warren Court to the era of the Burger Court marks a significant change in the history of American law, especially

with respect to civil rights. It may have been the case that the Warren Court heard more “easy,” cases where direct evidence of discrimination by governmental actors were traceable to their *de jure* sources. It may have been the case that the Warren Court dealt with more egregious cases of discrimination, such that one’s moral senses as an American were incensed. Or it may have been the case that the Warren Court held the ear and greater sympathy for people of color and “minority” rights.⁴ Whatever the reason, the tide on the Court was changing and in the midst of this change was a young civil rights activist attorney turned father of critical race theory Derrick Bell.

Bell began his legal work with the NAACP Legal Defense Fund in 1960, in the wake of civil rights victories in *Brown v. Board of Education* (1954)⁵ and *Cooper v. Aaron* (1958).⁶ However, by the time he became the first tenured African American

⁴ See HAROLD J. SPAETH AND JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT (1999) (documenting Court support for civil rights in the Warren, Burger, and Rhenquist Courts, finding significant progression towards conservatism beginning in the Burger Court); and Francine Sanders Romero, The Supreme Court and the Protection of Minority Rights: An Empirical Examination of Racial Discrimination Cases, 24 LAW AND SOC’Y REV. 291 (2000) (presenting data that while the rationales for why more liberally composed Courts were better able to support minority rights cannot be disentangled, that there is a significant difference in the upholding of minority rights between liberal and conservative compositions of the Supreme Court).

⁵ 347 U.S. 483 (1954) (*Brown I*).

⁶ 358 U.S. 1 (1958). *Cooper v. Aaron* is significant as it is the Warren Court’s first pronouncement against massive resistance to the Court’s initial decision in *Brown I*. Note, however, that resistance by public officials in the South, such as the Governor and Legislature of Arkansas brought to Court in *Cooper*, was encouraged by the Court’s decision in *Brown II*, 349 U.S. 294 (1955) (employing a framework of “all deliberate speed” which permitted delay in remedying discrimination). For more on massive resistance see Black, The Unfinished Business of the Warren Court, 46 WASH. L. REV. 3 (1970) and James T. Patterson, BROWN V. BOARD OF EDUCATION A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY (2001). Cf. J. Harvie Wilkinson, FROM BROWN TO BAKKE 68 (1979) (arguing that at the time of *Brown I* it was unclear whether the federal executive and legislative branches would enforcement, as such there is no clear causal link between *Brown II* and massive resistance).

Note that this is generally a positive time in civil rights history. During Bell’s time at the Legal Defense Fund from 1960 to 1965, the Warren Court’s 1963 decisions of *Goss v. Board of Education*, 373 U.S. 683 and *Watson v. Memphis*, 373 U.S. 526 and its decision in *Griffin v. County School Board*, 377 U.S. 218 (1964) seemed to harken the end of massive resistance to desegregation in education and public facilities. Similarly on the legislative front the Civil Rights Act of 1964 and the Voting Rights Act of

law professor at Harvard in 1971, Martin Luther King was dead (1968), White populism grew and White liberal support for the quest of equality waned, trembling in fear of the wrath of Black nationalism.⁷

From the ivory tower, Bell, along with other legal scholars of color, noted a turn in civil rights trends coinciding with President Nixon's appointment of Warren E. Burger to the position of Chief Justice. According to the historico-legal work of Bernie Jones, Bell and other saw "the Supreme Court was no longer an articulate voice in favor of civil rights and liberties; instead, it became a threat, for the justices seemed able to limit precedents or do away with them altogether".⁸ From this vantage, Bell began to see *Brown I* in a new light, a failure as the formalistic grounds upon which the Legal Defense Fund based its successful argumentation of *Brown* was now *Brown's* undoing. The prize in desegregation strategies was not just to have Black children sit next to White children in school. The prize was equal opportunity and equitable resources for all in education, work, civic participation, and leisure.⁹

Towards the gaining of the true prize, Bell began his work towards the training of a new generation of lawyer activists. As a practitioner-scholar, Bell was influential

1965 codified the Court's work to allow systematic enforcement of civil rights for all people. More personally, after his tenure with the Legal Defense Fund Bell joined the administration, working as the deputy director of civil rights in the Department of Health, Education, and Welfare. From all angles it seemed to be the case that equality of opportunity was becoming a reality for people of color. For more on the life and work of Derrick Bell see Derrick A. Bell, Richard Delgado, and Jean Stefancic, *THE DERRICK BELL READER* (2005).

⁷ See Bernie D. Jones, Critical Race Theory: New Strategies for Civil Rights in the New Millennium? 18 HAR. BLACKLETTER J. 1, 1-4 (2002).

⁸ *Id.* at 3.

⁹ See William F. Tate, IV, Critical Race Theory and Education: History, Theory, and Implications, 22 REVIEW OF RESEARCH IN EDUCATION 195, 218-221 (1997).

as a teacher and mentor to both the theory and practice of civil rights litigation. Bell's pedagogical and scholarly work reflects praxis, the intersection of theory and practice, as engaged in a critique of liberal formalism. His students also engaged in this notion of praxis, becoming leaders of protest movements at Harvard in an effort to gain legal education capable of creating change instead of reinforcing the status quo.¹⁰ Bell's work with his colleagues and students coalesced into creating a set of theoretical frameworks we now know as Critical Race Theory (CRT).

B. Central Tenets of Critical Race Theory

At its core critical race theorists acknowledge a centrality of White supremacy and the subordination of people of color as foundational and ubiquitous in American (U.S.) society. The intellectual precursors of Critical Race Theory began as critiques of formalism within a more generalized movement of Critical Legal Studies (CLS).¹¹ Going beyond the CLS critique of law and jurisprudence as emanating from politics and chaos, these works began to identify that racism is imbedded in the fabric of American (U.S.) law. As such law as constructed is incapable of reaching equitable results along racial lines.

¹⁰ *Id.*

¹¹ See Kimberlé Crenshaw, Neil Gotanda, Garry Peller, and Kendall Thomas (Eds.), *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT*, 1995. See also, Bell, Delgado, and Stefancic, *supra* note 6.

As critics of CLS, critical race scholars are “racial realists”¹² committed to the exposure of the racialized nature of political, economic, and social structures. Critical Race Theorists give language to the centrality of race in American (U.S.) law and society, as well as the injustices springing there from. By drawing upon CRT, Philosopher Charles W. Mills offers the “Racial Contract” as a vehicle for understanding American racism. Mills suggests that

...unlike mainstream white theory, liberal *and* radical, the “Racial Contract” sees that “race” and “white supremacy” are themselves critical theoretical terms that must be incorporated into the vocabulary of an adequate sociopolitical theory, that society is neither just a collection of atomic individuals nor just a structure of workers and capitalists. On the other hand, the “Racial Contract” demystifies race, distancing itself from the “oppositional” biological determinisms (melanin theory, “sun people” and “ice people”) and occasional deplorable anti-Semitism of some recent elements of the black tradition, as the 1960s promise of integration fails and intransigent social structures and growing white recalcitrance are increasingly conceptualized in naturalistic terms.¹³

As such, from a CRT vantage, the social contract is not racially neutral, but imbeds White privilege and the CRT notion of “Whiteness as Property.”¹⁴ More pragmatically, the appearance of differences in achievement and attainment across socio-economic, political, and educational measures are systematic and endemic reflections of tensions between expressed ideals of “the rule of law” and “equal

¹² *Id.* As the class critique proffered by CLS scholars principally concerned themselves with wealth differentials, the founders of CRT sought a new vocabulary to articulate and name structures of oppression in the law and society under girded by differences in race

¹³ THE RACIAL CONTRACT, 126 (1997).

¹⁴ See Cheryl Harris, *Whiteness as Property*, 106 HAR. L.REV. 1707 (1993).

protection.”¹⁵ These tensions are imbedded within the constitution and reinforced through formalistic interpretation.¹⁶

Towards an end of achieving social equity and justice, CRT advances the understanding of the centrality of race from a multiplicity of disciplinary and experiential perspectives within historical contexts.¹⁷ In this vein, CRT scholars advance true democracy that is pluralistic, justice seeking, and embracing of equality of opportunity in law as in fact.¹⁸

C. The Tools of Critical Race Theory, CRT’s Critique, the Response, and Responsibility of Generation Next

Multidisciplinarity and interdisciplinarity are core components of CRT work, a concept hardly new in law and legal scholarship. Louis Brandeis’ classic brief in *Muller v. Oregon*¹⁹ drew Supreme Court acceptance of social facts as having evidentiary value

¹⁵ Kimberlé Crenshaw, et. al. (Eds.), *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (1995).

¹⁶ *Bell, supra* note 2 at 50.

¹⁷ Mari Matsuda, Charles R. Lawrence, III., Richard Delgado, and Kimberlé W. Crenshaw (Eds.) *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 6* (1993).

¹⁸ See, Robert L. Hayman, Jr., *The Color of Tradition: Critical Race Theory and Postmodern Constitutional Traditionalism*, 30 HARV. C.R.-C.L. L. REV. 57 (1995). Note that the quest towards “equality of opportunity in law as in fact,” does not require the guarantee of lock-step equality of result for all. It is a mere extension of the framers aspiration for equality as expressed in its highest forms, not as carried out in their contradictory self-aggrandizing actions.

¹⁹ 208 U.S. 412, 426 (1908). For more on Justice Brandeis and the “Brandeis Brief” see S.W. Baskerville, *OF LAWS AND LIMITATIONS: AN INTELLECTUAL PORTRAIT OF LOUIS DEMBITZ BRANDEIS* (1994); A. T. Mason, *BRANDEIS: A FREE MAN'S LIFE* (1946); and, M. I. Urofsky, *A MIND OF ONE PIECE: BRANDEIS AND AMERICAN REFORM* (1971).

in legal cases.²⁰ Within legal scholarship, social science was drawn upon to support legal arguments. Social science methods were employed in CLS work and outgrowths of CLS such as Law and Economics. Similarly, social scientific methodologies are accepted in CRT.²¹

Part of the draw towards interdisciplinarity for CRT scholars was rejection of the necessary constraint within the methodology of formalism, as it often reinforces status quo inequity.²² In addition to social science approaches, one of the key methods CRT scholars developed to get out of the binds of formalism is voice scholarship. Voice scholarship gives outlet to marginalized voices to allow the disempowered to render their perspective on ostensibly natural and neutral occurrences in American (U.S.) life. Voice scholarship can be defined as a method of empowerment as seen through counterstory/ counter-narrative, the retelling of social and legal story from a racialized view.²³ The most controversial method within the voice scholarship genre involves the creation of new characters, alter egos, to retell stories within historical context.²⁴

²⁰ See John Monahan and Lawrence Walker, *SOCIAL SCIENCE IN THE LAW: CASES AND MATERIALS* (2002).

²¹ Richard Delgado, *When a Story is Just a Story: Does Voice Really Matter?*, 76 *VIRGINIA L. REV.* 95 (1990).

²² See, e.g., Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 *MICH L. REV.* 2411, 2415 (1989) (“Stories and counterstories ... offer a respite from the linear, coercive discourse that characterizes much of legal writing.”).

²³ See Tate, *supra* note 9, 218-221 (1997).

²⁴ For example, one of the first characters to arise out of the counter-narrative is Bell’s Geneva Crenshaw in *And We Are Not Saved* (1987). Through Geneva Bell is able to retell the stories of the Constitution and its subsequent interpretations via judicial review in a manner that exposes the tradeoffs made in favor of the White and the privileged, to the detriment of people of color. Another character is Rodrigo, as created and whose life’s work is chronicled by Richard Delgado.²⁴ In these chronicles, Rodrigo with Delgado address tunnel vision within the civil rights movement, a vision of gender equality to the exclusion of other subdominant groupings. Through the CRT frame of structural determinism

Voice scholarship and the use of characters in “serious” legal research drew mainstream critique and served to fuel the belittling of critical race scholarship. In the 1980s and 1990s mainstreamers dismissed this line of work as “literature” and “personal anecdote.”²⁵ Contemporarily, on the scholarship of Derrick Bell Winkfield F. Twyman, Jr. writes that

Because he taught at the premier law school in the country, Bell’s thoughts had a disproportionate impact on the best and the brightest black law students. Bell became more of a fiction writer than a scholar of constitutional doctrine. He devised more and more imaginary narratives that infused the law with the experience of racism. He wrote about space ships that came to take blacks away. He wrote about imaginary civil rights lawyers, to keep it real. And the bright ones took their lead from Bell’s troubled sojourn into irrelevance.²⁶

To critique the work of Bell and other CRT scholars as a “sojourn into irrelevance” highlights the very marginalization CRT scholars seek to address through voice scholarship.

Traditional legal discourse reifies the voice of the dominant through claims regarding law, politics, and morality that are universalistic in tone. It reinforces and

Delgado exposes the marginalization of minorities within subdominant groups, as the structure of the movement, the conversation dictates the results effected. With Rodrigo, Delgado offers a theory of social change and small group dynamics to explain social reform and social movements. See Richard Delgado, *Rodrigo’s Chronicle*, 101 YALE L.J., 1357 (1992) and Richard Delgado, *Rodrigo’s Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L.REV. 639 (1993).

²⁵ Tate, *supra* note 9 at 220. See, e.g., Steven L. Winter, *The Cognitive Dimension of the Agon between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2228 (1989) (“Narrative does not meet the threefold demands of generality, unreflexivity, and reliability that are necessary if a prevailing order is credibly to justify itself.”).

²⁶ *The Lightness of Critical Race Theory*, INTELLECTUALCONSERVATIVE.COM (2005). For the proposition that “the bright ones” were lead astray I say let my fellow alum of University of Virginia School of Law speak for himself.

legitimizes power inequity.²⁷ Voice scholarship, on the other hand, counters that universality, revealing the socially constructed nature of reality. Voice scholarship challenges dominance through the unveiling of assumed norms, allowing for critical reflection. According to Delgado, stories and counterstories “...invite the reader to suspend judgment, listen for their point or message, then decide what measure of truth they contain.”²⁸ Moreover, by giving voice to the subdominant voice scholarship encourages democratic dialogue allowing for all to engage in social construction.²⁹ Voice scholarship furthermore has psychic benefits for those whose voices are marginalized as “irrelevant.” Through the sharing of stories people of color can cross-validate experiences and facilitate racial identity development.³⁰

Finally, to relegate CRT discourse to mere “storytelling” is fallacious. As defined by Richard Delgado, a key characteristic of CRT is “the borrowing of insights from social science on race and racism.”³¹ As CRT critic Twyman notes, through the proliferation of CRT scholarship there is a new generation of scholars within the field of law who are CRT knowledgeable. CRT also has been influential across the social science fields and there is a cadre of scholars, generation next, who are competent in

²⁷ See, Tate *supra* note 9 at 219-220. See also Patricia J. Williams, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* (1991); Delgado, *supra* notes 21 and 22.

²⁸ Delgado, *supra* note 22 at 2415.

²⁹ Tate *supra* note 9 at 217-218. See also Delgado, *supra* note 22 at 2439.

³⁰ *Id.* See Beverly Daniel Tatum, *WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA? AND OTHER CONVERSATIONS ABOUT RACE* (1997). See also Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Anti-discrimination Law*, 101 HARV. L. REV. 1331 (1988).

³¹ Delgado, *supra* note 21 at 95.

both legal and social science methodologies. It is incumbent upon this new generation, in order to rebuild momentum for social justice and equity, to engage in systematic inquiry. In this manner the stories of CRT can move beyond the pall of “anecdote” to new legitimization as quantitative and qualitative data. It is in this spirit the rest of this article proceeds.

Part II - The Behavioral Model of Adjudication and Contemporary Race Conscious Admissions Cases

Drawing from the fields of law and political science, there are two overarching camps of scholars presenting models of how judges make their decisions. On the one hand, scholars proffering the legal model of adjudication argue that judges rule on the basis of precedent, deductively arriving at an opinion, which is either similar or distinguishable from previously, decided cases.³² On the other hand, behavioralists argue that law is made rather than ascertained, and that the content of made-up law is, in fact, the product of judicial pre-dispositions. Put more succinctly by Harold Spaeth and Jeffrey Segal, behavioralists,³³ or more specifically,

³² For research and arguments in support of the legal model of adjudication *see, e.g.*, Arthur L. Stinchcombe, *WHEN FORMALITY WORKS: AUTHORITY AND ABSTRACTION IN LAW AND ORGANIZATIONS* (2001); Richard S. Markovits, *MATTERS OF PRINCIPLE: LEGITIMATE LEGAL ARGUMENT AND CONSTITUTIONAL INTERPRETATION* (1998); Kent Greenwalt, *Law and Objectivity* (1992); and Ronald Dworkin, *TAKING RIGHTS SERIOUSLY* (1988).

³³ Note the attitudinal model is one of three behavioral models of judicial decision making. Other models include the public opinion model, which is a variation of the attitudinal model suggesting that judicial attitudes mirror the opinions of the general American public by a lag of 2 to 7 years (Michael W. Link, *Tracking Public Mood in the Supreme Court: Cross-time Analyses of Criminal Procedure and Civil Rights Cases*. 48 *POLITICAL RESEARCH QUARTERLY* 61 (1993); William Mishler and Reginald S. Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-analytic Prospective*. 58 *THE JOURNAL OF POLITICS*, 169 (1996); Segal and Spaeth, *supra* note 4; the separation of powers model, which focuses on the influences of the executive, legislature, as well as the composition of courts to predict individual judicial behavior (Cornell Clayton and David A. May, *A political regimes approach to the analysis of legal decisions*. *POLITY*, Winter, 2000 at 233; for a critique *see* HAROLD J.

[a]ttitudinalists argue that because legal rules governing decision making (e.g., precedent, plain meaning) in the cases that come to the Court do not limit discretion; because the justices, unlike their lower court colleagues, may freely implement their policy preferences.³⁴

They find that out of 2,245 Supreme Court votes and opinions, 88.1 percent align with judicial preferences; whereas, 11.9 percent are attributable to *stare decisis*.³⁵

The work of Segal and Spaeth focuses on Supreme Court decision making, which they concede may be different from that of lower courts,³⁶ given the Court's heightened prestige and general status as a terminal appointment and ability to rule without interference from Congress, the President, and among judges, all but their colleagues on the Supreme Court. On the other hand, lower courts are constrained, not only by the court above them and their own precedent, but also by the defense of their reputation, namely the fear of being reversed on appeal.³⁷ However, these fears are subdued in cases where:

SPAETH AND JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT (1999); and the rational choice model, another variation of the attitudinal model, which focuses on judicial policy goals, including the following of precedent as an aim for judicial policy (Thomas J. Miceli and Metin M. Cosgel, *Reputation and Judicial Decision-making*. 23 JOURNAL OF ECONOMIC BEHAVIOR AND ORGANIZATION 31 (1994); DAVID E. KLEIN, MAKING LAW IN THE UNITED STATES COURTS OF APPEALS (2002)); for a doctrinal critique see N.S. Siegel, *Sen and the Hart of jurisprudence: A critique of the economic analysis of judicial behavior*. 87 CALIFORNIA LAW REVIEW 1581-1608 (1999).

³⁴ Segal and Spaeth, *supra* note 4 at 111.

³⁵ Spaeth and Segal, *supra* note 33.

³⁶ See Charles A. Johnson, *Law, Politics, and Judicial Decision Making: Lower Federal Court Uses of Supreme Court Decisions*. 21 LAW AND SOCIETY REVIEW 325 (1987) (finding that the legal model, marked by its adherence to precedent, accounts for more variation in lower court decisions).

³⁷ See Miceli and Cosgel, *supra* note 33.

1. the law is new, the case is without precedent, or the applicability of past precedent is unclear;³⁸
2. the evidence is contradictory or of equal weight on both sides of the issue;³⁹ and,
3. the issues presented are politically salient.⁴⁰

Under these conditions, the routine of norm enforcement undertaken by most judges, most of the time,⁴¹ is by definition supplanted by judicial policymaking. Given the questionable legal status of race-conscious admissions policies prior to the Supreme Court's Michigan decisions, the novelty of social science research on the benefits of diversity, and the political salience of affirmative action in admissions, the context of race conscious admissions presents ripe timing for legislative judicial decision-making.

A. The Constitutional Contradiction and the Outcomes of Contemporary Race Conscious Admissions Cases

To conduct this analysis I estimate a behavioral model of adjudication to estimate the relative influence of judicial political affiliation, the presence of social science research, and demographic characteristics of judges on the outcomes of contemporary race conscious admissions cases. This analysis is conducted at the level

³⁸ See Robert A. Carp and Ronald Stidham, *THE FEDERAL COURTS* (2001).

³⁹ *Id.*

⁴⁰ Segal and Spaeth, *supra* note 4.

⁴¹ Only 14-15% of federal judges can be classified as activists who regularly engage in judicial policy making. More than half of district court judges are interpreters who mechanically apply precedent (52%), whereas most appellate judges are pragmatic, blending interpretivist and innovationist techniques (59%) (Carp and Stidham, *supra* note 38 at 160).

of the individual judge. The divergent approaches district and circuit court judges took in analyzing the constitutional validity of race conscious admissions policies provide a set of seventeen cases. Four of these cases arise in the higher education context.⁴² The other thirteen are from K-12 voluntary desegregation cases. Given the small number of higher education cases, the addition of K-12 cases helps to fill out the analysis. The general constitutional inquiry is parallel: whether diversity is a compelling governmental interest sufficient to justify race conscious integration plans.⁴³ The total number of judicial opinions included in the count is 40.⁴⁴

⁴² Note that the case of *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994) is not included in this analysis as the context of *Podberesky* differs from other race conscious admissions cases in the field of education. In particular, *Podberesky* arises in the context of financial aid, specifically race-specific scholarships. While an offer of admissions and a financial aid award are tied to a student's ability to enroll in a particular institution, the institutional decision to permit entry to the university and give financial aid are distinct. The presence or absence of financial aid in this context renders it more likely that a student will attend a particular school, rather than enabling their ability to attend college at all. Cf. Michael A. Olivas, *Constitutional Criteria: The Social Science and Common Law of Admissions Decisions in Higher Education*, 68 COLORADO LAW REVIEW, 1065 (1997)(arguing that the context of financial aid and admissions are tied, such that the financial aid consideration is part of the admissions decision from the perspective of an applicant).

⁴³ See Wendy Parker, *Connecting the Dots: Grutter, School Desegregation, and Federalism*, 45 WM AND MARY L. REV. 1691 (2004).

⁴⁴ For purposes of this inquiry, the seventeen cases are subdivided to present the opinions of 47 district and circuit court judges. Seven judges are excluded from the numerical counts presented in the table below, as they are decided on state law grounds. These cases arise in the state of Washington and were ultimately disposed of under Initiative 200 (I-200), also known as the Washington State Civil Rights Initiative. Implemented November 3, 1998, I-200 states that: "the state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting". WASH. REV. CODE § 49.60 (1998). This initiative is modeled after California's Proposition 209. The decisions excluded for reasons of state law include Ninth Circuit's opinions in *Smith v. University of Washington*, 233 F.3d 1188 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001) and *Parents Involved in Community Schools v. School Dist. No. 1*, 285 F.3d 1236 (9th Cir. 2002) and the district court opinion in *Smith*, 2 F.Supp. 2d 1324 (WA 1998).

Also note that only one opinion per judge is included so as not to over-represent a particular judge's approach to the cases. For that reason Judge Gertner's opinion in *Boston's Children First v. City of Boston*, 2 F.Supp. 2d 1324 (WA 1998), Judge Bryan's opinion in *Tito v. Arlington County School Board*, 1997 U.S. Dist. LEXIS 7932 (VA 1997) (unpublished opinion), and Judge Edenfield's opinions in *Tracy v. Board of Regent*, 59 F.Supp. 2d 1314 (GA 1999) and *Wooden v. Board of Regents*, 32 F.Supp.

If it is the case that social equity and the furtherance of the goals of diversity are in the aggregate the desired goals of lower court judges then it should be the case that research on the educational benefits of diversity should have a greater influence on case outcomes. This stands to reason because while this body of literature is relatively new, about ten years in the making, it by in large supports that there are measurable benefits to a racially and ethnically diverse student body. If, however, the property interests of the White and privileged were most valued, then case outcomes would conform more along political party affiliation lines. What follows is a description of the variables and the data analysis.

1. Description of Variables

The first variable used in this analysis is political party affiliation, as measured by the party affiliation of the appointing President. Although executive politics and judicial philosophy are not perfectly aligned, on average judges tend towards philosophies aligned with their appointer.⁴⁵ Note here that the argument is not that

2d 1370 (GA 1999), both involving admissions at the University of Georgia, are also excluded from the total count.

⁴⁵ Robert A. Carp and C.K. Rowland, POLICYMAKING AND POLITICS IN THE FEDERAL DISTRICT COURTS (1983); using a sample of 26,372 judges appointed between 1933 and 1977, found that 46 percent of Democratic judges rendered liberal decisions, whereas 61 percent of Republican judges ruled conservatively. Considering the party of the appointing president, 37 percent of Republicans appointed by Republicans vote liberally, 42 percent of Democrats appointed by Republicans and Republicans appointed by Democrats vote liberally, and 46 percent of Democrats appointed by Democrats vote liberally.

judges are partisans,⁴⁶ but that judges are likely to rule in a manner that support their perceptions of their interests as articulated through affiliation with political parties. Carp and Stidham report that with respect to affirmative action, 72 percent of Democratic federal district judges rule in a politically liberal manner, as compared to 49 percent of Republicans.⁴⁷ As such, I predict more plaintiffs' victories in cases over which Republican-appointees preside. I expect the converse to be true with respect to Democratic-appointees.

As the behavioral model of judicial decision-making includes a measure of previous decisions of a comparable nature, it was my original intention to use past Title VII decisions by the judges in the above cases to proxy judicial predispositions in race-based cases. However, after examining the decisions of nearly one-quarter of the judges used in this analysis, I found that nearly 90 percent of racial employment cases end in defendant, institutional victories. For circuit courts, such a high percentage is not unreasonable as the standard to reverse a lower court's decision is "clearly erroneous." Yet, the distribution among district court judges was also skewed. This is most likely due to administrative procedures through the Equal Employment Opportunity Commission, required in employment cases, resulting in the resolution of many suits before trial. In addition the burden of proof required for plaintiffs to

⁴⁶ See Randall Lloyd, *Separating Partisanship from Party in Judicial Research: Reapportionment in the U.S. District Courts*, 89 THE AMERICAN POLITICAL SCIENCE REVIEW 413 (1995). In this study, Lloyd finds no correlation between the appointer of the judge and decisions rendered in redistricting cases, despite the degree of political salience. This study points to judges being impartial with regard partisan issues, but is silent with regard to political issues with ideological undertones, such as race conscious admissions.

⁴⁷ Carp and Stidham, *supra* note 38 at 134.

succeed on the merits is high. Because of its unidirectional sway, the factor of previous rulings was excluded from the present analysis. The effect of previous rulings is likely to be captured in political affiliation as the combination of party affiliation and previous rulings reveal a judge's preference with respect to affirmative action.

The next variable in the equation is judge's race. Although there are several sociological factors related to judicial decision-making, including the judge's religion, socioeconomic status, and geography,⁴⁸ at the forefront of the competitive admissions issue is race and the constitutional appropriateness of the race factor in admissions considerations. As this issue historically is framed in terms of black and white⁴⁹ and the *Who's Who* biographical database flags self-identified judges of African American heritage with the *Who's Who Among African Americans*, judges are coded as either black or white/ not indicated. Other races/ethnicities are not indicated in the *Who's Who* Biographical Database. The validity of this classification was verified through cross-referencing the names of judges in this sample with *The Directory of Minority Judges of the United States*.⁵⁰ As such the risk of suppressing the effect of race for

⁴⁸ *Id.*

⁴⁹ See David A. Hollinger, Group Preference, *Cultural Diversity, and Social Democracy: Notes Toward a Theory of Affirmative Action* in RACE AND REPRESENTATION: AFFIRMATIVE ACTION (Robert Post and Michael Rogin eds., 1998). This is not to suggest that African American and judges rule alike or in any other particular manner. In fact, contrary to the hypotheses of Steffensmeier and Britt, black judges are actually tougher on crime, as evinced by higher incarceration rates, than their white counterparts. See Darrell Steffensmeier and Chester L. Britt, *Judges' Race and Judicial Decision Making: Do Black Judges Sentence Differently?* 82 SOCIAL SCIENCE QUARTERLY 749 (2001). A similar reversal of hypotheses could occur in the present study, with minority judges feeling pressured to render more conservative opinions in order to maintain their reputations as objective jurists.

⁵⁰ ABA, DIRECTORY OF MINORITY JUDGES OF THE UNITED STATES (2001).

judges who do not identify themselves as black, as well as judges who are neither black nor white, is *de minimus*.

Gender is also considered a factor in one's support for affirmative action. It too is included in the present analysis, coded on the basis of male/ female using *Who's Who* to confirm male or female status.

Of the 40 judges deciding contemporary competitive admissions cases, 23 are Republican appointees, 60.5 percent, as compared to 15 appointments by Democrats, 39.5 percent. In addition, three African American judges compose 7.9 percent of the sample and five women comprise 13.2 percent.

Does this set of judges reflect the demographics of the American judiciary? During the time span of the cases included in this set, 1994-2003, nationally 6.75 percent (N=4,045) of American judges were identified as racial or ethnic minorities. Of this group, 1,798 are African American.⁵¹ Thus, African American judges are slightly over-represented. Republican judges are also over-represented, which makes sense considering that disputes over competitive admissions are more likely to arise in more conservative states. As of the 2000 election, 52 percent of appointments from previous administrations judges in the federal judiciary were Clinton or Carter appointees. Forty-four percent (44%) were Reagan or Bush, Sr. appointees. The remaining judges (2%) are from previous administrations.⁵² Women, on the other hand, are slightly underrepresented, as approximately 20 percent of federal judges are women and only

⁵¹ *Id.*

⁵² Mark A. Hoffman, *Next president to fill vacancies in judiciary*. BUSINESS INSURANCE, Sept. 11, 2000, at 34.

thirteen percent of judges in this sample are female.⁵³ Nationally, 17.4 percent of U.S. Court of Appeals Judges and 16.2 percent of U.S. District Court Judges are women.⁵⁴

2. Data Analysis

Of the 40 judges in this analysis, two-thirds ruled against supporting race conscious admissions in education, 25 out of 40. Considering that nearly forty percent of the judges are Democratic-appointees, within this dataset overall there seems to be

Table 1 – The Number of Judicial Rulings by Political Affiliation of the Judge and the Presence of Social Science Evidence at Trial

	Plaintiff Wins	Defendant Wins
Republican		
Data	6	1
No Data	14	2
Democrat		
Data	2	9
No Data	2	4

Table 2 - Logit Estimates Defendant Wins by Judicial Ruling

	Model A	Model B	Model C
Party	2.75* (0.88)	2.78* (0.86)	2.94* (0.85)
Gender	1.35 (1.42)	1.43 (1.4)	-
Data	0.23 (0.9)	-	-
Race	-	-	-

⁵³ ABA, COMMISSION ON WOMEN IN THE PROFESSION (2003).

⁵⁴ *Id.*

limited support for affirmative action. Yet, the party lines in the ruling outcomes are fairly apparent. Republican appointees were stronger in their stance against affirmative action, being five times as likely to rule in favor of student plaintiffs. Democratic appointees were only three times as likely to rule in favor of defendant institutions.

Disaggregating judicial opinions by party affiliation and the presence of social science evidence highlights the degree to which political affiliation dominates judicial opinions in race conscious admissions cases. Regardless of the presence of social science evidence, Republican-appointees ruling in favor of student plaintiffs represent the outcomes of 50 percent of judicial opinions. Democratic-appointees ruling for educational institutions account for 31.6 percent of judicial opinions

In only 18 percent of the opinions do Republican and Democratic appointees (N=7) cross political affiliation lines, as shown in Table 1. This small degree of philosophical deviance concurs with findings by Carp and Rowland that in the area of racial discrimination, judges are more likely to rule along party lines.⁵⁵ These findings also concur with those of Francine Sanders Romero who finds that courts with a higher percentage of “liberal” judges are more likely to rule in favor of minority interests, in this case, pro affirmative action.⁵⁶

Contained in Table 2 are results of the binomial logistic regression analysis employed which reflect the aggregated relative influence of political affiliation, social science evidence, and background factors in judicial opinions on race conscious

⁵⁵ Carp and Rowland, *supra* note 45.

⁵⁶ Romero, *supra* note 4 at 304.

admissions cases.⁵⁷ With respect to demographic factors, note that the race term drops for reasons of collinearity as a Democratic president appointed each black judge in this dataset.⁵⁸ In addition, each of these judges (N=3) ruled in favor of affirmative action. Among women judges, rulings were also along party lines, with the one Republican-appointed woman ruling for plaintiffs, the others (N=4), Democratic appointees, ruling for defendants. Hence, the controlling factor for women, and perhaps for African-American judges as well seems to be political affiliation. While the number of observations (N=40) is small, there are enough independent opinions from which one trend in particular can be exacted.⁵⁹ When all the factors but political affiliation are

⁵⁷ The models in Table 2 are derived from binomial logistic regression analysis, a statistical technique designed to measure the relative association between a dependent variable (in this case judicial ruling in favor of defendant educational institutions) with a categorical distribution (win/ not win) and one or more independent variables (here the political affiliation, race, and gender of judges, the presence of social science data. Logit analysis is appropriate for this type of inquiry as the outcome variable used in this analysis is dichotomous. Logit estimations of the maximum likelihood of an event's probability correct for the non-linearity, non-normal distribution of errors, and heteroscedasticity generated by general regression models using categorical outcome measures. *See*, ELAZAR J. PEDHAZUR, MULTIPLE REGRESSION IN BEHAVIORAL RESEARCH (3d ed. 1997).

⁵⁸ As such, the estimates of political philosophy, data, data quality and quantity as presented in Table 2 are calculated without the race term.

⁵⁹ This is a small dataset. However, note that in each of these models only one factor has a statistically significant charge, meaning that the probability of this one factor, political affiliation, being influential in judicial opinion-making in these cases is greater than 95 percent. The magnitude of this factor changes little, even when all of the other factors are taken away. Forty observations are more than sufficient to establish a pattern between two variables.

One may also be concerned about the three layers of variable clustering. First, judges at the district and circuit court level are analyzing the same set of facts. Second, judges at the circuit court level are analyzing the same set of facts in consultation with each other. Third, researchers testified at multiple trials. Given the ambiguity of Fourteenth Amendment law at this juncture, judges are relatively free to interpret the law according to their own predispositions. However, judges reviewing cases at different levels, district and appellate, are constrained by the same set of facts. Upper level courts are usually bound to findings of fact from courts below as the trial court has the advantage of actually hearing testimony and watching the disposition of witnesses. But upper level courts are never bound to findings of law from the court below and in these cases the essence of the dispute is not the facts, but the law. As such, there is more, albeit imperfect, independence of observations in these cases than in other judicial contexts, such as employment discrimination law where cases are handled in a relatively uniform fashion

taken away, the relative weight of political affiliation changes very little and the predictive power of the model remains the same: The percentage correctly predicted is 81.6% overall, 80% of defense wins, and 82.6% of wins by student plaintiffs.

Social science evidence, however, seems influential in only about 8 percent (N=3) of cases (See Table 1). By influential, I mean that there is an inverse relationship between the judge's philosophical predisposition and his or her decision.⁶⁰ In this dataset, only one Republican-appointee ruled in favor of defendants when social science data was employed. Judge Patrick J. Duggan who, ruling in the *Gratz* district court decision, emphatically asserted that "based upon the record before it, that a racially and ethnically diverse student body produces significant educational benefits such that diversity, in the context of higher education constitutes a compelling governmental interest."⁶¹ Slightly more prevalent (N=2) were Democratic-appointees who ruled against defendant educational institutions when social science evidence was absent. When these two Democratic-appointees ruling for student plaintiffs are factored in with Republican-appointees, they create a majority of judges most comfortable ruling against affirmative action in an effort to protect White interests.

As hypothesized, political affiliation is a greater predictor of judicial rulings than social science research, with the estimates of the former registering statistically

according to statutory mandates. I mediate clustering effects by computing the Huber-White standard error, which captures the relationship among errors in groups of observations, and compared results with and without clustering controls. There is no difference in the relative weight of party affiliation.

⁶⁰ Segal and Spaeth, *supra* note 4.

⁶¹ *Gratz*, 122 F. Supp. 2d at 824.

significant and the latter not. Thus, the odds of a defendant win are more dependent on the political affiliation of the judge,⁶² than on the presence of social science research.⁶³ This set of findings supports the CLS notion that judicial decision-making is political. Yet the politics here go beyond differences in philosophical understandings of the democratic enterprise. At center are the politics of race and racism in the United States.

Part III – Perceived Interests and Interest Divergence: Judicial Opinions in Race Conscious Admissions

The affirmative action in admissions debate, when framed as a zero-sum game, pits Whites and certain classes of Asian students against Black and other students of color.⁶⁴ In practical terms, while affirmative action allows for people of color to compete for scarce resources Whites cherish, such as seats in elite colleges and universities, it does little in the aggregate to harm whites.⁶⁵ With the dominant perception of affirmative action, however, it is in the perceived interest of whites to

⁶² E.g., Model A: $OR^{Party} = 15.41$.

⁶³ E.g., Model A: $OR^{Data} = 1.25$.

⁶⁴ See Girardeau A. Spann, *RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA*, (1993); Girardeau A. Spann, *Pure Politics*, 88 *MICH. L. REV.* 1971 (1990); and, K.G. Jan Pillai, *Neutrality of the Equal Protection Clause*, 27 *HASTINGS CONST. L.Q.* 89 (1999) (arguing that whites and males are the beneficiaries of constitutional pushes for neutrality). The actual harm to students of color is grave as evident in the composition of elite universities in the aftermath banning of affirmative action in the states of Washington, California, and Texas. See, e.g., Andrea Guerrero, *THE SILENCE AT BOALT HALL*, 2002. See also Gary Orfield and Edward Miller, *CHILLING ADMISSIONS: THE AFFIRMATIVE ACTION CRISIS AND THE SEARCH FOR ALTERNATIVES* (1998).

⁶⁵ Note that eliminating the “racial plus” in competitive admissions at elite universities only increases the likelihood of admissions of Whites from 25 to 26.5 percent, while seriously injuring the probability of admissions for students of color. See William Bowen and Derek A. Bok, *THE SHAPE OF THE RIVER* (1998).

oppose affirmative action. Hence, perceived interests between whites and non-whites diverge around affirmative action, as in the aggregate Whites are not willing to pay the price for true equity and racial justice.⁶⁶

With respect to perceived interests, the CRT frame of interest convergence posits that gains for people of color are made only when and to the extent there are gains for Whites.⁶⁷ A corollary of interest convergence is the price of racial remedies frame. According to Derrick Bell

the fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for black where the remedy sought threatens the superior societal status of middle and upper class whites.⁶⁸

As framed as a competition for resources then, Whites are not willing to internalize the cost of the risk of not being admitted to elite institutions. While this perception is fallacious as the competition for seats at elite institutions is competitive within and without racial groups, this perception is dominant in contemporary American (U.S.) discourse.⁶⁹

⁶⁶ See Bell, *Bakke, Minority Admissions, and the Usual Price of Racial Remedies*, 3 CALIFORNIA LAW REVIEW, 76 (1979); Note that there is actual interest convergence in the cause of race conscious admissions. All students benefit from racially diverse student bodies. These benefits, while not evenly distributed, span academic, civic, and social in nature. The educational benefits of diversity are presented in Patricia Gurin, et. al., *DEFENDING DIVERSITY: AFFIRMATIVE ACTION AT THE UNIVERSITY OF MICHIGAN* (2004).

⁶⁷ See *id.*; Derrick A. Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARVARD LAW REVIEW, 518 (1980); Bell, *supra* note 2; and, Derrick A. Bell, *RACE, RACISM, AND AMERICAN LAW*, 2nd Ed. (1992). See also Girardeau A. Spann, *Color Coded Standing*, 80 CORNELL L. REV. 1422,1425 (1995)(“From Dred Scott to Plessy to Brown, the primary concern of the Court in race cases has been the protection of minority interests [citations omitted].”).

⁶⁸ Bell, *supra* note 67 at 523.

⁶⁹ See Bowen and Bok, *supra* note 65.

At a basic level one cannot ignore that the reason for the inception of affirmative action is the historic denial of civic equality to women and people of color. For people of color, in particular, it was not until 1964, 96 years after the 1868 enactment of the Fourteenth Amendment's guarantee of "equal protection of the laws" that a statutory framework of civil rights was erected to protect the negative right of freedom from discrimination in education and employment.⁷⁰ However, even the Civil Rights Act of 1964 could not undo the damage of centuries of inequality.⁷¹

Towards ameliorative ends, President Lyndon B. Johnson promulgated Executive Order 11246 recognizing legally theoretical equality was not enough, "but as a fact and as a result."⁷² In the field of education, affirmative acts included not only the employment of mechanisms to increase the presence of people of color in higher education, but plans at the K-12 level, most notably busing and magnet programs, to create better educational opportunities for all students.

In some respects, Executive Order 11246 represents the height of liberal support for social equity, a rather low high point considering the absence of endorsement from two houses of Congress. Within the same speech supporting affirmative action, touting a quest for "not just legal equity but human ability," sociologist Steven Steinberg highlights that it was with "Machiavellian genius" that the administration

⁷⁰ Civil Rights Act of 1964, 42 U.S.C. §2000a et seq.

⁷¹ See Melvin I. Urofsy, *The Supreme Court and Civil Rights since 1940: Opportunities and Limitations*, 4 BARRY L. REV. 39 (2003).

⁷² Graduation address to Howard University, *reprinted in* Lee Rainwater and William L. Yancey, *THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY: A TRANS-ACTION OF SOCIAL SCIENCE AND PUBLIC POLICY REPORT*, 125-132, (1967; 2003).

shifted the discourse away from, the radical vision of “equal results” that emanated from the black protest movement of the 1960s back to the standard liberal cant of the 1950s... The conceptual groundwork was being laid for a drastic policy reversal: The focus would no longer be on white racism, but rather on the deficiencies of blacks themselves.⁷³

Thus, as Steinberg notes, from its inception support for the remediation of past discrimination through affirmative action was limited. Using statistics Romero depicts Steinberg’s contentions as she finds that the Supreme Court in particular is less likely to support remedies for “de facto” conditions, but tends to be more vigilant when discrimination can be traced to a particular governmental actor.⁷⁴

With time and the entrenchment of the Reagan revolution, support for affirmative action within the political regime and the polis waned. Not only is are the courts packed with Reagan and Reagan protégé appointees, according to the public opinion model of adjudication, judicial attitudes mirror the opinions of the general American (U.S.) public by a lag of 2 to 7 years.⁷⁵ In all probability the average judge, a White male of privilege, does not support affirmative action, as he is not willing to pay its perceived cost.⁷⁶

⁷³ *The Liberal Retreat from Race During the Post-Civil Rights Era*, 21 (Wahneema Lubiano Ed., THE HOUSE THAT RACE BUILT, 1997).

⁷⁴ Romero, *supra* note 4 at 204.

⁷⁵ See, e.g., Michael W. Link, Tracking Public Mood in the Supreme Court: Cross-time Analyses of Criminal Procedure and Civil Rights Cases. 48 POLITICAL RESEARCH QUARTERLY 61 (1993); William Mishler and Reginald S. Sheehan, Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-analytic Prospective. 58 THE JOURNAL OF POLITICS, 169 (1996); and Segal and Spaeth, *supra* note 4.

⁷⁶ A Los Angeles Times poll appraising the public’s view of President Bush’s stance against the University of Michigan policies announced that of the 1,385 persons sampled, 55 percent were in favor. See Davis G. Savage, *Bush's Opposition to Racial Preferences Gets Big Support*, L.A. TIMES, Feb. 6, 2003, at 16. These figures compare well with Gallup Poll surveys in 1996 in which 61 percent of

Looking at the data in Part II, overall judges are more likely to rule against affirmative action and in favor of student plaintiffs. While it is generally expected that Republicans would do so, what is most interesting is the degree to which Republican-appointed judges are stronger in their support of student plaintiffs (five times as likely to rule for plaintiffs) than Democratic-appointed judges are of defendant institutions (three times as likely to rule for defendants). Thus, while Democratic-appointed judges are not necessarily against affirmative action, they are not strongly in favor of it.

Therein lay the dilemma of people of color as suits challenging affirmative action are pursued. Whites bring these suits usually against institutions. No party involved represents the interest of people of color. Intervention of right is not guaranteed and is often fought for and lost.⁷⁷ What the present research adds is that in the context of race conscious admissions judges, whether Republican or Democratic appointed, are not likely to stand up in the Hamiltonian tradition of the defense of minority rights. Hope for the continuance of affirmative action lays at the hearts of cowardly lions, those judges one would expect to uphold minority interests but fail to

respondents supported a national policy modeled on California's Proposition 209, which prohibits affirmative action in public employment, education, and contracting. See G. Gallup, THE GALLUP POLL: PUBLIC OPINION 1997(1997). More systematically, political scientists Kinder and Winter use the 1992 National Election Study and estimate the black-white divide at 36 percent on issues of equal employment opportunity, 43 percent with respect to hiring preferences, and 52 percent for college quotas. Although their simulation models suggest some convergence in the divide when accounting for social class, the most significant variation is related to philosophical differences. In principle, blacks prize equal opportunity, while whites value limited government. Blacks express within group solidarity, while whites express racial resentment, which becomes more pronounced during competition for resources. Thus, although higher education levels are associated with more liberal positions on questions of race, this liberality is tempered for Whites, as income is directly related to conservatism and as resource competition intensifies. The results of the polls in combination with political science research suggest that with respect to affirmative action the "middle" is under siege. In this vein, the average elite European American (U.S.), including judges, is not likely to support affirmative action. See Donald R. Kinder and Nicholas Winter, *Exploring the Racial Divide: Blacks, Whites, and Opinion on National Policy*. 45 AMERICAN JOURNAL OF POLITICAL SCIENCE 439 (2001).

do so. Instead they hide behind formalism losing sight of the values of equality of opportunity formalism at its core is said to embrace.

Part IV - When Hope Lies with the Courage of a Cowardly Lion: Affirmative Action Now and in 25 Years

If it is the case that the perceived interest of Whites diverges from people of color with respect to affirmative action, then how is the result in *Grutter* explained? After all, at the time the Supreme Court's opinion in *Grutter* was rendered, seven of the nine justices on the Court were Republican-appointees. To answer, the cowardly lion metaphor is useful.

As one may recall in the *Wizard of Oz* the Cowardly Lion is the character who seeks courage and just like the other characters seeking gifts from the Wizard he too is already so equipped, in his case to be courageous. When Lion finally meets the Wizard, the Wizard shows Lion that he can be courageous and was the hero Dorothy needed when she needed him most.

Just like the Cowardly Lion the Supreme Court spent the 25 years from *Bakke* to *Grutter* wringing their hands in cowardice trying to figure out what to do about affirmative action. On the one hand, the Court cannot deny the force of history or present day disparities. On the other, the Court is not willing to forsake White privileges for equity's sake. Hence we have the wringing of hands: whether states and localities can affirmatively act or only the federal government,⁷⁸ what is the appropriate

⁷⁷ Spann, *supra* note 67.

⁷⁸ See *Fullilove v. Klutznick*, 448 U.S. 448 (1980) *cf.* *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989). (invalidating an affirmative action program in government contracts based upon the

standard of review,⁷⁹ for what level of government,⁸⁰ and what is the evidentiary burden for governmental institutions?⁸¹ The tensions masked in these questions are no more apparent in the Court as a whole as in the jurisprudence of Justice O'Connor.

While O'Connor appointment was part of the Reagan revolution and the rise of conservatism in government, as a female student at Stanford Law during the 1940s, she

program upheld for the federal government in *Fullilove*). Here the Court was particularly concerned about the possibility of racial spoils in a city with a sizable Black population. As such the compelling interest was suspect. Perhaps this argument would have grounding if it were the case that raw political power attained by blacks could operate a city, without financial support from predominantly white gentry and white-owned-businesses. For this reason, even majority minority localities are more often than not beholden to Whites for financial support and assurances of re-election. See Paul E. Peterson, *City Limits* (1981). Even if it were the case that the black political elites of Richmond were engaging in “spoilage,” would not that “spoilage” be justified given Richmond’s long history of segregation and discrimination? The lingering effects of that past were apparent in the case as only 0.67% of contracts for the city actually went to firms owned by people of color. *Croson*, 488 U.S. at 479.

Additionally the policy was found to be overly broad, including Aleuts and Alaskans who historically had not been discriminated against by the City of Richmond. See *id.* at 506. Note that the program in *Fullilove* included Aleuts as well, although no significant numbers resided in the City of Jacksonville where the program was challenged.

⁷⁹ See *University of California Board of Regents v. Bakke*, 438 U.S. 265 (1978) and *Wygant v. Jackson Board of Education* 476 U.S. 267 (1986)(where severely fractured majorities rejected affirmative action policies. While in the former five Justices could agree to the one standard of strict scrutiny, in the latter consensus was not found). Cf. *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989)(where a majority held strict scrutiny to be the standard of review in all racial classifications at the level of states and localities), *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547 (1990) (where a majority declared intermediate scrutiny appropriate for “benign” racial classifications proffered by the federal government)and *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (reversing *Metro Broadcasting*, declaring strict scrutiny the appropriate standard of review for all racial classifications).

⁸⁰ See *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) cf. *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547 (1990).

⁸¹ See *Fullilove v. Klutznick*, 448 U.S. 448 (1980) cf. *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) (requiring a more rigorous evidentiary burden on the City in both statistical and geographic specificity). See also *University of California Board of Regents v. Bakke*, 438 U.S. 265 (1978) (Opinion, Powell, J.) (supporting the educational benefits of diversity rationale with citation in footnote to an editorial of then Princeton President William Bowen) cf. social science evidence amassed in *Grutter v. Bollinger*, 539 U.S. 306 (2003) and *Gratz v. Bollinger*, 539 U.S. 244 (2003). Even though the Supreme Court deferred to the data in the Michigan cases, that data was necessary ground the Supreme Court’s decision. See further *Wooden v. Board of Regents of the University of Georgia*, 32 F.Supp. 2d 1370, 1380 (GA 1999) (Opinion, Edenfield, J.) (“[a]lthough the court recognizes the theoretical benefits of an educational setting which is open to a diverse collection of viewpoints, it is not convinced that these benefits – furthered here only in an abstract sense – justify outright discriminatory admission practices which cause concrete constitutional injuries”).

understood from personal experience what it means to be in the minority. She also understood that she was an affirmative action beneficiary.⁸² In parallel contradiction to her life, O'Connor consistently enunciated the stringency of the strict scrutiny standard in her equal protection jurisprudence and striking affirmative action cases in the race context, while asserting that strict scrutiny was not "fatal in fact."⁸³ Education was one area O'Connor seemed to be more aware of the consequences of limiting the opportunities of students of color. In concurrence, O'Connor in *Wygant v. Jackson Board of Education*⁸⁴ holds out hope that there may be an affirmative action policy capable of meeting strict scrutiny's standard, stating

although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest.⁸⁵

⁸² See Joan Biskupic, SANDRA DAY O'CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE (2005).

⁸³ *Adarand*, 515 U.S. at 237. O'Connor specifically states her desire to dispel the characterization of strict scrutiny as strict in theory, but fatal in fact. However, in the one case she cites for this proposition, *United States v. Paradise*, 480 U.S. 149 (1987), she along with Justices Rhenquist and Scalia dissented from the majority's approval of the state's program to remediate open and pervasive discriminatory conduct by the Alabama Department of Public Safety. O'Connor's opinion in *Grutter v. Bollinger*, upholding the Michigan Law School's race conscious admissions policy makes good on this assertion in *Adarand*.

⁸⁴ 476 U.S. 267 (1986). *Wygant* involves the constitutional challenge of a stipulation in the collective bargaining agreement of teachers in Jackson, Michigan, which provided that in the event of lay-offs, they would occur on the basis of seniority, except that the percentage of minority teachers laid off could not exceed the percentage of minority teachers employed at the time of the layoff. In five separate opinions, a majority of the Supreme Court struck down the provision as violating the equal protection clause. However, there is no singular rationale from the court on this matter.

⁸⁵ *Id.* at 286.

While on the one hand O'Connor suggests a desire to hold open a hope for equity; she always found technical reasons to nullify affirmative action policies brought before the Court. For example, in *Wygant* and *Metro Broadcasting*, and *Croson* O'Connor does acknowledge that discrimination exists, but spends a considerable amount of time highlighting deficiencies in the data brought before the Court. Her criticism revolves around the potential skews in the statistical depiction of discrimination and need for present remediation. While detail orientation is important, if one is desiring "to create a society untouched by that history of exclusion, and to ensure ... equality,"⁸⁶ then why is the address of general societal discrimination taboo? The concern that the programs may be too broad, remedying general societal discrimination, is a red herring. By particularizing the harm as emanating from a singular defendant governmental agency creates a policy environment wherein affirmative action is difficult to pursue and costly to defend.⁸⁷ The weight of the policy climate is then towards a status quo of inequity. As such O'Connor's attention to detail in equal protection cases seems to hide her true concerns of upsetting the racial balance of power to the disadvantage of the White and privileged.⁸⁸

O'Connor's decision in *Adarand* embraces this status quo largely resting on the concepts of *stare decisis* and consistency. She speaks not of equity or justice for the

⁸⁶ *Metro Broadcasting*, 497 U.S. at 611. (Opinion, O'Connor, J.)

⁸⁷ See, e.g., Associated Press, *Admissions Lawsuits Cost U-M \$9 Million*, THE DETROIT NEWS, March 22, 2003, at <http://www.detnews.com/2003/schools/0303/27/schools-115479.htm>. Note that even with a price of \$9 Million the University received discounts from outside counsel and several experts waived financial compensation. See Janet Miller, *U-M Suit Cost Already \$9 Million: University-Owned Insurance Company Covering Affirmative Action Case's Legal Expenses – Most for Outside Counsel*, ANN ARBOR NEWS, March, 21, 2003 at <http://aad.english.ucsb.edu/docs/umsuit2.html>.

⁸⁸ See Bryan K. Fair, *Re(Caste)ing Equality Theory: Will Grutter Survive Itself by 2028?*, 7 U. PA. J. CONST. L. 721 (2005).

“disadvantaged” minorities for whom the federal affirmative action in contracting program was created. Nor is there discussion of the “advantaged,” those who by way of white and economic privilege are better able to compete for government contracts. The consideration of justice and equity is void, with the technical particularities of the strict scrutiny formula reified.

Why then deference to data in the Michigan cases? Perhaps akin to a deathbed confession O’Connor poises herself to retire from the Court with specific knowledge that she is not the one who closed the door on equality. Like the Cowardly Lion in the *Wizard of Oz*, she stepped up in favor of affirmative action when all but hope was gone.

In a fantasy world format echoing from her dissent in *Metro Broadcasting*,⁸⁹ O’Connor in *Grutter* expresses a an aspiration for affirmative action’s end:

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. [citations omitted]. It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education ... We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.⁹⁰

Seemingly, resting where the majority opinion in *Grutter* ends may be an uneasy place for O’Connor. A state of the world wherein all people are created equal and treated

⁸⁹ 497 U.S. at 610, 611. (Opinion, O’Connor, J.) (“As a Nation we aspire to create a society untouched by that history of exclusion, and to ensure that *equality* [*emphasis added*] defines all citizens’ daily experience and opportunities as well as the protection afforded to them under law”). Yet, even in her invocation of history, O’Connor states a desire to separate the reality of the past with the creation of a future imaginary state untouched by prior indiscretions by U.S. government at all levels. But by all but striking affirmative action policies, how do we create that society and whose daily experience is being protected by strict scrutiny?

⁹⁰ *Grutter*, 539 U.S. at 322.

equitably is easier for her to deal with: the Court can get on with the form of equality without attending to its substance.

Not too long after the University of Michigan declared victory in the law school case of *Grutter v. Bollinger*, investigations began against three universities in the fourth circuit, deemed the most conservative circuit in the United States.⁹¹ While it will take a while for these cases to percolate through the system, and it is unlikely that the Supreme Court will take up another race conscious admissions case until compelled by circuit splits, patterns in the lower courts and the recent appointments of Justices Alito and Roberts point towards O'Connor's aspiration begin achievable. However, in 25 years will the end of affirmative action be accompanied by equity? Probably not as the mutual grounding of the diversity interest as presented in *Grutter* laid in deferential cowardice.

⁹¹ See Peter Schmidt, *Federal Civil-Rights Officials Investigate Race-Conscious Admissions*, THE CHRONICLE OF HIGHER EDUCATION, December 17, 2004, at A26 (reporting challenges to admissions policies for undergraduate programs at the University of Virginia and North Carolina State, the Schools of Law at the University of Virginia and the College of William and Mary, as well as the University of Maryland at Baltimore's School of Medicine).