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# Courtroom to Classroom: Judicial Policymaking and Affirmative Action

Dylan Britton Saul  
*Macalester College*, [dylanbsaul@gmail.com](mailto:dylanbsaul@gmail.com)

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# **Courtroom to Classroom: Judicial Policymaking and Affirmative Action**

**Author: Dylan Britton Saul**  
**Advisor: Professor Patrick Schmidt**  
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## **Introduction**

*“Hardly any question arises in the United States that is not resolved sooner or later into a judicial question.” – Alexis de Tocqueville, *Democracy in America**

The Supreme Court of the United States, rarely recognized as a national policymaker, plays a fundamental role in the creation of American public policy. The public does not often acknowledge the Court’s policymaking function, for the Justices are not elected by popular vote. The coordinate branches of government downplay the Court’s hand in shaping public policy, so that they may retain a strong semblance of the separation of powers. The Justices themselves, particularly in Senate hearings to confirm their nomination, forswear the very idea of engaging in policymaking while sitting on the bench. America has deceived itself into believing that courts are, to a significant degree, removed from the policymaking process. Yet in reality, judges from the highest to the lowest court in the land engage in public policymaking on a daily basis, merely by exercising the function of judicial review.

At least since Justice Marshall’s *Marbury v. Madison* (1803) opinion, courts have used judicial review as justification for declaring legislative enactments null and void. A judge’s ability to rule on the constitutionality of a statute “is not simply a matter of measuring a statute against crisply defined constitutional provisions but, rather, a policy-making process, in which judges engage after the legislators.”<sup>1</sup> Judicial review thus becomes not just a check on legislative and executive power, but the final stage in a policy-making process where the judiciary has the chance to “substitute its own program

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<sup>1</sup> Bickel, Alexander M. *The Least Dangerous Branch: the Supreme Court at the Bar of Politics*. (Indianapolis: Bobbs-Merrill, 1962), 36.

for a popularly sponsored one that it finds constitutionally deficient.”<sup>2</sup> The popular notion that courts have a limited role to play in public policymaking cannot be sustained. Judges, whether we like it or not, possess a significant measure of policymaking capacity, and as de Tocqueville observed, most policy disputes inevitably find their way to the courtroom.

Assuming that judges do create public policy, the central question for political scientists and legal scholars becomes: when is judicial policymaking most appropriate? In other words, under what conditions is judicial intervention in the policymaking process conducive to an enduring policy solution?

Many scholars have offered answers, often simplistic ones. For some, the judiciary is never well-equipped to create effective public policy, given their relative isolation from the public when compared to elected representatives. Unlike the other branches, judges have few tools to gauge public opinion on a given policy, no formal pathway to social or technical information besides what is provided in case briefs and witness testimonies, and little incentive to conform to the democratic will of the people. Furthermore, the judicial branch lacks any sort of mechanism to enforce its own policies. Courts can impose fines, they can condemn criminals to prison, but in the realm of policymaking, courts depend on legislatures to enact laws conforming to judicial policy and on executive officials to ensure those policies are carried out. Without the power to punish non-compliance or create organizations of oversight, courts face a heightened challenge when they attempt to enforce policies, the legitimacy of which is already

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<sup>2</sup> Choper, Jesse H. *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court*. (Chicago: University of Chicago Press, 1980), 25.

questioned. Limited by the boundaries of public acceptance and inter-branch cooperation, judicial intervention in policymaking is rightly questioned.

Other scholars consider the possibility that courts have institutional policymaking advantages that the other branches do not. For one, judges' relative insulation from public opinion could be beneficial; judges may be more able to decide a case based on long-standing principles rather than on the frantic public opinion of the moment. Some of the Supreme Court's worst decisions occurred when the Court's commitment to values such as the equal protection of the laws caved to public sentiment. The racial segregation imposed by *Plessy v. Ferguson* (1896) and the Japanese internment camps erected by *Korematsu v. U.S.* (1944) tarnish the Court's history. Courts also have the advantage of being able to tailor their policies to address concrete, specific disputes. If legislative statutes create general rules that apply to entire populations, then court decisions are "concerned with the flesh and blood of an actual case."<sup>3</sup> Judges can afford to be less concerned with the unintended repercussions of their decisions, so long as they take care to constrain their rulings to the facts of the case before them. Finally, the judiciary often has the benefit of being able to see legislative or executive policies in action before it is called on to create a policy of its own. The court is able to witness first-hand the effects of a failed school integration plan, or the practices of a brutal prison system, and correct as needed. All of these factors contribute to what Justice Stone called "the sober second thought" provided by the courts.<sup>4</sup> The structural deficiencies of courts notwithstanding, it must be conceded that judicial policymaking also has potential advantages.

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<sup>3</sup> Bickel, *supra* note 1, at 26.

<sup>4</sup> Stone, H. F. "The Common Law in the United States," *Harvard Law Review* 50 (1936): 4, 25

I take the middle course between these two positions. Courts can create enduring public policy that sparks social change, and can even do a better job of it than the legislature, but only under tightly constrained conditions. Specifically, I hypothesize that judicial policymaking is appropriate only when courts possess adequate levels of policymaking capacity, complemented by heightened necessity of judicial intervention in a policy dispute. Stated differently, *capacity + necessity = appropriateness*. *Capacity* is defined as a court's ability to create an informed and feasibly enforceable policy solution. *Necessity* is measured by the extent to which injured parties require judicial involvement in the policymaking process, normally reserved for the other branches. *Appropriateness*, the interplay of capacity and necessity, is operationalized as a court's ability to produce enduring solutions to public policy problems.

A general discussion of judicial policymaking seems unlikely to draw fruitful conclusions. Instead, comparative case studies offer a useful way to test when judicial policymaking is most appropriate, and to sift out the common elements that correlate with more successful policies. Accordingly, I develop a holistic model based on the hypothesis that *capacity + necessity = appropriateness*. Each of these terms is further broken down into specific variables drawn from the scholarly judicial policymaking literature. I carefully illustrate the important features of the model by applying it to a broad range of policy areas, before testing it in an area that has escaped the scrutiny of scholars, namely, affirmative action policy in higher education institutions and in K-12 public schools. This comparative case study provides suggestive evidence as to when judicial policies provide effective race-based remedies in education specifically, and when judicial solutions to policy problems can produce the desired social change more generally.

## **Literature Review**

### **Three Approaches to Judicial Policymaking**

Three different schools of thought consider courts' capacity to create and implement public policy. I use the terms formalism, alternativism, and realism to describe these three approaches, but the terms themselves are less important than the ideas they represent. I examine each in turn before analyzing their application to specific areas of public policy.

#### *Formalism*

A long-standing formalist approach to law marginalizes the role courts play in shaping public policy. Adhering to traditional notions of the separation of powers, mandating that courts use the power of judicial review to decide the legality of statutes instead of making policy, and fearful that judicially active courts will pose a threat to democracy, formalists caution courts not to overstep their bounds. For instance, in *Swann v. Charlotte-Mecklenburg Board of Education* (1971), the Supreme Court held that busing students to different schools was a constitutionally acceptable method of achieving racial integration in highly segregated public schools. Lino Graglia argues that the judicially imposed *Swann* policy “would not be tolerated by the American people” if it had been advanced by the “avowedly political institutions of American government.”<sup>5</sup> If a legislature or a public school board had advanced the unpopular busing policy, public discontent would have clamped down on the policy or voted the responsible officials out of office. The Court's involvement, however, transformed busing policy from a political

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<sup>5</sup> Graglia, Lino A. *Disaster by Decree: The Supreme Court Decisions on Race and the Schools*. (Ithaca, N.Y.: Cornell University Press, 1976), 16.

to a legal dispute that left public opposition with few options: either comply or move to a new school district. To formalists, the Court's participation in the political process and engagement in policy-making is an inexcusable violation of the separation of powers, because courts generally do not derive their power from the consent of the electorate.

A separate but related formalist argument is that courts not only lack the right to create public policy, but they lack the capacity to do so effectively. Formalists point to judges' misuse of social science evidence and to their lack of enforcement mechanisms as the two primary faults in judicial policymaking. Grounding judicial policies in the findings of social scientists becomes problematic, not only because judges are expected to base their decisions on constitutional or statutory law, but also because judges risk misunderstanding or leaning too heavily on such findings. For example, the *Brown* court has been criticized for basing its decision on evidence that is "no more 'scientific' that the evidence presented in favor of racial prejudice."<sup>6</sup> The *Brown* case also illustrates the courts' inability to enforce its own decisions, for the judiciary was unable to achieve any significant degree of racial integration without help from the other branches. Even a decade after the *Brown* decision, only one in a hundred Southern black children attended desegregated schools.<sup>7</sup> Clearly, courts struggle to effectuate real social change when

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<sup>6</sup> Van den Haag, Ernest. "Social Science Testimony in the Desegregation Cases- A Reply to Professor Kenneth Clark." *Villanova Law Review* 6 (1960): 78.

<sup>7</sup> Rosenberg, Gerald N. *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago, 1991), 52. See also Bickel, Alexander M. "The Decade of School Desegregation: Progress and Prospects." *Columbia Law Review* 2 (1964), 214. Even in 1962, roughly 70 percent of black high school students and 85 percent of black elementary school students went to schools "whose student bodies were 90 to 100 percent Negro."

acting independently from the other branches.<sup>8</sup> Formalists, then, assert that judicial policymaking is both inappropriate and ineffective.

### *Alternativism*

The second approach to judicial policymaking allows room for the judiciary to create and implement public policy by suggesting that courts offer an *alternative* path for those groups seeking to push policy goals through the legislature or executive bureaucracy. Alternativists argue that minority, unpopular, unorganized or under-resourced groups lack the means to make their political voice heard in a purely democratic system, and that they find refuge in an adjudication system more concerned with their legal rights than with their political ideas.<sup>9</sup> Alternativism maintains that judges can and should make public policy to protect the rights and hear the voices of disenfranchised groups, despite the fact that judicial decisions are not guaranteed to be democratically supported or even effective.

Gordon Silverstein best encapsulates the alternativist approach, suggesting that groups will turn to the judiciary when confronted by institutional and political barriers in the other branches.<sup>10</sup> Silverstein illustrates his point with the example of prison reform. Although Congress was well aware of the fact that many prisons were in need of modernization in the 1960, no elected official was going to jeopardize their career by

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<sup>8</sup> Baum, Lawrence. "The Influence of Legislatures and Appellate Courts over the Policy Implementation Process," *Policy Studies Journal* 8 (1980): 561.

<sup>9</sup> Neier, Aryeh. *Only Judgment: The Limits of Litigation in Social Change*. (Middletown, Conn: Wesleyan University Press, 1982), 9. "Since the early 1950s, courts have been the most accessible and, often, the most effective instrument of government for bringing about the changes in public policy sought by social protest movements."

<sup>10</sup> Silverstein, Gordon. *Law's Allure: How Law Shapes, Constrains, Saves, and Kills Politics*. (Cambridge: Cambridge University Press, 2009), 15.

urging voters to give their tax dollars to prisoners. As such, “the courts seemed to be a plausible and perhaps the *only* plausible path around severe political barriers.”<sup>11</sup> The adjudication process, as a means of remedying perceived wrongs done to those with perceived rights, allows injured parties to circumvent a political process that often does not acknowledge those rights or wrongs because the political cost is simply too high. In the alternativist view, this distinguishing factor of courts makes judicial policymaking not only legitimate, but also, on occasion, highly appropriate.

Of course, judicial policymaking can be disastrous, even when it is necessary. In *Baker v. Carr* (1962), the Supreme Court sought to balance malapportioned state legislative districts under a “one-person, one-vote” policy. The injured parties, whose votes carried proportionately less weight than votes from other districts, had little chance of obtaining a remedy from the very legislators elected through this partisan gerrymandering. The judiciary offered the only alternative, yet courts were incompetent at enforcing their judgments and supervising the redrawing of districts, a task specifically assigned to the legislatures.<sup>12</sup> Alternativism demonstrates that even when judicial intervention in policymaking is necessary, lackluster policymaking capacity can reduce the effectiveness of a judicial solution.

### *Realism*

Realists contend that, regardless of whether or not courts have the capacity or necessity to influence public policy, judges engage daily in policymaking just by

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<sup>11</sup> *Id.* at 20 (emphasis in original).

<sup>12</sup> Zipkin, Saul. “Judicial Redistricting and the Article I State Legislature.” *Columbia Law Review* 103 (2003): 383.

exercising judicial review. They concede that judges, in traditional formulations, are supposed to uphold the rule of law by interpreting pre-existing law or precedent, not create new policies.<sup>13</sup> However, realists argue that this traditional notion is neither accurate nor applicable to modern government, because the modern administrative state is primarily concerned with creating new policy to address social issues. The reality is that “there is a substantial overlap between policy making and [legal] interpretation, and judges often engage in both modes of decision making within the same opinion.”<sup>14</sup> Divorcing courts entirely from policymaking, realism charges, denies courts their inherent power to “say what the law is.”<sup>15</sup>

The past century tells a story of realist judicial policymaking. In its famous *U.S. v. Carolene Products* (1938) doctrine, the Supreme Court first hinted that minority groups may find reprieve from a majoritarian political system within an adjudication system that is constitutionally bound to ensure the equal protection of rights.<sup>16</sup> Scholars awoke to the realization that courts routinely advance policies that protect the civil liberties of minorities and unpopular groups; subsequent decisions upholding the rights of criminals,<sup>17</sup> students with dissident political views,<sup>18</sup> and even hate speech groups<sup>19</sup> affirmed this realist belief. Scholars now agree that “deprived social groups have joined

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<sup>13</sup> Ronald Dworkin, “Hard Cases,” *Harvard Law Review* 88 (1975): 1058.

<sup>14</sup> Feeley, Malcolm M. and Edward L. Rubin. *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons*. (Cambridge: Cambridge University Press, 1998), 7.

<sup>15</sup> *Marbury v. Madison* (1803), at 177.

<sup>16</sup> *U.S. v. Carolene Products Co.* (1938) at 155, Footnote 4.

<sup>17</sup> *Miranda v. Arizona* (1966)

<sup>18</sup> *Tinker v. Des Moines* (1969)

<sup>19</sup> *R.A.V. v. City of Saint Paul* (1992)

the advantaged in the march to the courthouse”<sup>20</sup> and some go as far as to suggest that “courts offer the best hope to poor, powerless, and unorganized groups, those most often seeking significant social reform.”<sup>21</sup> In the minds of these scholars, courts went from being a referee reviewing the constitutionality of government policy to entering the field itself as a major player.

Yet it would be a mistake to suggest that courts only recently began shaping public policy. For instance, the Supreme Court had a hand in creating *laissez-faire* economic policy in the late nineteenth and early twentieth centuries.<sup>22</sup> In truth, courts have always engaged in policymaking, and realists have long acknowledged that judicial intervention in policymaking can act as a “substitute for politics.”<sup>23</sup> Acting on the realist assumption that courts mandate “not only what government [can] and [can] not do, but what it must do as well,”<sup>24</sup> the question now becomes when courts are able to appropriately exercise this policymaking function.

## Summary

Debates over the normative implications of judicial policymaking rage on between realist, alternativist, and formalist scholars. However, I bracket that debate to investigate when judicial policymaking is most appropriate. In the following section, I contribute an original model which aims to identify the conditions under

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<sup>20</sup> Horowitz, Donald L. *The Courts and Social Policy*. (Washington: Brookings Institution, 1977), 11.

<sup>21</sup> Rosenberg, *supra* note 7, at 24.

<sup>22</sup> See, e.g., *Lochner v. New York* (1905).

<sup>23</sup> Judith Shklar, *Legalism: Laws, Morals, and Political Trials*, Cambridge, Harvard University Press, 1964, p. 17

<sup>24</sup> Silverstein, *supra* note 10, at 6.

which the judiciary is best-equipped to create policy, and the conditions under which judicial policymaking is most necessary. Taken together, these conditions enable courts to appropriately participate in public policymaking.

## **Model: Judicial Policymaking**

### **Methods**

In this section, I develop an original model to answer the question: under what conditions is it appropriate for the courts to create public policy? Table 1, in the Appendix, is based on the formulation that *appropriateness* = *capacity* + *necessity*. *Capacity* is the judiciary's ability to arrive at an informed and feasible solution to a policy problem. *Necessity* is the extent to which the judiciary is forced to intervene in a policy dispute, regardless of the court's capacity to do so effectively. *Appropriateness* is the overall measure of whether judicial involvement in policymaking is conducive to policy solutions that stand the test of time. A subtle relationship connects these three considerations, further complicated by the fact that capacity and necessity are broken down into six different variables. While heightened capacity can compensate for a relative lack of necessity, and vice versa, judicial intervention in the policymaking process is most appropriate when both factors are at their peak.

The y-axis of Table 1 breaks down both capacity and necessity into more specific variables used by many scholars to analyze various areas of court-sanctioned public policy. The four capacity variables are the main factors that directly influence the courts' ability to create effective policy in their decisions. When these four variables are present,

the court's ability to create legitimate and effective public policy in the given area should rise. The two necessity variables are the factors that require the courts to create policy (regardless of whether they have high capacity or not) because the other branches are either unwilling or unable to create policy to address the given problem. When both necessity variables are present, the court should be under greater pressure to create public policy, though not necessarily more equipped to take action. The variables selected are all firmly grounded in scholarly literature and can be easily identified when reviewing a policy's history, but they have never, to my knowledge, been incorporated into a holistic model.

The x-axis of Table 1 lists five different areas of public policy that are considered in the model. The five areas of public policy that I have selected do not represent all of the policy areas that the judiciary has become involved in. Rather, I sampled five judicial policies that have been squarely discussed in scholarly literature, and most of them are readily familiar to those with even a rudimentary knowledge of the courts. There is a bias in this sample, which reflects a bias in the scholarly literature: scholars interested in examining the appropriateness of judicial intervention in the policymaking process have not considered civil liberties under the First Amendment's freedom of speech clause, or the Second Amendment gun rights debate. Although these may be doctrinally difficult areas, the appropriateness of Court involvement in such disputes, and its ability to enforce its decisions, have not been questioned. Though I would bracket that concern as I work within the prevailing framework, including those areas in this model could shift the emphasis in how scholars understand judicial policymaking.

Within each area of public policy, all six variables are given a categorical ranking of low, moderate, or high. A low ranking means that the variable was not present or hardly at all present as a factor in the given policy area; a high ranking, just the opposite. Though I tried to avoid giving moderate rankings, they were given in cases where scholarly opinion on a policy was decidedly mixed.

Finally, each policy area receives an aggregate appropriateness ranking. If appropriateness is high, I hypothesize that court intervention in policymaking will be conducive to an enduring policy solution. That is, courts will have both the capacity to resolve a policy dispute, and the necessity needed to make their verdicts legitimate. If appropriateness is moderate, I predict that court decisions will solve some deficiencies in a public policy, but progress will be hampered because the courts overstepped their bounds, or fought prevailing public opinion, or some other reason. If appropriateness is low, I hypothesize that the courts would do better not to get involved. The courts will struggle to create policy solutions, the policy will be met with considerable resistance, and quite possibly, the policy will lead to counter-productive results.

I now turn to a brief analysis of variable, illustrated with examples from the various policy areas.

### **Assessing Judicial Policymaking**

Reframing the question of judicial policymaking from a normative debate to a question of judicial capacity, Donald Horowitz questioned not “whether the courts *should* perform certain tasks but whether they *can* perform them competently.”<sup>25</sup> A wave of

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<sup>25</sup> Horowitz, *supra* note 20, at 18.

scholarship has engaged this question, producing a disparate range of issues that can be unified into a holistic model to analyze judicial policymaking. This model, as laid out in Table 1, incorporates six elements drawn from scholarly literature: generalism, bipolarity, minimalism, legitimization, structural impediments, and public support. Some of these variables affect judicial policymaking capacity; when inherent in a judicial policy, the policy will be more effective and easier to enforce. Others affect the judicial policymaking necessity; when present, they pressure the court to create a policy. All six, however, ought to make judicial policymaking more appropriate in the eyes of the court, the litigants, the state, and general public. Appropriateness, a function of both capacity and necessity, is the overall measure of whether judicial intervention in the policymaking process is conducive to an enduring policy solution.

The first variable considered is *generalism*. Most judges are “generalists” to the extent that they must hand down decisions on any case before them, even if they lack the social or technical knowledge required to make an informed policy decision.<sup>26</sup> Often forced to rely on amicus briefs or expert witnesses to attain any specialized knowledge,<sup>27</sup> judges’ interpretation and use of such information in policy-making is heavily criticized. For example, courts attempting to create educational policy have been accused of “lack[ing] an awareness of the complex, multifaceted process of education” and “disregard[ing] the development of children the perspectives of families and

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<sup>26</sup> *Id.* at 31

<sup>27</sup> Strum, Philippa. *Louis D. Brandeis: Justice for the People*. (Cambridge, Mass.: Harvard University Press, 1984), 24.

communities.”<sup>28</sup> Judges themselves admit as much.<sup>29</sup> In education, as in any other specialized area of public policy, judges often lack both relevant social or technical information and the training to put such information to effective use. It is reasonable to hypothesize that judges’ policymaking capacity will rise when the case before them is general in nature – when it contains a minimum of social or technical information.<sup>30</sup>

To understand the impact that generalism can have on a court decision, one need look no further than *Brown v. Board of Education* (1954). The Supreme Court’s reliance on socio-psychological studies in *Brown*, demonstrating the supposed psychological harm inflicted on black students by segregation, has been repeatedly challenged by those who would not have the constitutional rights of Americans rest on the “flimsy foundation” of questionable social science evidence.<sup>31</sup> Although Chief Justice Warren stated that the adverse psychological effects of segregation were “amply supported”<sup>32</sup> by such evidence, the Court’s decision was primarily grounded on congressional intent in writing the Fourteenth Amendment, and in basic moral considerations that negate the need for social

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<sup>28</sup> Lightfoot, Sarah Lawrence. “Families as Educators: The Forgotten People of *Brown*.” *Shades of Brown: New Perspectives on School Desegregation*. (New York: Teachers College Press, 1980): 4.

<sup>29</sup> *U.S. v. Jefferson County Board of Education* (1966) at 855: “Most judges do not have sufficient competence- they are not educators or school administrators- to know the right questions, much less the right answers.”

<sup>30</sup> As a counterpoint, Lawrence Baum advocates that “the Court is a specialist” in that “the bulk of its decisions are made in a few policy areas,” namely economic policy and civil liberties. However, as the Court can only decide a given number of cases in a term, and the subject matter and circumstances of those cases changes each year, the Justices have little ability to develop any sort of expertise, even in the long term, in one policy area. Furthermore, there are innumerable disputes within the broad category of civil liberties, each requiring different background knowledge and a different policy solution. Baum, Lawrence. *The Supreme Court* (7<sup>th</sup> ed.) (Washington, D.C.: CQ Press, 2001) 185, 194.

<sup>31</sup> Ravitch, Diane. *The Troubled Crusade: American Education, 1945-1980* (New York: Basic Books, 1983), 129. See also Newby, I.A. *Challenge to the Court: Social Scientists and the Defense of Segregation 1954-1966* (Baton Rouge: Louisiana State University Press, 1969).

<sup>32</sup> *Brown v. Topeka Board of Education* (1954) at 494.

science justifications.<sup>33</sup> Intertwining morality with psychological studies, the *Brown* decision was moderately generalist. Had the Court abandoned its attempt to justify its decision with the social sciences, and instead focused solely on the legal and moral argument, desegregation's critics would have been unable to question to the appropriateness of the decision. The inclusion of faulty social science evidence only gave critics a weapon to undermine the legitimacy of the Court's decree. Justifying a decision through social sciences or technical information, then, reduces generalism and calls the courts' capacity into question.

*Bi-polarity*, a term employed by Abram Chayes and the second variable considered, refers to disputes between two parties where one has wronged the other. Judges easily resolve such disputes by deciding the appropriate remedy owed to the injured party.<sup>34</sup> The difficulty is that, in modern adjudication, many cases are not bi-polar but "multi-plural." These lawsuits are "not a dispute between private individuals about private rights," as Chayes puts it, "but a grievance about the operation of a public policy."<sup>35</sup> Such cases are brought to court by multiple groups, each alleging to have been injured by a public policy, thus frustrating the judge's ability to assign blame or award damages. A multi-plural case involving a multitude of interested or injured parties, requiring the judge to balance the impact a court policy will have on each one, will necessarily make the policy-making process more difficult. A bi-polar case, by contrast, should raise the court's capacity.

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<sup>33</sup> "Many of the most dramatic civil rights questions depend so extensively on moral rather than factual reasoning that the technical competence of judges really does not seem relevant." Carter, Lief H. and Thomas F. Burke. *Reason in Law* (7<sup>th</sup> ed.) (New York: Pearson Longman, 2007), 123.

<sup>34</sup> Horowitz, *supra* note 20, at 34.

<sup>35</sup> Chayes, Abram. "The Role of the Judge in Public Litigation," *Harvard Law Review* 89 (1976): 1302.

The school prayer decisions provide a fine example of bi-polarity. These cases were all brought to court by students of a religious minority, such as Jehovah's Witnesses, who refused to pray in school. Given the small size and extreme unpopularity of such groups, not to mention the political powerlessness of young students, there were no allied interest groups that could have influenced the Court's policies.<sup>36</sup> Prison reform cases, as disputes between prison administrators and individual prisoners with no interest groups to represent them, also embody the concept of bi-polarity. Courts, freed from having to consider the impact of their decisions on allied groups, can boost their capacity by focusing on the issue at hand in both types of cases. The "one-person, one-vote" doctrine advanced in the Supreme Court's redistricting decisions, on the other hand, illustrates the difficulties judges face when issuing multi-plural rulings. In order to comply with rulings such as *Baker v. Carr* (1962), lower courts were required to re-apportion legislative districts across entire states, in pursuit of "mathematical exactness" and proportional representation.<sup>37</sup> By forcing the lower courts to balance the interests and voting power of every district in the state, the Supreme Court lowered capacity by advocating for a multi-plural solution.<sup>38</sup>

Capacity also raises when courts advance *minimalist* policies. As used by Cass Sunstein, minimalism encourages judges to advance a policy in small steps, over a series

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<sup>36</sup> Dolbeare, Kenneth M., and Phillip E. Hammond. *The School Prayer Decisions from Court Policy to Local Practice*. (Chicago: University of Chicago Press, 1971), 58.

<sup>37</sup> *Reynolds v. Sims* (1964) at 577.

<sup>38</sup> Hasen, Richard L. *The Supreme Court and Election Law: Judging Equality from Baker v. Carr to Bush v. Gore*. (New York: New York University Press, 2003), 7-8. Professor Hasen suggests that courts might apply Cass Sunstein's minimalism argument by protecting only "core" political-equality rights – political participation, competition, or equality – while leaving the rest to the legislature. As of yet, courts have not attempted this approach.

of related cases.<sup>39</sup> By issuing “narrow, incremental” decisions instead of “broad rulings that the nation may later have cause to regret,” courts restrain themselves from invalidating too many laws, instigating too many unforeseen consequences, or requiring too much action on the part of the implementing populations to be feasibly enforced.<sup>40</sup> This minimalist rule of thumb produces effective court policies because the adversary legal system is much more conducive to “deciding the particular case,” rather than “formulating a general policy.”<sup>41</sup> It allows judges render decisions specifically tailored to certain circumstances, and thereby allows them to reach the best possible outcome for that case. By erring on the side of caution and deciding a case solely on the issues before them, judges should be able narrow policies that provide maximum benefits for the target population with minimal government action.

In *Roe v. Wade* (1974), the Supreme Court singlehandedly abolished abortion restrictions in forty-six states.<sup>42</sup> Conservative religious groups across the nation rose up in protest when *Roe* was handed down. Justice Ginsburg herself has argued that had the Court struck down individual abortion regulations on a case-by-case basis, had they advanced a minimalist reform policy instead of a broad declaration, the Court could have avoided this incredible backlash.<sup>43</sup> Moreover, state legislatures might have “liberalized

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<sup>39</sup> See generally Sunstein, Cass R. *One Case at a Time: Judicial Minimalism on the Supreme Court*. (Cambridge, Mass: Harvard University Press, 1999).

<sup>40</sup> Sunstein, Cass R. *Radicals in Robes: Why Extreme Right-Wing Courts are Wrong for America*. (New York: Basic Books, 2005), xiii.

<sup>41</sup> Horowitz, *supra* note 20, at 47.

<sup>42</sup> *Roe v. Wade* (1973), Footnote 37. Although fourteen states had adopted some form of a liberalized abortion statute, only four states had “had repealed criminal penalties for abortions performed in early pregnancy.” These were Alaska, Hawaii, New York, and Washington.

<sup>43</sup> Ginsburg, Ruth Bader. “Speaking in a Judicial Voice,” *New York University Law Review* 57 (1992): 1199.

access to abortion without backlash if only the Court had stayed its hand.”<sup>44</sup> The Justices learned their lesson from *Roe*: throwing caution to the wind in pursuit of social change lowers court capacity, whereas minimalist decisions raise capacity by giving the public time to acclimate to new judicially-mandated policies. Prison reform decisions reflect a higher degree of minimalism, because courts are inclined to issue remedial judicial decrees, commanding administrators to address a certain deficiency or terminate a certain practice, rather than ordering the prison system as a whole to re-invent itself.<sup>45</sup> This minimalism makes the decisions easier for prison administrators to enforce.

Judges must also consider the degree to which their policies depend on the legislative and executive branches for *legitimization*. The judiciary largely lacks the power to enforce its own decisions, and a ruling that relies on extensive enforcement from the other branches diminishes the power judges possess over their own policies. Alexander Hamilton famously wrote in his *Federalist Papers* that the judicial branch “has no influence over either the sword or the purse,” and “must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”<sup>46</sup> While some decisions are relatively self-enforcing, it is true that “the judiciary, having no budget, no power to tax or to create new institutions, has much less ability to experiment or to adjust its techniques to the problems it confronts.”<sup>47</sup> It should be noted that Congress faces

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<sup>44</sup> Post, Robert, and Reva Siegel. “Roe Rage: Democratic Constitutionalism and Backlash,” *Harvard Civil Rights-Civil Liberties Law Review* 42 (2007): 377.

<sup>45</sup> Feeley and Rubin, *supra* note 14, at 41.

<sup>46</sup> Hamilton, Alexander, and Clinton Rossiter. *The Federalist Papers; Alexander Hamilton, James Madison, John Jay*. (New York: New American Library, 1961), 465.

<sup>47</sup> Horowitz, *supra* note 20, at 35.

similar enforcement issues, for “implementation of statutes is far from automatic.”<sup>48</sup> However, Congress at least possesses the power to levy taxes, subsidize compliance, or create bodies to oversee its policies, whereas courts’ “power to command consent” comes primarily from citizens’ continuing belief in the rule of law, the belief that judicial decisions are based on principles “which bind the judges as well as the litigants and apply consistently yesterday, today, and tomorrow.”<sup>49</sup> Most judicial policies must therefore rely, at least to an extent, on the considerable enforcement mechanisms of the coordinate federal branches and on the compliance of local government officials. Judicial policies that are easily legitimized ought to be the most successful.

None of the policies considered here were easily legitimized. Rather, they all depended on co-ordinate branch enforcement. As the painful history of military deployment in Little Rock and the resulting Civil Rights Act of 1964 demonstrates, desegregation policy relied heavily on the executive and legislative branches’ enforcement mechanisms.<sup>50</sup> Redistricting policies were no easier to enforce, as they relied entirely on the legislature for legitimization. Legislators not only “have the power to determine many of the rules that govern the democratic process,” they also have incentive “to manipulate the rules of the game in order to forward their personal or partisan ambitions at the expense of the public interest.”<sup>51</sup> The considerable power of

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<sup>48</sup> Baum, *supra* note 30, at 226, 241.

<sup>49</sup> Shapiro, Martin M. *The Supreme Court and Public Policy*. (Glenview, Ill.: Scott, Foresman, 1969), 101.

<sup>50</sup> For a full list of inherent implementation and legitimization flaws within the *Brown* and *Brown II* decisions, see Wasby, Stephen et al., *Desegregation from Brown to Alexander* (Carbondale, Ill.: Southern Illinois University Press, 1977), 122.

<sup>51</sup> Dawood, *supra* note 74, at 1440. See also Gerken, Heather K. “Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum,” *University of Pennsylvania Law Review* 153 (2004): 519.

these elected officials subtracted from the Court's legitimacy. Court rulings on school prayer, likewise, depended on legitimization and enforcement from school administrators,<sup>52</sup> and consequentially remain unenforced in much of the country.<sup>53</sup> Abortion and prison reform decisions encountered the same fundamental flaw in that they relied on compliance from hospital and prison administrators, though this problem has been mitigated somewhat by the public nature of the courts' pronouncements, and the courts' ability to impose sanctions on non-compliant officials.<sup>54</sup> In all these cases, however, courts' institutional dependency on outside enforcement constrained their capacity to legitimize their own policy decisions.

In keeping with the alternativism approach, courts offer an alternate path for policy goals blocked by *structural impediments* in the other branches. Structural impediments, such as corruption or partisan deadlock, prevent many policies from making it through the legislature, but majoritarianism poses the most significant barrier. Minority groups who are too small or too unpopular to make their voice heard in the representative branches of government must take their cause to court. Judicial policymaking thus becomes most defensible when "courts offer the only viable path to

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Gerken asserts that "the self-interest of elected state legislators can undermine democratic values, and the intervention of unelected judges can promote them."

<sup>52</sup> Dolbeare and Hammond, *supra* note 36, at 136. There was no institutional oversight to mandate legitimization and compliance on the part of these school officials. "With the prospect of no rewards and few punishments, local elements were especially free to exercise their own discretion" on school prayer policy.

<sup>53</sup> Alley, Robert S. *Without a Prayer: Religious Expression in Public Schools*. (Amherst, N.Y.: Prometheus Books, 1996), 21-24. See also Ravitch, Frank S. *School Prayer and Discrimination: The Civil Rights of Religious Minorities and Dissenters*. (Boston: Northeastern University Press, 1999), 3, 73.

<sup>54</sup> Harris, M. K. & D. Spiller. *After Decision: Implementation of Judicial Decrees in Correctional Settings*. (Washington D.C.: National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, 1977) 9, 84.

get around fundamental institutional barriers,” but most problematic when it “dilutes or deflects the ordinary political process.”<sup>55</sup> When the political process provides a viable route to realizing policy goals, courts ought not to involve themselves. However, when the coordinate branches are made inoperable by structural impediments, judicial policymaking necessity will rise to a boiling point, and the courts will have to act.

In contrast to the legitimization variable, all of the policies examined here confronted some degree of structural impediments. Judicial action was necessary to advance a desegregation policy, for Southern segregationists “had an unbeatable filibuster in the Senate,” and President Eisenhower was loath to enter the race-relations battle.<sup>56</sup> Justice Jackson was correct in stating: “if we have to decide this question, then representative government has failed.”<sup>57</sup> Similarly, structural impediments are a given in any redistricting case. John Hart Ely and Michael Klarman used the terms “systemic malfunction”<sup>58</sup> and “legislative entrenchment”<sup>59</sup> respectively, but both refer to instances when political parties remove threats to incumbents through gerrymandering and malapportionment. It is precisely this sort of corruption that judicial redistricting policies seek to prevent. Both of these policies, and many of the others, could only have been developed by the judicial branch due to structural impediments. The one clear exception

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<sup>55</sup> Silverstein, *supra* note 10, at 29.

<sup>56</sup> Lain, Corinna Barrett. “Upside-Down Judicial Review,” *Georgetown Law Journal* 101 (2012): 124.

<sup>57</sup> Friedman, Leon, editor. *Argument: The Oral Argument before the Supreme Court in Brown v. Board of Education of Topeka, 1952-55*. (New York: Chelsea House, 1983), 244. Dickson, Del. *The Supreme Court in Conference, 1940-1985: The Private Discussions Behind Nearly 300 Supreme Court Decisions*. (Oxford [England]: Oxford University Press, 2001), 658.

<sup>58</sup> Ely, John Hart. *Democracy and Distrust: A Theory of Judicial Review*. (Cambridge: Harvard University Press, 1980), 102-103.

<sup>59</sup> Klarman, Michael J. “Majoritarian Judicial Review: The Entrenchment Problem,” *Georgetown Law Journal* 85 (1997): 498.

is abortion policy. Cass Sunstein posits that by 1973, “state legislatures were moving firmly to expand legal access to abortion,” and that *Roe* “may have prevented state legislatures from working out long-lasting solutions based upon broad public consensus.”<sup>60</sup> Though state legislatures were in the process of liberalizing abortion, the Court’s over-eager intervention can be attributed to the structural impediments still remaining in the national Congress. Fearful of taking a polarizing stance on abortion, elected officials moved “to ensure that courts, rather than legislatures” would be “the forums responsible” for deciding abortion policy.<sup>61</sup> Judicial intervention in abortion policy was only moderately necessary, as support for liberalized abortion was strong at the local level but lacking on the national stage.

Finally, despite the insistence that judges be kept insulated from partisan pressures and public opinion, judicial policies cannot survive without *public support*. Many state judges are not held accountable to the electorate, and federal judges are always appointees, so there is seemingly little motivation for judges to appease the public. However, the Supreme Court rarely resists “a really unmistakable wave of public sentiment” for very long.<sup>62</sup> Swimming against the tide of public opinion, and taking “sustained policy position that lacks significant support outside the Court,” invites intense public scrutiny of judicial decisions.<sup>63</sup> In order to maintain their legitimacy, then, courts must indulge public opinion by creating popularly supported policies. When public demand for a policy solution grows especially strong, courts will feel compelled to

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<sup>60</sup> Sunstein, Cass R. “Three Civil Rights Fallacies,” *California Law Review* 79 (1991): 766

<sup>61</sup> Graber, Mark A. “The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary,” *Studies in American Political Development* 7 (1993): 54.

<sup>62</sup> McCloskey, Robert G. *The American Supreme Court* (Chicago: University of Chicago Press, 1960), 23.

<sup>63</sup> Baum, *supra* note 30, at 214.

participate in policymaking. Though there is no guarantee that courts will have high capacity when creating these policies, I predict that judicial policymaking necessity will rise in tandem with public support for court action.

Public support was weak for most of the policies considered here, and even when a majority of the nation supported judicial intervention, the minority was so vehemently opposed that any positive support was comparatively insignificant. For instance, although 54% of Americans agreed with the *Brown* ruling, the whites who opposed it were much more vocal than the whites who supported it.<sup>64</sup> Similarly, the rise of the religious right and Ronald Reagan's subsequent conservative revolution in the wake of *Roe* indicate that the outraged minority shouted louder than the liberal majority.<sup>65</sup> Other policies were met with majoritarian opposition from the very start. Both prisoners and religious minorities were so politically unpopular that judicial decisions in their favor could never garner public support. Tellingly, between 70 and 80 percent of Americans favored school prayer from 1964 to 2004, in direct opposition to judicial policies.<sup>66</sup> The only overwhelmingly popular policy was redistricting, which can be attributed to citizen's enthusiasm for stamping out governmental corruption.<sup>67</sup>

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<sup>64</sup> Gallup, George H. *The Gallup Poll: Public Opinion 1935-1971* (1972) at 1249.

<sup>65</sup> Friedman, Barry. *The Will of the People: How Public Opinion has Influenced the Supreme Court and Shaped the Meaning of the Constitution*. (New York: Farrar, Straus and Giroux, 2009) 305. See also Lain, *supra* note 56, at 134; Post and Siegel, *supra* note 44, at 374.

<sup>66</sup> Persily, Nathaniel, Jack Citrin, and Patrick J. Egan, eds. *Public Opinion and Constitutional Controversy*. (Oxford: Oxford University Press, 2008), 69.

<sup>67</sup> In 1966, four years after the Court's landmark redistricting policy commitment in *Baker v. Carr*, 76% of Americans favored the one-person, one-vote policy that required congressional districts to have equal populations. See Louis Harris and Associates Poll, The Roper Center for Public Opinion Research. Found in Fourgere, Jousha et al., "Partisanship, Public Opinion, and Redistricting." *Election Law Journal* (2010): 325.

## Findings

Three general conclusions can be drawn from Table 1. First, the findings suggest that judicial policymaking capacity is highest when court decisions protect the individual liberties of unpopular minorities from oppressive majorities. Despite (or perhaps because of) almost uniform public sentiment against the courts' school prayer and prison reform decisions, judicial action was the most successful in protecting unpopular groups such as Jehovah's Witnesses (who refuse to pray in school) or felons. This is indicative of what Professor Bickel terms the "anti-majoritarian difficulty," or the role of the courts in democratic society to act as a check on popular will.<sup>68</sup> While the policies considered here all concerned political minorities of some sort, be they African-Americans, women, or under-represented voters, it is arguable that even in the era of *de jure* segregation, African-Americans had more visibility and political clout due to the work of the NAACP and civil rights activists than did religious minorities or prisoners. Another by-product of the civil rights movement was the increased political debate over women's rights and healthcare, whereas the rights of prisoners received considerably less public attention. This is to say, perhaps unsurprisingly, that the smaller and more helpless the minority plaintiff in any given case, the more apt the judiciary is at creating beneficial policy.

Second, some structural impediments were present in every policy area, and were significant in every area except abortion. Taken in conjunction with the previous conclusion that courts perform best when protecting minorities from hateful public opinion, it could easily be maintained that structural impediments determine the necessity of judicial policy-making, whereas public support for judicial intervention is

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<sup>68</sup> See generally Bickel, *supra* note 1.

comparatively insignificant. This finding would be in keeping with the traditional formulation that courts are (or should be) insulated from public opinion. Judicial policymaking, then, appears to be most appropriate – or at least most necessary – when the other branches’ hands are tied. In other words, the judiciary ought to intervene in policymaking only as a last resort.

Third, bi-polar cases correlate with appropriate judicial policies. Judges in both the school prayer and prison reform decisions were freed from having to concern themselves with the opinions of various conflicting interested parties. Neither K-12 schoolchildren nor prisoners, after all, have powerful interest groups to lobby for their rights. This allows judges to focus on crafting an effective policy from constitutional principles, rather than compromising those principles in order to create a workable policy that meets the needs of many interested parties to the dispute.

There are flaws apparent in this model. For example, the model does not consider that some of the six variables might carry more weight than others. Furthermore, there might be covariance among these variables. It is not so hard to imagine that a bi-polar policy might, by its very nature, invite a minimalist solution because of the fewer number of parties involved. Despite all efforts to the contrary, these categorical rankings, grounded though they are in research, are to a degree subjective assessments of policy effectiveness. As no readily apparent way to quantify the six variables presented itself, a theoretical approach to judicial intervention in the policymaking process seemed the most effective option. It is especially important to highlight that I do not consider these five policy areas from the perspective of the many groups and individuals they benefit. I do not mean to suggest that the Supreme Court’s *Brown* or *Roe* decisions, for instance, did

not bring enormous relief to populations facing severe discrimination. On the contrary, I would applaud the Court for taking action in these cases when the representative branches failed to do so. I argue only that the judiciary was not the ideal or the most appropriate branch to resolve these policy issues, and therefore judicial intervention in the policymaking process itself may not solve the dispute in the long run. While I recognize these constraints and invite revisions and additions to this theoretical model, the *capacity + necessity = appropriateness* model does provide a foundation for further developments in the field of judicial policymaking.

### **Case Study: Affirmative Action in Education**

Having tested the model on a diverse range of policy areas, I turn to an assessment of judicial participation in affirmative action policymaking. Table 2 (found in the Appendix) applies the policymaking model to the Supreme Court's affirmative action jurisprudence. This analysis focuses specifically on educational affirmative action policies, which are defined as "policies that offer individuals deemed to be affiliated with a beneficiary group a preference over others in competitions for," apart from jobs and government contracts, "education."<sup>69</sup>

Two affirmative action educational policies come into focus: judicial corrections to higher-education admissions programs, and court-imposed busing plans for K-12 public schools. Scholars dispute the extent of judicial involvement in both policies. J.

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<sup>69</sup> Kennedy, Randall. *For Discrimination: Race, Affirmative Action, and the Law*. (New York: Pantheon Books, 2013), 20.

Harvie Wilkinson argues that while busing is a “court-controlled,” “race-conscious remedy,” affirmative action policies in higher education are “neither court-controlled nor court-compelled,” because higher education institutions “*voluntarily* [took it upon themselves] to redress past racial wrongs.”<sup>70</sup> However, this account belittles the central role that the judiciary played in developing higher education affirmative action. If, in the 1970s, the Supreme Court sanctioned the consideration of race in admissions policies, then by the 1990s, “the Court was proscribing affirmative action plans it once sanctioned.”<sup>71</sup> Regardless of whether these policies were voluntarily adopted or judicially mandated, both were developed and implemented by the judicial branch, acting in a non-traditional policymaking role, and both were intended to provide minority students with increased access to equal educational opportunities.

Several interesting differences between the two policy areas remain apparent. The Court’s higher education jurisprudence concerns individual applicants seeking admission to selective institutions, while its busing cases were all brought by organized groups or entire school districts protesting race-based school assignments. Plaintiffs in higher education cases typically ask the Court to strike down racial quotas; the Court, in busing cases, often feels compelled to do just the opposite. In the end, however, busing and higher education affirmative action alike aim “to overcome societal discrimination

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<sup>70</sup> Wilkinson, J. Harvie III. *From Brown to Bakke – The Supreme Court and School Integration: 1954-1978*. (Oxford: Oxford University Press, 1979), 275.

<sup>71</sup> Naff, K. C. “From *Bakke* to *Grutter* and *Gratz*: The Supreme Court as a Policymaking Institution.” *Review of Policy Research* 21 (2004): 424.

affecting minorities irrespective of whether nefarious intent can be proven.”<sup>72</sup> In its busing decisions, as in its higher-education adjudication, the Supreme Court sought to provide a remedy for the harm caused by generalized discrimination against minorities seeking equal access to education. Judicial involvement in higher education admissions and in K-12 busing plans, therefore, both conform to the above definition of educational affirmative action policies.

Tracing the judicial history of these two policy areas, and comparing their performances in the model, will provide insight on when, or if, judicially created race-based remedies can successfully counteract educational discrimination. While other policies concerning race and education, such as voucher programs, school funding disputes, and charter schools, were challenged in court and do merit further study, this analysis constrains itself to a comparison of two types of affirmative action because of their marked contrasts and the considerable extent of judicial involvement in forming both policies.

## **Judicial Intervention in Affirmative Action**

### *Higher Education*

The year 1965 marked the beginning of federal affirmative action, when Lyndon B. Johnson’s Executive Order No. 11246 ordered the federal government to take “affirmative steps” to remedy lingering effects of prior discrimination. The Supreme Court, however, first weighed in on the issue of affirmative action in higher education in

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<sup>72</sup> Leiter, Samuel, and William M. Leiter. *Affirmative Action in Antidiscrimination Law and Policy: An Overview and Synthesis*. (Albany: State University of New York Press, 2002), 114.

the landmark case *Regents of the University of California v. Bakke* (1977).<sup>73</sup> Ever since this highly controversial decision, “it is largely the courts that have defined the permissible scope of affirmative action programs.”<sup>74</sup>

Bakke, a white male, was twice denied acceptance at the University’s medical school under an admissions program which reserved sixteen out of one hundred seats in each incoming class for minority students. Bakke alleged that the University’s affirmative action program violated the Equal Protection Clause of the Fourteenth Amendment by denying him equal opportunity to attend a state school, solely on the basis of his race.

The Court failed to reach a majority decision, with four Justices concluding that a state-supported racial quota system in higher education was forbidden by the Civil Rights Act of 1964, and another four holding that considering race in admission decisions is constitutionally permissible. Justice Powell, with one foot in both camps, wrote for the plurality, finding that while race could be used as one of many factors in a broader criteria, the use of a racial quota violated the Equal Protection Clause of the Fourteenth Amendment. In short, Powell sympathized with the claim that the University had a “compelling state interest” interest in obtaining a diverse student body, but cautioned that this interest does not excuse higher education institutions from “treat[ing] each applicant

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<sup>73</sup> *Bakke* is by no means the first case argued before the Supreme Court concerning race in higher education. In *Missouri ex rel. Gaines v. Canada* (1938), the Court struck down a policy whereby the state provided a law school for whites and offered blacks tuition payments to attend law schools in neighboring states. In *Sweatt v. Painter* (1950), the Court held that the University of Texas Law School could not create a separate school for black applicants, and in *McLaurin v. Oklahoma State Regents* (1950), the Court forbade Oklahoma State from sectioning off certain areas of the classroom for black students to sit in. However, none of these cases fit the definition of affirmative action, since these students were not favored over non-minority applicants.

<sup>74</sup> Naff, *supra* note 71, at 407.

as an individual in the admissions process.”<sup>75</sup> Race could be used as a factor in admissions, but not as the only or even the primary one.

In *Bakke*'s wake, some institutions adopted admissions programs modeled after Harvard's, which Justice Powell had praised for considering students holistically and recognizing that there are many types of diversity beyond race. In the absence of more direction from the Court, however, most admissions programs continued to operate as before, either in confusion over or in violation of the *Bakke* ruling.<sup>76</sup> Given their confusing first step, it is hardly surprising that the Court continued to send contradictory signals about the constitutionality of affirmative action in higher education. The Justices rejoined the battle in 2003, when they handed down two seemingly conflicting opinions on the same day: *Grutter v. Bollinger* and *Gratz v. Bollinger*.

*Grutter* concerned an applicant to the University of Michigan's law school who was denied admission under a program that used race as a factor in making decisions. The University protested that it had a compelling interest in attaining a diverse student body. Justice Sandra Day O'Connor found that neither the Equal Protection Clause nor the Civil Rights Act of 1964 prevented the University from using race as a factor in its decision-making process, because diversity was a compelling state interest, the admissions program was narrowly tailored to realize that interest, and because it did not “unduly harm” non-minorities.<sup>77</sup> In doing so, O'Connor largely followed Powell's lead by reiterating the importance of diversity in higher education and upholding programs that did not overly burden non-minority applicants.

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<sup>75</sup> *Regents of the University of California v. Bakke* (1977) at 315, 318.

<sup>76</sup> Wilkinson, *supra* note 70, at 302.

<sup>77</sup> *Grutter v. Bollinger* (2003), at 309.

In *Gratz*, a white applicant was denied admission to the University of Michigan's undergraduate program, which also considered race as a factor in its decision-making process to further the compelling interest of achieving on-campus diversity. Specifically, the program gave applicants a numerical score; those with scores of at least 100 were admitted. African-American, Hispanic, and American Indian applicants were automatically awarded 20 out of the 100 required points, solely on basis of their race. Chief Justice William Rehnquist struck down Michigan's admissions program under the Equal Protection Clause. Though he did not outright ban the University from considering diversity as a compelling interest, Rehnquist found that the program was not narrowly tailored, and did not sufficiently consider students at an individual level, as Justice Powell would have required.<sup>78</sup>

To the Court's credit, the Justices applied the same strict scrutiny test to *Gratz* and *Grutter*: in both instances, the admissions program must be narrowly tailored to achieve diversity without causing undue harm on non-minorities or judging students solely by their race, rather than by their individual achievements. However, the Court failed to provide any concrete sense of when programs cross the line from constitutional to not. The program in *Gratz* considered more than a student's race; it merely gave minority students a "plus," to use Justice Powell's language.<sup>79</sup> A big plus, to be sure, but a plus nonetheless, and since there were no racial quotas present, a plus to a minority student could hardly be construed as a "minus" to white students. Critics further wondered whether the Court could truly hold the *Grutter* and *Gratz* admissions policies

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<sup>78</sup> *Gratz v. Bollinger* (2003), at 246.

<sup>79</sup> *Regents of the University of California v. Bakke* (1977) at 317.

to the same standard, when the undergraduate program clearly received a proportionately larger number of applications, and therefore could hardly afford to compare students on a strictly individual basis.

The Court's reluctance to guide higher education institutions through these questions could indicate low levels of capacity, but it might also reflect a wise tendency for minimalism, or simply a desire to remove itself from a fiery political debate. Those hoping that the Court would provide more answers remained disappointed after *Fisher v. University of Texas at Austin* (2013), which concerned a white applicant who was denied undergraduate admission to the University in favor of less qualified minority applicants. The Court was not asked to overturn *Grutter* – the petitioner acknowledged that diversity was a compelling interest – and indeed it did not. Rather, Justice Anthony Kennedy's majority opinion insisted that “strict scrutiny must not be strict in theory but feeble in fact,” holding that affirmative action is constitutional only narrowly tailored and absolutely necessary to achieve a diverse student body. As of 2013, race can only be considered when there are no realistic alternative measures to create diversity on campus.

### *Busing*

In *Brown II*, the Supreme Court entrusted the task of supervising desegregation on the ground to the district courts. These courts, lacking direction, were soon overwhelmed by avoidance schemes, which eventually climbed their way back up to the Supreme Court. *Goss v. Board of Education of Knoxville* (1963), for example, concerned a school board that unconstitutionally allowed students to transfer from a school where they were in the racial minority to one where they were in the racial majority. Similarly, in *Green v.*

*County School Board of New Kent County, Va.* (1968), the Court struck down a freedom-of-choice plan that allowed children to choose which public school they wanted to attend. By the time of *Swann v. Charlotte-Mecklenburg Board of Education* (1971), the Court had tired of combatting desegregation, and instead instructed local officials to do “whatever was necessary” to force integration.<sup>80</sup> In this case, Chief Justice Warren Burger upheld the power of district judges to use busing as a remedial decree. “Once a right and a violation have been shown,” Burger wrote, “the scope of a district court’s equitable powers to remedy past wrongs is broad.”<sup>81</sup> Lower courts now wielded the power to desegregate school districts by imposing court-created busing plans, even if those plans required busing children for upwards of an hour to reach a school in need of racial balancing.

Opposition to busing policy was particularly harsh in Northern cities where *de jure* segregation was unknown but *de facto* segregation had long since resulted in discriminatory housing patterns. *Keyes v. School District No. 1* (1973) excited outrage in Denver, where schools were ordered to integrate despite the fact that segregation was clearly a result of housing patterns, not school board bias.<sup>82</sup> In response to this widespread public criticism of busing, the Court rescinded this unpopular policy in following cases. In *Milliken v. Bradley* (1974), the Court held that the predominantly black, inner-city Detroit public school students did not have to be bused to the suburbs, because school districts could not be forced to desegregate if there was no clear showing

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<sup>80</sup> Ravitch, *supra* note 31, at 176.

<sup>81</sup> *Swann v. Charlotte-Mecklenburg Board of Education* (1971), at 15.

<sup>82</sup> Ravitch, *supra* note 31, at 177.

of discriminatory intent.<sup>83</sup> This decision marked a retreat for the Court, and an acknowledgement of the widespread public pushback against the busing doctrine. Under Chief Justice John Roberts, the current Court effectively put an end to racial remedies in K-12 public education. The *Parents Involved in Community Schools v. Seattle School District No. 1* (2007) decision concluded that racial diversity is not a compelling interest, and that assigning students to public high schools in order to achieve racial balance is therefore unconstitutional.

In busing, as in higher education, the Courts' affirmative action decisions have been controversial, and have called into question fundamental constitutional principles and American attitudes towards race. Courts, along with the rest of American society, continue to grapple with this history. The presence of three underlying challenges has limited the Court's ability to intervene in affirmative action policymaking.

### **Inherent Challenges**

#### *Race-blindness vs. Race-consciousness*

The Court's struggle to decide on a clear-cut standard for affirmative action policy is indicative a longer clash in American history between two sets of competing ideologies: race-blindness versus race-consciousness, and equality of opportunity versus equality of result.

The race-blind approach was first articulated by Justice Harlan's famous dissent in *Plessy v. Ferguson* (1896): "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." Harlan's statement, though made over a century ago, is

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<sup>83</sup> *Id.* at 178.

echoed by Justices sitting on the same bench today. Ironically enough, Harlan's color-blind doctrine was originally used to argue that segregated train cars discriminated against black Americans, while today, the same doctrine is used as justification end forms of "benign" discrimination that offer advantages to blacks. In *Parents Involved in Community Schools v. Seattle School District* (2007), Chief Justice John Roberts responded pointedly, "the way to stop discrimination on the basis of race is to stop discrimination on the basis of race," and Justice Thomas explicitly stated, "my view of the Constitution is Justice Harlan's view." Race-blindness remains an appealing rhetorical and conceptual approach to constitutional issues of race equality, although the kinds of racial discrimination that it seeks to counter have changed.

Proponents of race-consciousness, on the other hand, argue that law can correct for racial discrimination only by taking account of an individual's race. Justice Blackmun best exemplified the race-conscious approach in his *Bakke* concurrence/dissent. "In order to treat certain persons equally," he wrote, "we must treat them differently."<sup>84</sup> Subscribers to this approach see affirmative action as a remedy for institutionalized racism or vestiges of prior discrimination, and believe "benign" discrimination policies are constitutionally acceptable. While its opponents warn judges not to force distinctions between equal citizens, race-conscious advocates point out that "laws," by their very nature, "classify."<sup>85</sup> For example, the Supreme Court itself considers race to be a more protected class than sex, and thus holds race-based classifications to a higher standard of constitutional scrutiny. If laws and judges both sort

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<sup>84</sup> *Regents of the University of California v. Bakke* (1977) at 407.

<sup>85</sup> Rosenfeld, Michel. *Affirmative action and Justice: A Philosophical and Constitutional Inquiry*. (New Haven: Yale University Press, 1991), 147.

individuals into classes, and treat those classes differently under the law, then why should law not benefit those who are most often the targets of social discrimination?

The ideological debate between race-blindness and race-consciousness poses a particular challenge to the Court's capacity because both philosophies constantly evolve, keeping in pace with America's evolving understanding of race in society. Though both rooted firmly in precedent, these two approaches were developed in different centuries, in opposition to different racial issues. Race-blindness may have been the right choice in 1896, and race-consciousness may have worked well in 1978, but neither approach may be suitable for the present day. The Court, an institution that always looks backwards to find the way forward, struggles to articulate an effective approach to modern-day discrimination.

#### *Equality of Opportunity vs. Equality of Result*

A study by Gamson and Modigliani in 1987 found that the public sees affirmative action through one of two frames: 1) opposition to preferential treatment, or 2) remedial action to compensate for institutional racism.<sup>86</sup> These two frameworks correspond exactly to the race-blind and race-conscious arguments advanced by the Justices, respectively. This is a debate that not only encompasses competing visions of race, but competing visions of equality: equality of opportunity and equality of result.

Those who believe in the equality of opportunity might oppose affirmative action, because everyone should have an equal opportunity to attend college, be hired for a job, or be granted a government contract. If some are favored over others due to their race or

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<sup>86</sup> Persily et al., *supra* note 66, at 164.

gender, then people are not being given an equal chance, and the ones who rise to the top will not necessarily be the most deserving. Those who believe in equality of result, by contrast, will support giving preferential treatment to those who have been discriminated against, believing that the lingering effects of prior discrimination will prevent those groups from having truly equal access to scarce admissions slots or jobs. By compensating to an extent for this innate disadvantage, preferential treatment can lead to greater social equality.<sup>87</sup>

In the American tradition, the former conception of equality is heavily favored over the later: all three branches of government have explicitly endorsed the equality of opportunity ideal.<sup>88</sup> American's national narrative emphasizes "pulling yourself up by your bootstraps," rugged individualism, and the free-market ideal that the hardest-working and most deserving members of society will be the most successful, regardless of the challenges they face. The difficulty remains, however, that affirmative action brings into conflict two ideals of what equality should mean.<sup>89</sup> This is not a clash between two different rights, such as the fight between the right to privacy and the right to life that framed the abortion debate. Instead, judges are forced to say what equality is and what it is not, both defining the term and finding a place for it in the Constitution. This becomes

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<sup>87</sup> Many scholars "equality of opportunity" differently; indeed, many argue that affirmative action constitutes equal opportunity in that it provides more equal access to education. Wilkinson, J. Harvie III. "The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality," *Virginia Law Review* 61 (1975), 984-988. I use the term as Michael Rosenfeld employs it, as a contrast to race-consciousness and to equality of result. Rosenfeld, *supra* note 185, at 158.

<sup>88</sup> Title VII of the Civil Rights Act provides equal opportunity in employment, the executive provides equal opportunity in federal employment, and Justice Brennan, in his *Bakke* opinion, wrote "the court today affirms the constitutional power... to achieve equal opportunity for all." Rosenfeld, *supra* note 85, at 159.

<sup>89</sup> "The affirmative action debate is not between persons who are 'pro-equality' and others who are 'anti-equality.' Both the most ardent advocates of affirmative action and its most vehement foes loudly proclaim their allegiance to the ideal of equality." *Id.* at 2.

all the more difficult because “[judges] ought to be especially careful not to impose on the states particular conceptions of equality that are not constitutionally mandated.”<sup>90</sup> By imposing their own visions of equality, judges must endure higher levels of scholarly and public scrutiny whenever they waded into the affirmative action debate.

### *Judicial Inconsistency*

The most enduring critique of the Court’s rulings on affirmative action in higher education is that they are nebulous at best, disorienting at worst.<sup>91</sup> The failure to insist on a single, clear-cut rule or policy has left many observers confused as to what differentiates a constitutional affirmative action admissions plan from a prohibited one, which, in turn, has limited the Court’s capacity to sway public opinion.<sup>92</sup> These decisions are also indicative of the Court’s long struggle to guarantee the equality of all races at all levels of public education. Intriguingly, while the Court forbids racial quotas to attain diversity in higher education, it had no problem imposing racial quotas on elementary and secondary education to further school desegregation. Whereas racial assignments in K-12 schools necessarily reduce students’ identity to their racial groups, higher education affirmative action policy encourages admissions staff to consider an individual’s race as only one factor in making admissions decisions. Inconsistencies such as these cause public confusion and lend ammunition to the Court’s critics, thereby inhibiting judicial power.

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<sup>90</sup> Dworkin, Ronald. *A Matter of Principle*. (Oxford: Clarendon Press, 1986), 362.

<sup>91</sup> Rosenfeld, *supra* note 85, at 166.

<sup>92</sup> “Because the Court has not broadcast a consistent position on affirmative action- and because affirmative action has deeply divided the Court’s justices- the conditions for the Court to dramatically influence public opinion seem absent.” Persily et al, *supra* note 66, at 165.

Having addressed these limitations on courts' ability to resolve affirmative action disputes, I turn to the comparative case study. Table 2, in the Appendix, applies the model to judicial policymaking in higher education and busing.

### **Affirmative Action in Higher Education**

Justices ruling on higher education affirmative action cases are asked, at some point, to determine whether or not a rejected applicant deserves admittance to a higher education institution. "Courts," Gerald Rosenberg argues, "encounter particular difficulties when they try to reshape highly complicated institutions," because they lack institutional expertise.<sup>93</sup> When determining whether Bakke ought to be admitted to the UC Davis medical school, for instance, the Court needed review Bakke's application, compare it to competing applications, and assess the school's admissions program as a whole. The Court must, in short, perform the tasks assigned to the institution's own trained admissions staff. "Judges are trained in the law," as judges themselves point out, "they are not penologists, psychiatrists, public administrators, or educators."<sup>94</sup> The Court is nevertheless asked to go beyond its generalist knowledge in crafting higher education policy, an area of which it knows nothing.

As a conflict between a school and a rejected white applicant, higher education affirmative action cases seem bipolar. However, this first impression conveys anything but the truth, because every student or applicant to the institution has a vested interest in the school's admissions policy, as do the students' future employers. The widespread

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<sup>93</sup> Rosenberg, *supra* note 7, at 19.

<sup>94</sup> Johnson, Frank M. Jr. "The Role of the Federal Courts in Institutional Litigation," *Alabama Law Review* 32 (1981): 274.

public interest and debate over affirmative action cases “climaxed a trend toward public litigation.”<sup>95</sup> In the *Bakke* case alone, a record-setting fifty-eight briefs were filed,<sup>96</sup> a record smashed by the 200-plus briefs submitted in the companion cases *Grutter* and *Gratz*. The fact that everyone from the U.S. military to General Motors filed an amicus brief illustrates the multi-plurality of these decisions.

The Court advanced its higher education policy incrementally, largely due to the Justices’ own inability to agree on what standard of constitutional scrutiny to apply to affirmative action cases.<sup>97</sup> The Justices’ lack of cohesion resulted in many split decisions, “often without majority support for the reasoning upholding the decisions, and with sharp differences among the Justices.”<sup>98</sup> Unable to speak in unison, the Court could not take a strong stance on affirmative action, leaving school admissions officers themselves with considerable power to decide the impact of the Court’s policies.<sup>99</sup> For instance, educators estimated that after the *Bakke* decision, 90% of existing higher education admissions programs remained constitutional under Justice Powell’s test.<sup>100</sup> Intentionally or not, the Court minimized the breadth and sweep of its own opinions through in-fighting, compromise, and deference to the implementing populations. This is a fortunate

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<sup>95</sup> Wilkinson, *supra* note 70, at 260.

<sup>96</sup> Weaver, “Justice Dept. Brief 1 of 58 in Bakke Case,” *New York Times*, Sept. 20, 1977.

<sup>97</sup> Leiter & Leiter, *supra* note 72, at 5: “the Supreme Court has magnified the legal muddle [of affirmative action] on the constitutional level by initially failing to muster a majority on the issue of the proper standard for affirmative action judicial review.”

<sup>98</sup> *Id.* at 54

<sup>99</sup> “Institutionally and practically, it is the school admissions officers and administrators who will be crucial in determining what the impact of the *Bakke* decision will be.” Norman Dorsen of the American Civil Liberties Union, quoted in “Bakke Wins, Quotas Lose,” *Time Magazine*, July 10, 1978, at 15.

<sup>100</sup> Wilkinson, *supra* note 70, at 302.

occurrence, as “it would be a democratic disaster if the Court were to issue a broad ruling that foreclosed democratic debate” on so salient an issue as affirmative action.<sup>101</sup>

The Court’s rulings have done little to stifle public debate over affirmative action in higher education, and several states have not been shy to fight back against the Court’s tolerance for minority-preference programs. California’s Proposition 209, passed in 1996, states: “The state shall not discriminate against, or grant preferential treatment to any individual or group on the basis of race [in] public education.” Similarly, state legislatures have pushed back against Court rulings that validate considering race as a factor in admissions, with Texas and Florida adopting “Top 10 Percent” plans to automatically grant admissions to students graduating in the top 10 percent of their high school class, regardless of their race.<sup>102</sup> Higher education institutions, by contrast, have rarely fought the Supreme Court’s decisions outright, choosing instead to superficially modify their unconstitutional admissions programs, or maintain them in secret. “Virtually all universities and professional schools,” after the *Bakke* decision, “maintained their program for minority admissions,” and secured “roughly the same percentage of minority students each year.”<sup>103</sup> Whether through direct confrontation or indirect avoidance, officials at the local level have not legitimized the Court’s rulings.

On a national level, however, the legislative and executive branches have deferred to the Court where affirmative action is concerned. No President has taken a strong

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<sup>101</sup> Greenberg, Jack. “Affirmative Action in Higher Education: Confronting the Condition and Theory,” *Boston College Law Review* 43 (2002): 616.

<sup>102</sup> Bronner, Ethan. “Minority Enrollment at the U. of California Will Dip in Fall,” *New York Times*, A 20 (May 21, 1998); Connerly, Ward. “Why I’m Still Fighting Preferences in Florida,” *Wall Street Journal*, A26 (November 18, 1999).

<sup>103</sup> Schwartz, Bernard. *Behind Bakke: Affirmative Action and the Supreme Court*. (New York: NYU Press, 1988), 155

stance on affirmative action in higher education, wary of ensuing controversy. Even the Reagan administration's opposition to affirmative action policy prompted only a change in the rhetoric of affirmative action, not a change in affirmative action policy itself.<sup>104</sup> Bill Clinton's "low-key"<sup>105</sup> approach to affirmative action could be summed up by his "mend it, don't end it"<sup>106</sup> philosophy. George W. Bush also chose to follow the Court's lead: he "applauded the Supreme Court" on maintaining the "careful balance between the goal of campus diversity and the fundamental principle of equal treatment under the law" after the *Grutter* and *Gratz* decisions. The executive branch, clearly, has been willing to step aside and allow the Court to set the boundaries of affirmative action policy.

Congress, like the executive branch, elected to remain on the sidelines while the Court waded deeper and deeper into affirmative action juridification. Despite several opportunities to ban affirmative action, Congress consistently declined to do so. In fact, to this day, "Congress has failed to reverse any of the Supreme Court's affirmative action jurisprudence."<sup>107</sup> The executive and legislative branches alike have not challenged the Court's authority, but they have also stopped short of aiding the Court in its mission, except for carefully calculated endorsements of the Court's compromising decisions like *Grutter* and *Gratz*. Legitimization of the Court's higher education policy, lacking at the

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<sup>104</sup> Williams, Linda Fay. "Tracing the Politics of Affirmative Action." In *The Affirmative Action Debate*, edited by G.E. Curry, 241-257. (Cambridge, Massachusetts: Perseus, 1996), 253.

<sup>105</sup> Skrentny, J.D. *The Ironies of Affirmative Action*. Chicago: University of Chicago Press, 1996.

<sup>106</sup> Harris, John F. "Clinton Avows Support for Affirmative Action: 'Mend It, but Don't End It,' President Says in Speech," *Washington Post*, July 20, 1995, at A1 (quoting July 19, 1995 speech at the National Archives).

<sup>107</sup> Naff, *supra* note 71, at 423. Congress could have banned affirmative action with the Equal Opportunity Act of 1972, but chose not to do so. A second Equal Opportunity Act in 1995 threatened to restrict affirmative action, but the bill never even reached the floor, despite the Republican-dominated Congress.

local level and cautiously supported at the national level, indicates a moderate record of success for the Court's higher education decisions.

Despite the relative lack of action on the part of the coordinate branches, there is no discernable reason why the judiciary needed to intervene in higher education policymaking, especially considering the Court's indecisiveness as to the constitutionality of race-conscious admissions programs. Disgruntled, rejected applicants face an uphill battle in gaining admission to the school of their choice without court-orders, but there are other options available to them. Voters in California and state legislatures in Florida and Texas, for example, have proven sympathetic to demands to re-think affirmative action in higher education.<sup>108</sup> The coordinate branches' reluctance to engage in affirmative action policymaking, then, is more a function of their willingness to let the judiciary bear the burden than it is evidence of structural impediments.

Nor has there been widespread public support for judicial intervention in affirmative action. The American public (like the Justices of the Supreme Court) seems unable to decide if affirmative action in higher education should stay or go, thus limiting their ability to demand a judicial answer. A 1977 Gallup Poll conducted concurrently with the *Bakke* case found that while Americans oppose "preferential treatment" through affirmative action, they largely favored other publicly financed means of aiding minorities.<sup>109</sup> The same internal conflict remains apparent today. Despite consistently documenting opposition to formal racial discrimination, studies conducted concurrently with *Grutter* and *Gratz* found that only 35 percent of Americans thought that race should

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<sup>108</sup> Greenberg, *supra* note 101, at 538.

<sup>109</sup> Gallup, George H. "80% Majority Favors Ability as Criteria for Admissions," *Washington Post*, Nov. 20 1977.

be considered in college admissions, whereas 60 percent believed that admissions should be based entirely on merit.<sup>110</sup> Americans seem to desire equal opportunity of access to higher education in theory, but are unwilling to implement it in practice. Or possibly, they disagree on the true definition of “equal opportunity.” Either way, “in 2006, as in 1978, most Americans favor equal rights and equal opportunity, but they oppose the use of preferential treatment for particular groups to achieve those ideals.”<sup>111</sup> These conflicting feelings suggest moderate public support for affirmative action in higher education, perhaps pressuring the Court into taking its middle-of-the-road approach in *Bakke*, and preventing it from killing affirmative action in *Fischer*.

In the aggregate, the appropriateness of judicial intervention in higher education affirmative action is moderate-low.

### **Affirmative Action in K-12 Busing**

The Court’s busing decisions in cases like *Swann v. Charlotte-Mecklenburg Board of Education* arose out of the need to force school districts to comply with desegregation. The judicial takeover of bus routes, which had previously been set by democratically accountable school board representatives, was expensive, involuntary, and inconvenient.<sup>112</sup>

Not only were local courts unaccountable to the public, they had no experience in creating integration plans and were thus forced to rely on social science evidence to

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<sup>110</sup> Persily et al., *supra* note 66, at 164.

<sup>111</sup> *Id.* at 166.

<sup>112</sup> Graglia, *supra* note 5, at 17. Mandatory busing was “enormously costly,” “confer[ed] no known benefit,” and “seriously distort[ed] our political process.”

justify busing and racial quotas. While “it would be an exaggeration to say [the social sciences] are responsible for the busing dilemmas facing so many communities today,” social science research has “been inextricably interwoven with policy decisions.”<sup>113</sup> Early social science evidence persuaded the Justices “that the mixing of the races *in itself* will invariably have positive educational and social consequences,”<sup>114</sup> and a 1967 Commission on Civil Rights report instructed policymakers “to permit no school to be more than 50 percent black.”<sup>115</sup> Findings such as these “urged government to reassign pupil populations on the basis of race” through busing policies,<sup>116</sup> but many public schools today remain *de facto* segregated and no study has ever proved “that integration has had an effect on [minority] academic achievement as measured by standardized tests.”<sup>117</sup> Scholars charge that courts’ obsession “with questions of quantity rather than quality, with mathematical ratios, quotas and balance, rather than with the educational process itself,” has caused more harm than good to students of both races, and has done little “to translate desegregation into integration,” the true task at hand.<sup>118</sup> These realities depict the Court’s difficulty in interpreting social science data and grounding its decisions on such evidence. In its pursuit of statistical racial balance, the Supreme Court violated the principle of generalism by relying primarily on social facts, rather than on constitutional principles, to justify its busing policy.

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<sup>113</sup> Armor, David. “The Evidence on Busing,” *Public Interest* 28 (1972): 91.

<sup>114</sup> Hawley, Willis D. and Ray C. Rist. “On the Future Implementation of School Desegregation: Some Considerations,” *Law and Contemporary Problems* 39 (1975): 413.

<sup>115</sup> Ravitch, *supra* note 43, at 172.

<sup>116</sup> *Id.* at 175.

<sup>117</sup> Armor, *supra* note 113, at 99.

<sup>118</sup> St. John, Nancy H. *School Desegregation: Outcomes for Children*. (New York: Wiley, 1975), xii.

The drawing of new bus routes for every student within a *de facto* segregated district also required courts to balance a plurality of interests. The distance that each individual student within the district would be required to travel now factored into judicial decisions. Busing was no bi-polar conflict, but a policy that affected everyone, and “everyone suspected that they, personally, bore the brunt of the busing.”<sup>119</sup>

As courts grew ever more insistent on using racial quotas to achieve balance in public schools, it became clear that schools themselves were not always the ones responsible for causing segregation. Rather, “it was simply school racial separation or imbalance itself, however caused, that had become unconstitutional.”<sup>120</sup> Determined to integrate schools where no proof of racial discrimination or transgression could be found, the Court moved further and further away from minimalism. Tackling *de jure* segregation in *Brown v. Board* was challenging enough, but dealing with subtler *de facto* segregation required ever more complex busing schemes, as school districts remained stubbornly segregated due to housing discrimination and “white flight.” The Court recognized the enormity of the task it faced when asked to integrate the predominantly black Detroit public schools in *Milliken v. Bradley* (1974), holding that school districts could only be made to desegregate upon proof of racist intent. This decision was a retreat for the Court, a realization that its busing policy was not minimalist, and thereby difficult to enforce in the face of public opposition.<sup>121</sup>

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<sup>119</sup> Wilkinson, *supra* note 70, at 156.

<sup>120</sup> Graglia, *supra* note 5, at 16.

<sup>121</sup> *Milliken v. Bradley* gave rise to a small, short-term boost in the Court’s popularity, but led to a much larger fallout in public esteem for the Court in the long term. The Court’s retreat from forced busing seems to have been met favorably, but the Court’s own inconsistency on busing policy and the re-segregation of public schools eroded citizen’s faith in the Court in the long run, and therefore its capacity to effect social

Under the supervision of district courts, school boards were forced to comply with judicial busing policy, but the degree of implementation varied across the nation.<sup>122</sup> District courts lacked legitimacy when they assumed control of bus routes, because bus routes were traditionally “democratically conceived and democratically implemented” by the democratically elected school board.<sup>123</sup> Judicially imposed busing plans were not only inconvenient; they were also contrary to democratic principles. Max Weber, Seymour Martin Lipset, and others have argued that government derives its legitimacy from public perceptions that the political system is acting appropriately.<sup>124</sup> Since the unelected Justices took un-democratic action by imposing a policy that interfered with Americans’ daily lives, and which few Americans wanted in the first place, the Court reached far beyond its accepted boundaries. At its best, argues Martin Shapiro, “judicial policymaking contributes to well-rounded representation of interests or to popular control.”<sup>125</sup> Court-created busing plans contributed to neither, costing courts a large measure of legitimacy.

Furthermore, the Court was forced to rely on both local courts and school boards to enforce its busing requirements. To be effective, the Court must communicate its policy goals to both groups clearly (to prevent misinterpretation) and persuasively (to prevent avoidance.) Supreme Court decisions can be difficult for even other judges to

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change. Marshall, Thomas R. *Public Opinion and the Supreme Court*. (Boston: Unwin Hyman, 1989), at 147, 155.

<sup>122</sup> Johnson, Charles and Bradley Canon. *Judicial Policies: Implementation and Impact*. (Washington, D.C.: CQ Press, 1984), 3.

<sup>123</sup> Wilkinson, *supra* note 70, at 135.

<sup>124</sup> Marshall, *supra* note 121, at 136.

<sup>125</sup> Shapiro, Martin M. *Law and Politics in the Supreme Court: New Approaches to Political Jurisprudence*. (New York: Free Press of Glencoe, 1964), 46.

interpret. The *Swann* decision, for example, “although unanimous, was rather confusing.”<sup>126</sup> The decision affirmed the district courts’ power to achieve integration through busing, but stated that “no rigid rules can be laid down to govern conditions in different localities;” that the “very limited use of the racial ratio” could be used only “as a starting point in shaping a remedy;” and that the “limits on travel time will vary with many factors.”<sup>127</sup> Lower courts were understandably confused by such vague guidelines.<sup>128</sup> While “most judges accord the Court considerable authority,” the same cannot be said for the school administrators, for “administrative agencies are somewhat removed from the judicial system,” and so “the Court’s authority tends to decline as organizational distance from the Court increases.”<sup>129</sup> Since the effectiveness of the Court’s busing policy depended on a long chain of compliance from other courts and administrators, the policy’s legitimacy was impaired from the start.

The representative branches of government, had they led the charge on public school integration, would have at least avoided the anti-democratic drawbacks of court-imposed busing. However, once the judiciary affirmed the power of district courts to supervise busing plans, the coordinate branches faced a choice between supporting a wildly unpopular policy and using courts as a scapegoat for political gain. The choice was easy. For school administrators, implementing court busing plans both “threatened to

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<sup>126</sup> Johnson and Canon, *supra* note 122, at 49.

<sup>127</sup> *Swann v. Charlotte-Mecklenburg Board of Education* (1971), 3.

<sup>128</sup> The Court’s vague commands left also much discretion in the hands of local judges and officials, with the result that the degree of tolerable racial imbalance varied widely from city to city, district to district. Boston allowed a deviation of plus or minus 10% of proportional racial representation; Denver, 15%. St. Louis and Detroit public school student body was roughly 75% black. These cities sought to achieve a 50/50 balance between white and black students. Armor, David J. *Forced Justice*. (Oxford: Oxford University Press, 1995), 158-160.

<sup>129</sup> Baum, *supra* note 30, at 241, 238.

erode the [school] board's local standing" and "required expenditures the school system could ill afford."<sup>130</sup> For state legislators, meanwhile, the goal was to gain votes through inciting indignation over busing schemes handed down from up high.<sup>131</sup> Even at the federal level, coordinate branch support of court busing policy was lacking. Congress sought to "prohibit federal agencies from requiring school busing for desegregation" starting in 1968, and continued to "limit the issuance of busing orders by federal courts" after *Swann*.<sup>132</sup> School boards and legislatures alike were unwilling to force school integration, but only too willing to capitalize on the political gains of un-democratic judicial intervention. With overwhelming evidence that courts were ill-suited to create busing schemes, the presence of these structural impediments meant that courts were also the only ones willing to do so.

Parents, black and white, were outraged at the idea of their children being bused across the city to improve racial balance when there were schools half a mile from home. A Gallup Poll from 1970 found that only 14% of adults supported busing for the purpose of racial integration, whereas 81% were opposed.<sup>133</sup> While much of the opposition came from whites, black families were also frustrated with busing plans. Inevitably, the bulk of the busing burden was placed on them, as black students were bused further away from home in response to "white flight" from predominantly black areas.<sup>134</sup> Justice Thomas's

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<sup>130</sup> Wilkinson, *supra* note 70, at 155.

<sup>131</sup> *Id.* at 168: "The courts that issued the noxious orders lacked the funds to pay for them; when the issue was tossed to politicians, they used their power of the purse to balk, rail, and voice their most electable indignation."

<sup>132</sup> Baum, *supra* note 30, at 230.

<sup>133</sup> Persily et al., *supra* note 66, at 36.

<sup>134</sup> Holmes, Steven. "At N.A.A.C.P., Talks of Shift on Integration," *New York Times* A1, A15 (June 23, 1997).

concurring opinion in *Missouri v. Jenkins* (1995) gave voice to this sentiment by condemning “the idea that any school that is black is inferior, and that blacks cannot succeed without the benefit of the company of whites.”<sup>135</sup> Unfavorable to both white and black parents, court-created busing policy received pitiful levels of public support.

In sum, the appropriateness of court intervention in remedying school discrimination through busing policy is low.

## **Findings**

The model makes it clear that the judiciary’s higher education affirmative action policies enjoyed comparatively more success than their K-12 busing plans. But what causes the disparity in effectiveness between the two types of affirmative action cases? The most obvious explanation for the difference is the fact that higher-education affirmative action cases involve a simpler remedy, and a smaller number of students and adults. In cases such as *Bakke*, *Grutter*, *Gratz*, and *Fischer*, the Court has been able to remedy any injury caused to an applicant by ordering their admission and invalidating whichever parts of a university’s admission plan it deems unconstitutional. Other schools’ admission programs might have to be amended as well, but that is a task for the schools themselves, not for the Court. In K-12 integration cases, however, the injury of segregation cannot be cured until an entire school district, or even a metropolitan area, has been integrated through proportional-representation plans which the courts must

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<sup>135</sup> *Missouri v. Jenkins* (1995), at 119.

create, direct, enforce, and constantly re-evaluate.<sup>136</sup> At the end of the day, busing policy simply affects more students than higher education policy, and there are correspondingly more students in need of a remedy for racial discrimination. This economic and social reality warrants a massive policy remedy beyond judicial purview. Courts “lack the tools to deal effectively with these ‘relatively uncontrollable social and environmental factors,’” and providing a more taxing remedy to a greater number of injured parties only requires more effort on the part of the judiciary and the coordinate branches.<sup>137</sup>

Ironically, although the Supreme Court put an early end to racial quotas in higher education, the courts’ strive to meet racial quotas bogged down their K-12 busing jurisprudence. This sort of affirmative action – literally taking *affirmative* steps to integrate schools, rather than simply *negating* pre-existing unconstitutional admission programs – naturally requires more effort and a greater degree of policy-making from the judiciary. In short, the courts might be biting off more than they can chew in their pursuit of racial balance in public schools, because the remedies required are more drastic.

It is, of course, impossible to overlook the racial dimension of these decisions. All of the higher education cases here examined were brought by white claimants, alleging some form of reverse discrimination at the hands of biased admissions programs. By contrast, the principle issue in the K-12 affirmative action cases was the discrimination that African-American students suffered under segregation. It is entirely plausible that

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<sup>136</sup> *Keyes v. School District #1, Denver, Colorado* (1973) and *Milliken v. Bradley* (1974) demonstrate the enormity of this policymaking challenge. See also Orfield, Gary, and Susan E. Eaton. *Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education*. New York: New Press, 1996), 21-22.

<sup>137</sup> Rosenberg, *supra* note 7, at 104-105. Rosenberg is quoting Ayres, Whitfield Q. “Racial Desegregation in Higher Education,” *Implementation of Civil Rights Policy*. Edited by Charles S. Bullock III and Charles M. Lamb. (California: Brooks/Cole, 1984), 143.

white Americans would be more supportive of a court decision that requires suspect admissions programs to overcome a strict scrutiny test than a decision that requires racial balancing in public schools. As a result, judicially-mandated affirmative action might find more support among whites in higher education than in K-12 schooling.

A clear but overlooked difference between higher education and K-12 affirmative action cases is that all the universities at issue here are competitive institutions. Students compete vigorously for admission, but the universities themselves also compete to attract qualified minority students.<sup>138</sup> Public schools, facing the obligation to educate every student within the district, have no incentive to attract more. This could explain administrative reluctance to comply with an integration plan that would entrust more students, particularly minority students, to their responsibility. A court decision allowing a graduate school to continue operating essentially as before, with a reminder not to put too much weight on an applicant's race, invites no administrative deliberations, creates no financial strife, and requires no external oversight to enforce. Such a decision involves far less legitimization.

In sum, Table 2 offers three explanations for the relative success of judicial involvement in higher education when compared to K-12 court-ordered busing. The first proffered explanation highlights the importance of the minimalism variable – a judicial policy that is sweeping in scope will have less success than a narrow decision with a constrained impact. The second places more emphasis on the public support variable, for if public opinion runs contrary to a court decision, any judicially-mandated policy will be a bitter pill to swallow. The third explanation stresses the legitimacy variable. If the

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<sup>138</sup> Leiter & Leiter, *supra* note 72, at 143.

implementing populations and administrative organizations refuse to comply with court policies, the policy is hindered from the start. These three variables have caused the difference in appropriateness between the courts' higher education and K-12 affirmative action policies. In order to be most appropriate, future court decisions addressing race and equal access to education might take care to minimize their own impact, and to foster consensus among the public and education administrators.

## **Conclusion**

This thesis, acting under the realist assumption that judges routinely engage in policy creation, sought to identify the circumstances or factors that lead to appropriate judicial policymaking. Appropriateness, a measure of whether judicial intervention in the policymaking process was conducive to enduring policy solutions, was operationalized as a combination of the judiciary's capacity to solve a policy dispute, and the necessity of a judicial answer to a policy problem. In other words, I predicted judicial intervention would be most appropriate when courts were both compelled to intervene in policymaking and were able to arrive at informed and enforceable policy decisions.

To develop this theory, I proposed an analytical model that outlines six elements of an appropriate judicial policy decision: 1) a decision that relies on generalized knowledge rather than complex social or technical information, 2) a bi-polar dispute involving two clearly defined and limited parties, 3) a minimalist decision that invalidates the fewest number of pre-existing statutes or advances the fewest number of new responsibilities or policies, 4) a decision that does not rely to a considerable extent on coordinate branches of government or implementing populations for legitimization, 5) a

decision that is made necessary by structural impediments preventing the representative branches from taking action, and 6) a decision that has widespread public support. Combining these variables from the scholarly literature offers a nuanced understanding of judicial involvement in any given area of public policy. A court decision that conforms to these parameters should be easily enforceable, highly suited to remedy specific public policy grievances, and welcomed as a wise and necessary use of judicial review. In short, such a decision is appropriate because it is conducive to an enduring policy solution.

After applying this model to various areas of judicial policymaking, I extended it to a policy area that has not been given adequate attention, namely, the appropriateness of court policies proscribing race-based remedies in education. A multitude of judicial policies involve race and education, including school vouchers, school funding, and the charter school movement. While these policies ought to be explored in further work, I focused on affirmative action in higher education and busing in K-12 schools. I did so for two reasons. First, the judiciary played a fundamental role in advancing and determining the constitutional scope of these policies from their inception, while the other branches largely chose to remain above the fray. This allowed me to more easily isolate and analyze the impact of judicial intervention in the policymaking process. Second, although both policies qualify as affirmative action policies by seeking to remedy mass social discrimination, the two are in many ways perfect contrasts. In higher education jurisprudence, the courts focus on individual plaintiffs; busing cases concern entire school districts. In higher education, courts struck down racial quotas; in busing, courts mandated racial balancing through quota systems. In higher education, judges are able to offer a simpler remedy through a judicial decree ordering an applicant's admission; in

busing, no such easy fix exists. These key differences offered an opportunity to draw interesting conclusions through a comparative case study of affirmative action policies.

This comparative analysis highlighted that the Court's approach to affirmative action in higher education proved more minimalist, easier to legitimize, and more in step with public opinion than the Court's use of busing as a remedy for segregated schools. Table 2 considers these three variables to be the most significant. However, the findings from Table 1 suggest that judicial policymaking is most appropriate when it protects political minorities that bring bi-polar disputes, that face public opposition, and that have no means of scaling the structural impediments present in the co-ordinate branches.

This analysis has troubling implications for those hopeful that court intervention in affirmative action can produce enduring policy solutions. Both busing and higher education affirmative action cases involve a vast number of students or interested peripheral groups, so neither can be considered bi-polar. The Court faces considerable challenges when resolving such multi-plural disputes, for these policies affect the lives of too many students, families, and other interested parties to be effectively imposed by a non-democratic institution. The legitimacy of the Court's decisions, and its capacity to make those decisions, suffers as a consequence.<sup>139</sup>

The necessity of judicial involvement in higher education affirmative action also becomes suspect. The absence of structural impediments raises the question of why the judiciary needed to intervene in the first place when most higher education institutions

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<sup>139</sup> Jesse Choper asserts that "the people's reverence and tolerance is not infinite and the Court's public prestige and institutional capital is exhaustible." If the Court overdraws its legitimacy, its capacity is impaired, "inducing popular disregard of the Court's decisions or inspiring political forces to seek to bring it to heel." Choper, *supra* note 2, at 139-140.

already were and have continued to operate under admission plans that give some form of preference, directly or indirectly, to racial minorities. Busing policy, for all its faults, can at least be justified as necessary due to structural impediments and the coordinate branches' passivity towards true racial integration in K-12 schools. However, the Court pulled back on busing policy in the face of public opposition, as demonstrated by cases like *Milliken* and *Parents Involved*. If the Justices' lack of cohesion impeded their ability to lead public opinion on higher education affirmative action in any meaningful direction, then their submission to public opinion ultimately killed busing.

The courts ought to be applauded for taking a stand on racial equality in education. Their willingness to confront a thorny problem that the representative branches prefer to duck at least put the issue "on the national policy agenda so that other policy makers and the general public" might take action.<sup>140</sup> Nevertheless, the courts took a weak stance instead of a strong one. For supporters of affirmative action, courts have done little more than allow for its continued existence under confusing and rather arbitrary standards. For its opponents, the judiciary has accomplished nothing by banning racial quotas or point systems but allowing other types of affirmative action to flower. In sum, American education today very much resembles American education in 1970, before the judiciary's immersion in affirmative action: largely stratified along race and class lines, in spite of all the rhetoric of the compelling interest in diversity. The Court's contributions to affirmative action policy do not seem appropriate so much as they seem irrelevant.

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<sup>140</sup> Baum, *supra* note 30, at 267.

Judicial policymaking warrants further scholarly exploration, and the model presented in this thesis merits further development. The relative importance of capacity when compared to necessity, for instance, is a vital question not considered here. Capacity, necessity, and appropriateness could all be operationalized to test different hypotheses. Following Lawrence Baum's suggestion that courts play a vital policymaking role by directing policymaker's attention to certain issues, appropriateness could be measured by the number of new statutes re-affirming a judicial policy decree. In a similar vein, Jesse Choper's theory that courts have a finite amount of legitimacy has interesting implications for capacity: at what level of legitimacy does capacity begin to crumble, and does high capacity necessarily correlate with high legitimacy? Finally, the comparative affirmative action case study could be expanded to include racial preferences in employment and contracts, which conceivably could alter the conclusions the judiciary's policies involving race-based remedies. Within the realm of race and education specifically, there are further policies that could also be explored, namely judicial involvement in vouchers, charter schools, and school funding disputes.

Alexis de Tocqueville remarked that political questions inevitably become judicial ones in the United States. I would add that judicial questions are occasionally answered by judicial policies. In the majority of cases here examined, judicial policymaking is seriously constrained, and judges must exercise caution when substituting their decisions for popularly elected policies. This holds especially true for multi-plural cases, and when structural impediments are not prevalent in the representative branches. This is not to say that judges have no role to play in the creation of policy in a representative democracy, nor that the courts should hesitate to rule on vital

policy issues of concern to the public; only that judicial policymaking will be most appropriate when used to help discrete and insular minorities obtain the specific relief denied to them by majoritarian democracy.

## Appendix

<b>Table 1</b>		Desegregation	Abortion	School Prayer	Redistricting	Prison Reform
<b>Capacity</b>	Generalism	Moderate	Moderate	High	Low	Moderate
	Bipolarity	Low	Low	High	Low	High
	Minimalism	Low	Low	Low	Low	High
	Legitimization	Low	Moderate	Low	Low	Moderate
<b>Necessity</b>	Structural Impediments	High	Moderate	High	High	High
	Public Support	Moderate	Low	Low	High	Low
<b>Appropriateness</b>		Moderate - Low	Moderate - Low	Moderate	Moderate - Low	Moderate - High

<b>Table 2</b>		<b>Higher Education</b>	<b>Busing</b>
<b>Capacity</b>	<b>Generalism</b>	<b>Low</b>	<b>Low</b>
	<b>Bi-Polarity</b>	<b>Low</b>	<b>Low</b>
	<b>Minimalism</b>	<b>Moderate</b>	<b>Low</b>
	<b>Legitimization</b>	<b>Moderate</b>	<b>Low</b>
<b>Necessity</b>	<b>Structural Impediments</b>	<b>Low</b>	<b>Moderate</b>
	<b>Public Support</b>	<b>Moderate</b>	<b>Low</b>
<b>Appropriateness</b>		<b>Moderate - Low</b>	<b>Low</b>

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