

November 2006

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Recommended Citation

Jones, Augustus; Deardorff, Michelle D.; and Briscoe, Michelle G. (2006) "Splitting the Baby": Media Constructions of Grutter v. Bollinger and Gratz v. Bollinger," *Journal of Political Science*: Vol. 34 : No. 1 , Article 5.

Available at: <https://digitalcommons.coastal.edu/jops/vol34/iss1/5>

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“Splitting the Baby”:

Media Constructions of *Grutter v. Bollinger* and *Gratz v. Bollinger*

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Scholarship on the judiciary indicates that the ability of the media to interpret accurately and describe clearly judicial decisions, and more specifically Supreme Court decisions, is limited. Since the public generally relies on media accounts to find out what the High Court has decided, this limitation is significant. We investigate whether the print media accurately described the Supreme Court's recent decisions in the two affirmative action cases of Grutter v. Bollinger and Gratz v. Bollinger (2003). We find that most newspapers addressed the legal queries in both cases, expressed support for these split judgments, and considered some of the repercussions of these rulings. However, the press generally failed to discuss dissenting opinions, relevant background information, and potential implications of the ruling. As a result, the public was deprived of contextual knowledge and information necessary for developing informed judgments about these decisions and the public issues they involve.

Judicial scholars assert that members of the press play a crucial role in communicating Supreme Court decisions. In fact, they tell us that the public generally does not read Supreme Court decisions; rather, they rely on press accounts to discover

what the High Court has decided. Scholars also emphasize that media coverage of Supreme Court directives is often limited and misleading. Deadlines, space limitations, and the difficult process of reducing lengthy, convoluted, and legalistic language into brief, comprehensible and coherent sentences help explain why the press has not always done an effective job in explaining Supreme Court directives. Supreme Court justices have hinted or even stated explicitly that press accounts do not accurately report what they have decided.

In this study, we investigate whether the media have accurately described the Supreme Court's recent affirmative action decisions. The *Grutter* case questioned whether the University of Michigan Law School could consider race and ethnicity, among other factors, in making admission decisions. By contrast, *Gratz* focused on whether the University of Michigan's Undergraduate Admission Office can utilize race as a factor in selecting students. The decisions—simultaneously endorse and reject the use of affirmative action in a single institution—have been seen by many journalists as “splitting the baby,” referencing the wisdom of King Solomon in rendering a difficult decision. In conducting our investigation, we analyze immediate newspaper coverage of these decisions. We assess whether coverage was provided; whether the legal issues taken up in these cases, and the reasoning of the Court's majority and dissenting opinions, were mentioned; whether the accounts expressed agreement or disagreement with the decisions; and whether the impact and implications of these decrees were discussed. These variables are selected because scholars who have probed newspaper coverage of Supreme Court judgments have typically considered them in assessing whether the media is able to depict accurately the Court's

reasoning and outcomes immediately after decisions are rendered.

The Relationship of the Media to the Courts

Unlike the other branches of the federal government, the judiciary does not speak directly to the public; consequently, the media's interpretation of the Supreme Court is very significant. As an unelected branch in a majoritarian political system, the judiciary requires public approval and support to maintain the legitimacy it needs to be effective. Yet, courts do not directly communicate with the public outside of their legal rulings. The media is generally the filter through which the public understands the courts, discovers the decisions of the courts, and interprets the implications of the courts' determinations (Jamieson 1998). As Elliot Slotnick and Jennifer Segal (1998, 1) have argued

[I]n democratic political systems, the interaction and communication between political elites and institutions and the mass public are considered of primary importance. Because democratic governments are established to serve their citizens, the flow of information between elites and masses is critical to the functioning of these governments and to their perceived legitimacy. Ideally, effective democratic citizenship requires that the people know about the activities of their officials and institutions so that they may protect their interests by evaluating and holding them accountable for their actions. Political information is significant for the optimal functioning of this process.

As the highest court in the land, the Supreme Court is particularly dependent on the media. Judicial scholars assert that members of the press play a crucial role in communicating both Su-

preme Court decisions (Wasby 1978; Baum 1998; Canon and Johnson 1999) and in covering appellate court decision-making (Newland 1964; Larson 1985; Slotnick and Segal 1998). The public relies on press accounts, both articles and editorials, to find out what the High Court has actually decided (Slotnick and Segal 1998). Accuracy in media coverage would seem to be very important for the Supreme Court to maintain its legitimacy, as the Court frequently requires public approval to ensure proper enforcement of its rulings by the electorally-accountable branches of government (Davis 1994; Canon and Johnson 1999; Davis and Strickler 2000).

Scholarship on the judiciary has demonstrated that the ability of the media to interpret accurately and describe clearly the decisions of the judiciary, and more specifically the Supreme Court, is limited. Deadlines, space limitations, a reduction in the regular coverage of the Courts, as well as the difficult process of reducing lengthy, convoluted, and legalistic language into brief, comprehensible, and coherent sentences, are some of the reasons why the press has not always done an effective job in explaining Supreme Court directives (Ginsburg 1995; Fleeson 2002). In addition, the federal judiciary, especially the Supreme Court, have policies and practices that distract from quality media coverage (Ginsburg 1995; Greenhouse 1996). Such policies include a refusal to comment on decisions beyond that provided by their written opinions, and their closed conference deliberations. Hence, it is not surprising that Supreme Court justices have themselves indicated that press accounts do not accurately report what they have decided. According to Laurence Baum (1998, 381):

Justice O'Connor has observed [that] 'The summaries of the opinions of this Court carried in the media... frequently provide a perspective, not only on the work of the court but also on the perceptions and judgments of the reporters and their editors.' Likewise, Justice Brennan has suggested that the media's attacks on the Court's decisions affecting the media themselves are unreasonable, unintelligent, and inaccurate.

These limitations are exacerbated by the fact that much court coverage is reported by journalists with limited legal training who are waiting for more glamorous posts at the White House or on the Hill. Issues that are more salient to the public, such as controversies over individual rights, are deemed more newsworthy and tend to attract more media scrutiny than topics with greater doctrinal importance or constitutional significance (Katsch 1983; Haltom 1998; Slotnick and Segal 1998). The consequence of these factors has been a public that obtains its information about a significant institution through a medium, both print and televised, that does not prioritize the quality or quantity of its judicial coverage. Yet we know that one of the most significant factors related to the effective implementation of Supreme Court decisions is public support and approval (Canon and Johnson 1999).

Limited research has been conducted on the implementation and impact of Supreme Court decisions on affirmative action in higher education (the few exceptions are Dreyfuss and Lawrence III 1979; Ball 2000). More extensive research has been conducted on school desegregation, prayer in schools, libel law, the rights of the accused, and reapportionment. One possible reason for such limited scholarship might be the few rulings the Court has issued on the topic. But in the summer of 2003, the Supreme Court rendered two highly significant decisions in *Gratz v. Bollinger* and *Grutter v. Bollinger*.

Prior to 2003, the last significant Supreme Court precedent on the issue of affirmative action in higher education was in 1978, in the plurality decision of *Regents of the University of California v. Bakke*. As part of their study twenty years later, in *Television News and the Supreme Court: All the News That's Fit to Air*, Slotnick and Segal (1998, 151-152) carefully examined television coverage of the *Bakke* case, and found that the salience of the issue of affirmative action in higher education led to an atypically high level of television coverage; rarely has there been so much media scrutiny over a single case. They discovered, however, that the Court's decision in *Bakke* was not accurately portrayed in the televised reports. Slotnick and Segal (1998, 109) argued that the choice of

utilizing the personage of Allan Bakke to focus on the issue of quotas and "less qualified" minorities was understandable for the network newscasts. The issues contained drama and controversy and, clearly, represent what television news seeks the most of and does best. Furthermore, divergence in standardized scores was an easy topic for journalists to portray in the news format Yet to the extent that such reporting suggested that blacks admitted under the UC-Davis plan were "unqualified" (and, on balance, the reports appeared to do just that), news coverage misreported and misrepresented an important fact in the case.

This inaccuracy may have strongly influenced the public perception of affirmative action in higher education as unfair.

After *Bakke*, the Supreme Court abdicated its authority and allowed lower federal courts to make decisions that appeared to eradicate the ruling made in *Bakke*, and by refusing to hear the challenges to these decisions, allowed them to stand. This was most specifically the case in the Fifth Circuit decision of *Texas v. Hopwood* (1996). Most of the controversy around the appellate

court's decision focused on the fact that a federal appellate panel determined that the Court's ruling in *Bakke*, which held that creating a diverse student body is a compelling governmental interest, was no longer a binding precedent. This was especially significant because the Supreme Court had not overturned *Bakke*. Hence, for those mostly conservative political actors who hoped to find affirmative action unconstitutional, the University of Michigan cases were of critical importance; they determined the scope of the application of the *Hopwood* decision. President George Bush and the Solicitor General decided to use *Grutter* and *Gratz* to challenge *Bakke* and the use of affirmative action in higher education. The salience of this issue for many public actors and the general public is manifest in the fact that the Michigan cases attracted more *amicus curiae* briefs than even the previous record-holder, *Webster v. Reproductive Health Services* (1989). Thus, the 2003 cases of *Grutter* and *Gratz* clearly represented an opportunity for the Court to address the issues once again. But did the media do a more accurate job in interpreting these two cases than it had in *Bakke*? This is the main question we address in this study.

There are two reasons for performing this analysis. The first is that as far as we can determine, no other study has systematically probed press coverage of *Grutter v. Bollinger* and *Gratz v. Bollinger*. We intend to fill this gap in the literature by exploring how newspapers construed the Supreme Court's decrees. The second rationale for this analysis is that previous studies of Supreme Court decisions have mainly concentrated on school vouchers (Jones and Briscoe 2002), school desegregation (Orfield, Eaton, and Harvard Project on School Desegregation 1996), prayer in public schools (Dolbeare and Hammond 1971), libel (Gruhl 1980), the rights of the accused (Canon 1973), and

reapportionment (McCubbins and Schwartz 1988). Fewer studies have focused on affirmative action (Urofsky 1997). By paying attention to media constructions of the Supreme Court's recent affirmative action decisions, and by taking into consideration the variables weighed in other studies, this analysis contributes to a small but growing body of literature.

DATA AND FINDINGS

We identified 32 national and regional newspapers and examined all articles and editorials that mentioned *Gratz* and *Grutter* during the period of June 23, 2003 through December 31, 2003.¹ Newspapers were selected to ensure adequate coverage of the entire country. The data pool emphasizes newspapers with large circulations, without duplicating regional coverage whenever possible (e.g., Ohio has three major papers with large circulations—only one was selected). These sources were evaluated in light of whether or not they covered the *Gratz* and *Grutter* cases; called attention to the legal issues in these lawsuits; explained the legal reasoning behind the decrees; indicated agreement or disagreement with judgments; and examined the impact and implications of these rulings.

¹ The data pool includes: the *Atlanta Constitution*, the *Boston Globe*, the *Chicago Sun-Times*, *Christian Science Monitor*, the *Columbus Dispatch*, the *Denver Post*, *Hartford Courant*, the *Houston Chronicle*, *Los Angeles Times*, the *Union Leader* (Manchester, NH), the *Commercial Appeal* (Memphis, TN), *Milwaukee Journal Sentinel*, *Star Tribune* (Minneapolis, MN), *Times Picayune* (New Orleans, LA), *Newsday* (New York), the *New York Times*, the *Virginia Pilot* (Norfolk, VA), the *Oakland Tribune*, *Pittsburgh Post-Gazette*, *Richmond Times Dispatch*, *St. Louis Post Dispatch*, *St. Petersburg Times*, *Salt Lake Tribune*, *San Antonio Express-News*, the *San Francisco Chronicle*, *USA Today*, the *Washington Post*, and the *Washington Times*.

Coverage of Cases

The first question the study addresses is to what degree the newspapers selected for mentioning *Grutter* and *Gratz* actually covered the decisions. According to this analysis, “cover” means that the newspaper called attention to these rulings in a front page article, cited both cases in their headlines, or reported both cases within forty-eight hours after the High Court handed down the decisions. The objective was to analyze the articles that would most immediately frame the reader’s understanding of the issue. Using these standards, all of the selected newspapers covered the Supreme Court’s decisions in *Grutter* and *Gratz* (see Table 1 below). The widespread coverage probably reflected both recognition of public salience and the fact that the two cases marked the first time in 25 years that the Court ruled on whether universities could consider race in admitting students. As the literature demonstrates, landmark cases do enjoy much greater coverage by the press than do typical rulings. We evaluate below the coverage and assessment provided by those papers that wrote editorials on these cases.

The Mention of Legal Issues

The second question probes whether newspapers mentioned the legal issues in their coverage of the Supreme Court’s decision-making. The key legal query in *Grutter* was whether the University of Michigan Law School could consider race in selecting students, and the key question in *Gratz* was whether or not the University of Michigan’s undergraduate admissions office violated the Constitution when it implemented a race-sensitive admission policy. We found that 91% of the newspapers accurately cited the legal questions in both cases. This is not sur-

prising insofar as the questions in both cases were straightforward and were clearly articulated in the cases: the first queried

Table 1.
Summary of Newspapers' Coverage of *Gratz* and *Grutter*

TOTAL NEWSPAPERS STUDIED	Coverage Provided	Notes Separate Cases	Mentions the Legal Issues	Cites Court's Reasoning—Majority (M) Dissents (D)		Indicates Disagreement with Decrees		Discusses Impact and Implication of Decrees
				M	D	Gratz	Grutter	
n = 32	n = 32	n = 19	n = 29	n = 32	n = 8	n = 1	n = 8	n = 32
-	100%	59%	91%	100%	25%	3%	25%	100%

whether the law school contravened the Constitution by using race as one among many factors in selecting students, while the second asked whether the undergraduate office disobeyed the Constitution by inappropriately weighing race as a factor in the admissions process. Although nearly all the newspapers mentioned the legal issues, how they provided their analyses varied.

Two observations about the headlines are in order. First, most newspaper headlines accurately reported that the High Court

rendered two affirmative action decisions—one upholding affirmative action and the other striking it down. Specifically, we found that 19 newspapers noted that the Supreme Court issued two opinions concerning affirmative action policies at the University of Michigan while 13 did not. The headline in the *Columbus Dispatch* typified press accounts that accurately depicted what the Court decided. That headline read “U.S. Supreme Court Affirmative Action; Justices OK Race-Based Admissions with Limits; Law School Policy at Michigan Upheld: Undergraduate Rules Go Too Far, Court Says” (Torry 2003). Similarly, the *Los Angeles Times*, in a more general fashion, conveyed the same message. It notes “Supreme Court Rulings; Court Affirms Use of Race in University Admissions: Justices Render Two Close Decisions Involving the University of Michigan, One Stresses the Need for Affirmative Action, the Other Reasserts Limits.” While the *Los Angeles Times* did not draw a distinction between the law school and the undergraduate programs, the headline transmitted the message that one affirmative action policy at the University could be justified while the other could not (Savage 2003).

While 59% of the newspapers bore headlines that recognized that the Supreme Court rendered two opinions, only the *Denver Post* identified in detail the names of both cases, as well as the substance of the Court’s ruling. This paper’s headline read:

Court backs diversity in college admissions; Landmark ruling keeps affirmative action alive; Grutter vs. Bollinger: Supreme Court in a 5-4 vote upholds a program at University of Michigan’s law school that gives race a limited edge in admissions decisions. Gratz vs. Bollinger: Court strikes down in a separate 6-3 vote a point system used by the University of Michigan to give minorities preference in undergraduate admissions (Farrell 2003).

When compared to the other newspapers, this lengthy 62-word caption is unusual, but it does succeed in disseminating important information about the cases to its audience.

Rationales Behind *Grutter* and *Gratz*

The third question asks whether the newspapers report the explanations behind the justices' varied opinions. Did the press cover the majority and dissenting opinions in *Grutter* and *Gratz*? Six Justices (Chief Justice Rehnquist and Justices O'Connor, Ginsburg, Scalia, Thomas, and Kennedy) composed opinions in the two cases. Justice O'Connor authored the majority opinion in *Grutter*, joined by Justices Stevens, Souter, Breyer, and Ginsburg. Justices Scalia and Thomas sided with a portion of O'Connor's opinion in which she expressed the belief that in 25 years the Court would no longer consider race in selecting students. O'Connor made clear that, in the meantime, the University of Michigan Law School could consider race as a factor in selecting students because multiple educational benefits flow from a diverse student body.

Justice Ginsburg also authored a concurring opinion in which she backed major portions of O'Connor's decision, but questioned the section that stressed that universities would be barred from weighing race as a factor in selecting students in 25 years. Justice Thomas wrote a separate opinion in which he agreed in part with O'Connor's *Grutter* decision. Specifically, Thomas sided with O'Connor's view that in 25 years universities should discontinue using race in making admissions decisions. Like Thomas, Justice Scalia also sided with that segment of O'Connor's *Gratz* opinion in which she stipulated that a deadline

should be set when universities would no longer be able to utilize race in the admission process.

Chief Justice Rehnquist, joined by Justices Kennedy, Scalia, and Thomas, dissented. His primary objection was that the Law School's effort to attain a critical mass of minority students was a transparent effort to promote a racial quota. Thomas also composed a dissenting opinion in which he expressed disagreement with a portion of O'Connor's majority opinion. He took issue with the majority's argument that the Constitution permitted universities to consider race, along with other factors, in creating a diverse student body. Scalia also wrote a dissent in which he objected to the portion of the majority opinion that suggested educational benefits flow from a heterogeneous student body. Justice Kennedy's separate dissent posited that the Court misapplied the strict scrutiny test. In other words, Kennedy maintained that if the Court had clearly applied this particular standard, the law school's affirmative action plan would have been stricken.

Disagreements among the justices were similarly reflected in the *Gratz* decision, in which seven justices composed opinions. Chief Justice Rehnquist, writing for himself and Justices O'Connor, Scalia, Breyer, and Kennedy, pointed out that the University of Michigan's undergraduate program's point system was constitutionally defective because it did not consider all facets of an applicant's file. O'Connor generally concurred with Rehnquist and added that the University's undergraduate admissions office policy was fundamentally different from the law school policy. Thomas underscored the point that under the Constitution, universities should not take race into account. Breyer disagreed with Thomas, but argued that the University of Michigan's undergraduate admission's office relied too heavily on race in selecting students.

In his dissenting opinion, Stevens indicated that the Court should never have granted the litigants standing in *Gratz*. Souter likewise argued that the litigants had no personal stake in the outcome of the case, and also took issue with the majority's assertion that race played a predominant role in the undergraduate admissions policy. Ginsburg's dissenting opinion observed that the undergraduate system of awarding points on race to minority students was constitutionally acceptable because it helped minority groups who have historically and presently been affected by discrimination.

None of the 32 papers covered all of the opinions announced in *Gratz* and *Grutter*. What they do cover are the key majority opinions in both cases. All of the newspapers examined include at least a brief statement regarding the Supreme Court's majority opinion in *Grutter*. Most of the newspapers cite Justice O'Connor as the author for the majority's decree in *Grutter*. Many offer quotes from Justice O'Connor to help explain how the Court's majority reached its conclusions. For example, using O'Connor's explanation that Michigan's law school utilized a "highly individualized, holistic review of each applicant's file," newspapers detailed the Court's reasoning in *Grutter*. However, aside from these commonalities, the newspapers are quite varied in the amount of detail they give to their explanations of the Court's reasoning, particularly in regard to dissenting opinions. Some articles merely note that the Court was "highly divided," while others offer hints in their headlines as to what the divisions meant in terms of the Justices' interpretation of the *Bakke* case. As the *Boston Herald* explained, "a sharply divided Supreme Court said colleges and universities may use race," but the article does not offer any insight into the dissension on the Court or how the justices interpreted *Bakke* in light of constitutional standards (Rothstein 2003).

Regarding the dissenting opinions, 75% of the newspapers did not do a thorough job of explaining the dissenter's viewpoints. In fact, many do not mention anything about the dissenting opinion, not even naming which justices dissented. One newspaper, the *New York Times*, was very detailed in its accounting of the opposing viewpoints of the Court. The *Times* summarized its understanding this way:

Chief Justice William H. Rehnquist wrote the principal dissenting opinion that spoke for all four including Justice Anthony M. Kennedy. He took a more oblique approach that attacked the law school program not so much for its premise as for how it works in practice, dismissing it as 'a carefully managed program designed to ensure proportionate representation of applicants from selected minority groups.' Justice Kennedy, writing separately, said that Justice Powell's opinion in the *Bakke* case 'states the correct rule for resolving this case,' but that the court had not applied the 'meaningful strict scrutiny' under which the program should have been found unconstitutional (Greenhouse 2003).

The explicit coverage by the *New York Times* is not surprising. As often noted in the scholarly literature, the *New York Times* is one of the few print outlets that has continuously emphasized the significance of the courts. The *Times* has one of the few reporters dedicated to Supreme Court coverage, and this reporter, Linda Greenhouse, is renowned for her consistently high level of analysis (Davis 1994, Haltom 1998).

Newsday was similarly explicit, clarifying that four Justices dissented, that Chief Justice Rehnquist wrote the main dissent, and that Justices Kennedy and Scalia wrote separate dissents. The reporter, Tom Brune, was careful to clarify how the dissent-

ers agreed and disagreed relative to the *Bakke* decision, as the following excerpt demonstrates.

In a separate dissent, Justice Anthony M. Kennedy endorsed Powell's diversity rationale, but said that the majority had failed to properly apply strict scrutiny to the law school's program. Chief Justice William Rehnquist and Justices Antonin Scalia and Clarence Thomas rejected Powell's diversity rationale. Rehnquist rejected the law school's policy as "racial balancing." Thomas found all use of race in admissions to be unconstitutional. But Scalia issued the harshest dissent, calling the diversity rationale "a patriotic, all-American system of racial discrimination" and attacking Michigan for its "maintaining a 'prestige' law school whose normal admissions standards" exclude minorities (Brune 2003).

Newspapers that provided details regarding dissenting opinions, such as the names of dissenters, often quoted Justice Clarence Thomas and identified him as the Court's only black member. A majority of those newspapers whose analysis indicated a lack of support for one or both rulings cited Justice Thomas' quotation of Frederick Douglass' 1865 address to abolitionists. Thomas, upholding his long-standing opposition to affirmative action, stated that blacks only needed justice, not pity—"simply justice...all I ask is, give him a chance to stand on his own legs. Let him alone." Newspapers also frequently referenced Justice Thomas' statement that, "I believe blacks can achieve in every avenue of American life without the meddling of university administrators" (see, e.g., MacDonald (2003)). While we cannot forget the constraints of space in a newspaper, the selective discussion of concurring and dissenting opinions in stories appear to be designed to support the reporter's analysis as to the wisdom of the decisions.

Richard Davis (1994, 67) quotes a new Supreme Court press corps member as explaining the significance of space limitations: "When my job first opened, my editors interviewed about a half dozen lawyers thinking at first they really wanted someone with a law degree. They realized these people were interested in tiny legal twists and turns of opinion and not the larger picture. When you only have 20 inches to write a story, you really need to be general and you need to grab that reader."

Finally, the press may not have reported all decisions because they did not deem the concurring and dissenting opinions important to the readers' understanding of the case. The majority opinion is what results in the actual determination of the law, so concurring and dissenting opinions may be perceived as only more *obiter dicta* and not relevant to an understanding of the case's determination.

Support or Non-Support for *Grutter* and *Gratz*

With respect to the question of whether the newspapers indicated approval or disapproval of these affirmative action rulings, we discovered that most of the newspapers' editorials demonstrate agreement with the Supreme Court's split decisions in *Grutter* and *Gratz*. They endorse the *Grutter* decree that said that the University of Michigan Law School could weigh race as a factor in admitting students, and they support the *Gratz* ruling which held that the University of Michigan's undergraduate admission office used race in an unlawful fashion when it awarded points partly on the basis of race. Interestingly, the newspaper editors generally reason that race can be used but not too much.

In conclusion, in this set of cases, the majority opinions are consistently announced, while concurring and dissenting opinions are generally ignored. The majority opinions are likely cited because the O'Connor opinion made plain that universities could consider race in admission processes, something the Court had not reaffirmed in 25 years, while the Rehnquist majority was likely highlighted because it indicated what kind of affirmative action plan is constitutional. The newspapers' failure to report all opinions might be explained by three factors articulated in the literature.

First, the need to communicate to a mass audience helps explain why the media ignored key elements of the decisions such as "strict scrutiny," "compelling state interest," "narrowly tailored," and "standing." Relatedly, and as the scholarly literature indicates, outside of the few regularly assigned Supreme Court reporters, many members of the press who cover the Court are not legally trained (Davis 1994). Tony Mauro, who covered the Court for *USA Today*, *Legal Times*, and Gannett News Services, has argued that not having a formal legal background was an asset to his legal reporting. "It makes it easier to explain to lay people if I've gone through the same basic questions the reader has when I'm writing the story. I can still ask dumb questions. I feel I'm not as tempted to write in legalese" (Davis 1994, 67). This reasoning appears operative in much of the coverage in the Michigan cases. Reporters said little to nothing about Justice Steven's suggestion that the Court should have dismissed *Gratz* because the litigant lacked standing. In addition, the press did not report on Justice Kennedy's claim that the Court did not properly apply the strict scrutiny test.

Second, the press may not record all opinions because of the limited space allotted to coverage of Supreme Court decisions.

The following editorial from the *Houston Chronicle* captures the view of the majority of editorials.

Monday's two-pronged decision was in some ways an upholding of the 1978 Bakke case . . . and a rejection of the immediate challenge to the long-established precedent. But it also more narrowly defined the ways "affirmative action" is deemed constitutionally acceptable. The broader residual argument, however, is about the value of diversity and the undesirability of homogeneity. The Michigan cases served to highlight that issue to an unprecedented degree. The level of support from corporate America, past and present military leaders and others who filed "friend of the court" briefs in favor of the effort to provide equal opportunity across the board is remarkable. . . . Chief Justice William Rehnquist declared for the majority that the program for the undergraduate college went too far in providing an advantage to the selected minorities and thus violated the constitutional equal protection provisions (Reinert and Nissimov 2003).

Citing the Supreme Court's *Bakke* decision and the *amicus* briefs filed by corporate and military officials, most of the editorials contend that universities should be able to weigh race as a factor in the admissions process because of the benefits that flow from a diverse classroom. Yet these same editorials believe that when points are awarded on the basis of race, such a system resembles a racial quota, discriminates against whites, and postpones the day when America becomes a colorblind society. This perspective is quite consistent with the decisions of the Supreme Court.

Most of the editorials clearly articulated this distinction between the two plans. As one editor cleverly noted,

When judges look for middle ground in a case and offer a little something to both sides, it's called "splitting the baby." The reference, of course, is to wise King Solomon and his prudent decision to threaten to sever a baby as a ploy for getting to the truth. What's often forgotten, of course, is that Solomon never actually did split the baby. And if he had, it would have been regarded as one of the most wrong-headed judicial rulings in history (A Wise, Affirmative Ruling 2003).

Several editorials argued that the Court in its twin decisions was "splitting the baby" by simultaneously endorsing and rejecting the use of affirmative action by one university. And most found this Solomonic decision appropriate and correct, appreciating the concluding comments by the previously quoted newspaper. "In the two Michigan cases, by affirming affirmative action while limiting the way it can be applied, the court 'split a baby' and made good law."

While most newspapers endorsed the Supreme Court's twin rulings, 25% of the newspapers we surveyed took issue with the *Grutter* decision, while only 3% challenge *Gratz*. Those opposed to *Grutter* argued that it is confusing, results in "reverse discrimination," divides the country and is wrong. For example, after describing the divided decision, an editorial from the *Rocky Mountain News* in Denver, Colorado states:

The U.S. Supreme Court delivered a split decision Monday in two affirmative action cases at the University of Michigan, guaranteeing that colleges and universities can continue to practice racial discrimination under the name of diversity, but only if they're coy about it. . . . The majority accepted Powell's claim [in *Bakke*] that diversity is a "compel-

ling state interest” that potentially justifies race-based policies that would otherwise violate the constitutional right to equal protection under the law. This is a muddle (and we won’t even go into the tangle of conflicting and partial concurrences and dissents). In fact, it has been a muddle ever since Powell said it, except that in 1978 he was the only justice claiming diversity as compelling state interest. Now there are five votes for his claim. Diversity as a fact is a strength of the country. Diversity as an institution’s recruitment goal is actually commendable. But diversity as legal rationale for discriminatory practices by government is in conflict with the more fundamental principle that the state and the law should not treat people of one race differently from people of a different race, no matter how well-intentioned the policy and no matter which group is preferred.... The decision in *Gratz* arguably undermines the decision in *Grutter*.... (Jones 2003).

On the other hand, several newspapers stressed that *Grutter* was a wise decision, in part because it challenges misconceptions about race and the Constitution. An editorial from the *St. Petersburg Times* most clearly articulates this response to the conservative critique of affirmative action by contending that “[t]hose who sought a simple declarative about race and higher education were disappointed by the Supreme Court,” and by then explaining:

The Court peeled away two smothering layers of political pretense about affirmative action. The first is that the government should be out of the business of making decisions based on a person’s race, that any form of racial distinction is pernicious. But race, as the Court said in a 5-4 opinion written by Justice Sandra Day O’Connor, is still a factor that can’t be ignored. It shapes people’s lives and opportunities,

and universities such as Michigan serve a vital role for society when they provide racial diversity. The second fiction is that racial diversity can be achieved without consideration of race. President Bush and his brother, Governor Jeb Bush, asked the Court to follow their policies in Texas and Florida, which guarantee university admission to a certain percentage of graduates in every high school. The Court was unimpressed. . . . Race does indeed matter, which is why the nation struggles with it, and why the Court's decision was imperative (Race Still Matters, 2003).

Thus, while the vast majority of the headline stories clearly noted the key rulings in the twin cases, there was considerable, and unsurprising, disagreement among the editors of these newspapers when it came to analyzing the wisdom of the decisions.

Recognized Impact and Implications of *Grutter* and *Gratz*

The final question this study evaluates is whether or not the press reported stories about the impact and implications of the *Grutter* and *Gratz* decisions. "Impact" is defined as what occurred immediately after the decisions, whereas "implications" denote what is likely to occur in the long run. All of the newspapers did make some assessment of the impact and implications of the decisions. Indeed, scrutiny of the different publications reveals that newspapers observed two short-term consequences flowing from the cases. The first is that the Court made plain that it is constitutionally permissible for colleges to use race in the admissions process. The second is that the newspapers stressed that the Court specified what colleges could or could not do if they opted to adopt affirmative action plans. Consider the

following story that appeared in the *Washington Post* one day after the Supreme Court handed down the decisions in *Grutter* and *Gratz*:

The Supreme Court issued a qualified but resounding endorsement of affirmative action in higher education yesterday, in a pair of decisions that, taken together, ratified diversity as a rationale for race-conscious admissions and laid out constitutionally acceptable means for achieving it . . . The net effect of the two rulings was to permit public and private universities to continue to use race as a “plus factor” in evaluating potential students—provided they take sufficient care to evaluate individually each applicant’s ability to contribute to a diverse student body (Lane 2003).

In this article, the reporter indicates that one of the consequences of the decisions is the continued use of race in the admissions process, as long as universities and colleges engage in systematic, file-by-file analysis of each candidate’s contribution to a more diverse student body.

Like the *Washington Post*, the *Boston Globe* asserts that the impact of *Gratz* and *Grutter* was to remove constitutional doubts hanging over affirmative action programs and to offer guidance on how to put together a legally defensible affirmative action program. The *Boston Globe* distinguishes between mandatory affirmative action programs and voluntary programs.

The rulings do not require undergraduate colleges or professional schools to use race as a factor, but allows them to do so. Affected are most educational institutions in the country that are selective in granting admissions, if they are run by government or receive public aid, including private elementary and high schools. . . . For an admissions plan using race to

be constitutional, the court majority said, it must be “truly individualized” and operate “in a flexible, nonmechanical way” (Denniston 2003).

By discussing both the limits and significance of the decision, these particular articles provide both a context and an assessment of the implications of the decisions for their readers. However, this type of analysis was missing from most of the articles examined in our research.

CONCLUSIONS AND ASSESSMENTS

Most newspapers reported on the *Grutter* and *Gratz* rulings, addressed the legal queries in both cases, expressed support for these split judgments, and considered the repercussions of the rulings. On the basis of these findings, it might appear that the press did a thorough and accurate job translating and disseminating to the public the content and consequences of the cases. But this is not the whole story. Most interesting are the elements that were not mentioned in the press’ interpretation of these cases—the concurring and dissenting opinions, and the political and legal context.

One of the fundamental findings of our study is that most of the press did not contextualize the cases. For example, they did not put into perspective the closeness of the votes—5 to 4 in *Grutter* and 6 to 3 in *Gratz*. These narrow votes would seem to reinforce the significance of possible retirements and replacements on the Court. At the time of the rulings, the expected retirement of O’Connor meant that a new Justice could portend changes in affirmative action policy (Lithwack 2004, Taylor 2004), and the

recent appointments of Chief Justice Roberts and Justice Alito underscore and magnify that possibility.

In addition, the majority of newspapers did not consider the legal milieu in which the Court considered *Grutter* and *Gratz*. Prior to the Supreme Court decisions, federal appellate courts had offered conflicting opinions as to whether colleges and universities could use race as a factor in admissions. In fact, the Fifth and Eleventh Courts of Appeal had ruled that colleges could not consider race in selecting students, while the Sixth Circuit had ruled otherwise. Frequently, when lower courts are divided, the Supreme Court steps in to clarify the law, which is precisely what the Supreme Court attempted to do in these two judgments. However, by “splitting the baby,” the Court was able to provide each perspective precedential support in the decisions—race can be used in admissions decisions, but cannot be used too extensively.

Yet another consideration is that most newspapers did not place into context the telling fact that *Gratz* and *Grutter* did not accidentally arrive at the Supreme Court’s door. As many political scientists have noted, there are a variety of societal and political factors that influence what cases the Supreme Court hears and decides. As a political body, the Court is influenced by national debates, albeit in a fashion markedly different from the other, electorally-accountable, branches.

The Supreme Court [does] not cut these issues from whole cloth. Public debates over racially segregated schools, censorship, and government support of religion were all part of the national discourse prior to the Court’s involvement. The intensity of the debate waxed and waned with events, public opinion, or media attention; and these dialogues continued

after the Court began to express its views (Fleming, Bohte, and Wood 1997, 1225).

In the case of affirmative action, the Michigan lawsuits reflected a concerted effort by conservative interest groups to sway the Court to invalidate affirmative action plans by bringing carefully framed litigation through the lower federal courts (Bean 2004). A superficial examination of *amici* briefs submitted by supporters of the plaintiffs in both *Gratz v. Bollinger* and *Grutter v. Bollinger* expose the well-organized and well-funded interests of conservative groups whose bottom line goal is to eliminate policies that may burden white males in increasingly competitive settings (Taylor 2004, Phillips 2004).

Another point worth considering is the fact that most news accounts neglected to describe the nexus between affirmative action programs and past and present racial discrimination. The history of affirmative action policy and its subsequent discourse, conflicts, and decision-making creates a complex context that must be recounted to fully understand the impact of these decisions. Gandy, et al. (1997, 160) explain that "depending on the ways in which the problem of inequality is framed, then, press coverage may lead citizens toward, or away from, support of particular public policies." This finding also reinforces the argument of Slotnick and Segal (1998) regarding the media's influence over public opinion towards the *Bakke* case and affirmative action in higher education.

When considering the historical context of these cases and affirmative action policy, it is worth recalling the words of DuBois in 1903, when he said that the problem of the twentieth century is that of the color line. One hundred years later, in *Gratz*, Justice Ginsburg documented ongoing racial bias in education, employment, and housing; she looked upon affirmative action as

one remedy for differential treatment in policy areas. In her words, “the stain of generations of racial oppression is still visible in our society...and the determination to hasten its removal remains vital.” Justice Ginsburg saw the connection between America’s racial history and affirmative action policy; most of the press did not.

A final set of observations concerns the fact that, by failing to include in their reports dissenting opinions in *Grutter* and *Gratz*, the public was unable to develop a full or complete picture of the arguments against the Court’s decisions to uphold a law school affirmative action plan and to strike down the undergraduate program. Newspapers’ failure to cover all opinions may, as we have noted, be due to a variety of factors, including the press’ need to avoid the legal lexicon, limited time and space, and editors’ determination that not all of the decisions were important enough to warrant coverage. Ironically, by covering solely the majority’s determination, the press may enhance the judiciary’s legitimacy by presenting Court decisions as uncontested internally. Because the media did not provide competing understanding of the rulings, either in editorials or in the Court’s opinions themselves, the public may be more willing to simply accept the Court’s decisions than to pursue additional means of avoiding compliance.

While we have found that newspaper coverage of the *Grutter* and *Gratz* cases were more accurate than the television coverage Slotnick and Segal (1998) evaluated in *Bakke*, there were clear limitations to the reporting. This is unfortunate. In a democracy, the public is heavily reliant on the media to provide adequate and clear coverage of the judiciary. But in the Michigan cases, where the media accused the Court of “splitting the baby,” newspapers did the same in their coverage. By reporting on the content of

the majority rulings but by failing to adequately discuss the background and implications of the decisions, the public was deprived of relevant information needed to assess the Court's judgments and the contested issue of affirmative action.

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