Racial Preferences and Formal Equality

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In this paper, I want to discuss an approach to racial preferences different from the one often encountered in the philosophic literature. Many philosophers see racial preferences largely as instrumental: devices that produce admissions decisions that can be evaluated according to certain moral principles. They look to see who’s benefited and who’s burdened by the policies and evaluate those consequences according to some moral theory of a just society. In his paper, for example, James Sterba argues that racial preferences are justified because they are an efficient means to achieve a race-neutral society.

I want to suggest, however, that the dividing line between those who favor and those who disfavor racial preferences does not concern differing views about the value of the admissions decisions that might result. It rather concerns the deeper question of whether it is appropriate to evaluate racial preferences on the basis of the results they produce.

The organization that is litigating the two University of Michigan cases involving racial preferences that are now before the U.S. Supreme Court and for which I work, the Center for Individual Rights (CIR), does not dispute claims that certain race-specific ways of apportioning admissions slots might lead to admissions decisions that are more precisely just or more educationally efficacious.

Instead, it argues that racial preferences nonetheless violate the Constitution’s requirement that every citizen be afforded equal treatment under the law. And it argues that citizens have the right of equal treatment regardless whether it increases or decreases the likelihood that particular admissions decisions will be just or will produce an institution’s desired racial mix of students.

The constitutional claim is a formal one; it concerns the form or way government benefits are distributed. It says that the government must distribute its benefits in a regular, predictable fashion, according to rules laid down in advance. This argument against racial preferences is distinct from various claims about who, in the end, more deserves to attend elite public universities or what racial mix of students, in the end, produces the most edifying educational climate. In an important way, the formal argument deliberately sidesteps the moral question of who really deserves to attend the university or which racial mix of student produces the best educational outcomes.

And so in this paper, I want to explain why I think it is a good idea for institutions like the University of Michigan to sidestep these types of moral and policy questions—why it is more important to follow its own rules than
to make special, race-based exceptions to those rules. The reasons for this are implicit in the current legal effort to end the consideration of race in college admissions, and in this paper, I want to make them explicit.

I want to make three arguments in support of the importance of formal equality. First, I want to claim that using separate admissions procedures and standards for different racial groups is itself the source of harm. This harm occurs regardless of the good purposes for which some racial preferences may be used. Thus, the harm specific to racial classifications must be offset against whatever moral or educational benefits might result from employing such racial classifications.

Second, I want to offer several reasons why insisting on the formal requirement that all applicants be judged by the same standards makes special sense in the context of college admissions. I will argue that this kind of formal equality is best able to reconcile the inherently inegalitarian nature of elite colleges with the democratic imperative to treat all citizens equally.

Third, I want to address the primary criticism of formal equality, namely, that it purports to treat as equals individuals whose material circumstances, past opportunities, and social situations are unequal, partly as a consequence of past racial discrimination. I will argue that insisting on formal rules does not obscure such inequality, and that doing so offers a politically effective way to expose and change it.

The Harm of Dual Admissions Standards

The first question that I want to take up is the specific harm that results from treating people according to separate rules intended to achieve a certain racial outcome. It sometimes is difficult to grasp the particular nature of this harm. In part, we tend to assume that well-intentioned racial classifications are less onerous than racial classifications used for an invidious purpose. That is, we tend to think that racial classifications themselves are neutral, or that their moral weight depends on the ends to which they are put.

Many think that the type of race discrimination practiced by educational institutions like the University of Michigan is of a different kind than that practiced in the 1930s and 1940s when Jim Crow segregation characterized life in many parts of our country. Whereas the segregationists treated black Americans differently in order to exclude them from public life, schools like the University of Michigan appear determined to increase the opportunities for racial minorities to assume positions of power and influence in our society.

Many therefore view dual admissions standards as different from the sort of segregated public facilities, widely different municipal services, and overtly disparate application of laws that characterized segregationism during the early part of this century. At worst, dual admissions standards seem an excessively mechanical approach to race, not one that is harmful to the interests of racial minorities.

But I want to argue a different view. In an important way, the use of dual admissions standards represents the same wrong as the overtly discriminatory practices of the 1930s and 1940s. While we can distinguish between the good and bad motives of those who use racial classifications, the classifica-
tions themselves are the source of their own harm, and this harm is of the same sort regardless of the end or purpose to which they are put.

The way in which college admissions preferences and southern segregationism cause the same harm was illustrated vividly during the trial in the CIR’s case against the University of Michigan law school. This probably was the most dramatic twenty minutes of the four-week trial, which began in January 2001. It brought into sharp focus several of the most significant themes that both sides had been trying to advance before the court.

The attorneys for a group of minority students who had been granted leave to intervene in the case as interested parties had called John Hope Franklin to the stand to testify about the state of race relations in America. Franklin is a distinguished historian who served as the chairman of President Bill Clinton’s race advisory commission. He grew up in the segregated South, got his Ph.D. at Harvard University, and went on to a distinguished academic career.

The student interveners had called Franklin to testify about what it was like to be victimized by persistent, systematic racial discrimination. For most of a day, Franklin testified in detail about his experiences. Franklin now is in his late eighties and an effective storyteller. He was there to paint a vivid picture of the reality of racial life in America.

During part of his testimony, he told about trying to do research in a southern library. After presenting a letter of introduction from Harvard University, he asked the librarian for permission to use the facility. He soon was told that the other patrons objected to having a black in the reading room. And so he was directed to wait several days while the staff cleared out a store-room in which he alone would sit. And he was told that he could not ask the attendants to retrieve books from the stacks, as was the practice for the other patrons. He would have to get them himself. He testified that when the other patrons saw how many more books he was able to retrieve by going into the stacks directly, the librarian changed the rules again, and he was required to use the attendant system like everyone else.

On and on Franklin testified. But it gradually became clear that this history lesson was about more than history. For Franklin was there to suggest that the motives of CIR’s client, Barbara Grutter, were not all that different from the motives of the southern segregationists. This was not merely the subtle undercurrent of his testimony: it’s what he said explicitly as he looked directly at Grutter, sitting not more than ten feet from him.

Franklin analogized the current legal effort to end race preferences to the segregationist librarian who kept changing the rules to keep him at a disadvantage. Like the librarian, Franklin said, Grutter was trying to raise the bar a little higher, so that blacks would continue to be excluded from colleges and universities.

When he was finished with his direct testimony, one of the lead attorneys assisting CIR in this case, Lawrence Purdy, got up to cross-examine Franklin. By then, the tone of the courtroom was decidedly hostile. In addition to Franklin’s testimony, the interveners had arranged to bus in about two hundred inner-city high school students to fill the galleries behind the plaintiff and her attorneys. The idea was to make Franklin’s testimony even more
vivid than it already was, to suggest not just that segregationism lived on, but that some of its victims were there in front of the judge that day.

Purdy couldn’t do much about the intervener’s courtroom theatrics. But neither could he leave unchallenged the idea that the case against the university’s admissions preferences was intended to advance racial separation. And so he ventured well beyond the safe bounds of textbook cross-examination.

Purdy decided to ask Franklin what he thought about the university’s idea that a “critical mass” of minority students has important educational value and that it justifies the use of racial preferences. He asked Franklin to compare the educational climate of the University of Miami (where approximately 40 percent of the students are minorities) with prestigious Bates College (where about 2 percent are minorities).

To the discomfort of university lawyers, Franklin didn’t hesitate to lavish praise on Bates—for its commitment to equal treatment—and to criticize the University of Miami. As Franklin expressed it, Miami admits minority students with lower academic qualifications so they can play on its athletic teams. As he said, “for the purpose of, well, I’ll put it politely, playing on their team.” He went on to say, “I don’t think that’s a healthy educational environment. This is all I’m saying.”

But Purdy pressed Franklin for more. He asked, “So you... certainly oppose using different qualifications to permit athletes to come to a school, is that right?”

Franklin nodded. “Yes,” he said.

Purdy continued, “You oppose using different qualifications for alumni children. You don’t think they should have a lower qualification to come to their school?”

Franklin looked straight at Purdy. He said, “I’ll come to the end that you want me to come to, namely, that is, that I believe in using standards that are standards.”

Purdy asked, “For everyone?”

Franklin didn’t hesitate to answer: “Yes. Yes.”

So Purdy asked Franklin point blank, “Professor Franklin, when it comes to universities and college admissions you’ve been quite clear, have you not, that you do not support the admission of less-qualified minority applicants over more qualified Asian or White applicants?”

Franklin responded, “That’s right.”

For a minute, it appeared that no one knew what to say, because Franklin had just repudiated the central principle of the University of Michigan admissions system, namely, the use of different admissions criteria in order to admit a certain threshold number of minority students. Knowing he could do no better, Purdy just said, “That’s all I’ve got, Professor. Thank you very much.”

After Purdy finished his direct examination, the twenty-seven lawyers representing the university and the student interveners arose almost in unison and tried in various ways to get Franklin to take back what he had said about double admissions standards. Franklin wouldn’t budge.

It is significant that people of such different outlooks and experiences as John Hope Franklin and Barbara Grutter oppose the use of dual admissions
standards. But what is it that they see? What exactly is the harm caused by the use of such standards? And more important, what is the harm that this practice shares with segregationism?

In trying to explain the harm that results from the use of dual admissions standards, it is useful to start by looking closely at Franklin’s testimony, because not only was his testimony dramatic, it was instructive. It was instructive because Franklin’s account of how Jim Crow segregation worked sheds light on an aspect of state-enforced discrimination not often grasped. Understanding this feature points to the fundamental problem with dual admissions systems, one that exists regardless of the good intentions that may motivate their use.

Many believe that the problem with the Jim Crow laws was that they erected formal and rigid barriers between the races. Blacks were judged as blacks, not as individuals. Skin color made all the difference. Schools like the University of Michigan frequently rely on this characterization to justify the racial classifications that they favor. These institutions frequently suggest that their admissions systems go “beyond” rigid measures of academic ability, like standardized test scores, which they assert create artificial barriers between the races. Instead, these colleges say that their admission systems set aside formal standards in favor of an approach tailored to the separate experiences of different racial groups.

The appeal of dual systems like the ones the university is defending in court depends on the sense that old, rigid, formal measures of academic ability need to be set aside in favor of more relaxed, informal, flexible measures, measures that take into account many different cultural experiences. According to Franklin, though, this conventional view misconstrues the way the segregationists worked. And it has the unfortunate effect of hiding the real harm of separate admission standards. As Franklin explained, the real problem with southern segregationism wasn’t its excessively formal distinction between the races, but rather its informal—one might even say flexible—approach to such distinctions. Franklin testified that it wasn’t so much that the segregationists created a rigid set of formal rules that always kept people separated by race. It rather was that they were relentlessly informal about these rules. They kept changing the old barriers and making up new ones, to get the result they were determined to get.

The librarian that Franklin encountered in the 1940s was ingenious about creating new policies intended to keep Franklin at a disadvantage. As soon as Franklin learned to navigate his way through the rules that gave him separate access to the stacks, the librarian would change them around to maximize the inconvenience for Franklin. Franklin testified that this informality characterized the Jim Crow South, that there was no one way, no one set of rules that governed racial life, but a constantly changing set of rules.

At first glance, Franklin’s view is puzzling. Did he mean to suggest that it would have been acceptable for the librarian to continue to relegate him to a separate room just so the rules never changed? It seems counterintuitive to suggest that formal segregation is permissible so long as the state is consistent and unchanging in maintaining the rules of separation.
Franklin was testifying in favor of segregation so long as its rules were stable and unchanging. He rather was calling our attention to the idea that segregation can't be maintained through the use of stable and unchanging rules, and that the segregationists knew this.

The segregationists well understood that there was no set of formal rules that would reliably keep the races separate. Such rules assume that there are objective differences between the races. Moreover, such a system assumes that it is possible to say what those differences are with enough specificity to construct rules that will reliably take account of them.

But of course, the idea that there are deep and stable differences between the races is false. For that reason, any system of rules built on that assumption will prove to be unworkable. That’s why the segregationists found that they had to keep changing the rules to take account of the fact that there could be no one, stable, and predictable way to keep the races separated. Any set of rules built on supposed racial differences is doomed to failure.

Franklin’s testimony points to the real problem with admissions systems such as the University of Michigan’s. They aren’t informal and flexible in contrast to the sterile rigidity of segregationism. Rather, they are informal and flexible in exactly the same way as segregationism. Flexibility is the problem they share with segregationism.

Like the segregationists, the University of Michigan and other schools construct ad hoc standards designed to disguise their determination to get a certain racial result. Like the segregationists, the racial result preferred by these schools reflects their own institutional needs and agenda rather than their objective assessment of the academic needs and abilities of the individual minority students who apply. These schools do not measure minority students by a standard designed to gauge their academic competitiveness; they rather use standards intended to keep well hidden their interest in achieving a numerical representation of minority students almost regardless of academic competitiveness.

Let me try to be more precise about the analogy between segregationism and the use of dual admissions standards, because doing so will bring into relief the real problem with both approaches to race. The segregationists believed that there were objective differences between the races. And so they constructed rule after rule intended to capture those differences and produce the result that they thought was pre-ordained, namely, racial separation.

Schools like the University of Michigan, in contrast, do not believe that there are differences between the races and are not comfortable with the fact that they routinely have to use two very different admissions standards in order to get a representative percentage of racial minorities. And so they construct rule after rule intended to obscure the different standards that they are using.

So while the segregationists created rule after rule to accentuate racial differences that didn’t exist, the University of Michigan and other schools create rule after rule to hide the racial differences that their own admissions standards seem to say do exist. In the case of the University of Michigan and other schools, the result is an ad hoc series of rules intended to camouflage what
they really are doing, namely, using two very different academic standards in order to get a numerical result that they want.

Uncontested facts developed during CIR’s suits against the law school and undergraduate college make clear how fluid the admissions standards really are. For example, when CIR’s clients Jennifer Gratz and Patrick Hamacher applied in 1995 and 1996 to the University of Michigan Undergraduate College of Literature, Science, and the Arts, admissions clerks evaluated their applications according to a set of grids, containing grades along one axis and test scores along the other. Clerks would find the location on the grid where an applicant’s grades and test scores intersected, and in that box would be a set of instructions, broken down by race. That is, there were two sets of instructions for applicants with identical grades and test scores, one set for minority applicants and one set for nonminority applicants.

In many of these grid boxes, the instructions produced entirely different results. For example, in some boxes, clerks were instructed to reject automatically all nonminority applicants based solely on their grades and test scores. Minority applicants with precisely the same scores were passed on for further review and highly probable acceptance. In other grid boxes in the midrange of credentials, minority applicants had a 95–100 percent chance of admissions with certain grades and test scores, whereas nonminority applicants with the same grades and test scores had a 0–6 percent chance.

In 1998, the university adopted a new admissions system explicitly intended to better mask to the segregated nature of the old grid system. The new system was built around an index score, consisting of points awarded to each applicant for a variety of reasons. For example, an applicant received 12 points for a high SAT or ACT score, 10 points for attending a competitive high school, 3 points for an outstanding essay, and 20 points for being a member of an underrepresented racial group.

The university was open about the fact that the index point system was intended to achieve the same racial mix as the old grid system. To that end, the university advertised the fact that one of its own statisticians had been retained to calculate the number of index points that would have to be awarded for race in order to produce the desired racial mix of students. As a result, race was as important a factor in the new index point system as it had been in the old grid system. The 20 points awarded for race trumped many other diversity factors and in fact were enough to vault a minority candidate from the presumptive “deny” range of the index to the presumptive “admit” range. This mirrored precisely the effect of race in the old grid system, in which race increased the likelihood of acceptance from 5–10 percent to 80–100 percent.4

Franklin was clear about the harms caused by the segregationists’ constant changing of the rules. But what is the harm that results from the ongoing efforts of schools like the University of Michigan to disguise the fact that minority applicants don’t seem to score as highly on the admissions standards that these schools themselves identify as relevant for their other students?
Like the segregationists, today’s university officials engage in an ongoing effort to manipulate rules to get a racial outcome that best serves their own varied institutional interests. Like the Jim Crow rules, today’s admissions systems are constructed in a way to obscure the real motives of the officials who use them. And like the Jim Crow laws, the systems used by the University of Michigan and other elite schools reinforce the fact that the legal status of one race is not only different from that of other races, but is precarious, dependent always on official discretion, and the subject of many competing institutional interests.

In each case, minorities are treated according to a shifting standard constructed by officials. The direct goal of the University of Michigan and other schools today is to admit a certain number of racial minorities. This numerical goal in turn reflects a variety of institutional needs, policies, and motives. Some of these motives are educational, and some relate to their sense of social mission. Others are more political in nature: schools like the university need a certain minority representation if they are to successfully compete for funds from the state legislature.

Schools like the university say their ongoing massaging of the rules is guided by the principle of diversity. But their own rhetoric about diversity only underscores the ways in which this very general standard serves to cloak a variety of institutional agendas, at least some of which run directly contrary to the interests of minority students.

A clear example of the ambiguous nature of diversity was revealed during CIR’s case against the undergraduate college. In an effort to quantify the educational benefits of diversity, the university issued a report written by Patricia Gurin, a professor of psychology at the university. Gurin purported to calculate the educational benefits of racially mixed classes. She did a regression analysis designed to correlate the racial diversity of classrooms, on the one hand, with hundreds of educational outcomes, on the other.

Among her results was the finding that students’ self-reported intellectual self-confidence improved more dramatically in classrooms in which there was greater racial diversity. What could only be discovered by wading through pages of regression tables was the startling fact that student self-reported intellectual self-confidence in racially mixed classrooms increased for white students. In the case of black students, Gurin found either no correlation or a negative correlation. That is, black student self-confidence either didn’t improve or even declined in more racially mixed classes.

In other words, according to the university’s own representation of what diversity means, it’s appropriate to suspend normal admissions criteria in order to boost the number of black students so that, inter alia, white students can feel intellectually more self-confident about themselves, even as the university acknowledges that black students, on average, either don’t experience gains in self-confidence or may end up feeling less confident of their abilities. Franklin decried the use of separate, lower standards at schools like the University of Miami to admit minority students to, as he put it politely, “play on their team.” One can only imagine what he would say about the use of separate, lower academic standards to bolster the intellectual self-confidence of
white students while either not improving or actually diminishing that of minority students.

The consequences of hiding the double standard become apparent once accepted students show up in Ann Arbor and have to compete with one another in the classroom. Students from racial groups selected according to highly competitive measures of cognitive ability tend to do better, on average, than students from racial groups accepted in order to achieve a certain numerical presence. Differences in academic performance manifest themselves in many ways, but perhaps none are as stark as the resulting disparities in dropout rates. Whereas the six-year graduation rate for the University of Michigan undergraduate college as a whole is about 83 percent, the six-year graduation rate for African American students is about 61 percent.7

These differences in academic performance do not reflect differences in ability among racial groups. Rather they reflect the very different way applicants of different racial groups are selected. Schools like the University of Michigan would see more exaggerated racial disparities in performance if they were to select one racial group according to SAT scores and another racial group according to eye color. Whereas SAT scores tend to be good predictors of academic performance, eye color in no way predicts academic performance. Applicants accepted according to SAT score would do better, on average, than applicants accepted according to eye color.8

Thus, as a consequence of keeping their double standards hidden, schools like the University of Michigan end up reinforcing precisely the sorts of racial distinctions and stereotypes our country is at pains to avoid. That’s why Franklin immediately recognized the problem with double admissions standards and why he testified so strongly against them.

**Why Should We Care about Formal Equality?**

So far, I have argued that setting aside formal rules in order to achieve a racial result directly often has bad consequences for racial minorities. I have suggested that these bad consequences occur even when officials step outside the rules in order to get a “good” racial result, like increasing the number of minority students who attend prestigious universities.

The bad consequences of these sometimes well-intentioned efforts should be enough to persuade public officials not to create race-based exceptions to their ordinary rules. Certainly, any argument that rests on the alleged good consequences of setting aside the rules needs to include in its calculus the offsetting bad consequences that are endemic to such efforts.

But there is a more fundamental reason why public officials should refrain from setting aside the rules in order to achieve directly a preferred racial result. That’s because adhering to a single set of formal rules regardless of racial outcome is a uniquely democratic way for elite colleges and universities to discharge their larger political obligation to treat all citizens equally.

That political obligation is codified in the Fourteenth Amendment to the U.S. Constitution, which prohibits states from denying any person “the equal protection of the laws.” The Supreme Court has interpreted the Fourteenth Amendment as prohibiting the use of racial classifications unless they are
narrowly tailored to a compelling state interest. Another way of stating this principle is that a public college may not apply its rules differently on account of a person’s skin color unless it has a compelling reason to do so and the departure from its normal rules is narrowly tailored to that interest and no other.

In this section, I want to explain the idea behind this constitutional requirement in light of the specific political problem faced by elite educational institutions in a democracy. That is, I want to explain why the general prohibition on racial classifications makes special sense in the context of college admissions. Understanding the nature of the political problem posed by elite institutions points not just to the utility of formal equality in a democracy, but to the way in which formal equality is a particularly democratic manner in which these institutions can achieve equality.

The larger political problem that underlies the admissions procedures at the University of Michigan and elsewhere is this: even in a democracy, we have elites to which we cater. These elites must be developed and trained from an early age, and it is in the interest of the state, not just of private institutions, to undertake this task according to its needs and at its expense. That’s why states like Michigan go to the trouble to create, develop, and support first-rate universities like the University of Michigan.

To say that the particular mission of schools like Michigan is to develop and train an elite is just to say that these schools thrive on, develop, and thus exaggerate certain natural inequalities of intelligence, leadership, and accomplishment. But how can an institution that thrives on inequalities of a particularly sharp character reconcile its mission with the need to treat everyone as equals?

Using standards that are standards—in this case specifically, a single standard for all applicants—is a uniquely democratic manner in which to equalize relationships between and among citizens. That is because the form of official action—the way decisions are made—is more important in a democracy than achieving any particular outcome. Our respect for rights leads us to, for example, elevate the importance of due process over the end of efficiently prosecuting individuals convicted of a crime.

The formal aspect of government action is what can be separated from its end. We can make this distinction precisely in cases in which there is more than one way for the government to achieve its objective. If there is only one way to accomplish an end, then it is meaningless to speak of its form or the way it is achieved. Correct reasoning means following the single correct path from premises to conclusion. In contrast, deciding correctly means deciding in the right way in the face of many possible ways of deciding.

Making laws is one obviously formal activity: there are many ways to make laws, but our Constitution specifies the one right way. At a deep level, specifying the right way to make laws is what a constitution does. Governing regularly, according to the right procedures, is fundamental to a government built on a constitution. Not only does it restrain the powerful, but also it protects the liberty of the weak. Governing regularly equalizes the otherwise unequal relationships that are necessary to a democratic society but pose a political threat to it.
In the same way that formalities matter to lawmaking, they also matter to the process of selecting applicants for college. Elite colleges exercise tremendous power over the individuals who seek admission to them. Moreover, there is an inherently arbitrary element in the way that they exercise this power. For in the same way that there is more than one way to pass laws, there is more than one way to select students for college. This reflects the fact that there are many more applicants who could plausibly benefit from schools like the University of Michigan than there are spots to accommodate them. There thus is no single best entering class, but many possible combinations of applicants whom such schools plausibly could admit.

How the university selects students in the face of many possible ways to select them thus becomes important. Treating all applicants equally according to the same rules is a democratic way to achieve equality, even without knowing whether it produces equal results. It is possible to recognize instantly whether a school has followed the correct procedures. We do not have to wait to judge the results of its decisions to decide whether it has made those decisions in the right way.

Making admissions decisions according to a single “correct” standard softens the elite character and institutional power of schools like the University of Michigan. Doing so restrains its ability to get the result it wants directly. Insisting that schools like the University of Michigan adhere to a single “correct” way of considering applicants for admission makes it clear that even such powerful and elite institutions are restrained in what they can do to get what they want.

Of course, holding these schools to formal restraints deliberately prevents them from raising ultimate moral questions, such as who really deserves to attend elite schools. At the same time, it prevents these institutions from exercising arbitrary power over individual applicants, as occurs when admissions officials at a particular institution admit an unqualified applicant in order to further one or more of its own institutional interests.

Imposing formal restraints on the exercise of power is fundamental to a democracy. The restraints inherent in a single, “correct” admissions standard seem to avoid not just the undemocratic consequences, but in addition, the inherently undemocratic nature both of 1930s-style segregationism and 1990s-style racial preferences. The problem in both cases goes beyond the intended and unintended results of manipulating the rules. More fundamentally, there is no warrant in a democracy for powerful institutions to step outside the rules simply because they deem it convenient.

All types of executive assertions of extraordinary and unconstrained power are deeply threatening to democratic equality, whether exercised as a matter of brute force, or used to more efficiently achieve morally compelling results. In either case, officials claim authority to step outside the rules that otherwise equalize the relationship between the government and the governed. Such assertions of unconstrained power diminish the liberty of individual citizens regardless of what motivates the assertions. As Franklin testified, segregationism keeps its victims permanently insecure, always dependent on the arbitrary exercise of official authority. In much the same way, selecting students for college on the basis of hidden double standards
that reflect arbitrary institutional interests and suppressed moral agendas leaves applicants of all racial groups at the mercy of the unconstrained discretion of admissions officials.

Formal rules prevent unconstrained power, whether exercised for benevolent or malignant reasons. As the segregationists understood, it’s impossible to construct a set of standards that reliably keep the races separate. Requiring that officials always use a single correct standard—and forbidding the use of ad hoc standards—doesn’t just impede segregationism, it makes it impossible.

At the same time, using standards that are standards prevents well-intentioned institutions like the University of Michigan from raising—and trying to settle—the moral question of who really deserves to attend schools like the university. And it equally well prevents these schools from trying to answer the policy question of what racial mix of students produces the best educational outcome.

Failure to adhere to formal standards increases the likelihood of bad consequences because it permits officials to act on the basis of suppressed motives and agendas. But worse than that, it manifests an inherently undemocratic exercise of power by officials in its own right, regardless of the consequences. Democratic equality expresses itself most directly in the adherence to formal rules. Such rules make it clear that even elite institutions like the University of Michigan are constrained in what they can do.

**Formal Equality and Real Equality**

In setting aside the formal requirement that everyone be judged by the same standard according to regular procedures, schools like the University of Michigan dispense with the one device that actually does have some chance of reconciling the natural inequalities inherent in elite education with the duty of such schools to treat all of their citizen-applicants equally.

Insisting that schools judge all applicants according to the same standard leaves open the question of what that standard should be. Merely requiring that schools use some unitary standard is a bit relativistic: it suggests that any standard is as good as any other, so long as it is used regularly and consistently.

But that obviously is not the case. Certain admissions standards are better than others. In this last section, I want to consider the practical questions that arise once schools like the University of Michigan are forced to eliminate the use of racial double standards. How can schools construct a unitary standard that reconciles their need both to maintain standards and to be open to admission of a wide variety of individuals?

The question of what sort of unitary admissions standard best serves the interests of schools like the University of Michigan is the subject of much debate in the four states in which race no longer may be taken into account in admissions. Many schools in these states have tried to devise new, unitary standards that produce the same racial result as the old dual systems.

Thus, the University of Texas adopted the so-called Ten Percent Plan, whereby members of the top 10 percent of every high school in the state are
now offered places in the state university system. And schools in California automatically admit the top 4 percent of high school students for roughly the same reason. Other schools have tried to achieve a certain racial outcome by deemphasizing standardized test scores and increasing the weight given to grades.

Collectively, these efforts to engineer a certain racial outcome have worked. Today in California, Texas, Washington, and Florida, every public university and college enrolls underrepresented minority students at a rate equal to, or exceeding, 10 percent. This includes every flagship undergraduate school and all the professional schools. Ten percent, of course, is the minimum percentage of underrepresented minority students that the University of Michigan and other schools claim is the threshold necessary to have a critical mass of minority students. The experience so far in the four states that have done away with racial preferences in college admissions shows that what the University of Michigan itself considers a “critical mass” can be achieved without the use of racial preferences.

But the question arises as to what it means to judge everyone by the same standard when schools manipulate the standard in question so as to produce the same racial result that could more efficiently have been achieved through the use of racial preferences. So the question of which single admissions standard is the best standard has a twist. To what extent does engineering a standard that produces equal outcomes help or hinder an elite school from treating everyone equally?

In this paper I have argued that formal equality, rather than equality of result, is important in a democracy. It helps reconcile the very real inequalities on which schools like the University of Michigan rest with the democratic need to treat everyone equally. Formal equality is a way of softening the many real inequalities that are necessary to a democracy but that threaten its political fabric.

At the same time, though, it is important to recognize that insisting on the importance of formal equality in the light of very real and lasting inequalities can serve to undermine democratic equality. This is the fear that drives schools in Texas, California, Florida and Washington. They don’t want to use an admission standard that only calls attention to, and exacerbates, the natural inequalities that such schools know very well exist.

Of particular concern to these schools is the fact that inequalities in educational preparation and achievement run along racial lines. Elite schools like the University of Michigan estimate that exclusive reliance on standardized test scores would produce an incoming class of no more than 4 percent African American students. This reflects long-standing racial disparities in standardized tests, disparities that begin to arise in second grade and persist at least through graduate school.

Schools like Michigan are right to recognize that excessive reliance on any admissions standard that predictably excludes chronically underrepresented groups is inconsistent with the democratic ideal of equal treatment. Such a standard doesn’t soften natural inequalities; it makes them all the more obvious. So if the use of a single, formal admissions standard is going to serve the purpose of reconciling the nature of an elite institution with the demo-
ocratic need to treat all citizens equally, the standard must be selected in such a way as to be open in principle to everyone.

This reflects the precarious authority of constitutional and legal formalities in a modern democracy, where they are subordinate to the natural rights of life, liberty, and pursuit of happiness. Legal forms are constructed to serve those ends; they are not united with them, and they certainly are not an end in themselves. As a result, school officials will readily throw admissions formalities overboard if they do not achieve a desirable end. And so too will they tailor the forms that they do use in order to make sure that they serve that end, favoring one set of rules because it will produce an equal outcome more readily than another.

However, there is a great difference between throwing out formal rules in order to achieve an end directly and tailoring formal rules to achieve an end indirectly. The former thwarts democratic equality and undermines its institutions. The latter means that debate about the best admissions system will be deeply political, reflecting many competing objectives and agendas.

In almost every respect, it is preferable to have ongoing debate about what the formal standard of admissions ought to be than to permit elite schools like the University of Michigan to short-circuit that debate by dispensing with formal admissions standards altogether. When the University of Michigan and other similar schools keep hidden the fact that minority applicants routinely have difficulty competing according to the standards the university thinks relevant to its educational mission, it preempts the real debate that we ought to be having about the purpose of publicly supported institutions like the University of Michigan.

If our elite schools routinely exclude applicants from a wide variety of backgrounds, perhaps they have defined their role as an elite institution too narrowly. In some cases, they may be relying too heavily on certain reliable predictors of academic and social success instead of undertaking the hard work of identifying individuals whose potential for future leadership is just as real, but harder to discern. Also, hiding the use of double admissions standards cuts off debate we ought to be having about the failure of a large segment of our elementary and secondary school systems to adequately prepare disadvantaged students of all races to compete for admission to schools like the University of Michigan.

An open debate about admissions replaces the destructive idea that the best way to resolve the tension between elite educational institutions and democratic egalitarianism is by abandoning the formal requirement of a unitary system altogether in favor of a doomed effort to engineer equal outcomes through double racial standards and other ad hoc devices. What makes the debate difficult, of course, is that it’s not exactly clear how to reconcile the formal requirement that all college applicants be judged equally with the considerable inequalities across localities in K–12 education, many of which affect racial minorities.

But the difficulty of constructing a college admissions standards that does justice to those inequalities may in turn force us to face the problem of those
inequalities directly and do something about them. We can hope that if the Supreme Court does strike down the use of double admissions standards, that will create incentives at all political levels rethink the role of publicly funded elite schools as well as to undertake long-needed education reforms at the K–12 levels.

Conclusion

Let me summarize my discussion. Through the use of racial double standards, schools like the University of Michigan forsake formal equality in a calculated effort to engineer equal racial outcomes. Permitting college officials to achieve directly admissions outcomes that serve their sense of who is morally entitled to attend elite institutions or their sense of what racial mix of students is most educationally valuable exacerbates the inherently elitist nature of these institutions.

Moreover, the ad hoc admissions standards that result are deeply injurious to the minority students who are their intended beneficiaries. As Franklin testified, the use of separate, lower academic standards for minority students is deeply counter to the interests of those students. Requiring colleges and universities to adhere to a formal or single “correct” admissions standard for all applicants is a more democratic way to reconcile the inequalities on which elite educational institutions depend with the need to treat everyone equally. Moreover, using a single standard exposes underlying inequalities in a way that may lead to reform both of admissions standards and of the K–12 education system in the United States, which leaves too many students unprepared to compete effectively for admission to elite schools.

Notes

1 This paper avoids using the phrase “affirmative action” because its definition is so elastic as to preclude its use as a common basis for intelligent discourse. Moreover, recent opinion polls make it clear that majority of American oppose the use of racial preferences no matter how the question is couched. To give just one example, a recent Washington Post/ Harvard/Kaiser Family Foundation survey asked 1,709 Americans this question: “In order to give minorities more opportunity, do you believe race or ethnicity should be a factor when deciding who is hired, promoted, or admitted to college, or that hiring, promotions, and college admissions should be based strictly on merit and qualifications other than race or ethnicity?” Ninety-two percent—including 86 percent of African Americans—said that decisions “should be based strictly on merit and qualifications other than race/ethnicity.” See Richard Morin, “Misperceptions Cloud Whites’ View of Blacks,” Washington Post, July 11, 2001, A1. Of particular interest are the breakdowns of responses to particular questions, available online through an interactive feature at (http://www.washingtonpost.com/wp-srv/nation/sidebars/polls/race071101.htm). See in particular question 50.


3 Transcript of Trial Testimony of John H. Franklin (January 24, 2001), Vol. 7, 144.
It might be thought that the University of Michigan admissions system is not informal, as I have claimed, but rather very formal. Its rules carefully specify the ways in which admissions officials can use a different, lower academic standard for racial minorities. But such procedures create the appearance of formality only to hide the use of two different admissions standards, one of which is consciously intended to produce a certain racial outcome. In the same way that the segregationists strove to cloak their racial agenda behind a façade of formal rules, so too does the University of Michigan hide its results-oriented tinkering behind a veneer of administrative formality.

Schools rely on Justice Lewis Powell’s opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265, 312–15 (1978), where he opined that schools could take race into account in order to achieve the educational value of a diverse class. Since Justice Powell wrote in 1978, the principle of diversity has been used to justify many different types of racial preferences. In *Lutheran Church–Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998), the FCC justified racial preference in radio station employment as promoting “diversity.” The D.C. Circuit said this showed “how much burden the term ‘diversity’ has been asked to bear in the latter part of the 20th century in the United States. It appeared to have been coined both as a permanent justification for policies seeking racial proportionality in all walks of life (‘affirmative action’ has only a temporary remedial connotation) and as a synonym for proportional representation itself.” Ibid., at 356. See also Alan M. Dershowitz and Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext?* 1 Cardozo L. Rev. 379, 404 (1979) (“The concept of ‘diversity’ is so vague that it lends itself to a myriad of widely divergent and ever-changing definitions capable of masking the criteria actually at work.”)

See “Expert Witness Report of Patricia Y. Gurin,” December 15, 1998, Appendix D, table D1 (white students) and table D2 (African American students). According to table D1, the raw or zero-order correlation (r) between “classroom diversity” and student self-reported “intellectual self-confidence” for white students was .031. According to table D2, the raw correlation between “classroom diversity” and self-reported African American “intellectual self-confidence” was −.049. That means that “classroom diversity” partly explained an increase in “intellectual self-confidence” for white students and partly explained a drop in intellectual self-confidence for African American students. Gurin concludes that because the size of the African American sample was small, the negative correlation she found for this group was not statistically significant. If that is true, this means that “classroom diversity” produced a slight increase in reported “self-confidence” of white students while producing a statistically insignificant decline for African American students.

See 2002 *NCAA Division I Graduation Rates Report*, available online at (http://www.ncaa.org/grad_rates/2002/d1/Rpt00418.html). The report provides University of Michigan graduation rates for the following racial groups: American Indian (61%), Asian (87%), Black (61%), Hispanic (71%), White (87%), nonresident alien (70%), “other” (78%).

University of Michigan Professor Carl Cohen has developed this point. See, for example, Cohen, “Race Preference Is Wrong and Bad,” in Carol Cohen and James Sterba, *Affirmative Action and Racial Preference: Point/Counterpoint* (New York: Oxford University Press, forthcoming).

See, e.g., *Regents of the University of California v. Bakke*, at 312–15. Title VI of the Civil Rights Act of 1964 imposes a similar restraint on private colleges that receive federal financial assistance.

This point was developed in a particularly illuminating way by Harvey C. Mansfield, Jr., in “The Forms and Formalities of Liberty,” *The Public Interest*, no. 70 (Winter 1983): 121–31.

Ibid., 123.

Ibid., 124.

Those states are Texas, California, Washington, and Florida. Texas did away with racial preferences in response to the 1996 decision by the U.S. Court of Appeals for the Fifth Circuit in *Hopwood v. Texas*, 236 F.3d 932 (5th Cir. 1996). In California and Washington,
voters eliminated the use of racial preferences through ballot initiatives that amended the constitutions in those states to prohibit the use of race as a criterion in decisions involving government contracts, employment, and education. In Florida, the governor eliminated most racial preferences in education by executive action.


15 See *Grutter v. Bollinger*, 288 F.3d 732 at 737.