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ARTICLES

RULES, STANDARDS, AND FRACTURED COURTS

Adam H. Morse*

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INTRODUCTION

The United States Supreme Court normally decides cases by majority rule. Since the days of Chief Justice John Marshall,[1] in the typical case, a majority of the participating Justices join *the opinion of the Court*, which then has binding effect as the conclusion of the Supreme Court as a whole. In a minority of cases, however, no opinion receives the full support of a majority of the participating Justices. While the number of cases decided by a fractured Court is small—typically between five and seven cases in recent terms[2]—those decisions, nonetheless, have important effects. Unlike typical American elections in which a plurality vote suffices to elect an officeholder, a plurality of the Supreme Court cannot establish binding precedent. Instead, under

1. In the very earliest years of the United States Supreme Court, the individual Justices issued separate opinions, and lawyers had to infer the conclusions of the Court as a whole by comparing the various opinions. Ruth Bader Ginsburg, *Dissent Is an 'Appeal' for the Future*, 32 ALASKA B. RAG, Apr.–June 2008, at 1, 6; Chief Justice Marshall changed that practice to the modern norm. *Id.*; *see, e.g.*, Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796).

2. For a discussion of every example of a fractured decision from the October Terms of 2004, 2005, 2006, and 2007, see *infra* Part II.

the *Marks* rule, the opinion reaching the majority result on the narrowest grounds controls.[3] Major precedents in several important areas of the law, including equal protection analysis of affirmative action programs,[4] the constitutionality of guidelines constraining the discretion of judges in sentencing convicted criminals,[5] and various constitutional aspects of election law,[6] reflect the opinions of individual or small numbers of Justices rather than the unified conclusions of a majority of the Court.

While the decisions of fractured Courts have important substantive effects, fractured decisions also have substantial effects on the forms of legal doctrine by creating strong pressure toward the application of flexible standards rather than definite rules.[7] Even when a sizeable majority of the Court agrees that rules would be superior in a given area of the law, a fractured Supreme Court can perversely require lower decision-makers to apply standards through the application of the *Marks* rule.[8] In the absence of any majority opinion, even a single Justice can often implement a standards-based approach, notwithstanding the preferences of the rest of the Court, by writing an opinion as the median Justice. Because of the inherent moderating effect of standards,[9] fractured decisions by the Court frequently produce standards-based regimes, regardless of whether those decisions make sense.

A certain tendency toward standards is inevitable when the Supreme Court cannot reach a majority conclusion and may serve the salutary function of promoting ongoing dialogue and percolation that leads to the emergence of a later consensus. The inability of the Court to reach a majority consensus almost necessarily indicates an area of doctrinal flux. Applying standards may prevent ossification around an untenable rule and may assist in the development of a future stable legal regime. The Court can take advantage of the moderating effects of standards either by applying a standard in the high levels of analysis or requiring the

3. Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'") (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)).

4. *See infra* Part IV.

5. *See infra* Part V.

6. *See infra* Part II.

7. For empirical evidence for this claim, see *infra* Part II.

8. *Marks*, 430 U.S. at 193.

9. Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 96–112 (1992).

decision-makers who directly apply the Supreme Court's doctrines to use standards at an operational level in determining individual future cases. When the Supreme Court requires standards at an operational level, it incurs most of the costs of standards for little of the benefit in promoting dialogue and percolation.

The actual decisions of the Supreme Court in recent years support the conclusion that fractured Courts apply standards disproportionately often—an outcome that makes sense in light of prior analyses of the distinction between rules and standards, but that produces poor results in specific contexts. Part I provides an overview of the literature on standards and rules and articulates the normative assumptions underlying later arguments. Part II examines every decision by a fractured Supreme Court in the 2004 through 2007 October Terms and argues that as an empirical matter, fractured Court decisions impose standards with unusual frequency. Part III discusses the role of compromise and fractured Courts in promoting standards at a theoretical level to explain the data observed in Part II. Parts IV and V apply the theory developed in Part III to specific contexts where strong extrinsic reasons would support the application of clear rules—affirmative action decisions in education and sentencing decisions in criminal cases. I conclude by arguing that the Court should seek to apply standards at high levels of analysis rather than requiring low-level application of standards in the consideration of individual future cases.

I. STANDARDS VERSUS RULES IN GENERAL

Analysis of the forms of the law draws a divide between legal regimes that use rules versus those that use standards. While precisely defining the distinction raises difficulties because rules and standards represent ends of a continuum rather than discrete points,[10] the basic meaning of the concept remains clear. Consider a law prohibiting driving too fast.[11] A rule might state the following: Any driver who travels on a highway at faster than fifty-five miles per hour commits the offense of speeding.[12] The rule defines, in relatively certain terms, the

10. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 561–62 (1992); Margaret Jane Radin, *Presumptive Positivism and Trivial Cases*, 14 HARV. J.L. & PUB. POL'Y 823, 828–32 (1991); Sullivan, *supra* note 9, at 58 n.231, 61–62.

11. This example appeared in Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 23 (2000).

12. *See id.*

prohibited conduct. To determine whether a driver has violated the rule, a judge or police officer only needs to answer factual questions—who drove the car? how fast did the car travel? what type of road was it on? Conversely, a different regime could apply a standard to determine speeding offenses: Any driver who travels unreasonably fast, considering road conditions and traffic patterns, commits the offense of speeding.[13] The judge applying this standard not only must answer factual questions, but must also make judgments about what speed is unreasonable. At the most basic level, applying rules is not only more mechanical, subject to perverse results from over- and underinclusiveness, but also fair and relatively predictable, whereas applying standards allows for case-by-case adjustment and the consideration of special circumstances at the cost of unpredictability and different treatments of indistinguishable fact patterns.

A substantial body of literature analyzes the question of when to prefer rules over standards and vice versa. Some articles argue for a categorical preference.[14] Other authors apply economic or behavioral analysis to argue for the circumstances under which each approach excels—for example, preferring rules for frequently appearing fact patterns but preferring standards for handling disputes that arise rarely.[15] A third set of discussions focuses on the reasons that individual judges prefer rules or standards and on the dynamics that drive shifts in the law in each direction.[16]

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13. *See id.*

14. *Compare* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE, at vii–ix (1991) (arguing in favor of rules), Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 5–8 (1984) (rules), Robert F. Nagel, *Liberals and Balancing*, 63 U. COLO. L. REV. 319, 322–24 (1992) (rules), *and* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176–78 (1989) (rules), *with* Joseph R. Grodin, *Are Rules Really Better Than Standards?*, 45 HASTINGS L.J. 569, 569–72 (1994) (arguing for standards), Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561, 566 (1977) (reviewing DOUGLAS HAY, PETER LINEBAUGH, JOHN G. RULE, E.P. THOMPSON & CAL WINSLOW, ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND (1975) and E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT (1975)) (standards), Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 17–34 (1986) (standards), *and* Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 303–10 (1975) (standards).

15. *See, e.g.*, Kaplow, *supra* note 10, at 571–77; Korobkin, *supra* note 11, at 23–28.

16. *See, e.g.*, Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 590–604 (1988); Frederick Schauer, *The Failure of the Common Law*, 36 ARIZ. ST. L.J. 765, 765–73 (2004); Sullivan, *supra* note 9, at 96–112.

A. Review of the Literature

Two basic approaches dominate efforts to determine the relative merits of rules versus standards. The first approach describes the virtues and flaws of each form and then, perhaps, draws a conclusion as to which is superior.[17] The second approach, frequently framed in economic or behavioral terms, seeks to identify the different circumstances that determine which form would be superior in a specific area of law.[18]

1. The Canonical Virtues and Vices

Many scholars enumerate the relative virtues and vices of rules and standards, either to argue in favor of one or to suggest that the distinction is less important than it appears.[19] Rules have the virtue of fairness—similarly situated litigants receive the same treatment under rules.[20] At the same time, rules suffer from the potential of over- and underinclusiveness and of applying arbitrary distinctions to marginal cases.[21] Conversely, standards have the virtue of allowing decision-makers to take into account relevant differences between fact patterns that rules would ignore, thus allowing a more substantively fair outcome.[22] Alas, standards suffer from the complementary vice of often introducing more actual error[23]—the perfect judge might apply a standard more fairly than a rule allows, but our judges are fallible mortals, not Dworkin's mythic Hercules.[24] Indeed, standards often offer the theoretical possibility of more substantively accurate adjudications as a justification for the actual result of more inaccurate decisions.[25]

Rules can be more efficient both by simplifying and expediting

17. *See* discussion *infra* Part I.A.1.
18. *See* discussion *infra* Part I.A.2.
19. Professor Sullivan provides a concise and comprehensive discussion of these arguments. Sullivan, *supra* note 9, at 62–69. I draw most of this discussion of virtues and vices from Professor Sullivan's analysis.
20. *Id.* at 62.
21. Professor Rose's description of rules as crystals provides a compelling metaphor for the hard and rigid boundaries of rules. *See generally* Rose, *supra* note 16.
22. *See* Sullivan, *supra* note 9, at 66.
23. *See id.* at 63–65.
24. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 105 (1977).
25. *See* Sullivan, *supra* note 9, at 66–67.

adjudication and allowing more reliance.[26] Increases in predictability also offer the potential for reducing litigation by counteracting the natural tendency to judge a standard in a way favoring one's own position.[27] At the same time, efficiency arguments can be made in favor of standards.[28] Standards have fewer problems with "obsolescence"—if the meaning of *reasonable* changes, a standard of *behave reasonably* changes with it, while a rule defining reasonable conduct becomes increasingly antiquated.[29] And standards may eliminate incentives to search for ways to cheat the unsuspecting, thus reducing both the amount of misconduct and the energy wasted on trying to take advantage of the unwary.[30]

Rules and standards have different virtues and vices at a theoretical level as well. Some scholars advocate the use of rules to preserve liberty by safeguarding individuals against arbitrary or biased government decision-making.[31] Perhaps the most familiar examples of this reasoning are in the contexts of vagueness doctrines in the First Amendment[32] and criminal law.[33] In each case, courts require laws to be sufficiently rule-like in order to avoid unduly chilling behavior[34] or allowing government officials to punish citizens for acts that they could not have known were proscribed.[35] Conversely, several authorities consider rules to be inherently conservative, favoring preexisting "allocational efficiency" over the "altruism" and beneficial reallocations that standards promote.[36]

Finally, the choice between rules and standards affects the locus of power within the democratic system. Rules concentrate power at the

26. Professor Kaplow suggests that with sufficient expenditures of energy, a standard can be analyzed to the same precision as a rule. *See* Kaplow, *supra* note 10, at 586–88. For the same reasons as Professor Korobkin, however, I disagree with this analysis. Korobkin, *supra* note 11, at 36 n.34.

27. Korobkin, *supra* note 11, at 32–33.

28. *See* Sullivan, *supra* note 9, at 66.

29. *See id.*

30. *See* Rose, *supra* note 16, at 600.

31. *See* F.A. HAYEK, THE ROAD TO SERFDOM 72–73 (1944); JOHN RAWLS, A THEORY OF JUSTICE 235–43 (1971); Sullivan, *supra* note 9, at 64.

32. *See, e.g.*, NAACP v. Button, 371 U.S. 415, 431–35 (1963).

33. *See, e.g.*, Connally v. Gen. Constr. Co., 269 U.S. 385, 389–95 (1926).

34. *Button*, 371 U.S. at 437.

35. *Connally*, 269 U.S. at 391.

36. Sullivan, *supra* note 9, at 67 (quoting Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976)). Like most of the more theoretical arguments, testing the hypothesis that standards better support equality, redistribution, and altruism can be difficult.

level of rulemakers—frequently the legislature—thus not only strengthening democratic controls over unelected courts but also increasing the control of the Supreme Court and other appellate courts over lower courts.[37] Justice Scalia, the most prominent advocate of rules on this ground, considers rules essential to check judicial activism and enforce democracy.[38] Others, however, argue that this is a mere fig leaf. Under their account, neither rules nor standards effectively constrain decision-making, and standards thus have the virtue of preventing judges from passing the buck and claiming to be applying a neutral rule when they actually face little or no constraints.[39]

The distinction between rules and standards also parallels the traditional philosophical distinction between the Kantian maxim of treating an individual as an end in and of itself versus the utilitarian approach of seeking the best outcome.[40] People following the Kantian tradition often view a rules-based approach as somehow monstrous or inhuman—a perfect example is a much-cited section of *Koon v. United States*,[41] a case mandating abuse-of-discretion review for district court sentencing decisions: "It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."[42] Conversely, the utilitarian tradition, with its definition of the good in terms of the best outcomes, tends to view rules as a more reliable means of producing positive results rather than individual judgments.[43]

37. *See* Sullivan, *supra* note 9, at 64–66.

38. Scalia, *supra* note 14, at 1176.

39. *See* Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 37, 90–102 (2005); Sullivan, *supra* note 9, at 67–68.

40. *See* Sullivan, *supra* note 9, at 114–15 (linking Justice Scalia's support of rules to the tradition of Jeremy Bentham).

41. Koon v. United States, 518 U.S. 81, 113 (1996).

42. *Id.*

43. *See* Alexander Tsesis, *Toward a Just Immigration Policy: Putting Ethics into Immigration Law*, 45 WAYNE L. REV. 105, 129–30 (1999).

2. Differential Values by Circumstances

While many scholars argue for favoring either rules[44] or standards[45] as a general matter, others seek to explain the circumstances that favor one or the other. Most of these arguments can be broadly described as economic or behavioral analyses. Rather than proposing a general assessment of which form is better, these analyses suggest a rule (or at least a standard) for choosing between forms in a specific class of cases.

Under a typical economic analysis, courts should favor whichever form promotes efficiency. Promoting efficiency usually favors rules when the stakes are particularly high because those are the circumstances where expectations matter the most.[46] People are more likely to make large, ultimately beneficial investments if they do not face the fear of the destruction of their investment through the application of a standard.[47] Similarly, because the development of a rule is more costly than a standard but the application of a standard is more costly than the application of a rule, the frequency of application affects the choice of forms.[48] If frequent adjudications or even determinations by private parties of whether to seek an adjudication are likely, a rule will require less total costs.[49] Conversely, developing rules to cover highly exceptional cases may waste resources—akin to spending a dollar today to avoid the risk of paying five cents once a year for the next five years.[50]

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44. *See, e.g.*, HAYEK, *supra* note 31, at 72–73; RAWLS, *supra* note 31, at 235–43; SCHAUER, *supra* note 14, at vii–ix; Easterbrook, *supra* note 14, at 5–8; Nagel, *supra* note 14, at 322–24; Scalia, *supra* note 14, at 1176–78.

45. *See, e.g.*, Grodin *supra* note 14, at 569; Horwitz, *supra* note 14, at 566; Michelman, *supra* note 14, at 17–34; Tribe, *supra* note 14, at 303–10.

46. *See* Rose, *supra* note 16, at 577–78.

47. *See id.*

48. *See* Kaplow, *supra* note 10, at 563–64.

49. *See id.* at 564.

50. Of course, legal forms are not a binary category of rules or standards, but represent a spectrum of more rule-like to less rule-like. *See, e.g.*, *id.* at 561; Radin, *supra* note 10, at 828–32; Sullivan, *supra* note 9, at 58 n.231. Avoiding the extremes can sometimes provide an optimum mix of benefits. The Federal Sentencing Guidelines, for example, were fairly far toward the rule side of the spectrum prior to *United States v. Booker*, 543 U.S. 220 (2005). But rather than spending ever-increasing amounts of energy dealing with progressively more unusual cases, the United States Sentencing Commission adopts rules for the *heartland* cases and then provides for departures in exceptional cases. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(1)(4)(b) (2009). This structure seeks to gain the best features of both rules and standards: consistency and fair, quick determinations in most cases, with flexibility to deal with the aberrational case

Behavioral analyses follow similar patterns to economic analyses but with a heightened focus on the ways in which the choice of forms affects behavior. Standards may have a chilling effect, which may be either positive, if it prevents Holmes's *bad man*[51] from violating the spirit of a rule while conforming to its letter, or negative, if people choose to forego perfectly legal, beneficial activities because they are uncertain as to whether a court would hold those activities in violation of a vague standard.[52] Some have argued that the current emphasis on rules in the Generally Accepted Accounting Principles and Generally Accepted Auditing Standards contributed to financial misconduct like the Enron debacle: according to this theory, management could pressure its auditors into complicity with misconduct by focusing on the question of what rule specifically forbade misreporting.[53]

Unfortunately, the behavioral analysis is still in its infancy and can be just as easily spun around to reach opposite conclusions. For example, the self-serving bias refers to the well-established psychological "phenomenon that individuals are likely to interpret ambiguous information" to support their own interests.[54] The self-serving bias ensures that when an individual analyzes whether a course of action that he or she wishes to pursue violates a standard, the individual is much less likely to conclude that the standard prohibits the action than an objective observer would be.[55] As a result, even the *bad man* may in fact be more effectively deterred by clear rules rather than by standards, and the conclusion applies with even more force to the conscientious individual who wants to comply with the spirit of the law but still wants to gain the maximum advantage allowed.[56] Because of behavioral analysis's current tendency to point in both directions

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where rules would produce an unjust result.

51. *See* O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459–61 (1897).

52. *See* Korobkin, *supra* note 11, at 53–55; Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 385 (1985).

53. *See, e.g.*, Roman L. Weil, *Fundamental Causes of the Accounting Debacle at Enron: Show Me Where It Says I Can't*, 3–7 (Feb. 5, 2002), http://www.chicagobooth.edu /pdf/weil_testimony.pdf (summarizing Professor Weil's testimony before the House Committee on Energy and Commerce). Notably, Professor Weil also focuses on structural reforms, such as increasing the power and professionalism of audit committees and rotating auditors to reduce incentives to give management-favoring audits, in addition to increasing the emphasis on *principles*, i.e., standards. *Id.*

54. Korobkin, *supra* note 11, at 46.

55. *See id.*

56. *See id.*

simultaneously, it currently serves more as a fruitful avenue for future research and a reality check on the assumptions of economic analysis than as a source of concrete answers.

B. Normative Conclusions from the Literature

I draw several normative conclusions from the literature.[57] First, the distinction between rules and standards is real and has consequences. Some scholars argue that the distinction is illusory, generally working from a belief that judges lack sufficient constraints to prevent them from simply choosing outcomes they favor and then from justifying them with either rules or standards language as appropriate.[58] Similarly, other scholars suggest that as standards become more fixed by precedent, they become sufficiently rule-like that they can be treated as rules.[59] A third approach treats the distinction between rules and standards as real but as a manifestation of more important substantive distinctions.[60] Despite these arguments, the distinction between rules and standards is real and meaningful. As Professor Kathleen Sullivan discusses, the choice between rules and standards does not map neatly onto substantive policy preferences across time—at any given moment, rules may be more associated with one set of preferences and standards with another, but those associations can shift with changing circumstances.[61] More fundamentally, while decision-makers always have some ability to enforce their own will, legal forms influence their decisions either because decision-makers seek to act in good faith or because of concerns about criticism. Finally, some data from states that have made clear switches between rules and standards indicate that those changes have

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57. Readers who disagree with these positions will likely disagree with some of my overall normative conclusions. Nonetheless, I believe that my empirical assertions about the effects of fractured Supreme Court decisions would remain valid without accepting most of my assumptions.

58. *See* Schlag, *supra* note 52, at 429–30; *see also* Posner, *supra* note 39, at 39–41. Posner may intend to limit his comments primarily to decisions by the Supreme Court and the most free-ranging constitutional issues, but his reasoning suggests that the rules/standards distinction has less importance in all areas of law than others give it. *See* Posner, *supra* note 39, at 34–41.

59. *See* Kaplow, *supra* note 10, at 597. *But see* Korobkin, *supra* note 11, at 26 & n.8 (persuasively critiquing Kaplow's arguments).

60. *See* Kennedy, *supra* note 36, at 1776–78 (arguing that the real distinction is between liberty- and altruism-based legal regimes); Nagel, *supra* note 14, at 322–24 (espousing rules as a means of producing conservative outcomes).

61. *See* Sullivan, *supra* note 9, at 96–100.

actual effects on behavior and decisions.[62] To be sure, the dichotomy between rules and standards is not sharp, and pressures exist to make rules more standards-like and vice versa.[63] Even so, the distinction remains meaningful.

Similarly, individual Justices and judges have preferences between rules and standards, but those preferences are not the only ones that affect their decision-making. The simplest evidence for this conclusion is judges' own statements.[64] Even if they did not, their preferences show up in the different ways that Justices approach different cases as they apply both their substantive beliefs about the correct holding and preference in choice of form.[65] Equally important, preferences between rules and standards may vary between levels of analysis.[66] Thus, a Justice may believe that a balancing test is appropriate to determine whether a criminal punishment is unconstitutional, thus favoring a standard at one level of analysis, while believing that the precise sentence should be determined by applying a strict list of factors, thus supporting rules at a lower operational level. When the Supreme Court engages in freewheeling discussions of policy, balances many factors in a constitutional analysis, and then propounds a strict test to be applied by lower courts, it applies a standard at a high level of analysis while requiring lower courts to apply a rule at lower levels of analysis. As I discuss in Part III, the Supreme Court also sometimes creates rules at high levels of analysis that are operationalized by standards at lower levels.[67]

Finally, compelling reasons support constitutional requirements of rules in certain contexts, but no such support exists for constitutional requirements of standards. Most of my reasoning tracks Justice Scalia's arguments in favor of rules.[68] Basic principles of constitutional law, such as equal protection and due process, provide strong additional support for requiring the application of rules.[69] If a court or other decision-maker

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62. *See* Robert E. King & Cass R. Sunstein, *Doing Without Speed Limits*, 79 B.U. L. REV. 155, 179–83 (1999) (discussing the problems produced by Montana's decision to switch to a "reasonable and prudent" standard for speeding).

63. *See* Rose, *supra* note 16, at 601–04.

64. *See, e.g.*, Easterbrook, *supra* note 14, at 10–11, 19–21; Scalia, *supra* note 14, at 1176–78 (preferring rules); Grodin, *supra* note 14, at 569–72 (preferring standards).

65. Sullivan, *supra* note 9, at 123.

66. *Id.* at 69–70.

67. *See infra* Part III.

68. Scalia, *supra* note 14, at 1176–78.

69. These arguments largely track the liberty-promoting value of rules discussed

applies a rule, other parties in the same situation will receive the same treatment regardless of race, gender, or other factors that might alter a more freewheeling application of standards. Equal protection requires treating like cases alike, but the application of standards inherently relies on the judgments and intuitions of an individual decision-maker in addition to or instead of a general policy. While applying standards may better comport with the Kantian ethos of individual uniqueness, the constitutional norms appropriately focus on equal treatment, not on receiving a unique consideration.[70] In some circumstances, applying standards may be better policy, but that application does not provide a justification for a constitutional rule mandating the application of standards. Because the constitutional arguments on behalf of rules depend on the specific areas of law in which they operate, I discuss this point in more detail when considering specific subject areas.[71]

II. EMPIRICAL EVIDENCE THAT FRACTURED COURTS ADOPT STANDARDS

Examining recent Supreme Court cases with fractured opinions reveals a pattern: when the Supreme Court fractures, it tends to produce standards-based regimes. I use *fractured* to refer to a Court that is unable to produce a five-vote majority in a given case or maintain a consistent majority in a set of companion cases. The four-one-four division in *United States v. Booker*,[72] despite the presence of two *majority opinions*, and the four-two-three pattern in *Grutter v. Bollinger*[73] and *Gratz v. Bollinger*,[74] despite the nominal majority in *Gratz*, both qualify as decisions of fractured Courts.[75]

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earlier. *See supra* note 31 and accompanying text. The principal difference is that Rawls and Hayek argue for the application of rules as a matter of universal justice; linking the arguments to constitutional demands of equal protection and due process situates the application of rules more narrowly in the American constitutional tradition. *See* HAYEK, *supra* note 31, at 72–75; RAWLS, *supra* note 31, at 235–43.

70. The Due Process Clause sometimes requires individualized consideration, but due process does not require the application of standards. The application of a set of rules to a specific case can provide all the process needed for a deprivation of liberty or property without requiring the use of a standard.

71. *See infra* Parts IV–V.

72. United States v. Booker, 543 U.S. 220 (2005).

73. Grutter v. Bollinger, 539 U.S. 306 (2003).

74. Gratz v. Bollinger, 539 U.S. 244 (2003).

75. For a discussion of *Grutter* and *Gratz*, see *infra* Part IV. For an extensive discussion of *Booker*, see *infra* Part V.

In the 2004 through 2007 October Terms of the Supreme Court, the Justices fractured on a total of twenty-three cases.[76] I divide those cases into two categories. In the first category, which I term *true fractured decisions*, the plurality and the Justices who joined the judgment of the plurality irreconcilably disagreed about the legal approach that should apply to cases like the one under consideration.[77] While the swing Justice or Justices may have joined parts of the plurality opinion, no majority consensus existed for a single holding, and a majority of the Court did not join the section of the plurality opinion containing its proposed holding. In the second category, a majority of the Court joined the sections of the plurality opinion stating the Court's holding, but enough of the Justices to deny the plurality opinion an absolute majority refused to join some additional portion of the opinion that bolstered the reasoning of the plurality. For example, Justice Scalia sometimes refused to join sections of an opinion that discussed legislative history even though he joined the textual analysis of a statute and the plurality's conclusions as to the ultimate meaning of the statute.[78] In the extreme

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76. In the 2007 October Term, see *Giles v. California*, 128 S. Ct. 2678 (2008); *United States v. Santos*, 128 S. Ct. 2020 (2008); *Department of Revenue of Kentucky v. Davis*, 128 S. Ct. 1801 (2008); *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008); and *Baze v. Rees*, 128 S. Ct. 1520 (2008). In the 2006 October Term, see *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738 (2007); *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007); *Hein v. Freedom from Religion Foundation, Inc.*, 127 S. Ct. 2553 (2007); *Tennessee Secondary School Athletic Ass'n v. Brentwood Academy*, 127 S. Ct. 2489 (2007); *Microsoft Corp. v. AT&T Corp.*, 127 S. Ct. 1746 (2007); and *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority*, 127 S. Ct. 1786 (2007). In the 2005 October Term, see *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Beard v. Banks*, 548 U.S. 521 (2006); *League of United Latin American Citizens v. Perry (LULAC)*, 548 U.S. 399 (2006); *Randall v. Sorrell*, 548 U.S. 230 (2006); *Rapanos v. United States*, 547 U.S. 715 (2006); and *Hudson v. Michigan*, 547 U.S. 586 (2006). In the 2004 October Term, see *Van Orden v. Perry*, 545 U.S. 677 (2005); *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119 (2005); *Clingman v. Beaver*, 544 U.S. 581 (2005); *Smith v. City of Jackson*, 544 U.S. 228 (2005); *Shepard v. United States*, 544 U.S. 13 (2005); and *Booker*, 543 U.S. 220.

77. Technically, the plurality opinion is the opinion joined by the most Justices regardless of whether it supports the judgment of the Court. In occasional cases, the plurality by this definition is in dissent—if the Court splits three-two-four with the four dissenting from the judgment of the Court. The more typical pattern with a fractured Court is a split like four-one-four, where the four-Justice opinion supporting the judgment of the Court can be viewed as a plurality. For clarity, I use the term *plurality* to refer to the opinion supporting the judgment of the Court that received the most votes regardless of whether it is technically a plurality.

78. *See, e.g.*, Safeco Ins. Co. of Am. v. Burr, 127 S. Ct. 2201 (2007) (providing an instance of Justice Scalia joining all of an opinion except the footnotes referencing legislative history).

example, one case had a majority opinion except with regard to one footnote, which was the opinion of a plurality.[79] Eight of the twenty-three fractured Court decisions in the past four Terms fell into this second category.[80] Because a unified holding carried the support of a majority of the Court in these eight cases, they do not provide useful

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79. *Microsoft Corp.*, 127 S. Ct. at 1757 (majority opinion except as to footnote 14).

80. *Dep't. of Revenue of Ky.*, 128 S. Ct. at 1821 (Roberts, C.J., concurring in part) (seeing "no need to proceed to the [plurality's] alternative analysis" because a majority of the Court viewed the case as resolved by *United Haulers Ass'n*, 127 S. Ct. 1786); *Tenn. Secondary Sch. Athletic Ass'n*, 127 S. Ct. at 2498–99 (Kennedy, J., concurring in part and concurring in the judgment) (agreeing with most of the plurality's reasoning but declining to join a section that relied on Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) because the reliance was "unnecessary and ill advised"); *Microsoft Corp.*, 127 S. Ct. at 1760–62 (Alito, J., concurring as to all but footnote 14) (joining the reasoning of the Court but handling an issue that the plurality did not reach slightly differently); *Hamdan*, 548 U.S. at 567 (Stevens, J.) (plurality opinion) (concluding that the structure and procedures of military commissions convened to try Hamdan violated the Uniform Code of Military Justice and the Geneva Conventions); *id.* at 595–613 (noting that the offense with which Hamdan was charged was not an offense that may be tried by a military commission under the law of war); *id.* at 653–55 (Kennedy, J., concurring in part) (seeing "no need to consider [the additional] issues" supporting the judgment considered by Justice Stevens); *Hudson*, 547 U.S. at 602–04 (Kennedy, J., concurring in part and concurring in the judgment) (joining the Court's decision that violations of the knock-and-announce rule in serving warrants do not require suppression of evidence discovered based on most of the plurality's reasoning but questioning whether two cases "have as much relevance . . . as [the plurality] conclude[d]"); *Clingman*, 544 U.S. at 586–87, 591–97 (Thomas, J.) (plurality opinion) (holding that a semiclosed primary system in which a party may invite independents but not members of other parties to participate in its primaries imposes only a minor burden on associational rights and is supported by sufficient state interests); *id.* at 587–91 (adding as an additional reason to uphold the statute that members of other parties form only a very minor association with a third party by voting in its primary without reaffiliating as a member of that party); *Smith*, 544 U.S. at 233–40 (plurality opinion) (concluding that disparate-impact theory can be pursued in Age Discrimination in Employment Act claims based on the text of the ADEA, legislative history, and EEOC regulations); *id.* at 243 (Scalia, J., concurring in part and concurring in the judgment) (agreeing with "all of the Court's reasoning" but basing his conclusion exclusively on deference to the EEOC's reasonable conclusion); *Shepard*, 544 U.S. at 16 (holding that a determination of whether a prior guilty plea admitted "generic burglary" for sentencing purposes is "generally limited to examining the statutory definition [of the prior offense], charging document, written plea agreement, transcript of [a] plea colloquy, and any explicit factual finding by the trial judge to which the [accused] assented"); *id.* at 26–28 (Thomas, J., concurring in part and concurring in the judgment) (agreeing with the plurality's holding but concluding that the analysis should be based on clear constitutional error, not constitutional doubt). *Giles* arguably also falls into the category of cases where a majority supported the holding, but a plurality supported an additional rationale for the decision. 128 S. Ct. at 2685–86; *see infra* note 86 and accompanying text. I consider that an inferior understanding of *Giles*, and I thus categorize that decision with the true fractures.

insight into how a fractured decision shapes the form of legal decisions, and I exclude them from further analysis.

Out of the fifteen examples of true fractures, a substantial majority applied standards. Eleven cases adopted holdings that clearly fell within the category of standards.[81] In several of those cases, either the

81. *Santos*, 128 S. Ct. at 2031–34 (Stevens, J., concurring in the judgment) (interpreting the meaning of the term "proceeds" in a money laundering statute as varying based on the context in light of legislative history and the rule of lenity); *Crawford*, 128 S. Ct. at 1613–24 (Stevens, J.) (applying a wide-ranging factual inquiry to reach the "hard judgment" of whether the interests advanced by a state to justify an election rule outweigh the burdens imposed on voters) (internal quotation marks omitted); *id.* at 1624–25 (Scalia, J., concurring in the judgment) (criticizing Justice Stevens's opinion for not applying Burdick v. Takushi, 504 U.S. 428 (1992), which "forged [an] amorphous flexible standard into something resembling an administrable rule") (internal quotation marks omitted); *Baze*, 128 S. Ct. at 1532 (Roberts, C.J.) (plurality opinion) (stating that a method of execution, described by the plurality as a *standard*, violates the Eighth Amendment if there is a substantial risk of serious harm and an alternate method is shown to be "feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain"); *id.* at 1556–63 (Thomas, J., concurring in the judgment) (arguing for a test of whether a method of execution was "deliberately designed to inflict pain" and criticizing the plurality for producing "nothing resembling a bright-line rule"); *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2757–59, 2768 (Roberts, C.J.) (plurality opinion) (concluding that racial diversity in schools is not a compelling state interest and "schools that never segregated on the basis of race . . . or that have removed the vestiges of past segregation" cannot assign students on a racial basis); *id.* at 2789–97 (Kennedy, J., concurring in part and concurring in the judgment) (stating that diversity is a compelling educational goal that a school district may pursue but that its means of pursuing diversity must be narrowly tailored to that goal and rejecting the plurality's position that schools may not consider race in making school assignments); *Wis. Right to Life*, 127 S. Ct. at 2667 (Roberts, C.J.) (plurality opinion) ("[A] court should find that an ad is the functional equivalent of express advocacy [and therefore subject to the Bipartisan Campaign Reform Act's regulations] only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."); *id.* at 2679–84 (Scalia, J., concurring in part and concurring in the judgment) (advocating overturning McConnell v. FEC, 540 U.S. 93 (2003), *overruled in part by* Citizens United v. FEC, 130 S. Ct. 876 (2010), and criticizing the plurality's standard as too vague to comport with the First Amendment); *United Haulers Ass'n*, 127 S. Ct. at 1790, 1797 (Roberts, C.J.) (plurality opinion) (upholding a "flow control" statute that requires garbage haulers to bring local garbage to a government-owned processing center because a nondiscriminatory statute is valid "'unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits'") (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (alteration in original)); *id.* at 1799 (Scalia, J., concurring in part) (refusing to join that portion of the principal opinion "in which the plurality performs so-called '*Pike* balancing,'" on the ground that "balancing of various values is left to Congress" not the Court); *Beard*, 548 U.S. at 528–36 (Breyer, J.) (plurality opinion) (finding that the deprivation of a prisoner's First Amendment rights to newspapers, magazines, and photographs is constitutional if the regulations are reasonable by considering in particular whether the prison regulations

controlling opinion criticized efforts to apply rules,[82] an opinion reaching the same outcome as the controlling opinion criticized the controlling opinion for not applying a rule,[83] or both.[84] Furthermore, the remaining

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have a valid, rational relationship to penological purposes and showing considerable deference to prison administrators); *id.* at 536–38 (Thomas, J., concurring in the judgment) (arguing for a more rule-like approach to challenge prison rules by stating that "[j]udicial scrutiny of prison regulations is an endeavor fraught with peril" and deprivations of rights during incarceration are constitutional if they do not violate the Eighth Amendment); *Rapanos*, 547 U.S. at 759–87 (Kennedy, J., concurring in the judgment) (concluding in a controlling opinion under the *Marks* rule that *navigable waters* under the Clean Water Act extends to wetlands that do not contain and are not adjacent to waters that are navigable in fact if the wetland possesses a significant nexus to waters that are navigable in fact or could be readily made so as determined on a case-by-case basis); *Van Orden*, 545 U.S. at 698–705 (Breyer, J., concurring in the judgment) (upholding a long-standing Ten Commandments display and stating that "I see no test-related substitute for the exercise of legal judgment" (i.e., standards)); *Spector*, 545 U.S. at 130–38 (Kennedy, J.) (plurality opinion) (concluding that the Americans with Disabilities Act applies to foreign-flag cruise ships even without a clear statement of congressional intent to regulate foreign ships except if it unduly interferes with the internal affairs of a foreign-flag ship, such as requiring structural modifications); *id.* at 142–43 (Ginsburg, J., concurring in part and in the judgment) ("internal affairs" clear statement rule should be limited to cases where it is necessary to avoid "international discord"); *Booker*, 543 U.S. at 245 (holding that the Federal Sentencing Guidelines remain in effect but as standards rather than as rules).

82. *See Van Orden*, 545 U.S. at 699–700 (Breyer, J., concurring in the judgment) (criticizing attempts to frame the Establishment Clause in terms of tests or legal rules and discussing the importance of applying judgment in specific cases).

83. *Crawford*, 128 S. Ct. at 1624 (Scalia, J., concurring in the judgment) (criticizing the lead opinion for not applying *Burdick*, 504 U.S. 428, which "forged [an] amorphous flexible standard into something resembling an administrable rule") (internal quotation marks omitted); *Wis. Right to Life*, 127 S. Ct. at 2682 (Scalia, J., concurring in part and concurring in the judgment) (criticizing the plurality's test as insufficiently definite to satisfy First Amendment vagueness concerns); *Rapanos*, 547 U.S. at 754–55, 756 n.15, 757 (plurality opinion) (criticizing Justice Kennedy's *standard* as opaque and proposing a strict rule for whether a wetland is "navigable water"); *id.* at 808–09 (Stevens, J., dissenting) (criticizing Justice Kennedy's test as requiring substantial additional case-by-case determinations that could be avoided if the Court deferred to "the Executive's sensible, bright-line rule"); *Spector*, 545 U.S. at 156–59 (Scalia, J., dissenting) (criticizing the plurality for interpreting a statute differently in different contexts and asserting that fine-tuning should be left to Congress). Justice Scalia's argument that *Crawford* failed to apply a rule may not be entirely fair—he proposed a multistep test beginning by determining whether a burden is severe by asking whether the burden goes "beyond the merely inconvenient." *Crawford*, 128 S. Ct. at 1625 (Scalia, J., concurring in the judgment). Whether a burden is merely inconvenient or something more seems rather more like a standard than a rule to me. Nonetheless, I agree with Justice Scalia's assessment that the lead opinion endorses an amorphous, judgment-intensive standard.

84. *Compare Baze*, 128 S. Ct. at 1532 (Roberts, C.J.) (plurality opinion) (describing its approach as a standard), *with id.* at 1562 (Thomas, J., concurring in the judgment) (criticizing the plurality for producing "nothing resembling a bright-line rule").

four cases did not all represent cases in which a fractured Court produced a rule. In one case, *Hein v. Freedom from Religion Foundation, Inc.*, the holding of the Court was clearly a rule—taxpayer standing to challenge violations of the Establishment Clause does not extend to challenges to executive decisions to spend money in ways that arguably support religion if the legislature did not require that the money be used to support religion.[85] One other case, *Giles v. California*, produced a rule to govern the specific issue presented by the case—the forfeiture exception to the Confrontation Clause is limited to circumstances in which the defendant arranged for the unavailability of a witness purposefully to prevent the witness from testifying.[86] Two Justices in *Giles* whose votes were necessary for the majority applied a policy analysis amounting to a standard, however, to resolve the question of how to determine the scope of the forfeiture exception.[87]

The last two cases present classification problems. *Randall v. Sorrell* addressed the constitutionality of Vermont's campaign finance law, which imposed expenditure limits as well as unusually restrictive contribution limits.[88] Justice Breyer's controlling opinion struck down both the expenditure limits and the contribution limits as

85. Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553, 2569–72 (2007) (Alito, J.) (plurality opinion).

86. Giles v. California, 128 S. Ct. 2678, 2685–86 (2008). The split in *Giles*, with a majority of the Court joining all of the decision except for one section rejecting the dissent's argument, arguably should be categorized as not a true fractured decision, which would make the pattern of true fractured decisions producing standards even stronger. I believe, however, that it is more accurate to categorize *Giles* as a true fractured decision because Justice Souter's concurrence lays out a substantially different basis for the decision by relying on policy arguments rather than focusing on the historical analysis he joined in the majority decision. *See id.* at 2694–95 (Souter, J., concurring in part) ("It is this [policy] rationale for the limit on the forfeiture exception rather than a dispositive example from the historical record that persuades me that the Court's conclusion is the right one in this case.").

87. *Id.* A similar but different pattern existed in *Hein*. While the ultimate outcome of *Hein* was a rule limiting taxpayer standing, Justices Scalia and Thomas argued for a broader rule that would eliminate the concept of taxpayer standing altogether, as opposed to limiting it to a narrow context required in order not to overturn existing precedent. *Hein*, 127 S. Ct. at 2573–84 (Scalia, J., concurring in the judgment). In both cases, the controlling opinion had a less-broad sweep than the other opinion concurring in the judgment, as will always be true under the *Marks* rule. The difference is that *Hein* limited its sweep by refusing to overturn a prior precedent and limiting the precedent to its facts, whereas most examples of fractured Courts impose a standard to accomplish a similar substantive end.

88. Randall v. Sorrell, 548 U.S. 230, 236 (2006) (Breyer, J.) (plurality opinion).

unconstitutional.[89] His decision adopted what appears to be a per se rule, holding that all nonvoluntary limits on campaign expenditures violate the First Amendment.[90] With regard to the limits on contributions, Justice Breyer applied an amorphous standard to invalidate the specific contribution limits within the Vermont law, while rejecting the argument of Justices Scalia and Thomas that contribution limits should also be viewed as per se violations of the First Amendment.[91] *Randall* thus adopted both a standard and a rule, one for each aspect of Vermont's campaign finance law.

League of United Latin American Citizens v. Perry (*LULAC*) presented a more complicated pattern.[92] The Court considered three principal challenges to Texas's congressional redistricting plan and reached a majority conclusion with regard to one, but fractured on the other two.[93] First, no holding received majority support with respect to the plaintiffs' claim that the redistricting plan was "an unconstitutional partisan gerrymander."[94] The Court's two-two-one-four split evolved from a similar pattern as in *Vieth v. Jubelirer*,[95] despite the changed composition of the Court.[96] Justices Scalia and Thomas would have held partisan gerrymandering claims nonjusticiable.[97] Justices Stevens, Souter, Ginsburg, and Breyer would have struck down the challenged redistricting plan as a violation of equal protection.[98] Justice Kennedy continued to state that partisan gerrymandering claims are justiciable but that the plaintiffs had failed to identify a judicially manageable standard

89. *Id.* at 236–37.

90. *Id.* at 241–46 (relying on the stare decisis effect of Buckley v. Valeo, 424 U.S. 1 (1976)).

91. *Id.* at 246–63 (stating that courts must apply "independent judicial judgment" without a clear test in judging whether a statute restricting contributions violates the First Amendment); *cf. id.* at 265–73 (Thomas, J., concurring in the judgment) (describing the plurality's approach as "insusceptible of principled application" and "plac[ing the] Court in the position of addressing the propriety of regulations of political speech based upon little more than its *impression* of the appropriate limits").

92. League of United Latin Am. Citizens v. Perry (*LULAC*), 548 U.S. 399 (2006).

93. *Id.* at 408–10.

94. *Id.*

95. Vieth v. Jubelirer, 541 U.S. 267 (2004).

96. *LULAC*, 548 U.S. at 408.

97. *Id.* at 511–12 (Scalia, J., concurring in the judgment in part and dissenting in part).

98. *Id.* at 461–62 (Stevens, J., concurring in part and dissenting in part); *id.* at 483–84 (Souter, J., concurring in part and dissenting in part) (continuing to assert that partisan gerrymandering claims are justiciable under standards proposed by the dissenters in *Vieth* but not applying the analysis to this case in detail).

to assess gerrymandering claims.[99] Chief Justice Roberts and Justice Alito split the difference between Justice Kennedy's position and that of Justices Scalia and Thomas, stating that they agreed that the plaintiffs had failed to identify a judicially manageable standard but that they were not convinced that one existed and might hold that partisan gerrymandering claims are nonjusticiable in a future case that directly presented the question.[100] Under the *Marks* rule, Justice Kennedy's conclusion is controlling, but categorizing it as either a rule or a standard poses difficulties. As a practical matter, it likely will function as a rule—partisan gerrymandering claims, while nominally justiciable, will not be able to prevail until a new Justice joins the Court. At the same time, it left the door open for a claim to succeed if a test that satisfies Justice Kennedy can be proposed—as open-ended a standard as could be imagined.

The Court's second fractured holding in *LULAC* dealt with African-American plaintiffs' challenge to the redistricting plan under section 2 of the Voting Rights Act.[101] A majority of the Court voted to reject the African-American plaintiffs' claims, but a three-Justice plurality rejected their claims on a narrower ground than Justices Scalia and Thomas would have.[102] Justice Kennedy, joined by Chief Justice Roberts and Justice Alito, assumed without deciding that a minority group that made up less than fifty percent of the population in a given district could prove vote dilution if it could control the outcomes in elections in conjunction with allies of other races (a "crossover district"),[103] but held that the evidence presented was not sufficient to demonstrate control of the pre-redistricting district.[104] In contrast, Justice Scalia, joined by Justice Thomas, would have rejected all vote-dilution claims under section 2 of the Voting Rights Act by adopting a limited understanding of *voting practices and procedures*.[105] Justice Kennedy's decision could be read

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99. *Id.* at 414–20 (Kennedy, J.).

100. *Id.* at 492–93 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part).

101. *Id.* at 409 (Kennedy, J.).

102. *Id.* at 443–47.

103. The Court reached this issue in *Bartlett v. Strickland* with Justice Kennedy holding for a plurality that "crossover districts" in which a minority group could muster a majority with the support of other voters, but not on its own, cannot bring vote-dilution cases under section 2 of the Voting Rights Act. Bartlett v. Strickland, 129 S. Ct. 1231, 1242, 1249 (2009) (Kennedy, J.) (plurality opinion).

104. *LULAC*, 548 U.S. at 443–47 (Kennedy, J.).

105. *Id.* at 512 (Scalia, J., concurring in the judgment in part and dissenting in part)

as applying a standards-based approach to section 2 vote-dilution claims, but it could also be read as simply accepting the factual conclusions of the lower court. Depending on interpretation, then, *LULAC* provides either another example of a fractured Court producing standards or an example that does not classify well as applying either a standard or a rule.[106]

Taken as a whole, the fifteen true fractured decisions in the 2004–2007 October Terms showed a pronounced trend toward standards, with eleven decisions producing standards, two producing rules, and two falling in between and raising difficult classification problems. The classifications are subjective and contestable, but the overall pattern remains clear, even if some analysts would dispute individual classifications. The large supermajority of cases in which true fractured Courts adopted standards provides substantial support for the hypothesis that fractured Courts are disproportionately likely to adopt standards. Anecdotal evidence of earlier prominent cases in which fractured Courts adopted standards bolsters this conclusion.[107] Furthermore, prior

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(adopting Justice Thomas's reasoning in Holder v. Hall, 512 U.S. 874, 891–946 (1994) (Thomas, J., concurring in the judgment)).

106. *Bartlett* ultimately rejected the possibility that "crossover districts" could support a claim for vote dilution, adopting a fifty-percent rule despite a fractured Court. *Bartlett*, 129 S. Ct. at 1240–48 (Kennedy, J.) (plurality opinion).

107. In the recent university affirmative action cases of *Grutter* and *Gratz*, seven of the Justices preferred a rule-based approach, but the Court ultimately held that rule-based affirmative action programs are unconstitutional while standards-based programs are constitutional. *See* Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003); *infra* Part IV. In some ways, the seminal case of *Regents of the University of California v. Bakke* represented a similar result: four Justices wanted a rule permitting affirmative action generally; four appeared to want a rule prohibiting affirmative action in most university admissions; yet Justice Powell announced that affirmative action was permissible sometimes. 438 U.S. 265, 271–72 (1978). *Bakke* does not count conclusively as another example because Justice Powell's decision could be described as laying down a rule of no quotas, but his opinion also has a standards-oriented flavor, preferring weighing candidates in holistic evaluation to adopting clear rules admitting fixed numbers of minority applicants.

For another set of examples, Professor Sullivan notes that the 1991 Term produced much less of a conservative revolution than many had predicted because many cases produced moderately conservative standards rather than the strongly conservative rules advocated by some. *See* Sullivan, *supra* note 9, at 27–94. Several of the cases Professor Sullivan discusses that adopted standards were the results of a fractured Court. *See* Planned Parenthood v. Casey, 505 U.S. 833 (1992); Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672 (1992). Even in the cases that adopted standards with clear majorities, divisions lurked beneath the surface, pushing some of the Justices to embrace a narrower line than they would have preferred. *See, e.g.*, Lee v. Weisman, 505 U.S. 577 (1992).

analyses of the choice between standards and rules offer a logical explanation as to why fractured Courts would often adopt standards.

III. THEORETICAL EXPLANATIONS FOR WHY FRACTURED COURTS ADOPT STANDARDS

The Supreme Court's tendency to adopt standards-based approaches in the absence of a controlling majority follows logically from the prior analyses of Professors Sullivan and Rose on the use of standards as a moderating or resisting strategy. In particular, fractured Courts result in standards because of both the strategic decisions of Justices who cannot muster a majority for their preferred outcome and the opportunistic actions of median Justices who prefer standards.

A. The Use of Standards as a Moderating and Resisting Device

Prior analyses of judicial patterns leading to the use of standards have focused on standards as a mechanism to moderate the law and to resist shifts in the law that a judge opposes. Professor Rose discusses the process by which judges soften harsh rules, thus converting the hard but clear "crystals" of rules into soft but opaque "mud" of standards.[108] As efforts to provide clarity and consistency harden standards into rules, courts gradually replace the ever more constrained standards with rules embodying those constraints only to begin softening the harsh edges of the rules again.[109] Her analysis provides substantial insight into the oscillation between rules and standards, especially in classic common law areas of law,[110] but provides less insight into decisions on constitutional law and the dynamics within the Supreme Court.

Professor Sullivan's approach, by contrast, specifically focuses on the use of standards within the Supreme Court in contentious areas of constitutional law. She observes that rules can be moderate or extreme but standards always tend toward moderation.[111] Moderate Justices[112]

108. *See* Rose, *supra* note 16, at 603–04.

109. *See id.* at 604.

110. *See id.* at 580–90.

111. Sullivan, *supra* note 9, at 99–100, 122.

112. This sense of moderation can describe a Justice's overall outlook or simply the Justice's position relative to the Court on a specific issue. It should be no surprise that Justice O'Connor, at or near the center of the Court on many issues for most of her tenure, tended to support standards in a wide range of cases while Justice Scalia advocates rules. *See* Deborah Markowitz, *The Attorney's Query: May a Lawyer*

thus have incentives to push for standards rather than rules. Standards are also more flexible in the future; while a rule can be chipped away at with exceptions and then overruled, a standard can be gradually manipulated to move it ever closer to a judge's preferred substantive rules.[113] As a result, Justices who find themselves in the minority on a given issue have incentives to push for standards to leave room in the future to adjust back toward their preferred results. Thus, some liberal Justices who tended to support rules when they were in the majority began to support standards as a means of resisting shifts toward more conservative results.[114] By supporting standards, those resisting Justices both promoted a more moderate shift than a switch from a liberal rule to a conservative rule would have entailed and left more flexibility for a shift back toward their preferred outcomes.[115] While most Justices have default preferences for either standards or rules, they are frequently willing to compromise those preferences for more substantive preferences.[116]

B. Fractured Courts Produce Standards for Strategic and Opportunistic Reasons

When the Supreme Court fractures, two dynamics lead to the application of standards (or to requirements that other decision-makers apply standards). At a strategic level, Justices who cannot form majorities for their preferred outcomes have incentives to support standards. Moreover, the median Justice can act opportunistically to implement standards regardless of the preferences of the other Justices.

The strategic analysis precisely parallels the strategic thinking that leads Justices in the minority to resist and moderate decisions by supporting standards. Take *Booker*, in which a fractured Court ultimately converted the Federal Sentencing Guidelines from binding rules into standards that district courts must consult but may depart

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Ethically Post a Bond or Serve as a Surety on Behalf of a Client?, 18 GEO. J. LEGAL ETHICS 959, 967 (2005). However, even a Justice who is not near the center of the Court on most issues is more likely to support standards in areas of law where the Justice is moderate.

113. *See* Sullivan, *supra* note 9, at 96–100.

114. *See id.*

115. *See id.* at 98–99.

116. *See id.* at 99.

from,[117] as an example. The dissenters in the prior case of *Blakely v. Washington*[118] would have preferred to maintain the Federal Sentencing Guidelines as rules.[119] Because they could not muster a majority for that position, however, they had a strategic incentive to settle for converting the Guidelines into standards rather than losing them entirely as the structure for judicial sentencing. By implementing standards, Justices retain the ability to push later to crystallize the practical application of the standard into their preferred rule. In the case of *Booker*, the great question is when the *presumption* in favor of the Guidelines sentence is overcome.[120] The *Blakely* dissenters could be expected to, and subsequently in fact did to a certain extent, push for a very high presumption indeed;[121] if they succeed, they may years later be in a position to say the following:

> While nominally only presumptive, the Guidelines have been treated in fact as mandatory; in the interests of clarity and to bring doctrine in line with practice, the Guidelines are now mandatory, as Congress intended, and *Blakely*, *Booker*, and *Apprendi* are all overruled.

Even if they cannot reach that outcome, they can move the standard further to their liking. A rule, such as the one presented by Justice Stevens's opinion, would have left the *Blakely* majority with much less room to maneuver.[122]

The median Justice faces a different opportunistic reason to settle on a standard. As Professor Sullivan notes, standards inherently lean toward moderation.[123] As a result, a Justice seeking a moderate resolution is likely to prefer a standards-based resolution. When the rest of the Court divides sharply without a majority, even a single Justice can implement a standard simply by choosing to write a controlling opinion that announces a standard. The *Marks* rule[124] applies poorly to cases where the median opinion approaches the problem from a radically different

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117. United States v. Booker, 543 U.S. 220, 245 (2005).
118. Blakely v. Washington, 542 U.S. 296 (2004).
119. *Booker*, 543 U.S. at 326 (Breyer, J., dissenting in part).
120. *See infra* Part V.D.
121. *Booker*, 543 U.S. at 328–30 (Breyer, J., dissenting in part).
122. *Id.* at 243–44 (Stevens, J.) (majority opinion).
123. Sullivan, *supra* note 9, at 99.
124. *See* Marks v. United States, 430 U.S. 188, 193 (1977).

perspective, but those decisions still generally have controlling force. More to the point, the median Justice can often get one of the two sides to *bless* his or her viewpoint in the interest of strategic gains. Notably, Justice Ginsburg got a result that she alone preferred in *Booker* without even writing an opinion, and the opinions announcing her decision were each joined by a full majority of the Court.[125] Even when a Justice would prefer a rule, announcing a rule is difficult without a true majority—future courts have too much wiggle room to readjust when the rule was not announced by a majority decision. So a Justice seeking a more moderate position may be driven to implement a standard despite personal preferences for rules.

C. Standards as a Means of Obfuscation

The controlling opinions in cases with a fractured Court may also adopt standards as a means of obfuscation. Justice O'Connor showed a recurrent pattern in her decisions on race to permit the use of race in government decision-making, but only if it was not too obvious.[126] Governmental decision-making that relied on race as part of a rule would, in her view, make the role of race too obvious with the risk of both essentializing minorities and angering majorities. If obfuscation is the goal, the transparency that rules offer becomes a vice.

In several recent fractured decisions, the Justice authoring the controlling opinion has purported to adhere to existing precedent while adjusting the standard applied, but many observers, including other members of the Court, have viewed the opinion as overturning the prior precedent. Both Justice Scalia and Justice Souter lambasted Chief Justice Roberts's opinion in *FEC v. Wisconsin Right to Life, Inc.* for functionally overturning *McConnell v. FEC*[127] while purporting to simply apply an additional *as-applied* standard to applications of the Bipartisan Campaign Reform Act.[128] Justice Scalia would have openly overturned

125. *Booker*, 543 U.S. at 225.

126. *See, e.g.*, Shaw v. Reno, 509 U.S. 630, 647–53 (1993); Grutter v. Bollinger, 539 U.S. 306, 337 (2003) ("The importance of . . . individualized consideration in the context of a race-conscious admissions program is paramount."); *cf.* Gratz v. Bollinger, 539 U.S. 244, 276–80 (2003) (O'Connor, J., concurring). Samuel Issacharoff pointed out this pattern to me.

127. McConnell v. FEC, 540 U.S. 93 (2003), *overruled in part by* Citizens United v. FEC, 130 S. Ct. 876 (2010).

128. FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2683–87 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 2698–2705 (Souter, J., dissenting).

McConnell,[129] while Justice Souter would have upheld its application to Wisconsin Right to Life's advertisements,[130] but both agreed that Chief Justice Roberts's opinion could not be reconciled with *McConnell*.[131] Justice Scalia directly criticized the controlling opinion's reliance on stare decisis, stating that "[t]his faux judicial restraint is judicial obfuscation."[132] Justice Kennedy's opinions on partisan gerrymandering arguably had the same effect—continuing to assert that partisan gerrymandering claims are justiciable in accord with *Davis v. Bandemer*[133] while functionally eliminating a possibility of prevailing on them unless a particular case is so extreme as to shock Justice Kennedy into action.[134]

The same circumstances that allow a moderating Justice to adopt standards in a fractured Court allow an obfuscating Justice to do so as well. Several Justices, notably Chief Justice Roberts, Justice Kennedy, and perhaps Justice Alito, have strong personal commitments to stare decisis.[135] When they substantively agree with a group of Justices who wish to overturn a prior precedent, they may view adopting a standard that has the effect of eliminating most of the precedent as a means of reconciling their substantive beliefs about the best outcome in a case with their desire to observe stare decisis. By writing a controlling opinion in a fractured Court, they can respect both values, or at least maintain that appearance.[136]

D. Operational Standards Versus Analytical Standards

What, then, ought to be done by a Justice who prefers rules? The answer begins with the observation that while a fractured Court frequently adopts a standard for the reasons described above, not all

129. *Id.* at 2687 (Scalia, J., concurring in part and concurring in the judgment).

130. *Id.* at 2698 (Souter, J., dissenting).

131. *Id.* at 2683 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 2702 (Souter, J., dissenting).

132. *Id.* at 2683 n.7.

133. Davis v. Bandemer, 478 U.S. 109 (1986).

134. League of United Latin Am. Citizens v. Perry (*LULAC*), 548 U.S. 399, 414–20 (2006) (Kennedy, J.).

135. *See, e.g.*, Stephen A. Newman, *Evolution and the Holy Ghost of* Scopes*: Can Science Lose the Next Round?*, 8 RUTGERS J.L. & RELIGION 1, 42 (2007).

136. I do not intend to suggest that they are necessarily being dishonest in claiming to adhere to stare decisis while in fact effecting substantial changes. They may themselves view their opinions as consistent with prior precedent, even if a fair reader would disagree.

standards are equivalent.[137] In particular, high-level analytical standards that describe the approach to an entire area of the law differ significantly from operational standards that require individual decision-makers to apply a standard to every case. For example, the underlying analytical approach to Fourth Amendment search and seizure analyses involves the application of many standards—what is a *reasonable expectation of privacy*?[138] how intrusive is a search?[139] and so forth. However, at the operational level—when a police officer decides whether to perform a search or a judge decides whether to suppress the fruits of a warrantless search—clear rules established by prior Supreme Court decisions control many individual decisions.

Using standards at an analytical level offers substantial advantages over requiring standards at an operational level. First, most of the circumstance-dependent arguments with regard to when to favor rules and when to favor standards support rules-based regimes at an operational level and standards-based regimes at an analytical level. From an economic-analysis perspective, rules should be used when decisions frequently need to be made with regard to a similar fact pattern, whereas standards should be favored for infrequent decision-making.[140] Applying an analytical standard to resolve questions of first impression but then developing rules to handle the operational decisions in frequently recurring cases fits well with the results of the economic analysis. Conversely, an analytical rule requiring operational standards necessarily involves substantial wasted effort.

Also, applying high-level standards and operational rules strengthens democratic controls.[141] Operational standards imply that individual decision-makers—who may be too numerous to effectively evaluate—will exercise wide substantive power. Conversely, democratic checks can be applied effectively to erroneous applications of high-level analytical standards. These checks are less effective with regard to constitutional doctrines because Supreme Court Justices have life tenure, but even there, it is easier for the people to shape the evolution of

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137. *See* Sullivan, *supra* note 9, at 69–95. To some extent, the *operational* level of analysis I discuss is at an even lower level of generality than the "operative" level she discusses. My *analytical* level would include both her categories of degree of deference to precedent and interpretive rules and standards. *See id.* at 69–82.

138. *See, e.g.*, Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

139. *See, e.g.*, United States v. Karo, 468 U.S. 705, 719 (1984).

140. *See supra* notes 46–50 and accompanying text.

141. *See supra* notes 37–39 and accompanying text.

constitutional doctrines through appointments to a single court rather than through shaping the enforcement patterns of hundreds of judges or thousands of other decision-makers.

Applying standards at an analytical level instead of an operational level also has benefits for shaping the development of the law. Many observers comment on the value of percolation in the lower courts and the process of experimentation and cooperative deliberation it produces.[142] Fractured Courts represent a lack of consensus that can sometimes be resolved through further percolation. A consensus may emerge over time because of either changing opinions or shifts in the Court's composition. Alternately, a new take on the problem may replace the entire analytical approach. When the Court proposes a broad high-level analytical standard and then leaves it to lower courts to apply that standard, it promotes precisely this sort of productive percolation.

The lower court ferment will not always produce a future consensus. *Regents of the University of California v. Bakke*[143] produced anything but uniform practices in university admissions offices, and clear splits emerged among lower courts considering the issue.[144] Nonetheless, mud leaves more malleability to work on developing new crystals than a set of rigidly enforced rules. None of that productive percolation takes place, however, when the Court announces high-level rules that require operational-level standards. When the Court announces a rule that requires operational standards, it curtails rather than enlarges further judicial discussion and analysis.

Because announcing requirements of operational standards is so much worse for the long-term development of the law than announcing high-level standards, Justices who support rules should seek out high-level standards in cases where the Court fractures. A rule-favoring Justice cannot prevent some standard from emerging when the Court fractures badly—the opportunities for moderate Justices who support standards and the strategic benefits of winning a partial victory combined

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142. *See, e.g.*, Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilites: An Empirical Study*, 59 N.Y.U. L. REV. 681, 716 (1984) ("The process of percolation allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule."); Butler v. McKellar, 494 U.S. 407, 430 n.12 (1990) (Brennan, J., dissenting).

143. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

144. *See* Ellison S. Ward, Note, *Toward Constitutional Minority Recruitment and Retention Programs: A Narrowly Tailored Approach*, 84 N.Y.U. L. REV. 609, 624 & n.83 (2009); sources cited *infra* note 145.

are too much to overcome. But by joining a compromise, the rule-seeking Justice may be able to contain the damage and at least hope that the current decision, however flawed, will lay the groundwork for a better rule tomorrow.

IV. THE CONSTITUTIONALIZATION OF STANDARDS IN ACADEMIC AFFIRMATIVE ACTION

The constitutionality of affirmative action programs in public university admissions has been an intensely contentious and divisive question for decades.[145] Two cases from the 2002 Term challenging undergraduate and law school admissions to the University of Michigan held that affirmative action is constitutional if admissions offices use a standard—considering race as one of many factors to balance in admitting students[146]—but is unconstitutional if those offices apply a rule—providing a set effect for race in admissions decisions.[147] While the controlling opinions sought to position their holding as an extension of the prior doctrine established in *Bakke*, it represented a substantial departure and placed unprecedented weight on the form of admissions decisions rather than the content of those decisions.

A. Regents of the University of California v. Bakke *and the Prohibition of Quotas*

Prior to the 2002 cases, the controlling Supreme Court precedent on

145. An extensive literature examines the merits of these issues. *See, e.g.*, WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998); Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195 (2002); Jack M. Balkin, Plessy, Brown, *and* Grutter*: A Play in Three Acts*, 26 CARDOZO L. REV. 1689 (2005); Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622 (2003); Bryan K. Fair, *Taking Educational Caste Seriously: Why* Grutter *Will Help Very Little*, 78 TUL. L. REV. 1843 (2004); Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928 (2001). I focus exclusively on the choice of forms embodied in these decisions.

146. Grutter v. Bollinger, 539 U.S. 306, 343 (2003).

147. Gratz v. Bollinger, 539 U.S. 244, 255, 275 (2003). A recent case dealing with race-based school assignments below the college level adopted a different approach, again with a fractured Court. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2768 (2007). It remains to be seen whether and to what extent that case undermines the holdings of *Grutter* and *Gratz*.

affirmative action in public university admissions was *Bakke*.[148] In *Bakke*, the Court considered a challenge to the admissions policy of the Medical School of the University of California at Davis (Davis).[149] Davis admitted most of its class through a competitive process open to any applicant.[150] The school filled sixteen percent of the spots in the entering class, however, through a separate process designed to increase the number of students with disadvantaged backgrounds in the entering class.[151] Davis never admitted any white students through this separate process, and in at least one year, the committee explicitly decided to consider only racial minorities for those spots.[152] A white student, Allan Bakke, sued in California state court after being rejected twice, arguing that the separate admissions track for minority students violated his rights under the Fourteenth Amendment, the California Constitution, and title VI of the Civil Rights Act of 1964.[153]

Bakke fractured the Supreme Court. Justice Stevens, joined by Chief Justice Burger and Justices Stewart and Rehnquist, would have decided the case purely on the statutory claim under title VI.[154] Justice Stevens argued that title VI prohibited excluding any student from a federally funded educational institution on account of race and Davis had violated this prohibition.[155] Justice Stevens explicitly refused to consider whether any other race-based admissions program could be legal, although his reasoning suggests that any consideration of race in university admissions would violate title VI.[156] Justices Brennan, White, Marshall, and Blackmun argued in a joint opinion that "[g]overnment may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made."[157] The joint opinion would have reversed the California Supreme Court and would have

148. *Bakke*, 438 U.S. 265.
149. *Id.* at 269 (Powell, J.).
150. *Id.* at 273–74.
151. *Id.* at 274–76.
152. *Id.* at 275–76.
153. *Id.* at 277–78.
154. *See id.* at 408–21 (Stevens, J., concurring in the judgment in part and dissenting in part).
155. *Id.* at 412–13.
156. *See id.* at 411–21.
157. *Id.* at 325 (Brennan, White, Marshall & Blackmun, J.J., concurring in the judgment in part and dissenting in part).

upheld the legality of Davis's entire admissions process.[158]

Justice Powell wrote the controlling opinion for the Court, despite the fact that none of the other Justices agreed with his position. Justice Powell held that the Davis program was unconstitutional because it set aside a quota of spots for minority students.[159] Justice Powell concluded that the government had a substantial interest in promoting a diverse student body.[160] He also concluded, however, that setting aside spots for minority applicants was not necessary to achieve the goal of a diverse student body.[161] Justice Powell focused on the admissions system used by Harvard University—where belonging to a racial minority constituted a *plus* that made admission more likely but where all applicants were considered as part of a single pool—as an example of a constitutionally permissible system.[162] Justice Powell's solitary yet controlling opinion laid down the line for the next quarter-century: affirmative action admissions programs were constitutional if they sought to produce diverse classes by adding a plus to minority students' applications, but were unconstitutional if the programs considered minority applicants separately from white applicants or set aside positions exclusively for minority applicants.

B. The University of Michigan Cases and the Importance of Form

Approximately a quarter-century after *Bakke*, the Supreme Court decided two cases challenging the constitutionality of the University of Michigan's affirmative action policies. *Grutter v. Bollinger* challenged the admissions process of the University of Michigan Law School (Law School),[163] while *Gratz v. Bollinger* challenged the admissions to the College of Literature, Science, and the Arts (College).[164] The cases fractured the Court again. Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas would have declared both programs unconstitutional.[165] Their opinions seemed to support a complete ban on

158. Both the joint opinion and Justice Powell's opinion agreed that in the context of affirmative action programs, the requirements of title VI are "coextensive" with the Fourteenth Amendment. *Id.* at 352; *id.* at 287 (Powell, J.).

159. *Id.* at 319–20 (Powell, J.).

160. *Id.* at 311–15.

161. *Id.* at 315–16.

162. *Id.* at 316–17.

163. Grutter v. Bollinger, 539 U.S. 306, 311 (2003).

164. Gratz v. Bollinger, 539 U.S. 244, 249–51 (2003).

165. *Grutter*, 539 U.S. at 378–79 (Rehnquist, C.J., dissenting); *Gratz*, 539 U.S. at 249–

affirmative action in public university admissions, although Justice Kennedy simultaneously stated his support for Justice Powell's decision in *Bakke* and that neither the Law School's nor the College's admissions program complied with its requirements.[166] Justices Stevens, Souter, and Ginsburg, for their parts, would have upheld both admissions programs.[167] Their opinions suggested that any admissions policy designed to increase diversity that does not apply an outright quota would be constitutional.[168] Justices O'Connor and Breyer, however, provided the deciding votes: the Court upheld the Law School program in *Grutter* but struck down the College admissions policy in *Gratz*.[169] Justice O'Connor's opinions, writing for the Court in *Grutter* and concurring in *Gratz*, made it clear that the distinction between the two systems depended on the nature of the decision-making process in each case.[170]

Each school within the University of Michigan used a separate admissions process, and the processes varied considerably. The College admissions process varied over the course of several years, but always relied on a fairly mechanical consideration of factors such as GPA, standardized test scores, the quality of a high school, the strength of high school curriculum, geographic considerations, alumni connections, and an applicant's unusual circumstances.[171] Beginning in 1998, the College calculated a "selection index" by totaling scores from the various factors; applicants who received at least 100 out of 150 were generally admitted, while those who received less than 75 were generally rejected.[172] Applicants with scores in between might be accepted or rejected depending on individualized consideration.[173] Members of underrepresented racial or ethnic groups received twenty points in a miscellaneous category;[174] thus, a minority applicant with no other

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166. *Grutter*, 539 U.S. at 387–88 (Kennedy, J., dissenting).

167. *See id.* at 327–44 (O'Connor, J.); *Gratz*, 539 U.S. at 282–91 (Stevens, J., dissenting); *id.* at 298–305 (Ginsburg, J., dissenting).

168. *See Grutter*, 539 U.S. at 327–44; *Gratz*, 539 U.S. at 282–91 (Stevens, J., dissenting); *id.* at 298–305 (Ginsburg, J., dissenting).

169. *Grutter*, 539 U.S. at 343–44; *Gratz*, 539 U.S. at 249–51.

170. *Grutter*, 539 U.S. at 336–37; *Gratz*, 539 U.S. at 276–80 (O'Connor, J., concurring).

171. *Gratz*, 539 U.S. at 253–57 (Rehnquist, C.J.).

172. *Id.* at 255 (internal quotation marks omitted).

173. *Id.* at 255–57.

174. *Id.* at 255.

miscellaneous modifiers and whose other scores totaled 80 would go from having a slim chance of being admitted to being presumptively admitted.[175]

The Law School used a dramatically different system.[176] The Law School considered numerical data such as LSAT scores and undergraduate GPA, but made each admissions decision based on a holistic consideration of the entire application.[177] As far as can be gleaned from the Court's analysis, in fact, admissions officials made all of the decisions based on their personal evaluation of whether an applicant could succeed and what each applicant would add to the overall class.[178] Throughout the process, admissions officials remained highly cognizant of race, receiving periodic reports of the racial composition of the developing class.[179] In his dissent, Chief Justice Rehnquist laid out an impressive set of tables to show that "from 1995 through 2000 the percentage of admitted applicants who were members of these minority groups closely tracked the percentage of individuals in the school's applicant pool who were from the same groups."[180]

Justice O'Connor's opinions showed that the Court upheld the Law School's admissions program while invalidating the College's because the Law School provided "individualized consideration" of each candidate including each candidate's race while the College reduced consideration of race to the formal addition of a set modifier.[181] Considering the entirety of an applicant's circumstances according to a set of standards met constitutional muster even when race was one of the factors considered. In contrast, applying a fixed rule designed to uniformly implement a preference for underrepresented minorities failed to meet constitutional muster. To put the point more clearly: the choice

175. Several additional wrinkles, including a process of flagging certain applications with special characteristics for more individualized consideration, altered the system from the general overview provided here. *See id.* at 253–57.

176. Among other differences, the Law School received vastly fewer applications: about 3500 for 350 spots as opposed to more than 25,000 for roughly 5300 spots in the College. Grutter v. Bollinger, 539 U.S. 306, 312–13 (2003); *Q&A re University of Michigan Former Admissions Policies*, UNIV. MICH. ADMISSIONS LAWSUITS, http://www.vpcomm.umich.edu/admissions/archivedocs/q&a.html (last updated Feb. 19, 2003).

177. *Grutter*, 539 U.S. at 312–15.

178. *Id.*

179. *Id.* at 391–92 (Kennedy, J., dissenting).

180. *Id.* at 383–84 (Rehnquist, C.J., dissenting).

181. *Id.* at 336–37 (O'Connor, J.); Gratz v. Bollinger, 539 U.S. 244, 276–77 (2003) (O'Connor, J., concurring).

between whether to implement racial affirmative action policies in public university admissions through rules or through standards determined whether those policies were constitutional.

To be sure, Justice O'Connor expressed substantial concern about the size of the preference given to minority applicants in the College's program.[182] But as Chief Justice Rehnquist's dissent forcefully showed, as a practical matter, race played a huge role in the Law School's admissions program as well.[183] Justice O'Connor also worked hard to justify her decisions in light of Justice Powell's opinion in *Bakke*; and indeed, in some ways, the refusal to essentialize applicants according to race reflected Justice Powell's reasoning.[184] At the same time, the College's admissions program seemed almost precisely like a rule-based implementation of the sort of program that Justice Powell described with approval: all applicants competed in a single pool, but minority applicants received a plus in the same way that students with unusual leadership activities, student athletes, or students with unusual artistic or musical talents received a plus.[185]

C. Rules Versus Standards in Affirmative Action: Transparency Versus Individualization

The affirmative action context brings special considerations to the fore in choosing between rules and standards. The sheer volume of admissions decisions supports a rules-based regime on efficiency grounds—a large state undergraduate college might be unable to afford to apply the sort of admissions process that the Law School used. Strict scrutiny can spin this around into an advantage for standards, however, as a test of whether the government interest in promoting diversity is really compelling. If the state is unwilling to spend more money on the admissions process in order to have a standards-based affirmative action program, is the interest in diversity actually compelling? Requiring standards-based affirmative action programs forces the state to put its money where its mouth is.

The typical over- and underinclusiveness arguments can also be made against the rules-based approach. Simply adding twenty points to

182. *Gratz*, 539 U.S. at 279 (comparing the size of the preference based on race to the maximum size of the preference for outstanding high school leadership).
183. *Grutter*, 539 U.S. at 381–85 (Rehnquist, C.J., dissenting).
184. *See id.* at 341.
185. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 317 (1978).

every candidate from an underrepresented minority community gives substantial advantages to minority candidates from wealthy and privileged backgrounds while failing to provide weight to the backgrounds of white students who have overcome poverty and discrimination.[186] The obvious reply is that the evidence suggests that the standards-based programs suffer from many of the same flaws: the statistical evidence in Chief Justice Rehnquist's *Grutter* dissent hardly reflected a program that actually took into account background in a highly nuanced way.[187]

The opinions in *Grutter* that directly addressed, albeit in slightly different language, the choice between standards and rules in affirmative action programs focused on different issues. Justice O'Connor's decision discussed the importance of individualized consideration.[188] To her, a rule-based affirmative action program would essentialize applicants as just representatives of their race rather than treating them as individuals who happen to affect the diversity of their class.[189] From this viewpoint, additional transparency would have the effect of focusing attention on the role that race played in the decisional process and would be a negative, whereas quietly allowing race to have an enormous role in the Law School's admissions decisions avoided the stark and obvious weighing of race in a rule-based program. Her Kantian insistence on individual treatment reflected an underlying concern about the way in which the law addresses race and paralleled her concerns about not focusing on racial groups as distinct communities of interest in the redistricting context. Justice Souter, for his part, emphasized the importance of transparency.[190] Under his analysis, in an area as fraught with peril as affirmative action, providing clear statements of the role of race in admissions served valuable government functions and helped to ensure fairer treatment.[191] The opacity of the Law School's program, where it is impossible to determine from the outside the role that race plays, raised the danger of resentment, fear, and even the use of race to a degree that would not be permissible were it fully understood. The dispute between standards and rules thus focuses on the choice between

186. *See Gratz*, 539 U.S. at 279–80.
187. *See Grutter*, 539 U.S. at 381–85 (Rehnquist, C.J., dissenting).
188. *Id.* at 334–40 (O'Connor, J.).
189. *See id.*
190. *Gratz*, 539 U.S. at 297–98 (Souter, J., dissenting) ("Equal protection cannot become an exercise in which the winners are the ones who hide the ball.").
191. *See id.*

individualization, at least in theory, and transparency.

Reasonable policy arguments support each structure, but the arguments in favor of the rules-based system are more compelling. As is often the case with preferences for standards, the Law School's standards-based approach favored the theoretical possibility of gains over the concrete pragmatic advantages of rules. Nonetheless, reasonable university administrators could choose either approach, and indeed, different schools within the University of Michigan in fact chose different approaches. What is remarkable about *Grutter* and *Gratz* was the conclusion that this choice had constitutional significance. The Court in *Grutter* and *Gratz* held that the choice of standards is constitutional, while a rules-based approach fails. The opposite outcome could be easily defended—a rules-based approach would allow courts to accurately weigh the role race plays in admissions decisions, while a standards-based approach would run the risk of race being given predominant effect under the guise of being one of many factors considered. Instead, the Court's actual result reflected a preference for standards with little grounding in constitutional values.

Grutter and *Gratz* leave comparatively little room for public universities and lower courts to experiment with the details of affirmative action programs. Programs that apply numeric approaches almost certainly fail; programs that rely on judgments by admissions officials almost certainly pass. No enlightenment can emerge from applying those rules again and again, and we remain stuck with the highly dubious result of more ad hoc decisions by all-too-human admissions officials.

Grutter and *Gratz* illustrate both the pattern of a fractured Court embracing standards rather than rules and the dangers of requiring standards at an operational level. Because Justices O'Connor and Breyer chose a middle path between the extremes supported by most of the Court, they could implement a standard without even approaching a majority. But in doing so, they chose to require the use of standards at the lowest operational level—requiring individual admissions offices to use standards if they wish to include affirmative action considerations. That choice leaves little room for further productive developments in the law, notwithstanding Justice O'Connor's prophecy about the limits of indefinitely prolonging affirmative action.[192] It will also require schools that implement affirmative action programs to spend substantial

192. *Grutter*, 539 U.S. at 343.

additional resources on admissions—resources that could otherwise have been used for increasing spending on instructors or financial aid—while still permitting race to play an arbitrarily large role in admissions. Had Justices O'Connor and Breyer instead required the application of an analytical standard—some form of *race can be used as a criterion in admissions decisions but not if it is given too large a role in the decision-making process*—they would have achieved a more just result and more efficient admissions, while still leaving room for the law to evolve productively in the future.[193] As it turned out, they incurred all the costs of standards with very little of the gain.

V. SENTENCING: FROM UNLIMITED DISCRETION TO RULES TO STANDARDS

Sentencing policy represents another area where the Court has recently mandated the application of standards at the operational level despite substantial reasons to prefer rules. For most of the modern period, judges picked criminal sentences out of a wide range of possibilities with essentially no rules or appellate review.[194] The sentencing-reform movement resulted in many states and the federal government switching to sentencing guidelines systems, which generally provided a set of rules based on a criminal offense and prior criminal history that determined, within narrow limits, the sentence that a court must impose.[195] The Supreme Court concluded that a state guidelines system violated the guarantee of a jury trial by shifting too much power to judges;[196] while the majority spoke approvingly of rules, it concluded that juries, not judges, must apply rules-based sentencing.[197] When considering the Federal Sentencing Guidelines, however, the Court blinked[198]: the Court held that lower court judges would continue to apply the Guidelines but the Guidelines would become presumptive

193. Justice Kennedy's controlling opinion in *Parents Involved in Community Schools* moved further in the direction of permitting consideration of race in school assignments but not if race had an overwhelming effect or if the numbers showed the lack of narrow tailoring. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2791 (2007).

194. MICHAEL TONRY, SENTENCING MATTERS 6 (1996).

195. *See id.* at 9–10.

196. Blakely v. Washington, 542 U.S. 296, 313 (2004).

197. *Id.* at 313–14.

198. As will be discussed later, it would be more accurate to say that Justice Ginsburg alone blinked.

rather than binding.[199] In other words, the Court transformed the Guidelines from rules to standards despite overwhelming support within the Court for a rules-based approach.

A. The Sentencing-Reform Movement: From Chaos to Rules

The sentencing-reform movement that produced guidelines systems originated in the 1970s from profound dissatisfaction with the inequalities of the general practice of criminal sentencing of the day.[200] The most influential work in cataloging the problems of the system then in use and suggesting solutions was Judge Marvin E. Frankel's book *Criminal Sentences: Law Without Order*.[201] As Judge Frankel described, most sentencing consisted of a judge picking, by whatever method the judge chose, a sentence from a broad range of possibilities:

> To take some of our most common federal crimes—driving a stolen car across state lines may result in a term of "not more than five years," robbing a federally insured bank "not more than twenty-five years," and a postal employee's theft of a letter "not more than five years." The key phrase is, of course, the "not more than." It proclaims that federal trial judges, answerable only to their varieties of consciences, may and do send people to prison for terms that may vary in any given case from none at all up to five, ten, thirty, or more years.[202]

Judge Frankel included a brief discussion of some of the horror stories that this sentencing system produced, including judges who always applied the maximum for a given crime or conversely never gave anyone a prison sentence for a given crime—perhaps the same crime that the judge in the neighboring chamber always gave the five-year maximum.[203] Judge Frankel also acknowledged the

> broad latitude in our sentencing laws for kinds of class bias that are commonly known, never explicitly acknowledged, and at war with the superficial neutrality of the statute as literally written.

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199. United States v. Booker, 543 U.S. 220, 245–46 (2005).
200. TONRY, *supra* note 194, at 9.
201. *Id.* at 9–10.
202. MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5–6 (1972).
203. *Id.* at 17–23.

> Judges are on the whole more likely to have known personally tax evaders, or people just like tax evaders, than car thieves or dope pushers.[204]

Predictably, although Judge Frankel only touched on it in passing, the system also produced widespread bias on the basis of race (of both offenders and victims) and gender.[205] The completely opaque process also destroyed any public confidence in the system, at least among people who had been exposed to it.[206] But beyond the well-documented and almost universally acknowledged specific ill effects, Judge Frankel directed much of his wrath at the fundamental problem: "the almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law."[207]

The criticisms of the old sentencing regime amount to arguments for moving the system toward a more rule-like structure. To be fair, Judge Frankel noted that judges did not even apply a fixed set of standards: essentially the only standard was the judge's personal judgment in light of an individual consideration of the case.[208] Nonetheless, the considerations of the problems with the sentencing structures then in place were essentially a laundry list of the problems that rules ameliorate: unfair and inconsistently applied sanctions; bias; unwarranted concentration of power in the hands of individual decision-makers; lack of democratic control over the range of sentences; and the gross appearance of unfairness. And, predictably, the sentencing-reform movement resulted in a pronounced shift toward a rules-based system.

Both the federal government and many states shifted to a system of largely mandatory sentencing guidelines defined by administrative agencies called sentencing commissions.[209] These guidelines systems generally apply two-dimensional grids—with the severity of the offense along one axis and criminal history along the other.[210] Each cell in the grid specifies the sentence for an offense of that severity by an offender

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204. *Id.* at 23.
205. TONRY, *supra* note 194, at 7.
206. *See* FRANKEL, *supra* note 202, at 39–49.
207. *Id.* at 5.
208. *Id.* at 25.
209. TONRY, *supra* note 194, at 10.
210. *Id.* at 15.

with that criminal history.[211] Empirical studies of some of those systems showed significant increases in the consistency of sentences and decreases in the discriminatory effects of race and gender on sentencing.[212]

Many observers criticize the Federal Sentencing Guidelines, in particular, for a variety of faults.[213] In particular, many observers consider the Federal Sentencing Guidelines much too severe, imposing unwarrantedly long sentences for nonviolent crimes, especially drug crimes.[214] Few of these criticisms, however, provide a compelling argument for returning to the pre-Guidelines era, as opposed to reforming the specific system in place.

B. Blakely *and Two Conflicting Visions of Rules*

The Supreme Court addressed a challenge to the constitutionality of systems that require judges to make extensive factual findings as part of a sentencing regime in *Blakely v. Washington*.[215] The petitioner in *Blakely* pled "guilty [in state court] to . . . kidnaping . . . his estranged wife."[216] Applying the Washington sentencing guidelines, the trial court judge found that the petitioner acted with "deliberate cruelty" and sentenced him to ninety months of imprisonment rather than the fifty-three month maximum that would have applied without that finding.[217] The Supreme Court, in a five-to-four decision, concluded that Washington's sentencing structure violated the petitioner's Sixth

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211. *Id.*

212. *Id.* at 10. "The evidence on [the Federal Sentencing Guidelines] is mixed." *Id.* at 42; *see id.* at 43–49. Furthermore, some observers criticize the Guidelines for decreasing racial and gender disparities by lengthening the prison sentences of women and limiting the sentencing criteria to minimize the role of information besides the current offense and criminal history. *Id.* at 32–33.

213. *Id.* at 11 ("Few outside the federal commission would disagree that the federal guidelines have been a disaster."). Many critics believe that the Federal Sentencing Guidelines exclude morally relevant information from consideration while improperly including alleged criminal conduct of which the defendant was never convicted as "actual offense behavior." *Id.* (internal quotation marks omitted).

214. *See, e.g.*, Charles J. Ogletree, Jr., Commentary, *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1939 (1988); Jack B. Weinstein, *The Role of Judges in a Government Of, By, and For the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 194–97 (2008).

215. Blakely v. Washington, 542 U.S. 296, 298–301 (2004).

216. *Id.* at 298.

217. *Id.* (internal quotation marks omitted).

Amendment right to a jury trial.[218]

Justice Scalia, joined by Justices Stevens, Souter, Thomas, and Ginsburg, concluded that in order for the requirement of a jury trial to be meaningful, the jury must find every fact necessary to the imposition of a sentence.[219] Any other standard, according to the majority, either would allow the legislature to transfer too much of the fact-finding requirements to the judge, thus leaving the Sixth Amendment protection as a mere procedural formality, or would require judges to apply an ill-defined standard to determine when the legislature has gone too far.[220] Thus, partially to avoid the imprecision of a standard, the Court adopted the rule that any fact that increases the maximum sentence length permissible must be found by a jury. The majority stressed that the decision did not address the permissibility of more structured, determinate sentencing systems in general but merely who the fact-finder needed to be.[221] Justice Scalia asserted that the "salutary objectives" of determinate sentencing schemes can be achieved through empowering juries and prior decisions of the Court had already produced a shift in that direction.[222]

Justice O'Connor, in a dissent joined in relevant part by Chief Justice Rehnquist and Justices Kennedy and Breyer, argued that the Court's decision sent the message to legislatures that

> [i]f you want to constrain the sentencing discretion of judges and bring some uniformity to sentencing, it will cost you—dearly. Congress and States, faced with the burdens imposed by the extension of *Apprendi v. New Jersey* to the present context, will either trim or eliminate altogether their sentencing guidelines schemes and, with them, 20 years of sentencing reform.[223]

The dissent argued that the practical consequences of the decision would

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218. *Id.* at 297, 305.

219. *Id.* at 313. Much of the decision was framed in terms of the application of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Blakely*, 542 U.S. at 305–08, 313–14. However, the core dispute between the majority and the dissent was about the basic meaning of the Sixth Amendment with regard to sentencing guidelines, and a detailed analysis of *Apprendi* adds nothing to the points on which I focus. *Id.* at 314 (O'Connor, J., dissenting).

220. *Blakely*, 542 U.S. at 306–08.

221. *Id.* at 308–09.

222. *Id.* at 308–10.

223. *Id.* at 314 (O'Connor, J., dissenting) (citation omitted).

be disastrous: either sentencing guidelines must be abandoned[224] or the entire sentencing structure needed to be rearranged to allow juries to find precisely the sorts of facts that judges traditionally took into account when picking sentences under indeterminate-sentencing systems.[225] The dissent had a flavor of greater includes the lesser. It sensibly asked, if the old indeterminate-sentencing system, which allowed judges to consider whatever facts they wished in just picking a sentence, was constitutional, how could it possibly violate a defendant's rights to have the same judge make the same decisions subject to rules?

C. Booker *and the Result No One Sought: From Rules to Standards*

The Supreme Court returned to the sentencing-guidelines arena less than a year later to answer the inevitable question of *Blakely*'s effect on the Federal Sentencing Guidelines.[226] The Supreme Court reached a surprising conclusion. Rather than either rejecting *Blakely* or applying *Blakely*'s apparent consequences, the Court held that the Sentencing Guidelines would remain in force, applied by judges, but converted from rules to standards.[227] Instead of requiring judges to apply the Guidelines, judges would have to consider it but would then have the power to disregard it in appropriate cases.[228] The Court reached this surprising result despite the fact that eight of the Justices were on record as supporting a decision that would preserve the Guidelines' rule-like character.[229]

The dissenters in *Blakely* continued to maintain that the whole line of inquiry was an error and the Sentencing Guidelines were constitutional as written.[230] The *Blakely* majority, however, remained unswayed: in an opinion by Justice Stevens, the Court held that the Federal Sentencing Guidelines violated the Sixth Amendment for precisely the same reasons as the Washington sentencing guidelines in *Blakely*.[231] Justice Stevens was unable, however, to muster a majority for his remedy. In an opinion

224. *Id.*
225. *Id.* at 318.
226. United States v. Booker, 543 U.S. 220 (2005).
227. *Id.* at 245–46. This outcome has the vaguely amusing effect that for the first time since its promulgation, the Federal Sentencing Guidelines are actually guidelines rather than rules under a misnomer.
228. *Id.* at 245.
229. *See infra* notes 239–41 and accompanying text.
230. *Booker*, 543 U.S. at 326–27 (Breyer, J., dissenting in part).
231. *Id.* at 226–27 (Stevens, J.) (majority opinion).

joined by Justices Souter and, in the relevant part, Scalia, Justice Stevens argued that relatively few cases involved violations of the *Blakely* rule because plea agreements could include the facts necessary to support higher sentences—most cases do not involve upward enhancements in any event—and prosecutors could deal with most of the remainder by alleging the additional facts in the indictment and proving them to the jury.[232] This approach, Justice Stevens argued, would preserve the Guidelines' rule-like character and its "stated goal of uniformity" while satisfying the Sixth Amendment.[233] Justice Thomas wrote separately to address the mechanics of severability analysis, but "agree[d] with Justice Stevens' proposed remedy."[234]

The majority on remedy, however, consisted of the *Blakely* dissenters and Justice Ginsburg.[235] In a decision by Justice Breyer, the Court held that the portion of the Federal Sentencing Guidelines' enabling legislation that made the Guidelines mandatory "must be severed" and invalidated, thus preserving the remainder of the legislation.[236] The statute now requires federal judges to consider the Guidelines, but judges remain free to sentence outside of a guidelines range by considering other factors.[237] To a significant degree, the dissenters managed to win the real fight: as a practical matter, the Guidelines remain the touchstone for federal sentencing, and judges continue to make the findings that determine the Guidelines sentencing ranges. However, the Guidelines now lack the mandatory force it used to have, surely allowing wider variation and many of the problems that plagued pre-Guidelines sentencing to creep back in.

The most striking thing about *Booker*'s result is that only Justice Ginsburg actually supported it.[238] The *Blakely* dissenters wanted the Guidelines to remain as rules applied by judges. The rest of the *Blakely* majority wanted the Guidelines to remain as rules but for juries or plea agreements to find the crucial facts. None of the litigants sought *Booker*'s results, and all the reasons that supported the sentencing-reform movement in the first place counsel for rules instead of standards.[239]

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232. *Id.* at 272–78 (Stevens, J., dissenting in part).
233. *Id.* at 298–302.
234. *Id.* at 313 (Thomas, J., dissenting in part).
235. *Id.* at 244–45 (Breyer, J.) (majority opinion).
236. *Id.* at 245–46.
237. *Id.*
238. *See id.* at 225.
239. *See supra* Part V.A. Some academics, however, have argued that guidelines

Constitutional prohibitions on applying rules in sentencing are not unheard of; for example, capital punishment sentencing decisions cannot be based on rote application of rules, but must allow the sentencer to weigh the facts supporting a death sentence against mitigating factors.[240] But the constitutional jurisprudence of capital punishment is unique, reflecting among other things a concerted effort by some Justices to either eliminate capital punishment altogether or erect as many barriers as possible in an effort to make it as rare as politically feasible. In the context of ordinary sentencing decisions, applying rules offers vastly more reassurance to those who fear the distortions of bias about race, wealth, class, and gender, not to mention the predilections of the sentencing judge. Indeed, to an observer not steeped in the American sentencing tradition, the obvious focus would be on how indeterminate sentencing can possibly comply with a guarantee of due process of law, not on whether rule-based sentencing is permissible. Justice Ginsburg alone wanted to convert the Guidelines into standards, but her view prevailed.[241]

D. The New Requirement of the Operational Application of Standards

Booker's outcome represents another example of the operational application of standards mandated by a fractured Court. Only Justice Ginsburg supported the entirety of *Booker*, yet her viewpoint resulted in the application of standards. Had the *Blakely* dissenters refused a compromise on remedy—insisting that the Guidelines were fully constitutional as rules and refusing to accept their constitutionality as standards—they could have driven Justice Ginsburg to have joined Justice Stevens's remedy analysis. Because the Court fractured, a moderating standard resulted. At the same time, the level at which the standard would apply was the lowest operational level—the decisions of individual district judges on specific sentences.

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systems function better as standards instead of rules ("presumptive, neither merely voluntary nor mandatory"). TONRY, *supra* note 194, at 193. These academics may think that however the Court got there, the ultimate rule in *Booker* produced the correct result. Analyses of the empirical effects of *Booker* will determine whether their hopes are justified. See *infra* notes 242–47 and accompanying text for some preliminary reasons to think that standards will not solve the problems they see.

240. *See, e.g.*, Brown v. Sanders, 546 U.S. 212, 216–17 (2006).

241. *See Booker*, 543 U.S. at 225 (listing which Justices joined each of the two majority opinions).

Booker reintroduces many of the faults of the pre-Guidelines system, but does not cure many (or any) of the actual problems of the Guidelines. To the extent that people object to the allocation of power to judges (or prosecutors making charging decisions) rather than to juries, *Booker* is not progress at all and can even be regarded as a step backward. If, instead, some of the Justices actually cared about overly long sentences, *Booker* does not require more lenient sentencing. In fact, the U.S. Sentencing Commission's analysis of sentences following *Booker* concluded that "[t]he severity of sentences imposed has not changed substantially across time. The average sentence length after *Booker* has increased."[242] At the same time, *Booker* has increased disparities, both in methodology and by increasing the number of departures from the Guidelines range, both upwards and downwards.[243] The Supreme Court could have addressed concerns about unreasonably long sentences much more effectively by applying a high-level analytical standard. The dissenters in *Blakely* suggested that a requirement that particularly large enhancements of sentences based on judicial fact-findings could violate the Sixth Amendment. They proposed a high-level analytical standard that would be operationalized through rules, whereas the ultimate result of *Booker* was a high-level analytical rule, no mandatory sentence enhancements based on judicial fact-finding, and the operational application of standards.

The Supreme Court has decided several major Sentencing Guidelines cases since *Booker*, but those decisions underline the ways in which analytical rules and operational standards impede the development of the law rather than facilitate it. The Court has held that circuit courts may, but do not need to, adopt a presumption of reasonableness for sentences within the Guidelines ranges.[244] Conversely, the circuit courts cannot require that a district court cite extraordinary circumstances to justify any decision outside the Guidelines range.[245] Taken together, *Rita v. United States* and *Gall v. United States* emphasized that *Booker* meant what it said—the Guidelines continue to have significance but only as a set of standards. *Rita* and *Gall* also included language suggesting that judges should use *Booker* as an opportunity to give shorter sentences than the

242. U.S. SENTENCING COMM'N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING, at vii (2006), *available at* http://www.ussc.gov/booker_report/Booker_Report.pdf.

243. *Id.* at iv–vii.

244. Rita v. United States, 127 S. Ct. 2456, 2459 (2007).

245. Gall v. United States, 128 S. Ct. 586, 591 (2007).

Guidelines range when appropriate,[246] but their holdings allow judges to impose more severe sentences than the Guidelines suggest just as easily. In any event, neither case moved toward a more stable equilibrium.

Kimbrough v. United States adjusted federal sentencing in a more meaningful way, holding that judges may depart downward from the Federal Sentencing Guidelines for crack cocaine based on their assessment of a lack of justification for the vastly harsher treatment of crack cocaine when compared to powder cocaine.[247] Perhaps *Kimbrough* will actually shorten some of the sentences that many observers view as most unreasonable. But even there, while some district judges will now routinely depart downward, the reasoning of *Kimbrough* provides nearly as much support for routine upward departures. And in light of the fact that Congress has repeatedly refused to amend the crack/powder disparity, anyone committed to democratic principles must face the difficult question of whether there is really a constitutional problem with the crack/powder disparity or whether it is simply a bad policy choice like the many bad policy choices that any democratic government makes. Perhaps the crack/powder disparity should be considered cruel and unusual, or perhaps it should be treated as a violation of equal protection because of its association with race. If the Court is unwilling to embrace those or other substantive criticisms of the disparity, however, its effort to curtail the disparity, regardless of what Congress may do, lacks much legitimacy. It is hard to find progress in the return to a situation where one person may be sentenced to a year in prison and another to fifteen for the same crime simply because of which judge they each happened to appear before.

CONCLUSION

When the Court fractures, strategic and opportunistic reasons combine to drive the decision toward standards and away from rules. In the many contexts where rules should be preferred, the Court implements standards anyway because of its internal dynamics. Unfortunately, exhorting the Court to work harder to reach firm majorities and to avoid standards is likely a waste of energy. Some Justices disagree that rules should be preferred. Even Justices whose personal preferences run toward rules would find it difficult to subordinate their substantive

246. *See Rita*, 127 S. Ct. at 2465; *Gall*, 128 S. Ct. at 594–97.
247. Kimbrough v. United States, 128 S. Ct. 558, 564 (2007).

preferences to their preference on form. For example, Justice Scalia would be unlikely to join the Justices who wanted to uphold both rules-based and standards-based affirmative action programs simply to promote rules. His support for rules is real, but it does not override his other policy preferences and beliefs about constitutional law.

Rules-favoring Justices should seek to ensure that any standards that the Court does adopt as a result of an inability to form a majority are at the highest level of analysis possible. A high-level analytical standard that is operationalized through rules still allows consistency in practical applications. It also allows the hierarchical structure of the courts to work at its best with efficiencies from consistent treatments of common patterns and a well-functioning system of percolation for the development of the law. Conversely, requiring the application of standards at the operational level produces all of the vices of standards without countervailing benefits.